IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 504
3198259

	BETWEEN	JOSEPH CHUN KIT HO Applicant
	AND	THE HEADACHE CLINIC NELSON LIMITED First Respondent
	AND	THE HEADACHE CLINIC LIMITED Second Respondent

Member of Authority:	David G Beck
Representatives:	William Rasburn and Callum Osborne, counsel for the Applicant Sarah McKenzie, counsel for the respondents.
Investigation Meeting:	15 August 2023 at Nelson
Submissions Received:	25 August 2023 from the Applicant 25 August 2023 from the Respondents Further information provided by Respondents on 1 September 2023.
Date of Determination:	6 September 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joseph Chun Kit Ho has asked the Authority to determine the identity of his employer and then deal with a claim he was unjustifiably dismissed and/or unjustifiably disadvantaged by actions of that identified employer. In seeking this determination, Mr Ho is contending that

he was jointly employed by The Headache Clinic Limited (HCL) and The Headache Clinic Nelson Limited (HCNL) or in the alternative, that this was a triangular employment relationship.

[2] Mr Ho seeks arrears of wages, compensation and penalties should the Authority determine any of his personal grievances are substantiated.

[3] HCL denies unjustifiably dismissing Mr Ho and contends that Mr Ho was employed by HCNL and says that Mr Ho resigned his employment rather than continue to engage in a discussion about options to avoid dismissal due to the operation of a vaccine mandate arising from the COVID 19 Public Health Response Act 2020 (CPHRA).

The Authority's investigation

[4] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act") I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received. I have carefully considered the helpful submissions and information provided by both parties and refer to these where appropriate and relevant.

[5] Joseph Chun Kit Ho and Helen Tufui, founder of The Headache Clinic and sole director of HCL and HCNL, provided written briefs of evidence and oral evidence at the investigation meeting.

Issues

[6] The issues to be decided are:

a) Which company was Joseph Chun Kit Ho's employer and in what capacity?

b) Once the appropriate employer/s is identified then:

(i) Was Mr Ho unjustifiably dismissed or unjustifiably disadvantaged?

(ii) If so, what remedies are appropriate?

(iii) If Mr Ho is successful in all or any element of his personal grievance claims, should the Authority reduce any remedies granted because of any contributory conduct in applying s 124 of the Act?

c) How costs are to be dealt with.

What caused the employment relationship problem?

[7] Mr Ho, a registered physiotherapist since 2014, was employed as a Headache and Migraine Consultant. The role was initially located in Auckland. Ms Tufui says the first point of contact was Mr Ho emailed his curriculum vitae on 28 February 2021 to apply for an Auckland based role. Ms Tufui then described a two-weeks' recruitment process she conducted; with Mr Ho providing a video followed by a phone conversation then an audio-visual link (AVL) interview.

[8] No documentation was provided around the advertising/interview process but I was shown email exchanges between Ms Tufui and Mr Ho from 30 March to 2 April 2021, that evidenced the parties negotiated over the terms of an individual employment agreement. The first email of 30 March providing the first draft of the employment agreement, noted that Mr Ho had indicated he was planning to move to Nelson in Sept/Oct 2021. Ms Tufui responded asking "are you thinking you would continue to work in Auckland or would you be looking to start work in Nelson during this time? Mr Ho responded his preference was to work in Nelson as he planned to move his family, including two young children, to Nelson regardless; but he was open to continue working in Auckland. In response, Ms Tufui indicated a willingness to discuss his preference as she saw "a great opportunity in opening a Headache Clinic in Nelson" and offered to discuss this further.

[9] After clearing up some queries about hours of work and getting an updated version, Mr Ho signed the employment agreement on 6 April 2021 and commenced work on 17 May 2021. The employer party to the agreement is cited as "The Headache Clinic Limited". An attached job description noted Mr Ho reported to Ms Tufui, the "Operations Manager". The

purpose of the role is described in part, as: “Responsible for delivering superior patient services and contributing to the growth of The Headache Clinic”.

Structure of Headache Clinic

[10] HCL was incorporated on 2 March 2006 and according to its website was established at Invercargill in 2014. Ms Tufui, a registered physiotherapist, had studied in Australia and set up the clinic to focus upon specialist treatment of headaches, migraine, and the after-effects of concussions. Ms Tufui is the sole director and shareholder of HCL. Ms Tufui has established four other companies: in Christchurch, Auckland, Nelson (and latterly Hamilton). All operate as separate legal entities with Ms Tufui and her partner James Tufui as directors using the “The Headache Clinic” as brand identification.

[11] There is significant ‘dependent’ integration of all entities with shared business servicing and personnel operations being managed from Invercargill. This includes a cloud-based patient management system and shared reception and centralised patient booking services. A business Facebook page advertises the Headache Clinic as a nationwide organisation and does not refer to each clinic being a separate legal entity or autonomous business. All references cite a collective team of physiotherapists or consultants and one single point of contact telephone number is used. The sole website address is headacheclinic.co.nz.

