

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 621  
3230199

BETWEEN	JAMES CASWELL Applicant
AND	KAMO LANDSCAPE & QUARRY SUPPLIES LIMITED First Respondent
AND	JOHN CLIFFORD WALTER ROBINSON Second Respondent

Member of Authority: Rachel Larmer

Representatives: Bradley McDonald, counsel for the Applicant  
John Robinson for the Respondents

Investigation Meeting: 18 and 19 April 2024 in Whangarei

Submissions and other Information Received: 22 April 2024, 29 May 2024, 23 July 2024, 10, 11, 14  
and 15 October 2024 from the Applicant  
10 June and 14 October 2024 from the Respondents  
22 April and 14 October 2024 from Elevate CA Limited

Date of the Determination: 16 October 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

*The parties*

[1] Mr James Caswell, the applicant, began work for the first respondent, Kamo Landscape & Quarry Supplies Limited (KLQS) in January 2021.

[2] KLQS owned and operated a quarry block which it had been cleaning up and logging from 2020. Mr Caswell was employed as a Forestry Worker, but the reality was that he did whatever manual work needed to be done for KLQS. This included cleaning up and logging of the quarry block, repairing and operating machinery and any

other tasks that were assigned to him. Mr Caswell lived in a house bus which was situated at the Opuia yard where he worked.

[3] The second respondent, Mr John Robinson, is KLQS's sole director. He is also a 51 percent shareholder, with the other 49 percent of shares being held by Alan Gilbert.

[4] Mr Robinson and Mr Caswell had worked together previously in another company Mr Robinson owned and operated which had ended up in liquidation, so their history pre-dated Mr Caswell's employment by KLQS that had started in January 2021.

[5] Mr Robinson as the Managing Director was responsible for running KLQS. Mr Robinson was the person who made decisions about what work Mr Caswell had to do. Mr Robinson was responsible for paying Mr Caswell and for ensuring that KLQS met its obligations as an employer.

[6] Mr Robinson ended Mr Caswell's employment by KLQS because he did not want the legal obligations associated with KLQS being an employer.

#### *Mr Caswell's claims*

[7] In 2022 Mr Caswell became aware that there were issues with Inland Revenue Department (IRD) regarding his PAYE and KiwiSaver contributions not being accurate. Mr Caswell said he raised his concerns about this with Mr Robinson on a number of occasions, but Mr Robinson brushed him off and said, "the matter was being handled".

[8] These discussions caused rising tension between Mr Caswell and Mr Robinson as it was an issue that Mr Caswell remained concerned about, so had repeatedly raised. Although Mr Robinson assured Mr Caswell that "everything would be sorted out", Mr Caswell was not given any evidence to prove that had occurred and, as at the date of this determination, no evidence has been provided to establish that these issues have now all been resolved.

[9] On 28 February 2023 Mr Robinson visited KLQS's work site where Mr Caswell was working. When he arrived at the work site Mr Robinson phoned Mr Caswell to tell him that his work had ended and no more work would be provided to him. Mr Robinson reinforced that message by visiting Mr Caswell in his house bus later that same day, at which time Mr Robinson made it clear that he "did not have employees".

[10] Mr Caswell claimed he was owed wages arrears, and that KLQS had unjustifiably disadvantaged him by failing to accurately account to IRD for the deductions that has to legally be made from his wages.

[11] Mr Caswell said KLQS failed to provide him with wage and time records as required by s 130 of the Employment Relations Act 2000 (the Act), or with his holiday and leave records, as required by s 81 of the Holidays Act 2003 (the HA03).

[12] Mr Caswell claimed KLQS had breached its good faith obligations to him under the Act. He was concerned that KLQS would be unable to pay him any wage arrears or other money he was awarded, so he sought a determination that Mr Robinson was “a person involved in breach of employment standards”, as defined by s 142W of the Act. Mr Caswell also sought leave from the Authority to pursue Mr Robinson personally for any wage arrears or other money that KLQS was ordered to pay him, but was unable to pay.

[13] Mr Caswell sought a finding that KLQS had breached employment standards. He asked that interest be paid on any money he was owed. He asked the Authority to order the respondents to account to IRD for the correct PAYE, KiwiSaver and any other legally required deductions that should have been made from his wages for the entire period that he was employed.

[14] Mr Caswell claimed he was unjustifiably dismissed on 28 February 2023. He sought distress compensation for his personal grievance claims. He also sought unpaid notice pay arising from his unjustified dismissal, along with lost remuneration and costs.

#### *The respondents' position*

[15] The respondents denied all of Mr Caswell's claims, with the exception that they agreed Mr Caswell's KiwiSaver employee contributions had not been deducted from his wages or remitted to IRD. They also acknowledged there were outstanding IRD issues regarding deductions KLQS had made from Mr Caswell's wages for PAYE and KiwiSaver contributions.

[16] The respondents said Mr Caswell had been paid correctly up until the end of March 2022, at which time his employment with KLQS had ended. They disputed that

the Authority had jurisdiction to investigate any of Mr Caswell's claims on the basis there was no employment relationship between any of the parties after 31 March 2022.

[17] Although the respondents admitted Mr Caswell had done work for KLQS after 1 April 2022, they denied he had been an employee. Instead, they claimed he was either doing the work as an independent contractor, or "a prospective shareholder" or he was a "working shareholder" in KLQS. Mr Robinson was not clear about the legal basis on which Mr Caswell had continued to do work for KLQS from 1 April 2022 onwards, other than to say he definitely was not an employee from the end of March 2022 onwards.

[18] The respondents also said Mr Caswell's involvement with KLQS ended on 24 November 2022. However, the respondents contradicted themselves by also admitting that Mr Caswell had done work for KLQS in December 2022 and in January and February 2023. Mr Caswell was paid \$800.00 per week for work he did from 25 November 2022 to 20 February 2023, excluding the period from 23 December 2022 to 8 January 2023 which was unpaid. Mr Caswell was then paid \$700.00 per week on 20 and 28 February 2023.

