IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2024] NZERA 53
3177415

	BETWEEN	GEORGIE ORMOND Applicant
	AND	VERY NICE PRODUCTIONS LIMITED First Respondent
	AND	MYLES THOMAS Second Respondent

Member of Authority:	Michael Loftus
Representatives:	Adam Mapu, advocate for the Applicant Myles Thomas, for the Respondents
Investigation Meeting:	9 March 2023 at Whanganui
Submissions Received:	22 March 2023 by AVL
Date of Determination:	1 February 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Georgie Ormond, claims to have been unjustifiably disadvantaged by reason of various warnings she received and then constructively dismissed.

[2] That said, and before those claims can be considered there is the issue of whether or not she was an employee, at least prior to September 2021 during which time some of her unjustified action grievances are said to arise.

[3] There was also, at least at the time the claims were lodged, a question about who her employer might have been – Very Nice Productions Limited (VNPL) or Mr Thomas, VNPL's sole director and shareholder. This issue was resolved when, during her oral evidence, Ms Ormond advised she no longer considered Mr Thomas to have been her employer and withdrew him as a respondent. Therefore the only issue that remains in this regard is her status, contractor or employee, between 12 February 2019 and 12 September 2021.

[4] The respondents deny Mr Thomas ever employed Ms Ormond but accept she was employed by VNPL with effect 13 September 2021. Prior to that they say she was a contractor. They also deny her claims of disadvantage or dismissal have any validity.

This Determination

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[6] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[7] Ms Ormond was engaged as a Video Journalist producing news content for an online broadcaster with the funding coming from NZ On Air between 12 February 2019 and her cessation.

[8] She says that between commencement and 12 September 2021 she was classified a contractor and engaged under a contract for services. The relevant contract definitely takes the form of a contract for services though it is Ms Ormond's position it did not accurately reflect the situation and she was, in reality, an employee given VNPL and/or Mr Thomas:

(a) Provided the tools required to carry out the role including a vehicle and petrol card, camera and all necessary accessories, phone, laptop, video software subscription and travel expenses;

(b) Paid a regular salary;

(c) Set targets:

(d) Issued written warnings;

(e) Expected she attend weekly team meetings by Zoom;

(f) Expected she attend annual team-building events in Rotorua and Havelock North;

(g) Directed how she carried out the work with frequent instructions regarding editing which, according to Ms Ormond, could be to such an extent that the final product sometimes failed to resemble her own original work;

(h) Advising that although a contractor she was to behave as an employee; and

(i) After she was engaged as an employee the relationship and the way it worked never altered.

[9] It is VNPL's position Ms Ormond's engagement as a contractor was perfectly valid given her work was clearly 'film production work' as defined by s 6 of the Employment Relations Act 2000. They also add this was the parties' intent and Ms Ormond was free to freelance for other companies which reflected then current practice in the industry.

[10] VNPL says that prior to her engagement Ms Ormond ran her own business, albeit a bar, and continued to do so. VNPL adds its belief Ms Ormond took advantage of the situation by claiming relevant expenses on her tax returns with VNPL taxing her as a contractor and deducting withholding tax.

[11] The arrangement between VNPL and Ms Ormond was one under which she was paid to produce a minimum amount of broadcastable video content and not by the time taken to do so. VNPL also says Ms Ormond was free to choose the nature of that content within certain parameters, though it reserved the right to request specific work. They say any of her work which was broadcast carried her name along with a branding owned by NZME and not VNPL.

[12] On 15 June 2021, and according to Ms Ormond without prior discussion, she received an email from Mr Thomas (copied to Belinda Henley, a colleague who was also responsible for providing support to Ms Ormond along with Mr Thomas) which briefly discussed a technical issue before going on to advise Ms Ormond she was not meeting her required

production levels – either two stories a week or 5 five minutes content. It advised she was required to increase her output to 6 minutes a week before advising that if her weekly rate of production didn't increase VNPL would have to look for someone to take the role.