[12] HCNL was incorporated on 22 June 2021 and Mr Ho purchased a 45% shareholding of it on 6 August 2021. Ms Tufui is sole director of HCNL and the majority shareholder.

[13] HCL is however, the tenant party to the lease agreement for the premises the Nelson clinic operates from. Ms Tufui says having HCL as a party to the lease was not intended as when she and Mr Ho discussed costings of the business it was planned that HCNL would be the leaseholder. Ms Tufui however, negotiated and signed the lease.

Establishment of Nelson clinic

[14] Mr Ho started working sole-charge in the Nelson clinic from 9 August 2021 after moving his family from Auckland. No new employment agreement was entered into and Mr

Ho remained on a pay rate of $40.86 per hour arising from the provisions of his extant employment agreement. Specific hours of work were not formally agreed. Ms Tufui says her assumption was that as a shareholder, Mr Ho would be more committed, so she thought it unnecessary to discuss hours of attendance. Ms Tufui says she was busy and simply neglected to provide Mr Ho with a new employment agreement.

[15] Mr Ho's payslips provided for the periods ending 30 May 2021 and 8 August 2021, indicate the "Headache Clinic Auckland North" as the "Pay Point". In the latter pay period, it is recorded that Mr Ho was paid all "Holiday Pay Owing". The next pay slip, up to period ending 25 August 2021 has the pay point as "Headache Clinic Nelson" and Mr Ho's holidays begin to accrue again. Thereafter up to the last pay period ending 14 November 2021, Headache Clinic Nelson is identified as the pay point.

[16] Evidence provided as directed by the Authority, was that each individual company made payments for wages to the HCL accountant who completed payroll tasks and then paid everyone through a common account that identified the clinic business each person worked for.

[17] Mr Ho says he did not notice his holiday pay had been paid out when he left Auckland and maintained a view that his employer continued to be HCL based on the level of control he says, Ms Tufui exercised over the operation of clinics outside Invercargill. Mr Ho says he had previously worked at physiotherapy clinics both as an employee and as a contractor but had not done so as an owner/shareholder.

[18] Ms Tufui says she explained the legal structure of HCNL and the related companies when interviewing Mr Ho and asserted he would have been aware, that when he bought a shareholding in the Nelson operation, it was a separate legal entity for which he was also an employee. Ms Tufui also cited discussions around the shareholding purchase, that she says included how costs would be split between the two companies (HCL and HCNL) and that she provided Mr Ho with a spreadsheet of costings. In addition, IRD returns show Mr Ho's identified employers for the relevant period as being respectively: The Headache Clinic Auckland Limited then The Headache Clinic Nelson Limited.

[19] Ms Tufui says she initially provided Mr Ho with the wrong employment agreement and simply omitted to correct this error when he moved to Nelson. Ms Tufui says of Mr Ho, that HCL "never exercised control or directions over his employment".

The employment relationship

[20] After Mr Ho commenced working in the Nelson Clinic an issue arose with the introduction of a CPHRA vaccine order covering healthcare providers/practitioners that became effective on 25 October 2021. The order provided that to continue working, a practitioner needed to get an approved vaccine first dose by 15 November 2021 and a second dose by 1 January 2022.

[21] Ms Tufui says in early November 2021 she had conversations with all Headache Clinic physiotherapy staff including a telephone call with Mr Ho. Mr Ho indicated he was not going to be vaccinated. Then in an email of 3 November 2021, introduced as "Dear Headache Clinic Team", Ms Tufui addressed the staff of all Headache Clinics on vaccine requirements. Referring to discussions over the last couple of weeks, Ms Tufui opined: "I believe, that COVID-19 Vaccination Order does indeed effect every one of us working at the Headache Clinic". Compliance was described as "non negotiable for our business". To plan for "continuity of client care", Ms Tufui requested a response from each team member by 5pm, 5 November, detailing current vaccination status including any exemptions gained.

[22] Ms Tufui warned in the 3 November email:

> Please note: based on this Order, any Headache Clinic staff member not receiving their vaccination (or written exemption) as per outlined timeline, would need to be stood down from their duties from the 15th of November 2021. This would affect Employment matters and a formal one on one meeting needs to be arranged.
>
> I do not take this matter lightly. I do appreciate every one of you as an individual as well as an amazing team member.

[23] Ms Tufui also encouraged recipients of the email to seek independent advice. Ms Tufui says she sent the email in her capacity as sole director of the various entities claiming all employees "knew which Company they were employed by". However, no corroborating evidence to support this assumption was provided to the Authority.

[24] Mr Ho obtained a brief: "To whom it may concern" letter of 30 October 2021, from a registered clinical psychologist indicating in the psychologist's opinion, it was inappropriate that Mr Ho be vaccinated. Mr Ho forwarded the letter to Ms Tufui and in an email of 5 November he confirmed: "I won't be getting the Pfizer vaccine by 15th November". At the time (11 November), the government made the exemption criteria stricter and Mr Ho was subsequently unsuccessful in obtaining one.