[19] The respondents' arguments for why Mr Caswell was not an employee after the end of March 2022 appeared contrived. Mr Robinson claimed Mr Caswell was "part of the company" up until 24 November 2022, however there was no documentation recording that, and the evidence established that Mr Caswell did not have any legal interest in KLQS's business.

[20] Mr Robinson also claimed he had "loaned" Mr Caswell money equal to the wages he would have earned for "casual" work Mr Caswell did for KLQS in January 2023 and February 2023.

[21] If there was found to have been an employment relationship from 1 April 2022 onwards, then the respondents disputed that Mr Caswell had raised his personal grievance claims within the 90-day time limited required by s 114(1) of the Employment Relations Act 2000 (the Act).

#### *Individual employment agreement*

[22] Mr Caswell was not given a written individual employment agreement (IEA) to sign until 12 April 2021. Mr Caswell was also not given a copy of the IEA after he had

signed it on 12 April 2021. The IEA had been signed by Mr Robinson on behalf of KLQS on 23 January 2021. KLQS failed to retain a signed copy of Mr Caswell's IEA as the original signed IEA was apparently provided to Work and Income New Zealand (WINZ) to support KLQS's application for a training subsidy for Mr Caswell.

[23] The copy of the IEA the Authority received had come via WINZ, because Mr Caswell had collected it from WINZ on 23 March 2023 then provided it to the Authority. The start date for Mr Caswell recorded in the IEA of "12 April 2021" had been crossed out and a handwritten notation of "24/01/2021" had been added by Mr Robinson.

[24] A handwritten note from the Work and Income work broker who had received the original IEA said that the start date recorded on it had already been amended by KLQS when WINZ had received it.

#### *Material terms and conditions in the IEA*

[25] Mr Caswell was employed on a fulltime basis for 40 hours a week from Monday to Saturday, with the hours of work being from 7.30am until 4pm. He was contractually entitled to be paid \$25.00 gross per hour, which was to be paid weekly into his nominated bank account. His contractual wages were therefore \$1,000 gross per week for 40 hours a week.

[26] The IEA included a total remuneration KiwiSaver clause that provided Mr Caswell's base wages included all KiwiSaver Compulsory Employer Contributions (CECs) and that his employee KiwiSaver contribution would be deducted from his wages at the statutory default rate of three percent, unless Mr Caswell specified an alternative amount (which he did not do).

[27] Accordingly, \$60 per week should have been deducted from Mr Caswell's weekly wages of \$1,000 and remitted to IRD as the three percent CEC plus his three percent employee KiwiSaver contribution. However, that did not occur.

#### *Deviations from the IEA*

[28] The pay records Mr Robinson provided for Mr Caswell from 24 January 2021 to 6 August 2021 showed that he was only paid \$971 gross for working 40 hours per week, instead of the \$1,000 he should have been paid. From 15 August 2021 to 3 April

2022 KLQS recorded Mr Caswell as having been paid \$1,067 gross for working 40 hours a week. That amounted to an hourly rate of \$26.68 gross.

[29] The correct amount of KiwiSaver deductions were not remitted to IRD, with the CEC deduction varying from \$29.13 to \$32.01, and there being no employee KiwiSaver contribution deducted.

[30] Mr Caswell was also only paid \$910 gross, which was recorded by Mr Robinson as having been 80 percent of Mr Caswell's normal wages from 24 August 2021 to 12 September 2021, due to Covid. There was no evidence that Mr Caswell had agreed to reduce his wages over that period. Nor was there written consent from Mr Caswell for KLQS to deduct anything from his normal wages, or for it to pay him less than his normal wages. This unilateral reduction in his wages was therefore an unlawful deduction that was not permitted by the Wages Protection Act 1983 (the WPA).

#### *IRD issues*

[31] Mr Robinson acknowledged he had sometimes paid cash 'under the table' to Mr Caswell and to other workers, and that he was not aware of the minimum code legislation that applied to Mr Caswell's employment by KLQS.

[32] Mr Robinson ran into difficulties with the IRD due to KLQS failing to comply with its tax obligations as an employer. Mr Robinson said that he was "old school" so did everything by hand, which meant that he was unable to use what he described as "the new IRD online system". He therefore blamed IRD for the problems that occurred with the deductions from Mr Caswell's wages. However, that did not explain why issues discovered in 2021, and raised with IRD in 2022, were still not resolved by the date of this determination.

[33] Although KLQS had an accountant, Mr Subritzky of Elevate CA Limited (Elevate) in Whangarei, Mr Robinson did not instruct the accountant to ensure KLQS had complied with its IRD obligations as an employer. Mr Robinson told the Authority during the investigation meeting that his wife had payroll experience, but he did not ask her to assist him to ensure that KLQS had met its IRD obligations.

[34] As a result of these difficulties with IRD, KLQS failed to correctly remit to IRD the PAYE, KiwiSaver and any other legally required deductions it had made from Mr Caswell's wages. These problems caused Mr Robinson to try to unilaterally end

Mr Caswell's employment by deregistering KLQS as an employer with IRD on 31 March 2022.

*Disputed relationship status*

[35] Mr Robinson said KLQS ended Mr Caswell's employment at the end of March 2022. The Authority noted different end dates had been provided by Mr Robinson; 27 March 2022 in the accountant's records, 28 March 2022 in the statement in reply, 29 March 2022 in the IRD records, 31 March 2022 by Mr Robinson when he gave evidence to the Authority and 1 April 2022 in the respondents' submissions.

[36] On 24 November 2022 Mr Robinson said he told Mr Caswell to stop the work he was doing for KLQS as it could no longer afford to pay him. Mr Robinson said Mr Caswell was paid \$800.00 per week cash for the four weeks from 25 November 2022 until 23 December 2022. Mr Caswell also worked as normal over that period.

