

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 523  
3215180

BETWEEN MANUELA KLEVISSER,  
AINSLEY BRUNTON,  
ANASTASIA HUIARANGI,  
JODIE REID, SOFIA  
O'KEEFE, LUCIA O'KEEFE,  
TRAVIS O'KEEFE  
Applicants

AND TE WHARE HUKAHUKA  
LIMITED  
First Respondent

AND SHAY WRIGHT  
Second Respondent

Member of Authority: Sarah Blick  
Representatives: Manuela Klevisser in person and for other applicants  
Shay Wright for the first respondent and in person  
Investigation Meeting: 29 May 2024  
Submissions received: At the investigation meeting  
Determination: 30 August 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Te Whare Hukahuka Limited (TWH) was incorporated as a social enterprise, and according to its constitution has the primary objective of improving the lives of indigenous people through the advancement of education and relief of poverty. Its website says it offers governance training, a rangitahi programme, e-commerce training and business coaching. Shay Wright and Travis O'Keefe are its directors and equal

shareholders. Ms O’Keefe has been based offshore for some time, and appears now to be in Vietnam.<sup>1</sup>

[2] Manuela Klevisser, Ainsley Brunton, Anastasia Huiarangi and Jodie Reid (the first four applicants) worked for TWH in various roles. On a number of occasions in 2022, they received their salary or wages late. All of the applicants raised personal grievances for unjustified disadvantage relating to the ongoing late payments, for which they now pursue remedies in the Authority. Outstanding commission payments are sought by Ms Klevisser.

[3] Mr O’Keefe is one of the applicants, but Mr Wright disputes that Mr O’Keefe was an employee of TWH. The Authority is to shortly hold an investigation meeting in relation to Mr O’Keefe’s claim to be an employee. No findings on Mr O’Keefe’s claims, as well as those of his daughters Sofia and Lucia O’Keefe, are made in this determination which are to be investigated separately.

[4] In TWH’s statement in reply, drafted by Mr Wright, TWH apologised for the delays in relation to the first four applicants and stated it did not intend to cause harm, hurt or humiliation. While Mr Wright acknowledges the delays he says they were not for extensive periods of time and were resolved quickly, and were due to new financial processes being implemented in TWH.

[5] Mr Wright denies Ms Klevisser is owed additional commission payments on the basis the commissions were not agreed by TWH’s board of directors (himself and Mr O’Keefe).

[6] Mr Wright is named as a respondent apparently on the basis he is a person involved in employment standards breaches. Mr Wright denies personal responsibility for the delays and says he took actions in the “best interests of the company”.

### **The Authority’s process**

[7] The parties have attended mediation with a mediator from Ministry of Business, Innovation and Employment on two occasions and say they have attended private mediations. None of these attempts at resolution have resolved the various issues between the parties. The relationship between Mr Wright and Mr O’Keefe has been

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<sup>1</sup> According to his director details on the Companies Register.

incredibly fractious for some time, which seems to have hindered all possibility of reaching a reasonable resolution of Ms Klevisser, Ms Brunton, Ms Huiarangi and Ms Reid's claims.

[8] For completeness, I note Mr Wright established his own personal grievance in the Authority against TWH, which was determined by another Authority Member.<sup>2</sup>

[9] The parties consented to the investigation meeting being held by audio visual link. The first four applicants attended and answered questions under affirmation from the Authority. Mr O'Keefe and Mr Wright also answered questions under affirmation. The parties had the opportunity to ask each other questions and make oral statements regarding matters at issue.

[10] As permitted by s 174E of the Employment Relations Act (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **The issues**

[11] The following are the issues for investigation and determination:

- a. Did TWH fail to pay wages to the first four applicants?
- b. Does TWH owe Ms Klevisser commission payments?
- c. Do they all have personal grievances for unjustified disadvantage?
- d. Should they be awarded remedies?
- e. Is Mr Wright a person involved in employment standards breaches under s 142W and should leave be granted to recover wages or other money due to Ms Klevisser under s 142Y of the Act?

### **Background**

[12] Ms Klevisser was employed by TWH in October or November 2019 as a programme coordinator, and in June 2020 became an operations manager. She resigned in February 2024.

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<sup>2</sup> *Wright v Te Whare Hukahuka Limited* [2023] NZERA 683.

[13] Ms Brunton was employed by TWH on a fixed-term agreement in March 2022. Her agreement was extended in September 2022.