[25] Ms Tufui says she called Mr Ho on or around 11 November and says they agreed to an arrangement, that from 15 November Mr Ho would not attend the Nelson clinic and Ms Tufui would keep it operating by travelling from Invercargill. Ms Tufui says it was agreed any income generated in this arrangement was to be paid to HCL as Ms Tufui says she did not charge her time as an employee to HCNL. Mr Ho confirmed during the investigation that he agreed with Ms Tufui his wages would cease to be paid and he effectively was on leave without pay from 15 November. Mr Ho however, says there was no agreement that HCL would get the patient income generated. Mr Ho says as he was uneasy about the conversation and the proposed arrangement, he obtained legal advice.

15 November letter

[26] Ms Tufui says she also obtained legal advice and her solicitors emailed Mr Ho a letter on 15 November. The letter was headed "CONFIRMATION AS TO INTERIM MEASURES AT THE NELSON HEADACHE CLINIC". The letter indicated the law firm was acting for Ms Tufui. It proceeded to confirm the arrangements agreed between Ms Tufui and Mr Ho to cover the Nelson Clinic but did not refer to Mr Ho's employment status or the Nelson clinic as a distinct legal entity. It concluded: "In early January 2022 you and Ms Tufui will meet to reassess this agreement".

17 December phone conversation

[27] Ms Tufui says the arrangement to cover the Nelson clinic from her Invercargill base proved impractical and so she telephoned Mr Ho on 17 December 2021. From the parties' accounts of the conversation, it emerged that Ms Tufui indicated she could no longer sustain travelling to and from Nelson and was looking to engage another physiotherapist to cover the

Nelson Clinic. Mr Ho says Ms Tufui then indicated she was invoking a clause in the shareholders agreement compelling him to relinquish 25% of shares; that she had sought her accountant's advice as being of nil value. Mr Ho says Ms Tufui emphasised he would retain a 20% shareholding and that when the vaccine mandate was lifted, he could resume his employment but in the interim, he would get no shareholder dividend payments. Mr Ho says afterwards he felt he had been fired. On the same day, Ms Tufui transferred $20,000 out of the HCNL's bank account and placed it in a holding account. Ms Tufui also instructed the bank to revoke Mr Ho's access to the HCNL business account.

21 December letter

[28] In a letter of 21 December, Ms Tufui indicated to Mr Ho that she was taking advice on the shareholding matter (given a transfer would require Mr Ho's consent) and she expressed a view (based on the shareholders agreement) that Mr Ho's ability to hold shares was linked to his employment. Ms Tufui then stated:

> As you are currently not employed by the Company due to the fact you cannot work under the current vaccine mandate rules, the Company could require you to sell all your shares at "fair value". I have sought advice from the Company accountant who has advised that the current fair value of the shares is nil.

[29] Ms Tufui then suggested Mr Ho may be able to "to come back on board in the business in the future" should the vaccine mandate be lifted. Ms Tufui says she obtained legal advice and had the letter drafted for her. While acknowledging the letter said, "currently not employed", which implied this was Mr Ho's status at the time, Ms Tufui claimed the first sentence that Mr Ho was "currently unable to work" because he was not vaccinated, better expressed her view. I, however, note the use of the latter expression was made in the past tense as it referred to "recent discussions" (the 17 December telephone conversation). The letter then suggested Mr Ho agree to giving up all but 20% of his shareholding for no return and, that if he was "unable to return to being employed" within 12 months, he should relinquish the remainder of his shares "at today's fair value".

Mr Ho's response

[30] Mr Ho conceded that he then avoided contact with Ms Tufui who made several attempts to call him. Ms Tufui says she did not write again to Mr Ho as she wanted a conversation. There was one piece of evidence of contact between the parties in early 2022 being a text exchange of 10 January of Ms Tufui explaining to Mr Ho she was flying a physiotherapist to Nelson to cover the clinic for three days and asking if he would arrange to pick up a laptop. Mr Ho responded offering to assist.

[31] Mr Ho says he then instructed counsel to deal with the matter. Mr Ho's counsel Mr Rasburn, emailed Ms Tufui's lawyers on 18 January 2022, indicating he was acting for Mr Ho. Mr Rasburn referenced the 15 November letter and said he would take instructions and "be in touch shortly". However, before this further contact occurred, Ms Tufui's lawyers responded to Mr Rasburn by letter of 1 February 2022.

1 February 2022 letter

[32] In a letter of 1 February, Ms Tufui's lawyers stated they now acted for "The Headache Clinic Nelson", and they invited Mr Ho to a meeting to "discuss his employment relationship" and his current inability to perform it, due to the vaccine mandate. It is noted this letter did not refer to Ms Tufui's conversation with Mr Ho of 17 December or her subsequent 21 December letter. The letter maintained a stance, that Mr Ho was still on unpaid leave. The purpose of the proposed meeting was described as: to allow Mr Ho to "discuss alternatives to remaining on leave without pay". However, the letter warned that their client was unlikely to be able to continue leave without pay indefinitely and a potential outcome should Mr Ho remain unvaccinated and no alternatives were identified, was dismissal on four weeks' notice.