[37] On 9 January 2023 Mr Robinson said he offered Mr Caswell "full time involvement within the company" (KLQS) if he signed shareholder documentation. Mr Caswell refused to do so, because he did not want to become a shareholder in KLQS. The shareholder documentation was not prepared by the accountant until 31 January 2023.

[38] Mr Caswell disputed Mr Robinson's claims that he was not an employee from 1 April 2022 onwards. Mr Caswell said he was employed by KLQS from 24 January 2021 until he was verbally summarily dismissed by Mr Robinson on 28 February 2023. He said his status as an employee did not change over that period.

[39] Mr Caswell agreed he had stopped work on 23 December 2022, because Mr Robinson had told him KLQS could not afford to pay him. However, Mr Caswell said he had often continued to work through periods when KLQS said it could not pay him, so he knew he would be paid again when the work picked up in early January. Mr Caswell was correct about that, as that is what did in fact occur.

[40] As context, Mr Caswell had also taken time off work over the 2021/2022 Christmas/New Year holiday period, so he saw the two-week period from 23 December 2022 to 9 January 2023 when he did not do any work for KLQS in that same light.

## **The Authority's investigation**

[41] The Authority held a two-day investigation meeting in Whangarei in April 2024. All the witnesses gave evidence in person. The Authority heard from Mr Caswell and his two witnesses Mr Holger Wermer and Mr Ngatikopaki Thompson. Mr Robinson gave evidence for the respondents along with Mr Rodney Takimoana, who had worked with them.

[42] The accountant, Mr Dean Subritzky of Elevate, was witness summonsed to ensure he attended the investigation meeting. Although Mr Robinson had identified Mr Subritzky as a relevant witness for the respondents during the case management conference (CMC), he objected having to pay KLQS's accountant to prepare a witness statement, provide evidence or to participate in these Authority proceedings.

[43] During the CMC Mr Robinson was informed he could obtain a witness summons for Mr Subritzky to compel his attendance at the investigation meeting without having to pay anything other than the normal (very minimal) witness expenses that a summonsed witness was entitled to be paid. Mr Robinson agreed that he would witness summons Mr Subritzky. However, he then failed to do so.

[44] Because the respondents had failed to witness summons Mr Subritzky, that responsibility was passed to Mr Caswell to action, because Mr Subritzky's evidence was needed. Mr Caswell therefore had to engage a process server and pay the conduct money to Mr Subritzky himself to ensure the summons had been served on Mr Subritzky.

[45] Mr Subritzky provided the Authority with some information prior to the investigation meeting and some additional information subsequent to the April investigation meeting.

[46] Mr Subritzky told the Authority that he had just followed Mr Robinson's instructions, and did not look into whether or not the correct information provided by the respondents regarding Mr Caswell's earnings was correct. Mr Subritzky also confirmed that KLQS's recent accounts had not been finalised because of the uncertainty over the status of Mr Caswell's relationship.

[47] Mr Caswell provided some additional information to the Authority after the investigation meeting. Both parties provided written submissions.

## Issues

[48] The following issues are to be determined:

- (a) Assessment of credibility;
- (b) What date did Mr Caswell's employment relationship with KLQS start?
- (c) Did the status of Mr Caswell's employment relationship change from the end March 2022 onwards?
- (d) Did KLQS fail to keep, and/or provide upon request, Mr Caswell's employment documentation?
- (e) If so, should penalties be imposed on KLQS?
- (f) Should some, or all, of any penalties imposed be paid to Mr Caswell instead of, or as well as, the Crown?
- (g) Is Mr Caswell owed wage arrears?
- (h) Should interest be awarded on any wage arrears Mr Caswell is owed?
- (i) Did KLQS breach employment standards, as defined by s 5 of the Act?
- (j) If so, was Mr Robinson a person involved in any breach of employment standards that occurred?
- (k) If so, should Mr Caswell be granted leave to pursue Mr Robinson personally to pay any wage arrears or other money KLQS owed, but was unable to pay him?
- (l) Did KLQS breach its good faith obligations to Mr Caswell?
- (m) Did Mr Caswell raise his personal grievances within the 90-days' time limit required by s 114(1) of the Act?
- (n) If so, was Mr Caswell unjustifiability disadvantaged in his employment?
- (o) If so, what remedies should be awarded?
- (p) Was Mr Caswell dismissed?
- (q) If so, was his dismissal justified?
- (r) If not, what remedies should be awarded?
- (s) Should Mr Caswell's remedies be reduced on the grounds of contribution?

- (t) What costs and disbursements should the successful party be awarded?

### **Assessment of credibility**

[49] Mr Caswell presented as a more credible witness than Mr Robinson. Where there has been a material conflict in the evidence that could not be resolved by relevant documents, the Authority has preferred Mr Caswell's account of events, on the basis it was more likely than not to be correct.

[50] The lack of employment documentation also meant the Authority could accept Mr Caswell's evidence about the wages actually paid to him, and the days, hours and times he had worked under s 132(2) of the Act, unless the respondents had proved that evidence was incorrect.

### **What date did Mr Caswell's employment relationship with KLQS start?**

[51] According to Mr Robinson's handwritten note on Mr Caswell's IEA, he started work as a full-time permanent employee of KLQS on 24 January 2021.

### **Did the status of Mr Caswell's employment relationship change from the end of March 2022 onwards?**

#### *Mr Caswell's position*

[52] Mr Caswell said he was continuously employed as a permanent full-time employee by KLQS from 24 January 2021 until 28 February 2023. He said he had always worked as an employee, and he never agreed to change the status of that relationship. He did not agree to be an independent contractor, he did not work as "a potential shareholder", he was never a "working shareholder" as he was not a shareholder, and he did not do "casual" work in 2023 in exchange for a weekly loan from Mr Robinson.

#### *The respondents' position*

[53] The respondents agreed that KLQS employed Mr Caswell from January 2021 to the end of March 2022. They also agreed that Mr Caswell continued to do the same work he had previously been doing for KLQS from 1 April 2022 to 23 December 2022, and then from early January 2023 to 28 February 2023.