[13] It is VNPL's position this correspondence was not unheralded with the issues having been raised many times prior. It also says the warning was warranted by virtue of Ms Ormond's lack of performance. It is Mr Thomas' evidence that when the issue was raised Ms Ormond became "… defensive blaming her equipment or finding other excuses". Here it should be noted Mr Thomas' evidence is there were no issues during Ms Ormond's first year of engagement and they only arose during 2021 after the death of Ms Ormond's father.

[14] Mr Thomas adds the issue had to be addressed as if one region missed its target of 240 minutes per region per year the whole project is deemed to have failed with repercussions on final payments for all.

[15] On 6 July 2021 Ms Ormond received a second email from Mr Thomas entitled "Second Warning". It referred to the mail of 15 June and that Ms Ormond had failed to meet the required level of output. It closed with advice that should she not do so Mr Thomas would feel obliged to terminate her "supply of service contract".

[16] Mr Thomas says he was becoming desperate as VNPL's contract with NZ On Air was coming up for renewal in September but, in any event, the warnings have no relevance as they were later withdrawn when the contract was renewed with VNPL having met its obligations. That said he attributes this, in Ms Ormond's case, to an improvement augmented by a couple of videos he had made.

[17] It is Ms Ormond's evidence she was finding her relationship with Mr Thomas increasingly difficult. She says his expectations would change, often in a contradictory way, which required continued rework and editing of her output which impacted her ability to produce. Ms Ormond also complained that Mr Thomas had the ability to choose not to use her work which also impacted her ability to meet the NZ On Air target.

[18] Mr Thomas' response to this and the fact the assistance referred to in paragraph [12] often took the form of 'editing notes' which the evidence leads me to conclude were somewhat more than assistance or suggestions. His response is that ultimately it was he and Ms Henley who were responsible to NZ On Air for the final product.

[19] VNPL denies these claims saying they and later claims of bullying lack substance. It says its comments were necessary given Ms Ormond's first cuts of a story were 'often inferior'. This meant the resulting notes were more extensive than normal but the purpose was to assist.

[20] On 13 September 2021 Ms Ormond became an employee with an agreement citing VNPL as the employer. Mr Thomas' evidence is that a key factor behind this was that historically NZ On Air contracts had lasted a year. From September 2021 funding was guaranteed for three years which offered a level of certainty that allowed him to offer his producers the choice of being an employee, especially as some did not avail themselves of the freelance opportunities contracting had permitted. He also noted the cost implications were muted as the 240 minutes per year per producer meant that at 5 minutes per week four weeks were left for holidays. Those who chose to be employed continued on the same pay while those who remained contractors received a small increase in remuneration pay.

[21] Ms Ormond says that in October she telephoned Mr Thomas and told him she might feel compelled to resign if her concerns were not addressed. Mr Thomas has no recollection of the call but accepts he cannot deny it occurred.

[22] What he does say is that while improvement had occurred in the lead up to renewal of the NZ On Air contract Ms Ormond's performance soon regressed and she produced only half the required content between early September to mid November. He says they discussed this but she became defensive and he could not figure out what the issue was with Ms Ormond rejecting his suggestion he travel to Whanganui to try and assist. This led to Mr Thomas insisting on "an assessment and support programme" effective 22 November which would see regular phone contact between the two.

[23] It is Mr Thomas' evidence Ms Ormond appeared disinterested in the programme which led to his forwarding a letter entitled "Formal Warning" on 13 December. It said that while Ms Ormond's production remained below that required the situation was improving. It referred to the fact Ms Ormond was, once again, well behind the target before making some suggestions that might assist. The letter discussed the fact the production target was the main KPI in VNPL's contract with NZ On Air before then stating this was a "first warning". The letter then advised that failure in any subsequent week would see the issuing of a final warning and a second failure would result in termination. Further comments were made including advice Ms Ormond would receive daily calls from Ms Henley and should cease blaming her equipment.

[24] The response was a "Formal complaint about Work Placed Bullying" with the allegation being that Mr Thomas was the bully. It is a long document raising multiple allegations about the way Ms Ormond was being treated. It was then Mr Thomas decided to withdraw from contact with Ms Ormond and use intermediaries, particularly Ms Henley.