8 February meeting

[33] The parties (counsel for both parties, Mr Ho and Ms Tufui) met by AVL on 8 February. The meeting was recorded and an agreed transcript was provided to the Authority.

[34] Ms Tufui says it was only at this point that she realised Mr Ho was claiming he had been dismissed..

[35] The transcript of the meeting shows that HCL's lawyer opens the meeting by updating the situation, suggesting Mr Ho was still employed and the leave without pay was continuing therefore there was a need to discuss his continuing employment, given no alternative roles had been identified. The shareholding issue is described as not being at issue even if there were any issues. I, however, observe this to be somewhat disingenuous as it ignored the impact of the 17 December conversation and 21 December letter. In response, Mr Rasburn drew attention to Mr Ho's view that the 21 December letter said he was "no longer employed" and he alluded to the attempt to force the shareholding sale and that the two issues are intertwined.

[36] The parties then entered a without prejudice discussion that evidently did not resolve matters. The 'open' part of the meeting does not discuss the issue of who was Mr Ho's employer. The meeting opened with a statement that the lawyer was acting for HCL and mentioned Mr Ho as being "employed as a physiotherapist at the Headache Clinic in Nelson and as being a shareholder".

[37] After the meeting in an exchange of emails of the same day (8 February), HCL's lawyer outlined what can only be viewed as a 'constructed premise' that prior to the AVL discussion, because Mr Ho had not made his position known, HCL's view was "Mr Ho's employment had not been terminated". An offer to meet again was proffered to discuss "potential employment opportunities within the company while he remained unvaccinated" (a premise that contradicted what had been stated during the earlier AVL discussion). Reference was also made to the shareholding dispute needing to be resolved once the employment matters had been settled.

[38] In a further email of 14 February, The HCL's lawyer repeated the construct of Mr Ho's employment being ongoing as leave without pay. Further, for the first time, the lawyer acknowledged Ms Tufui's letter of 21 December that they claim to have "reviewed". This is odd given Ms Tufui's evidence was that her lawyers drafted the letter. The lawyer suggests Mr Ho has "purported to rely" on it as notice of termination of his employment. The letter repeated an offer to meet and that the shareholding dispute will be dealt with once "the employment matters are resolved".

28 February 2022 personal grievance letter

[39] By letter of 28 February, Mr Rasburn identified and detailed personal grievances, claiming Mr Ho had been unjustifiably dismissed and disadvantaged by Ms Tufui's actions leading up to the 21 December letter that was also described as the point of dismissal. It highlighted that Mr Ho had not signed an employment agreement with HCNL. A somewhat contradictory suggestion was then made that Mr Ho was a "shareholder-employee" with additional responsibilities beyond clinical duties. The 'dismissal' is claimed as having been effected in a procedurally unfair manner in breach of good faith obligations, by Ms Tufui in her capacity as the sole director of HCL. There then followed unsuccessful attempts to resolve matters.

29 June 2022 letter of response

[40] HCL's lawyers later responded to the 28 February letter on 29 June after the parties had attended an unsuccessful mediation, summarising their view that Mr Ho had wrongly seized upon the content of the 17 December 2021 letter as evidence of his dismissal when, "despite the incorrect wording used in that letter, this was not termination of his employment". The letter offered to allow Mr Ho to return to the business if he was legally able to do so "pursuant to the Order" (the vaccination mandate for health and disability workers was lifted on 26 September 2022).

[41] The 29 June letter did not traverse the contested issue of the identity of Mr Ho's employer.

Issue one - who was Mr Ho's employer and in what capacity did they employ him?

[42] The relevance of the identity of the employer appears to be a legitimate concern of Mr Ho's in that he perceives HCNL may not have sufficient funds or assets to meet any successful claim he is pursuing. A concern for Mr Ho is while HCNL is still trading it is doing so as an effective 'shell' for HCL who is employing the current physiotherapist and any income derived is going to HCL. This, however, is a civil dispute outside the scope of the Authority's jurisdiction.

[43] In contrast, HCL notes Mr Ho is still a shareholder of HCNL, an entity that is currently still trading.