[54] According to Mr Robinson, Mr Caswell stopped working for KLQS on 24 November 2022 but was paid up until 23 December 2022, then resumed doing

“casual” work for KLQS in January and February 2023. According to Mr Robinson, this work Mr Caswell did for KLQS in 2023 was paid for by Mr Robinson “loaning” Mr Caswell money equivalent to the wages he would have usually been paid.

[55] The respondents said Mr Caswell was either an independent contractor, or a “potential shareholder” or a “working shareholder” in KLQS from 1 April 2022 onwards and that although Mr Caswell did “casual” work for KLQS in January and February 2023 he was not an employee. The regular weekly payments that were made to Mr Caswell in January and February 2023 were all repayable “loans”.

*Was Mr Caswell working for KLQS as a “potential shareholder”?*

[56] Mr Caswell did not want to be a shareholder of KLQS, so he was not “a potential shareholder”. Mr Caswell told Mr Robinson he just wanted to work for wages, because he understood that but did not understand anything to do with being a shareholder in KLQS.

[57] Mr Robinson knew that, and continued to give Mr Caswell work to do for KLQS, that he was paid for.

[58] Even if Mr Caswell had been a “potential shareholder” that did not negate the existence of an employment relationship, because he could be both an employee and potential shareholder.

*Was Mr Caswell working for KLQS in 2022 and 2023 as a “working shareholder”?*

[59] Mr Caswell was not a shareholder of KLQS at any time after 1 April 2022, because he had never agreed to or consented to becoming a shareholder. The respondents could not unilaterally impose a shareholding on Mr Caswell against his will.

[60] Mr Robinson did not ask Elevate to prepare share documentation including “consent and share transfer” documents until 12 September 2022. Elevate sent Mr Robinson the share documentation on 31 January 2023, which was ten months after 1 April 2022, being the date the respondents claimed Mr Caswell had become a shareholder of KLQS.

[61] Although Elevate accountants lodged a share transfer form with the Companies Office on 25 January 2023, that had transferred five shares to Mr Caswell, that was an

error. Mr Caswell was not given the share transfer or consent forms to sign, he did not sign them, he had not agreed to be a shareholder and did not want to be a shareholder. He was also not told a share transfer had been lodged or that five shares had been transferred to him until a friend saw it on the Companies Register.<sup>1</sup>

[62] Elevate unilaterally lodged the share transfer form without Mr Caswell's knowledge, consent or agreement. That should not have occurred. As soon as Mr Caswell found out about it, he insisted that Elevate fix its mistake. The Companies Registrar rescinded the incorrect share transfer to Mr Caswell on or around 8 February 2023.

[63] In the statement in reply the respondents stated:

James Caswell's employment as an employee ended on 28 March 2022 and he, with some difficulty in understanding how this worked, agreed to continue working as part of the company.

[64] It was clear from Mr Caswell's evidence during the investigation meeting that he did not understand what the respondents had proposed in terms of him allegedly becoming "part of the company". As far as he was aware, he continued doing the same work for KLQS, for the same remuneration in the same circumstances that had always applied.

[65] Although Mr Robinson had wanted Mr Caswell to be a "working shareholder", Mr Caswell never agreed to become a potential shareholder or a working shareholder in KLQS. Elevate's error with the share transfer form did not unilaterally change Mr Caswell's status from being an employee of KLQS to becoming a working shareholder in KLQS.

[66] Mr Caswell was not a shareholder in KLQS, so he cannot have been working for KLQS as a "working shareholder". Mr Robinson knew that because he had ended Mr Caswell's work for KLQS when Mr Caswell refused to sign a shareholder documentation, because he did not want to be a shareholder.

[67] An individual can also be both shareholder in a company and employed to work by the company as an employee. The ownership of shares does not nullify the existence of an employment relationship. These two positions are not mutually exclusive. It is not

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<sup>1</sup> That information is no longer visible on the Companies Register.

uncommon for senior employees to be both an employee and a shareholder in a business. Therefore, even if Mr Caswell had been, or had intended to become a shareholder in KLQS (as Mr Robinson claimed), that did not mean Mr Caswell was no longer employed by KLQS.

*Was Mr Caswell working for KLQS as an independent contractor?*

[68] There was no evidence to support the existence of an independent contractor arrangement over the period 1 April 2022 to 28 February 2023.

[69] Mr Caswell was not in business on his own account. He had not agreed to become an independent contractor from 1 April 2022 onwards. Mr Robinson admitted that in March 2022 “mention was made of James becoming self-employed but James did not seem very receptive to that proposal.” The respondents could not legally unilaterally impose an independent contractor arrangement on Mr Caswell without his consent.

[70] Mr Caswell was clearly not interested in becoming self-employed or running his own business. He has never operated his own business. He does not have his own company or trading entity. Mr Caswell made it clear to Mr Robinson that he wanted to continue to receive wages, so his ongoing work for KLQS was on the basis he would remain a waged employee. Mr Caswell did not invoice KLQS in order to be paid and he did not pay his own taxes or KiwiSaver contributions.

[71] Mr Caswell has a blue-collar background. He left school at age 15 without achieving school certificate. He has done a range of manual labouring jobs since then. He finds reading, writing and communicating challenging, so would not be comfortable or confident in running his own business. Mr Caswell’s evidence that he would struggle with the basics of running his own business appeared credible.

*Did Mr Caswell work for wages in 2023 or was the money he was paid for the work he did for KLQS in 2023 “a loan” from Mr Robinson?*

[72] Mr Caswell was paid his usual weekly wages for work he did for KLQS from 9 January to 28 February 2023. He did not ask for a loan. He did not want a loan, as he needed to be paid wages for the work he did. There was no loan documentation. It was illogical Mr Caswell would work full time for KLQS in 2023 in return for a repayable “loan”, even more so when the amount of the alleged “loan” equalled the weekly wages he had previously been paid. Mr Robinson’s evidence about these payments in 2023

being “a loan” was inherently unlikely. There was no reason why Mr Caswell would have worked for KLQS in 2023 for free.