[25] VNPL's evidence is this did not work with Ms Henley beginning to struggle with Ms Ormond who seemed to be getting more agitated. A decision was made to task the most senior video journalist, Partick O'Sullivan, with day to day support of Ms Ormond and he was also asked to investigate the bullying allegation. That led to a process Ms Ormond describes as long and very stressful and resulted in a conclusion in mid February that there had been no bullying.

[26] Mr Thomas says with that decision he tried to reinstate contact with Ms Ormond but she wanted nothing to do with him and continued to claim she was being harassed. It was about this time communication started to be channelled through Ms Ormond's husband, though not all. It would be fair to say that by this time the communication was also becoming terse, with Ms Ormond writing on 28 February taking issue with the bullying conclusion. The letter advised she was raising a personal grievance for unjustified disadvantage and also referred to the previous warnings. She was by then in receipt of representation and formally requested mediation over the issues.

[27] Also in late February Ms Ormond advised she intended a week long shoot on the Whanganui River, though Mr Thomas attempted to veto the idea due to the danger it posed to equipment and because he was of the view no story was planned. Ms Ormond still went which led to a further deterioration with questions as to whether it was leave or not and Mr Thomas taking issue with staff taking time off work when so far behind. Further conflict arose with an escalation in the messages about performance improvement which culminated in Ms Ormond absent from, but represented by her husband, in a performance improvement meeting, by zoom, on 7 March.

[28] That led to a proposed programme of work for the next two weeks though Mr Thomas says that while Ms Ormond said she was working on videos there was no evidence of that in VNPL's systems. That claim would be correct with Ms Ormond's husband advising, on 21 March, that she had been working on a 23 minute documentary on the river trip. He advised

this had been recommended by her advisors on the grounds of 'rehabilitation' and in order to regain confidence by doing work unsupervised.

[29] That email also intimated neither she nor her husband would attend a performance improvement meeting planned for the next day (22 March). The chain then degenerated into a debate about whether or not Ms Ormond had been doing any work for VNPL over the previous week. There as also advice Ms Ormond no longer felt safe meeting with Mr Thomas and would not do so till mediation on the bullying complaint had occurred.

[30] The correspondence culminated on 25 March with advice Ms Ormond would be taking stress leave (though she later produced a medical certificate backdating the commencement of leave to 7 March). From there things degenerated further with three particular events to the forefront in Ms Ormond's evidence. They were:

(a) That on 25 March 2022 VNPL emailed Ms Ormond's husband suggesting she resign;

(b) That on 29 March VNPL issued a warning for absence without leave; and

(c) On the same day VNPL issued a further warning regarding continued performance issues.

[31] The email of 25 March refers to there being a huge shortfall of content from Ms Ormond as she had not delivered anything for some time. It talked about leave before continuing to canvass the shortfall in output and possible repercussions.

[32] The email goes to say "If Georgie is so badly affected by the work, and so traumatised by the work to the point she can't or won't do it, has she considered resigning… For her sake have you considered encouraging her to stop trying not do the job".

[33] The letters of 29 March had a short covering email that advises Mr Thomas felt compelled to issue "formal warnings for performance and absence". It then stated another performance review had been scheduled for 12 April and advised Mr Thomas looked forward to receiving a promised medical certificate covering the stress leave. There was then a two page letter regarding unauthorized absence concentrating on the meeting of 22 March. The second letter addressed the warning for performance issues.

[34] These events, along with a continuing chain of antagonistic emails, ultimately led to advice, tendered on 20 April 2022 that Ms Ormond was resigning. Her letter, entitled "Medical Certificate, Resignation and further Personal Grievance", was written in the third person. Appended was a further medical certificate through to 7 June 2022 and reference to what she saw as the increasingly aggressive, malicious and damaging comments in email correspondence from Mr Thomas, before advising "Georgie has now reached the point that she feels to protect her own health and wellbeing she is forced to resign". The letter closed with advice that there was now a further personal grievance claiming constructive dismissal.

Analysis

[35] For determination are three questions. They are:

(a) Whether or not Ms Ormond was an employee prior to 13 September 2021;

(b) Whether or not she as unjustifiably disadvantaged by the issuing of the warnings; and

(c) Whether or not she was constructively dismissed.