Legal framework

[44] The guiding principles the Employment Court has used are:

(a) The onus of proving the identity of the employer rests on the employee (where the employee is putting the fact at issue).
(b) The standard of proof is on the balance of probabilities.
(c) The question of who the employer was must be determined at the outset of the employment.
(d) It is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all the relevant communications between the parties; the question to be asked is who an independent but knowledgeable observer would have said was the employer.
(e) Failure to notify or make an employee aware of the identity of the employer is not conclusive.[1]

[45] The Employment Court [2] has also held that s 6 of the Act which is predominantly used to distinguish between employees and contractors, may be of guidance to assist in identifying an employer party as it, at s 6(2) and (3), addresses the question of what is the "real nature of the relationship".[3]

[46] In addition, in some more factually unusual cases such as *Orakei v Doherty*, it has been held the situation may be deemed as one of 'joint employment' or where it is "within the contemplation of the Act that a person may have more than one employer".[4] This can include a circumstance where, as is here, common operational and management control by both cited

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[1] *Colosimo v Parker* (2007) 8 NZELC 98, 622 (EmpC).
[2] *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 112 at [17].
[3] Section 6 Employment Relations Act 2000
[4] *Orakei Group v Doherty* [2008] ERNZ 345 at [53].

employer parties is at issue. However, to determine if joint employment exists, it requires an objective assessment of the facts and the context of the employment relationship.[5]

Assessment

[47] A starting point is to examine the commencement of the relationship and the written employment agreement the parties entered. Here the only employment agreement executed was while Mr Ho was engaged as an employee in Auckland and it identifies HCL as the employer and this did not change throughout the period of employment and neither party sought such a change. This must also be set against an examination of all the relevant communication between the parties at the time the employment relationship was formed, as it has been posited by the Employment Court: "Put another way, who would an independent but knowledgeable observer" have said was the employer "when the employment commenced".[6]

[48] It was clear that Mr Ho 'floated' the idea of a Nelson clinic being established when he advised he was relocating. Ms Tufui considered this situation and made a proposal to Mr Ho that he establish and run a clinic in Nelson as the sole employee. Mr Ho was then offered a shareholding to purchase and he did so at a significant cost. Objectively, I find that Mr Ho who says he took legal and accounting advice on the content of the shareholders agreement, must have been aware that the Nelson operation was being set up as a separate legal entity to employ him. The shareholders agreement dealt with Mr Ho's employment by reference to what would happen to the shares if the employment ceased. In addition, Mr Ho's payslips subsequently indicated he was being paid by HCNL.

[49] So, standing back, whilst I can accept some confusion existed as to the employer party at the outset of the relationship, I cannot see how Mr Ho would not appreciate that HCNL was an entity set up to employ him and he was at least, moving out of the ambit of being employed by HCL based in Auckland.

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[5] *Hutton v Provencocadmus Ltd (inRec)* [2012] NZEmpC 207 at [79].
[6] *Mehta v Elliot(Labour Inspector)* [2003] 1 ERNZ 451 (EmpC) at [22].

[50] On the balance of probabilities, it was more likely than not, that Mr Ho knew his employer after he relocated from Auckland became HCLN as this was clearly the expressed intention of the parties.

[51] While documentation in the form of an employment agreement between Mr Ho and HCNL was not executed, the documentation around the shareholding agreement evidences a relationship existing between Mr Ho and HCNL and nothing displaces the implication that Mr Ho would also be engaged as an employee of HCNL.

[52] I am not attracted to the notion this was a joint employment situation, as while Ms Tufui operated a centralised business model from HCL in Invercargill and branding was generic, it was clear in offering Mr Ho a stake in the Nelson business, that it was to be a separate business entity. But for the shareholding of Mr Ho, I may have found this to be a joint employer situation akin to the *Orakei v Doherty* situation but I caution that the cases cited in support of this premise are distinguishable on facts and context. For example, *Orakei* involved a situation where the parent company was in liquidation and held both companies acted in concert to employ Mr Doherty. It also was a situation where a separate company was established without Mr Doherty being aware of it and he was not a shareholder.

Triangular employment

[53] Mr Ho, whilst identifying this as at issue in his statement of problem and arguably fulfilling the requirement of s 115A by notifying HCL of the existence of a personal grievance,[7] did not seek to have the HCL joined as a controlling third party under s 103B(2) of the Act. Had Mr Ho done so, this would have entailed him having to make out a case to establish that HCL directed and controlled his employment.

[54] What emerged during the investigation was that Ms Tufui was a significant controlling party and the business was horizontally integrated but I am satisfied that the control she exercised, was also in her capacity as the sole director of HCNL and that Mr Ho as a shareholder of this company, was objectively aware of Ms Tufui's role. While unfortunately

[7] However, Mr Ho's counsel's Personal Grievance, letter of 28 February 2022 did not mention a potential "triangular" employment relationship but did allude to the actions of Ms Tufui as a director of The Headache Clinic Limited.

correspondence was sometimes, somewhat opaque on this issue, Ms Tufui's conversations with Mr Ho and her letter of 21 December 2021 are objectively evidence of Ms Tufui acting in a narrower capacity toward Mr Ho. On the latter, the crucial 21 December letter heading, referred to "The Headache Clinic Nelson Limited" and Ms Tufui signed off as "Director". While I do not need to determine who employed Mr Ho when he worked in Auckland, I do observe this period of employment ended as evidenced by his final holiday pay being paid in the guise of The Headache Clinic Auckland Ltd.