[14] Ms Huiarangi was employed by TWH on a fixed-term agreement in April 2021. Her agreement was extended on a number of occasions, the last apparently being in October 2022.

[15] The parties' evidence was unclear when Ms Brunton and Ms Huiarangi's employment ended, but it was at least after November 2022.

[16] Ms Reid was employed by TWH on a fixed-term agreement in April 2021. Her agreement was also extended, the last being apparently in January 2022. Her employment ended in May 2022.

*First delay in payments*

[17] Payments due to the first four applicants on 6 April 2022 were delayed by 14 days, received on 20 April 2022. There was no communication made prior that the delay would occur.

[18] By way of explanation for the delay, Mr Wright says he became concerned with TWH's expenditure during 2021 and early 2022, with many expenses incurred not being ones he would have prima facie approved if his authorisation had been sought. Mr Wright took action to "freeze" TWH's bank account in late March 2022. He says this was in the best interest of the company, its shareholders and employees, in order to stop Mr O'Keefe's alleged "profligate, unauthorised, bad faith expenditure". Mr O'Keefe later co-signed a request letter to the bank requesting that a "two to authorise" facility be restored to TWH's account. His intention was to restore his authorisation rights, which he claims had been removed. To facilitate the payment of salary and wages to employees and contractors, Mr O'Keefe says he reluctantly signed an agreement allowing a new approval process to be implemented which included Mr Wright. This was provided to the bank and restored Mr Wright's payment authorisation rights.

[19] On or about 19 April 2022, it appears the bank account block was lifted and the "two to sign" authorisation was effective, and employee payments were processed and paid the next day.

[20] Mr Wright claims it was Mr O’Keefe’s duty, as managing director with direct management over employees, to manage the consequences of introducing this change in business process and communicate with the employees in case of foreseeable delays.

*Second delay in payments*

[21] Salary and wages due on 20 April 2022 were also delayed by a day and received on 21 April 2022. Mr Wright says he authorised payments and is unaware of the reason for the delay, and denies responsibility for it. Mr O’Keefe has not provided an explanation for this either.

*Third delay in payments*

[22] On 1 June 2022, salary and wages were delayed for two days before being paid on 3 June 2022. Mr Wright says that while TWH’s financial administrator loaded up employee and contractor payments on 31 May 2022, he says he had queries that he required responses to before he was willing to pay some international contractor payments. He says he let Mr O’Keefe and TWH’s financial administrator know this straight away, but due to the workload of verification and authorisation of all company payments that fortnight, employee payments were missed due to an “inadvertent lapse” on his part.

[23] On 7 June 2022 Ms Klevisser sent a letter to Mr Wright and Mr O’Keefe raising her concerns and the consequences resulting from the payment delays. She said the delays created disruption and low morale in the team, with whom she worked closely as operations manager.

[24] Although Ms Reid was somewhat vague in her evidence about when she left her employment with TWH, Mr Wright confirmed she left at the end of May 2022. Mr Wright says Ms Reid received her final payment on 3 June 2022.

[25] On 5 July 2022, Ms Kleivsser emailed Mr Wright saying staff were raising a personal grievance for being unjustifiably disadvantaged in employment due to the payment of wages being unjustifiably delayed, which led to staff experiencing financial and emotional hardship.

#### *Fourth delay in payments*

[26] Employee payments due on 16 November 2022 were yet again delayed until 23 November 2022.

[27] Mr Wright explains that on 16 November 2022 he called TWH's bank to understand how the "two to sign" was allowing TWH's financial administrator to load payments and Mr O'Keefe to approve them without authorisation needed from Mr Wright. Mr Wright says the bank advised the financial administrator was one of the signatories, which he says was inconsistent with the directors' agreement that both directors needed to sign off payments. Mr Wright's evidence is that he authorised the first four applicants' payments, but on 18 November 2022, noticed that staff salary payments were still awaiting Mr O'Keefe's authorisation. As Mr O'Keefe was offshore an alternative arrangement was made which allowed the financial administrator to authorise payment on behalf of Mr O'Keefe, which resulted in payments being made some seven days late.

[28] Ms Klevisser sent an email on 18 November 2022 raising the latest delay in wage payments and a delay in paying commissions to her as an issue.