[36] Section 6 of the Employment Relations Act 2000 provides the meaning of employee. It states:

> *(1) In this Act, unless the context otherwise requires,* ***employee*** *—*
> *(a) means any person of any age employed by an employer to do work for hire or reward under a contract of service; ...*
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
>
> *(3) For the purposes of subsection (2), the court or the Authority —*
> *(a) must consider all relevant matters, including any matters that indicate the intention of a person; and*
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[37] What might constitute all relevant matters was considered by the Supreme Court in *Bryson v Three Foot Six Limited (No.2)*[1] but that decision led to a further overlay which was the Employment Relations (Film Production Work) Amendment Act 2010.

[1] [2005] ERNZ 372

[38] That amendment provided that the definition of employee excludes a person engaged in film production work.[2] Film includes video recordings. Film production work is defined as including:

(a) Pre-production work or services (whether on set or not);

(b) Production work or services;

(c) Post production work.[3]

[39] The evidence leads to a conclusion Ms Ormond's work complies with all of the above. She planned the shoot (pre-production work); she shot the video (production work) and she was engaged in editing the work so it could be broadcast (post production).

[40] For completeness I note the exception to Ms Ormond's statutory exclusion as an employee would be that the services provided relate to the production of a programme intended initially for broadcast on television.[4] That exclusion does not apply as her work was intended for dissemination over the internet by what was once a print news service (the New Zealand Herald) and not broadcast on television.

[41] Ms Ormond was, as her contract stated, a contractor prior to accepting the employment agreement effective 13 September 2021. It follows any grievance relating the warnings issued prior to that date cannot be considered by the Authority. It also means the remedies sought – unpaid holidays and kiwisaver etc, need not be considered.

[42] The second issue is whether or not Ms Ormond was unjustifiably disadvantaged with this claim expressly relating to the issuing of the warnings of 15 June 2021, 6 July 2021, 13 December 2021 and the two of 29 March 2022.

[43] With respect to the later warnings the answer must be yes – Ms Ormond was unjustifiably disadvantaged.

[44] The reason is simple. It is well established the provisions of section 103A of the Act and in particular subsections (3)(b),(c)and (d) apply to warnings. In other words a warning must be proceeded with a clear raising of the employer's concerns, with advice it is in a context

[2] Section 6(1)(d) of the Employment Relations Act 2000
[3] Sections 6(7)(a)(ii), (iii) and (iv) of the Employment Relations Act 2000
[4] Section 6(7)(b) of the Employment Relations Act 2000

in which disadvantageous consequences might follow (ie: warning or dismissal); that the employee be given a chance to respond in the knowledge of a disciplinary context and the response is listened to with an open mind.

[45] The evidence makes it clear none of these things happened with respect to the warnings given after Ms Ormond became an employee. It was Mr Thomas' evidence he simply sent the warning of 13 December given a conclusion Ms Ormond was not interested in discussing his concerns with no evidence he put her on notice he was considering formal action at that time. Here, and with respect to this last point, I note the warnings prior to employment cannot count given VNPL's own evidence Ms Ormond had, albeit briefly, met the target, been congratulated and the warnings wiped.

[46] Similarly, the requirements of the Act were not met with respect to the two warnings of 29 March – indeed Ms Ormond was no longer in the workplace with Mr Thomas stating he simply felt compelled to issue them given the circumstances. At the very least he should have put Ms Ormond on notice that should she not participate in a process she risked adverse consequences. There is no evidence that occurred, though I accept that by then any action might have been fraught given the advice of medical issues and stress leave.

[47] I now note Ms Ormond's submission addresses the response to her bullying complaint as constituting a disadvantage but for two reasons I disagree. The first is it was not suggested until submissions. The second is it is, in my view, part of the constructive dismissal claim to which I now turn.

[48] That leaves the claim of constructive dismissal.

[49] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*[5] the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

(a) An employer gives an employee a choice between resigning or being dismissed;

(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

(c) A breach of duty by the employer causes an employee to resign.