*Was Mr Caswell an employee of KLQS?*

[73] Whether Mr Caswell continued to work for KLQS as an employee from 1 April 2022 onwards depended on whether he continued to meet the definition of “employee” in s 6 of the Act.

[74] Section 6(2) of the Act required the Authority to determine “the real nature of the relationship” between the parties. Under s 6(3) of the Act the Authority had to consider all relevant matters, including the parties’ intention, but that was not determinative of the status of the parties’ relationship. Intention is to be assessed objectively, so the parties’ subjective intentions are not determinative of that issue.

[75] *The parties’ intention* – there was no mutual intention that Mr Caswell would continue working for KLQS but he would cease to do so as an employee. Mr Robinson unilaterally decided he did not want the legal burdens associated with KLQS employing Mr Caswell after 31 March 2022, so he deregistered KLQS as an employer with IRD.

[76] *Did the status of the relationship change?* - Mr Caswell did not resign from his employment by KLQS. There was no termination letter or dismissal documentation sent by KLQS to Mr Caswell ending their employment relationship. There was no record to show that Mr Caswell was paid out his HA03 entitlements. Although Mr Robinson attempted at the end of March 2022 to get Mr Caswell to agree to change the status of his relationship with KLQS from an employment relationship to something else (namely either a contractor, proposed shareholder or working shareholder), this was not agreed to by Mr Caswell. The fact that Mr Robinson was unclear about what legal basis Mr Caswell had continued working for KLQS after 1 April 2022 supported Mr Caswell’s position that his employment status had not changed. Had it changed, then all parties would have known what the new relationship was.

[77] *Communication of the proposed change* - The proposed change the respondents wanted to make to the employment relationship was never adequately communicated to Mr Caswell, so he did not understand it. Because Mr Robinson did not know if Mr Caswell was a contractor or a proposed or working shareholder (claiming he was one of these) the outcome of the proposed change also remained unclear to the respondents. There was no adequate consultation, no disclosure of relevant information,

no explanation of what the proposed change in status would mean for Mr Caswell. He therefore cannot reasonably be said to have agreed to something that none of the parties were clear about, which he did not receive relevant information about, and which he did not understand.

[78] *Deregistration of KLQS as an employer* - Mr Robinson's decision to deregister KLQS as an employer with IRD on 31 March 2022 was not communicated to Mr Caswell, so he was unaware of it. The deregistration of a company with IRD as an employer is an administrative matter, so it was not decisive of the status of the relationship, particularly where the employee was unaware of it and continued working as they had always done for the employer company.

[79] *Relevant documents* – The key document is Mr Caswell's employment agreement, which the parties had signed. There was no documentation to establish that Mr Caswell's employment relationship had ended in March 2022. He did not sign a share transfer form, so did not agree to become a shareholder and he did not actually become a shareholder of KLQS. The parties did not discuss the terms of, enter into or sign, an independent contractor contract.

[80] *Independence* – Mr Caswell was not acting differently in terms of the work he did from 1 April 2022 onwards than he had done from 24 January 2021 to the end of March 2022, when it was accepted he had been employed. Mr Caswell did not act independently as a business owner from 1 April 2022 onwards.

[81] *Tools of trade* – Mr Caswell used the same tools of trade from 1 April 2022 onwards as he had used during the admitted employment relationship from January 2021 to March 2022.

[82] *Payment* – Mr Caswell was paid from different bank accounts during 2022, including one payment made from Mr Robinson's wife's account. He was also required to use an ASB card from 2 September 2022 to 27 October 2022 to compensate him for the work he did. He also received cash payments from Mr Robinson.

[83] *ASB card* – Mr Robinson was away from New Zealand from mid-August to 10 October 2022, so he put \$4,500.00 on an ASB card with the account name ACC Hospice Fund t/a Robinson Group. He gave the ASB card to Mr Caswell on 15 August 2022 and told him to use it for KLQS's expenses. Mr Robinson also instructed Mr Caswell to use the card to cover his personal expenses instead of being paid weekly,

while Mr Robinson was overseas. Mr Caswell was unhappy with this arrangement, but had no choice but to do so, if he wanted to be paid for the work he had been doing for KLQS in August, September and October 2022.

[84] *Drawings* – Mr Robinson made a \$500.00 payment from his bank account to Mr Caswell on 25 July 2022, beside which he had added the handwritten notation “drawings”. Mr Robinson’s claim that the money Mr Caswell was paid for the work he did from 1 April 2022 onwards was “drawings” from KLQS did not withstand scrutiny. Mr Caswell was never a shareholder. It did not make sense for Mr Robinson to assert that the work that Mr Caswell was doing for KLQS had been done as a shareholder for potentially recoverable drawings, instead of being done as an employee who was remunerated by wages. Mr Subritzky confirmed to the Authority that any drawings could be recoverable from Mr Caswell if KLQS could not meet its outgoings, which was the case at the time that Mr Robinson was pressing Mr Caswell to become a shareholder.

[85] *Legal risk of drawings being clawed back* - Mr Caswell did not understand the potential risk or liability of drawings being recoverable from him, and no information was given to him about it. KLQS was in arrears with IRD and according to its accountant it “could not pay any amount that it was ordered to pay Mr Caswell”. People associated with KLQS had also given it significant loans that were repayable on demand. Had these loans been called up, then there may have been no equity left in the company. It was illogical that a low paid, unsophisticated and financially vulnerable individual such as Mr Caswell would put himself in that position, particularly when the value of the shares he was supposedly offered was never discussed with him.

[86] *Value of shareholding* - Mr Caswell was not told what the value of the shares Mr Robinson wanted to transfer to him was and Mr Robinson had not even ascertained that information for himself. The share transfer form KLQS prepared recorded the proposed transfer of five shares was for \$0 consideration. During the investigation meeting Mr Robinson was still unable to provide a recognised value for the five shares he had wanted to transfer to Mr Caswell.