[29] Ms Brunton sent an email raising personal grievances on 21 November 2022 on behalf of all the applicants, expressing the impact of the recent payment delay. The email requested a meeting to discuss the effect on the team and compensation. Attempts at holding a meeting in December 2022 were unsuccessful.

#### *Non- payment of commissions affecting Ms Klevisser*

[30] The Authority understands that on 9 September 2022, TWH's financial administrator processed sales commissions for Ms Klevisser. These were apparently approved by Mr O'Keefe but Mr Wright did not authorise the payment of the commissions.

[31] On 9 September 2022 Mr Wright says he received an email from the financial administrator requesting sales commission payments to Ms Klevisser be approved. Mr Wright's evidence is that the payments appeared to be calculated using a commission structure model that differed from the model previously agreed. He says he was not given any notice about this change prior to the sales commissions being loaded for payment. Mr Wright says he requested a report on sales commissions so he could

understand how the commissions fitted within the total unpaid sales commissions across the company. The financial administrator sent a report on sales commissions to Mr Wright on 20 September 2022. Mr Wright says he continued to request information over the coming months. He believes Mr O’Keefe and Ms Klevisser surreptitiously agreed to alter the commissions contrary to his interests as it affected his split on commissions, without alerting him.

[32] Ms Klevisser says in a performance review she had requested incentive payments because she was required to do sales in addition to the Operations Manager role she was employed for. Mr O’Keefe acknowledges after a period of indecision, he made an “executive decision” as managing director and confirmed Ms Klevisser’s commission entitlements directly with her in mid-2021. He accepts the commissions sought by Ms Klevisser are owing to her in accordance with their agreement, which have remained unpaid at their agreed level.

### **Personal grievances for unjustified disadvantage**

[33] Under s 103(1)(b) of the Act, an unjustified disadvantage is a personal grievance where an employee’s employment, or one or more conditions of their employment, is affected to the employee’s disadvantage by some unjustifiable action by the employer. The first four applicants must therefore establish that there was some unjustifiable action by TWH which affected their employment or the conditions of their employment to their disadvantage.

[34] TWH’s actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

#### *The four delays in payment*

[35] Failure to pay wages in full when due and owing was a serious breach of the duty owed to the first four applicants, as TWH’s employees. TWH breached this duty on four occasions because it did not pay them for hours worked when the payment for that work fell due under the terms the parties had agreed. I am satisfied TWH breached duties owed to the first four applicants which have caused them each disadvantage. TWH’s actions in failing to ensure employees were paid on time were not what a fair and reasonable employer could have done in the circumstances. The explanations provided by Mr Wright do not justify the repeated actions.

*Ms Klevisser's claim for commission payments*

[36] In *Nelson v Porirua Community Law Resource Centre Incorporated* the then Chief Judge Goddard set down the test to be applied in a situation in which there is an issue regarding ostensible authority:<sup>3</sup>

Ostensible means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? ... The fact that as between them and the respondent there is a limitation of authority unknown to the applicant cannot be allowed to affect his position. It was up to the respondent to notify him of the existence of the limit.

[37] Mr O'Keefe was the managing director of TWH at the relevant times. He had overt authority in relation to the management of its employees, including Ms Klevisser's employment. A reasonable person in Ms Klevisser's situation could not be expected to know there was a limitation on Mr O'Keefe's authority to determine the level of commissions Ms Klevisser would receive at the time of the agreement. Ms Klevisser's evidence was clear that she believed the issue Mr Wright raises about not being involved in the decision-making was a governance level issue between Mr Wright and Mr O'Keefe. I agree with that assessment and find Mr O'Keefe exercised ostensible authority in reaching agreement with Ms Klevisser.

[38] I am therefore satisfied Ms Klevisser also has established a personal grievance for unjustified disadvantage in relation to the failure to pay sales commissions in accordance with the agreement she reached with Mr O'Keefe. Although there is clearly a dispute about the entitlement between Mr Wright on the one hand, and Mr O'Keefe and Ms Klevisser on the other, given my findings I am satisfied the issue could be, and was, pursued appropriately as a personal grievance for unjustified disadvantage.

[39] Having heard from the parties, I accept Ms Klevisser is owed commissions totalling \$47,753.10, relating to three financial years. Rather than awarding this as a personal grievance remedy, I am satisfied this amount is recoverable as arrears of wages under s 131 of the Act.

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<sup>3</sup> *Nelson v Porirua Community Law Resource Centre Incorporated* [1993] 2 ERNZ 1109 (WEC39/93) at p 17.