[5] (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

[50] In *Wellington etc Clerical Workers etc IUOW v Greenwich*[6] the Court stated that for a dismissal to be constructive:

> It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[51] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case. There must also be a causal link between the employer's conduct and the tendering of the resignation[7] and the possibility of resignation should be foreseeable.[8]

[52] Here the answer again becomes relatively simple. Mr Thomas' email of 25 March is, in my view, fatal. Raising the option of resignation and suggesting Ms Ormond consider it while also undertaking a process in which the possibility of dismissal has been aired is, in my view, a classic constructive dismissal. While not as stark as expressly saying there is a choice the spectre has been raised by the employer – it is simply something an employer should never do.

[53] Even of that were not the case a reading of the email chains would lead me to conclude Ms Ormond had been constructively dismissed.

[54] The parties accept virtually all interaction from mid December 2021 was in writing and reading those exchanges would easily lead to a conclusion Ms Ormond was constructively dismissed. On 13 December she received an unjustified warning. She reacted with a claim of bullying. From there the note and tenure of the exchanges deteriorated. On one hand Mr Thomas continued to exert pressure correctly summarised by Mr Mapu as "continued and amplified". To that I add the continuing dissatisfaction Ms Ormond was expressing with regard the way her bullying complaint was handled and VNPL's reluctance to address that properly when it had a duty to do so.

[55] On the other hand Ms Ormond was expressing concern she could not speak to Mr Thomas without getting distressed[9] and more importantly exhibiting and evidencing signs that she was medically and mentally unwell. It was at this point Mr Thomas should have

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[6] (1983) ERNZ Sel Cas 95; [1983] ACJ 965
[7] *Z v A* [1993] 2 ERNZ 469
[8] *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140
[9] For example – email of 8 March 2022

reconsidered his approach and perhaps sought professional advice yet he not only continued, he compounded the situation with further unjustified warnings.

[56] These actions amount to a situation in which Ms Ormond can claim to have been constructively dismissed and resignation was foreseeable. In evidence Mr Thomas does not deny Ms Ormond said she raised the possibility as early as October and once Mr Thomas raised it resignation was clearly a possibility.

[57] The conclusion Ms Ormond was both unjustifiably disadvantaged and unjustifiably dismissed means the question of remedies must be considered.

[58] Ms Ormond seeks lost wages and compensation pursuant to s123(1)(c)(i) of the Act.

[59] Section 128(2) of the Act requires the payment of three months wages or the actual loss if less. In this instance the claim is limited to that, minus $3,289.31 Ms Ormond earned during that period working on short term contract roles.[10] The residue, which she claimed, was $10,077.69 and in accordance with the Act that is payable.

[60] While Ms Ormond sought compensation for both the unjustified actions and unjustified dismissal, amounts were not specified. As a result of that and the fact her evidence makes it very difficult to separate the effect of individual acts I shall consider the matter globally.

[61] Ms Ormond gave evidence of being extremely stressed by the situation and there was evidence of medical repercussions. She also evidenced the fact her attempts to secure replacement employment were impeded by the fact she had lost confidence as a result of these events. Her evidence was supported by that of her husband who spoke of the need for medical intervention and both physical and mental damage. He spoke of Ms Ormond's continuing sadness at having lost the job.

[62] Having considered the evidence and current levels of compensation I consider $18,000 appropriate.

[63] Finally the conclusion Ms Ormond has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory

[10] Witness statement of Ms Ormond at [20]

conduct.[11] While the evidence makes it clear there were issue with her performance she did not contribute to the deficient and unjustified manner in which that was addressed.

Conclusion and Orders

[64] For the above reasons I conclude Ms Ormond has a personal grievance in that she was both unjustifiably dismissed and unjustifiably disadvantaged. As a result, I order Very Nice Productions Limited pay Georgie Ormond:

(a) $10,077.69 (ten thousand and seventy seven dollars and sixty nine cents) gross being wages lost as a result of the dismissal; and

(b) A further $18,000.00 (eighteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act;

[65] Costs are reserved with the parties encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Ormond may, as the successful party, lodge and then should serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum VNPL will have 14 days to lodge any reply memorandum.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[12]

Michael Loftus
Member of the Employment Relations Authority

[11] Section 124 of the Employment Relations Act 2000
[12] For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.