[55] Further, while the law enacted as an amendment to the Act on 27 June 2020, is developing and there is no current precedent addressing whether a parent company may be joined in an action under s130B, this is not a typical triangular employment relationship situation of unconnected entities being involved (such as a labour hire organisation and a client). The purpose of s 103B of the Act, appears to start from the premise that a distinct and separate employer may be joined (at s103B(3)) if "the party's actions caused or contributed to the personal grievance".[8] Here I have found it not to be the case that HCL took any action in relation to Mr Ho as outlined above and, I have also dismissed the perhaps more feasible claim, that HCL was a joint employer. I also agree with the submission of counsel, that Mr Ho did not perform work for the benefit of HCL.

Finding

[56] I find that at the relevant time, Mr Ho was solely employed by HCNL.

Issue two - was Mr Ho unjustifiably dismissed?

[57] Having established Mr Ho was employed by HCNL, I now consider whether he was unjustifiably dismissed. Mr Ho is primarily arguing he was summarily dismissed on 17 December 2021 (a premise confirmed by the letter of 21 December) or in the alternative constructively dismissed. The first question is at what point did the dismissal occur.

[58] I am satisfied that objectively viewed, Mr Ho was advised of Ms Tufui's decision to bring his employment with HCNL to an end, during their conversation of 17 December 2021

[8] Section 103B(3) Employment Relations Act 2000.

when Ms Tufui sought to get Mr Ho to relinquish his shareholding and advised she was going to engage another physiotherapist in the Nelson clinic. This decision is recorded retrospectively by Ms Tufui in her subsequent letter of 21 December, that used the unambiguous term: "As you are currently not being employed by the Company due to the fact that you cannot work under the current vaccine mandate rules". The message was objectively twofold: first Mr Ho's employment has already ended and the reason for such is explained as the current vaccine mandate and this was closely followed by a suggestion Mr Ho may be able to return to employment at some point. I find this was a unilateral change to what was a mutual agreement up to this point that Mr Ho remain on leave without pay. This was effectively a summary dismissal, so I do not need to assess the alternative claim that Mr Ho was constructively dismissed.

[59] Counsel suggested the discussion and letter of 21 December was confined to a shareholding proposal but I find this to be unsustainable as the employment of Mr Ho was inextricably linked to his shareholding. It was not as suggested, "a poor choice of words" that in no way sought to terminate the employment – to Mr Ho the communication was explicit, he had to give up his shareholding because Ms Tufui considered his employment to be at an end. I consider that a person in Mr Ho's position would have reasonably considered his employment to be at an end.[9]

[60] I have carefully assessed HCNL's letter of 1 February 2022 and objectively found it to be a 'construct' or 'legal fiction'[10] that inexplicably, given Ms Tufui says she was not responsible for the content of such, ignored the import and impact of the 21 December letter to Mr Ho. The 1 February letter sought to portray the employment as ongoing and invited Mr Ho to consult over his limited options. It lacked credibility and I further do not objectively accept the evidence that at the later meeting of 8 February, Ms Tufui and her attending lawyer were surprised by Mr Ho communicating a view that he had already been dismissed. Clearly a prudent course of action would have been for Ms Tufui to acknowledge her inappropriate attempt to get Mr Ho to relinquish his shares by using his employment status as leverage,

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[9] See *Cornish Truck and Van Ltd v Gildenhuys* [2019] NZEmpC 6.

[10] An expressed assumption that purports to conceal a fact – here being the fact that Mr Ho had already been dismissed.

albeit understandable in the circumstances and then clarify her supposed belief that Mr Ho was still employed.

[61] In considering a dismissal's justifiability, the statutory framework of the Act is applied. This normally involves the application of s 103A (the justification test) and whether good faith obligations were met by either party to the employment relationship. Generally, the Authority must consider on an objective basis whether the actions of HCNL and how it implemented the dismissal, were what a fair and reasonable employer could have done in all the circumstances.

[62] The Act guides this inquiry by setting out four aspirational procedural factors (s 103A(3)) and then allows for any other factors the Authority may consider appropriate (s 103A(4)). In addition, the Authority must balance its approach if it identifies procedural defects, by assessing whether the defects are potentially minor and did not result in the employee being treated unfairly (s 103A(5)). In using the aspirational steps as a guideline an overarching matter is consideration of the resources available to the employer. Here HCNL although a small enterprise, had access to experienced employment law focused, legal advice from the outset, so lack of resources or capacity is not at issue.

[63] The Authority's focus in considering the adequacy of procedural fairness, will also assess whether in effecting the dismissal, there was sufficient exploration of alternatives given the contextual circumstances. In doing so I am conscious of the fact that the substantive reason for the dismissal here was Mr Ho's vaccination status and his indication that was not going to change over time.

[64] I also carefully examine the question of, once the dismissal was implemented or confirmed (that I have found to be on 21 December 2021), whether steps taken to re-engage with Mr Ho were genuine and what impact that communication had on the overall fairness or otherwise, of the termination of Mr Ho's employment. This is because on any assessment of whether all the steps set out in s 103A of the Act were complied with, is rendered largely redundant due to the abruptness of the dismissal.