## **Remedies for personal grievances**

[40] The first four applicants have established personal grievances for unjustified disadvantage. They are entitled to a consideration of the compensation under s 123(1)(c) that is sought.

### *Ms Klevisser*

[41] Ms Klevisser gave evidence of multiple effects resulting from the late payments. She felt disrespected, undervalued and disregarded. She says the workload at TWH was so intense and then not being paid for it was surreal. She found the first delay the hardest because it was out of blue and rattled the team whom she had to try and reassure that everything would be fine when they had deadlines and contracts to fill. Then the repeated delays were difficult because although she thought it might happen again it was uncertain about when. As a solo parent reliant on her sole income, her family was impacted and she had to ask for help which she found mortifying, priding herself on her independence. Ms Klevisser also referred to having gone through the resolution and Authority process reiterated the hurt. Ms Klevisser's circumstances warrant a compensation award of \$8,000.

### *Ms Brunton*

[42] Ms Brunton gave compelling evidence about the effects the late payment of her wages had on her and her whanau, and provided personal reasons about why it was difficult and triggering for her. She found not being able to afford necessities shameful, having to ask her children to tide her over. In my view Ms Brunton's circumstances warrant a compensation award of \$8,000.

### *Ms Huiarangi*

[43] Ms Huiarangi gave evidence that at the time of the late payments she was living with her partner and his family, contributing to board. She says she suffered embarrassment from having to ask her partner (who was not earning much at the time) and his family to help. Following the events April 2022, the late payment in June 2022 created anxiety about when she would be paid.

[44] Ms Huiarangi found the delay in payment in November 2022 impactful because it was the time leading into Christmas, with pressure to purchase Christmas presents and whether or not she was going to be able to afford gifts. She said she ended up

prioritising paying her partner back rather than purchasing gifts. She said it damages your mana when you are fully performing a role and duties but not earning what you expect. Ms Huiarangi's circumstances warrant a compensation award, of \$6,000.

#### *Ms Reid*

[45] Ms Reid said the delay in payment was triggering and she started getting anxious such that she could not stay in employment with TWH. The insecurity of pay brought back a difficult memory.

[46] At the investigation meeting Mr Wright questioned Ms Reid about why she left employment. He says on 18 May 2022 Ms Reid started as a participant on a programme run by TWH which helped participants to launch their own online businesses. He refers to a post on Facebook on 27 May 2022 stating Ms Reid had left TWH employment to start her own business. Ms Reid responded that her business was existing and that was at a time when she still felt she could operate her business, but she then became unwell. She says it has two years to travel back from the harm. I find Ms Reid's circumstances warrant a compensation award of \$8,000.

#### *Contribution*

[47] None of the first four applicants contributed in any way to the situation that gave rise to their grievances. No reduction in remedies is required.

#### **Claim against Mr Wright**

[48] There is no basis for finding Mr Wright is liable to pay the personal grievance remedies of compensation, which are payable by TWH as the first four applicants' employer.

[49] This leaves a possible claim that leave should be granted to recover commissions owing to Ms Klevisser, on the basis Mr Wright may be a person involved in breaches of employment standards (likely s 4 of the Wages Protection Act 1983) such that he should be liable for the defaults in the payments as a result of the breaches.

[50] I decline to grant leave to recover the commission payments from Mr Wright at this stage of the proceedings, but reserve leave for Ms Klevisser to further pursue the persons involved claim against Mr Wright in the event TWH fails to pay her commission payments.

## **Outcome**

[51] Te Whare Hukahuka Limited is ordered to pay compensation under section 123(1)(c) of the Act within 21 days of the date of this determination:

- a. \$8,000 to Manuela Klevisser;
- b. \$8,000 to Ainsley Brunton;
- c. \$6,000 to Anastasia Huiarangi; and
- d. \$8,000 to Jodie Reid.

[52] Te Whare Hukahuka Limited is also ordered to pay arrears of wages (commissions) under s 131 of the Act totalling \$47,753.10, to Manuela Klevisser within 21 days of the date of this determination.

## **Costs**

[53] Although Ms Klevisser has ably represented the first four applicants before the Authority, it appears they may have sought and obtained legal advice during the process. Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[54] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the first four applicants may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondents will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[55] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>4</sup>

Sarah Blick  
Member of the Employment Relations Authority

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<sup>4</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)