[87] *KiwiSaver* – As per Mr Caswell’s employment agreement, KLQS paid Mr Caswell’s KiwiSaver contributions on a total remuneration basis up to 31 March 2022. Although that was supposed to have continued after 1 April 2022, that did not occur. A “To Whom it May Concern” letter from Elevate dated 10 July 2023 recorded

that it was agreed between the parties that KLQS would pay Mr Caswell's KiwiSaver at the rate of \$30 per week for the period 1 April 2022 to 23 December 2022. Elevate said that \$1,140 was owed to Mr Caswell for that 38-week period. However, that amount was based on what Mr Robinson had told Elevate and even this admitted amount has still not been paid to IRD on Mr Caswell's behalf.

[88] *Taxation* – Mr Caswell did not pay his own taxes. KLQS was supposed to have continued to do that for him, as it had done prior to 31 March 2022. However, PAYE or other tax was not deducted from the payments KLQS made to Mr Caswell from 1 April 2022 onwards. Even prior to then, the PAYE deductions that had been made from Mr Caswell's wages were not correctly calculated or remitted to IRD. Mr Subritzky's evidence was that no tax has been paid by KLQS to IRD on the payments it made to Mr Caswell from 1 April 2022 onwards.

[89] *GST* – Mr Caswell was not GST registered in New Zealand and he was not operating his own business regarding the work he did for KLQS.

[90] *Public perception* – KLQS's clients/customers would not have known that Mr Robinson had deregistered KLQS as an employer with IRD, or that Mr Caswell's employment relationship had ended, or that the status of the relationship he had with KLQS had changed from 1 April 2022 onwards. Outwardly everything continued as it had prior to 31 March 2022, meaning there were no obvious changes made to the employment relationship the parties had been in since January 2022.

[91] *Ability to work for others* – Mr Caswell worked for KLQS full time so was not free to work for others. Mr Caswell said he worked long hours, often 60 plus hours a week, so he had no time to work for others.

[92] *Substitution* – Mr Caswell could not substitute another person to do the work he had been engaged to do for KLQS. It was Mr Robinson who called the shots and he remained the person who was solely in control of running KLQS's business.

[93] *Ability to profit* – Mr Caswell has always been paid an hourly rate based on him working 40 hours per week, and that did not change after 31 March 2022. He had no ability to profit from his endeavours, because he was only paid for a maximum of 40 hours per week regardless of how many hours in excess of that he had actually worked. His earnings were limited to his hourly wage, up to a maximum of 40 hours per week.

[94] *Risks* – Mr Caswell did not take on any business risks in terms of KLQS’s business. He was paid per hour for 40 hours per week, and that was it.

[95] *Payslips* – Mr Caswell never received payslips.

[96] *Employment records* – KLQS did not keep any wage and time records or holiday and leave records for Mr Caswell either before or after 1 April 2022.

[97] *Holiday Act 2003 entitlements* – Mr Caswell was not paid out his annual holiday pay entitlements in the next pay run after March 2022. Mr Robinson told Mr Caswell to stop working for KLQS on 24 November 2022 but he was paid up until 23 December 2022. Mr Robinson offered Mr Caswell full time permanent work again on 9 January 2023, but only if he signed a share documentation. Mr Caswell was not paid out his holiday pay entitlements in the pay run after 23 December 2022 and he was not paid for the public holidays that fell between 24 December 2022 and 8 January 2023. He was not paid his HA03 entitlements when the work he did for KLQS was ended by Mr Robinson at the end of 2022.

[98] *Wage subsidy payments* – Bank records provided by Mr Robinson showed that on behalf of “Kamo” he received “wages subsidy” payments for Mr Caswell on 8, 13 and 21 April 2022, 30 May 2022, 18 August 2022 and on 18 October 2022. The reference to “wages subsidy” was a handwritten notation that had been added by Mr Robinson before the document was provided to the Authority. This would not have been paid had there not been an ongoing employment relationship. The last payment KLQS received from Mana in Mahi was for the period 11 October 2022 to 10 November 2022.

[99] *Mana in Mahi claim form* – A two-page undated extract from the “Mana in Mahi” claim form Mr Robinson had completed in his handwriting was provided to the Authority. Beside the question “Has the worker left your employment? (yes/no)” Mr Robinson left the box empty, and instead wrote under the question “Part of company”. For the question “Is the worker still in your employment? (yes/no)” he added in handwriting “Yes” above the question. Beside “Milestone payment 8” Mr Robinson had recorded in his handwriting “No longer part of the company as of 24 Nov.” This claim form showed payments were being received by the respondent for Mr Caswell being an employee up until November 2022. Mr Caswell was never “part

of the company”, so what Mr Robinson wrote on the claim form was self-serving and factually incorrect.

[100] *Control test* – KLQS exercised a level of control over Mr Caswell from 1 April 2022 onwards that was consistent with the employment relationship from January 2021 to the end of March 2022. That is evident by Mr Robinson allocating Mr Caswell work and directing when he was to start and stop work, and what work he needed to do.

[101] *Integration test* – There was no evidence produced that Mr Caswell had not been fully integrated into KLQS’s business.

[102] *Economic reality/fundamental test* – The economic reality was that Mr Caswell was not in business on his own account, but had continued to work as an employee for KLQS after 31 March 2022.

*Real nature of the relationship*

[103] The evidence established on the balance of probabilities that Mr Caswell’s relationship status did not change after 31 March 2022. Accordingly, it was more likely than not that the real nature of the parties’ relationship for the period following 1 April 2022 remained the same as it was prior to 31 March 2022, namely it was an ongoing full time permanent employment relationship.

[104] Mr Caswell was given no information to support him to make any decisions about changing the status of his employment relationship with KLQS. He was not told that KLQS was in arrears with IRD. He was not given a valuation of the company or any other company information which would have helped him understand what its financial position was and what, if any, potential liabilities he would be exposing himself to. Nor were the potential shares valued.