[65] The one exception and it is arguably significant, is s 103A(3)(b) and (c) of the Act requires before enacting a dismissal an employer should take two basic steps. One is to make the employee aware of concerns and two, is to provide the employee with an opportunity to respond to those concerns before being dismissed.

[66] I am satisfied that Mr Ho was adequately apprised of his employer's concerns about the impact of the government's vaccine mandate through discussion in early November 2021 and Ms Tufui's subsequent email communication of 3 November that indicated a stand down was inevitable for those not vaccinated. In the circumstances pertaining to Mr Ho, working in a sole-charge clinic, a stand down or suspension, was an inevitable outcome given the nature of his role required direct client contact. While there does not appear to have been discussion around alternatives, the evidence was Mr Ho initially accepted being placed on leave without pay and that was clearly advantageous to him as he maintained his employment status. Unfortunately, this arrangement was unilaterally rescinded without Mr Tufui allowing Mr Ho any input into this decision - this was a breach of good faith obligations owed.

[67] As I have found above, Ms Tufui also worsened the situation by attempting to secure Mr Ho's shareholding interest that he had recently paid a significant amount to secure. In these circumstances procedural fairness and good faith factors were simply ignored.

[68] Section 103A(4) of the Act, allows the Authority to consider any other factors "it thinks appropriate" and in this context, I do accept that HCNL's business was under enormous pressure without Mr Ho being able to attend work. I can also not discount the efforts Ms Tufui made to keep the business afloat, while being also occupied with her other allied business interests. Fundamentally, this was a 'no win' situation brought on by external circumstances that HCNL had little control over. This is a factor to weigh overall.

[69] I also need to look at s 103(5)(a) and (b) of the Act that requires the Authority not determine a dismissal is unjustified if process defects are "minor and did not result in the employee being treated unfairly". This provision does not however assist HCNL as the process defects at the time of the actual dismissal which is my prime investigation focus, were not minor and they resulted in Mr Ho being treated unfairly. The main identified unfairness to

recap, was Ms Tufui effectively implementing a dismissal to secure Mr Ho's agreement to relinquish his shares.

[70] In this narrow context, the operation of a then newly enacted, statutory provision (Schedule 3A of the Act) [11] also came into play as it was enacted to guide employers through the process of ending employment relationships where a vaccine mandate prevailed and it detailed the need to provide a paid four weeks' notice period and outlined that an employer should engage with an employee on alternatives to dismissal.

[71] I have carefully assessed The Headache Clinic Nelson Ltd.'s lawyer's letter of 1 February 2022 that could be said to comply with schedule 3A of the Act. However, I have found it was a 'construct' that inexplicably, given Ms Tufui says she was not responsible for the content of such, ignored the import and impact of the 21 December letter to Mr Ho. The 1 February letter sought to portray the employment as ongoing and invited Mr Ho to consult over his limited options. It lacked credibility and I have not accepted as credible the evidence that at the later meeting of 8 February, Ms Tufui and her attending lawyer were surprised by Mr Ho communicating a view that he considered he had already been dismissed.

[72] If the suggestion of further consultation had been timely, I may have viewed it differently but some six weeks elapsed in which, impliedly Ms Tufui was still seeking to secure Mr Ho's agreement to relinquish shares in the business. I have also assessed that at the time of dismissal, the leave without pay option that had been agreed, had only been in place for four weeks and was initially indicated as having to be reviewed after a month (a review that did not occur at the time indicated).

Finding

[73] I find that the procedural and statutory failures identified, make HCNL's decision to dismiss Mr Ho unjustified. I stress this was a marginal decision as I do recognise the immensely difficult pressure placed upon HCNL by the government's vaccine mandate and, that this is not a case where an exploration of alternatives to dismissal was feasible – the only

[11] Schedule 3A, inserted into the Employment Relations Act 2000 on 16 November 2021 by Section 22 of the COVID-19 Response (Vaccinations) Legislation Act (2021 No 51).

alternative was a continuation of Mr Ho's unpaid leave for an indefinite duration. Given the sole charge nature of the role, it was reasonable that a continued leave option was considered problematic.

[74] However, this was a case where Ms Tufui did not treat Mr Ho as a stakeholder in the business and did not seek to involve him in a mutual solution.

[75] I also have taken account of, without judging the reason for Mr Ho not being vaccinated or attributing fault, the premise that once Mr Ho became set upon that choice there was an inevitability that his employment would end and he would have been acutely aware of that possibility.

[76] Having established an unjustified dismissal claim, Mr Ho is entitled to consideration of various claimed remedies. Amongst those potential remedies was a claim for any penalties the Authority considers appropriate. I find in the circumstances the only potential penalty would be for a breach of good faith but considering the circumstnces I decline to order any penalties.

Lost earnings/loss of future benefit

[77] Mr Ho seeks three months lost wages and $40,000 for the loss of value of his shareholding and the opportunity to realise profit from his shareholding status, but for the personal grievance.