[105] The evidence did not establish that Mr Caswell had entered into business on his own account from 1 April 2022 onwards. In particular, he:

- (a) Wanted to continue working for KLQS as an employee, and did not resign from his employment;
- (b) Did not agree to change the status of his relationship with KLQS, as he said he wanted to keep being paid wages;
- (c) Was not GST registered;

- (d) Did not believe he was capable of running his own business;
- (e) Did not want to run a business;
- (f) He did not understand business, or the relevant law or what he had to do to in order to run his own business;
- (g) Did not invoice KLQS;
- (h) Was not GST registered;
- (i) Did not pay his own tax;
- (j) Did not contract his services to others;
- (k) Could not substitute his services to others;
- (l) Was not set up to accept any of the advantages associated with self-employment;
- (m) Did not take on the risks/rewards associated with being an independent business owner.

[106] Accordingly, Mr Caswell established that from 1 April 2022 onwards he had continued to meet the legal definition of “employee” in s 6 of the Act. He was not a volunteer. He expected to be paid (“rewarded”) for the work he did for KLQS and he was paid (“rewarded”) by KLQS for the work he did. KLQS therefore continued to employ Mr Caswell after 1 April 2022.

[107] In explaining why Mr Caswell’s work for KLQS ended, the respondents in the statement in reply stated:

When James finally refused to join the company, I had no option left, as he would not become a self-employed contractor either, than to end all further casual work ...

[108] That response recognised Mr Caswell had not agreed to become an independent contractor and had declined to be a shareholder, yet had still been doing work for KLQS.

*When did Mr Caswell’s employment relationship with KLQS end?*

[109] Mr Caswell’s employment with KLQS ended when Mr Robinson verbally summarily dismissed him on 28 February 2023, for refusing to become a shareholder of KLQS.

[110] Mr Robinson's argument that he had ended Mr Caswell's association with KLQS on 24 November 2022, or by the latest on 23 December 2022 (both dates were given as Mr Robinson said Mr Caswell was paid up until 23 December 2022), did not succeed.

[111] The fact Mr Caswell had continued working for KLQS and had been paid as normal up to 23 December 2022 and from 9 January to 28 February 2023 fundamentally undermined the respondents' argument that his employment had ended in November or December 2022. Mr Robinson's statement that the regular payments Mr Caswell received each week from 9 January to 28 February 2023 was paid to him as "a loan" was not credible.

[112] Mr Caswell took a two-week holiday over Christmas 2021/New Year 2022 period, so the situation that applied in 2022/2023 was similar, with the exception being Mr Caswell was paid for the first Christmas break (2021/2022) but not for the second (2022/2023).

[113] Mr Robinson's advice to Mr Caswell to stop working from 23 December 2022 looked as if its sole purpose was to avoid having to pay him for the four statutory holidays over the two weeks' Christmas 2022/January 2023 period.

[114] The ending of Mr Caswell's employment that Mr Robinson said had occurred at the end of 2022 therefore appeared to be a fiction, likely created to avoid paying minimum entitlements under the HA03. Section 238 of the Act provides that an employer cannot contract out of the provisions of the Act and s 6(3) of the HA03 provides likewise.

[115] Attempts to avoid minimum code legislation were therefore of no effect, because the Authority had to look at the reality of the situation and not at a fictitious label one party had put on a situation in order to avoid paying the other party their minimum entitlements.

[116] There was no change in the reality of the status of the employment relationship over the Christmas 2022/New Year 2023 period. Mr Caswell had a two-week unpaid break over the Christmas/New Year period. He did that in the expectation that there would be ongoing work for him in January again, and that was in fact the case. Pay information showed Mr Caswell resumed work, as normal, and was paid again as usual, each week from 9 January 2024 onwards.

[117] On 9 January 2023 Mr Robinson also presented Mr Caswell with a “work contract” for essentially the same terms and conditions he had already been working on, but subject to him signing shareholder documentation. That supported Mr Caswell’s claim that he kept working in the same role, doing the same work, at the same workplace and continued to be paid by KLQS until 28 February 2023, because there was clearly sufficient work available for him to do and he had continued to be paid his usual weekly wage.

[118] Mr Caswell did not resign. There was no documentation to establish that the employment relationship had ended or that Mr Caswell had been paid out his HA03 entitlements in November or December 2022. Even if there had been, that would have been a fiction, because the reality was that Mr Caswell’s employment status had not changed.

[119] Mr Caswell had previously continued working when KLQS did not have sufficient money to pay his wages, in the knowledge he would be paid when it did. The break he took from 24 December 2022 to 8 January 2023 was just another example of that. This two-week break was therefore not evidence that the employment relationship had ended.

[120] For these reasons, it was therefore more likely than not that Mr Caswell was not dismissed on 24 November or 23 December 2022, but instead took a two-week unpaid break from work, resuming work again as normal on 9 January 2023. On that basis, the employment relationship can be said to have continued through the two weeks (from 23 December 2022 to 8 January 2023) he did not work and was not paid.

### *Finding*

[121] KLQS employed Mr Caswell from 24 January 2021 until 28 February 2023. There was no mutually agreed change to the status of their relationship over that period. Mr Caswell remained working for the entire duration of his employment under the terms of the written individual employment agreement he had signed on 12 April 2021. However, he was not paid over the two-week period from 24 December 2022 to 8 January 2023.

## **Did KLQS fail to keep, and/or provide upon request, Mr Caswell's employment documentation?**

[122] KLQS as Mr Caswell's employer was legally required to keep wage and time records for him under s 130 of the Act. That did not occur. No legally compliant wage and time records have been kept for any of the time Mr Caswell was employed, in breach of s 130 of the Act.

[123] Section 81 of the HA03 required KLQS, as Mr Caswell's employer, to keep holiday and leave records for him. However, no legally compliant holiday and leave records have been kept, in breach of s 81 of the HA03.