[78] Apart from the failure of HCNL to pay Mr Ho four weeks' paid written notice of termination of his employment as per Schedule 3A(3)(a) of the Act, I decline to award any lost earnings beyond this sum as Mr Ho was not available for employment due to his decision to remain unvaccinated and if he had remained in employment he would have been on leave without pay. Mr Ho's evidence was to mitigate his loss he obtained alternative employment outside his profession.

[79] In the absence of specified hours of work I calculate the one month of paid notice at a notional 40 hours per week at $40.86 per hour, being a total of $7,060.60 (gross) inclusive of 8% holiday pay.

[80] I decline to order any sum relating to Mr Ho's shareholding in HCNL. This is not a loss of a benefit arising out of the employment relationship in that Mr Ho did not initially acquire the shares as consideration for entering an employment agreement nor did Mr Ho's employment terms include the value of the shares as part of a remuneration/benefits package.

[81] Mr Ho's counsel cited the Authority decision *Hillman v SKL8*[12] in support of his claim for the loss of the value of shares but a distinguishing feature of that decision, was Mr Hillman's shareholding was part of consideration for him initially entering an employment agreement. Mr Hillman did not subsequently purchase the shares whilst employed. Here I had no evidence that Mr Ho's shareholding acquisition formed part of the consideration of him entering the employment relationship (albeit on oral terms) with HCNL.

[82] Mr Ho's purchase of the shares was a separate investment decision and Mr Ho's rights are governed by the shareholders agreement. Mr Ho is still a shareholder and therefore, the dispute over the fair valuing of the shares and any account of profit on them is a civil dispute that the Authority has no jurisdiction to determine.

[83] Mr Ho also made a claim for arears of wages suggesting he should have been remunerated at a higher hourly rate from 9 August 2021 to 15 November 2021. However, during the investigation meeting Mr Ho conceded he had wrongly interpreted the Key Performance Indicators required to qualify for an increased hourly rate and on this basis I decline to make an award of any arrears owed.

Compensation

[84] Mr Ho gave compelling evidence of the distress the dismissal caused him in terms of the breakdown in an otherwise trusting working relationship with Ms Tufui and the abruptness and the circumstances of his dismissal. Mr Ho also described the impact of the dismissal on his mental well-being and that he felt he could not discuss this with others and seek support as he had to be strong for his family.

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[12] *Hillman v SKL8 Limited* [2012] NZERA Auckland 308

[85] Unfortunately, but not something that HCNL could be responsible for, is the dismissal came at a time when Mr Ho's partner also lost her job in similar circumstances. This left the family in a difficult and disruptive situation at a stressful time of the year, with no income and a house in Nelson that had to be sold. Mr Ho and his family moved to live with his parents who live in Golden Bay. I do note from the evidence given that Mr Ho had planned to move to Nelson in any event and the opportunity to work and establish a practice on his own account as a shareholder was fortuitous, albeit at a significant investment cost.

[86] I find that the distress around the job loss was reasonably significant but transitory and not career ending. I also have not found that HCNL engaged in behaviour designed to deliberately humiliate Ms Ho and the loss of his employment was objectively foreseeable.

[87] In the circumstances, I consider that Mr Ho's evidence warrants compensation of $15,000 under s 123(1)(c)(i) of the Act.

Contribution

[88] Section 124 of the Act states that I must assess the extent to what, if any, Mr Ho's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced.

[89] In the circumstances, I cannot find that Mr Ho's decision to eschew the then available vaccine is a ground for contribution to the circumstances that led to his personal grievance, this was a decision he was entitled to make. The grievance was about his employer essentially reneging on an initial agreement he remain on leave without pay and then an inappropriate attempt to force him to relinquish a shareholding in the business he had invested in. While I accept the evidence that Mr Ho stopped returning Ms Tufui's calls in early January, I am not persuaded that this is evidence of him adopting a deliberately obtuse position that brought about his dismissal as I have found it had already occurred and Ms Tufui had the option of formally communicating in writing.

[90] I do not find Mr Ho has contributed to his personal grievance. I decline to reduce the remedies I order below.

Outcome

a. Joseph Chun Kit Ho's sole employer was The Headache Clinic Nelson Limited.

b. Joseph Chun Kit Ho was unjustifiably dismissed by The Headache Clinic Nelson Limited.

c. The Headache Clinic Nelson Limited must within 28 days of this determination being issued, pay Joseph Chun Kit Ho the sum of $15,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000; and the sum of:

d. $7,060.60 (gross) lost remuneration pursuant to s 123(1)(b) Employment Relations Act 2000.

Costs

[91] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, the party seeking costs has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be determined outside this timetable unless prior leave is sought and granted by the Authority.

[92] The parties can expect the Authority to determine costs on its usual "daily tariff" basis unless specific circumstances or factors, require an adjustment upward or downward. [13]

David G Beck
Member of the Employment Relations Authority

[13] For further information about the factors considered in assessing costs see: *www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1*