## **Should penalties be imposed on KLQS?**

### *Need for penalties to be imposed*

[124] The requirement to keep wage and time records under s 130 of the Act and holiday and leave records under s 81 of the HA03 was an important minimum code protection to ensure the employee was paid correctly for all hours that they worked. KLQS's failure to keep the required employment documentation for Mr Caswell was a breach of employment standards, so was serious. It was appropriate to impose penalties on KLQS for its breaches of s 130 of the Act and of s 81 of the HA03.

### *Relevant law*

[125] When assessing penalties the Authority is required to take into account the factors set out in s 133A of the Act.

[126] The Authority has also been guided by the Employment Court decisions in *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*<sup>2</sup> as summarised by the Employment Court in *Nicholson v Ford*<sup>3</sup> and *A Labour Inspector v Daleson Investment Limited*.<sup>4</sup>

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<sup>2</sup> *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

<sup>3</sup> *Nicholson v Ford* [2018] ERNZ 393.

<sup>4</sup> *A Labour Inspector v Daleson Investments Ltd* [2019] NZEmpC 12.

### *Objects of the Act*

[127] Section 4B of the Act reflects the importance of an employer keeping legally compliant and accurate employment records relating to minimum entitlement provisions as being one of the three “key provisions” accompanying the Act’s objects.

[128] Section 4B of the Act requires employers to keep records in sufficient detail to demonstrate compliance of minimum entitlement provisions, as defined in s 5 of the Act. Section 4B(2) of the Act provides that obligation is in addition to the requirements of any other provisions, such as ss 65 and 130 of the Act and s 81 of the HA03, relating to record keeping.

[129] One of the objects in s 3 of the Act is to recognise the need for trust and confidence and good faith behaviour in employment relationship and within the employment environment.

[130] Failure to keep employment records, so that an objective assessment can be made as to whether an employee has received their minimum entitlements, was inconsistent with good faith behaviour and fundamentally undermined the trust and confidence inherent in the employment relationship.

[131] Other objects in s 3 of the Act are to acknowledge and address the inherent inequality of power in employment relationships, and also to promote the effect of enforcement of employment standards.<sup>5</sup> KLQS’s failure to keep legally compliant employment records for Mr Caswell arose within what can be described as a distinct power imbalance and KLQS’s actions breached employment standards.

### *Nature of the breaches*

[132] The failure by KLQS to keep any employment documentation for Mr Caswell was an ongoing breach of employment standards that continued for the duration of the employment relationship.

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<sup>5</sup> Section 3(a)(ii) and 3(ab) of the Act.

### *Maximum potential penalty*

[133] The maximum penalty for each breach by a company such as KLQS is \$20,000.00. Section 130 of the Act and s 81 of the HA03 have both been breached, so the maximum potential total penalty was \$40,000.00.

### *Globalisation*

[134] Because the breaches which have attracted penalties both involved the failure to keep employment documentation, even though they occurred under different legislation, it was appropriate to globalise these two breaches into one breach for the purposes of assessing penalties.

[135] Globalisation therefore reduced the two breaches to one breach, which can be summarised as a failure to keep employment documentation. That reduced the potential maximum penalty from \$40,000 to \$20,000.

### *Were breaches deliberate, negligent or inadvertent?*

[136] The breaches were negligent. Mr Robinson as the sole director of KLQS had access to an accountant and he told the Authority his wife also had payroll experience. He had also run other businesses which had employed employees. He should have known what KLQS's legal obligations were regarding employees.

### *Impact of the breaches*

[137] The breaches by KLQS had a seriously adverse impact on Mr Caswell. Mr Caswell said he had worked on a number of public holidays, but the lack of employment documentation meant that he was unable to prove which days or dates he had worked or how many hours he had worked on each public holiday. He was therefore unable to produce evidence to the required standard to prove what he was still owed for the public holidays he had worked.

[138] Mr Caswell has therefore suffered financial loss, but the full extent of it cannot be accurately ascertained or quantified because of the lack of employment documentation.

### *Mitigation*

[139] KLQS has not taken any steps to mitigate the effects of its breaches on Mr Caswell.

### *Aggravating factors*

[140] The lack of employment documentation and the incomplete and confusing information Mr Robinson provided to the Authority made the investigation of Mr Caswell's wage arrears claims far more difficult than it should have been.

[141] Instead of being able to base his wage arrears claim on the actual days and hours he had worked, Mr Caswell's contractual hours of work and statutory entitlements had to be used to calculate what he was owed. That resulted in his wage arrears being calculated as less than he was likely actually owed, because 40 hours ordinary time was less than what he had worked in reality for each week he was employed.

### *Previous penalties*

[142] There was no evidence that KLQS has had penalties imposed on it previously.

### *Culpability*

[143] There is a high level of culpability. Mr Robinson has run multiple businesses. He should have known what KLQS's legal obligations were. Even if he did not know, he could and should have obtained that advice for KLQS.

### *Consistency with other cases*

[144] It is important that the penalty imposed in this matter was consistent with other cases involving breaches of employment documentation.

### *Ability of KLQS to pay*

[145] Mr Robinson did not address the Authority on KLQS's ability to pay. Mr Subritzky told the Authority that KLQS was not in a position to pay any amount that the Authority imposed on it. As a landowner, KLQS would likely be able to sell its property if it was unable to pay a penalty out of the funds it has on hand.

### *Need for deterrence*

[146] Penalties must be set at a level that will act as a deterrence to KLQS, and to Mr Robinson as its director. Penalties also need to be sufficient to deter other employers more generally, who could be inclined to be lax with their employment documentation.

[147] The level of penalty therefore has to send a strong signal to all employers throughout New Zealand that their business practices must uphold minimum code

employment law obligations, one of the most important of which is keeping accurate employment documentation and producing it upon request.

*Amount of penalties imposed on KLQS*

[148] After considering all of these factors, the Authority imposed a penalty of \$4,000.00 on KLQS for its breaches of s 130 of the Act and s 81 of the HA03.

*Proportionality*

[149] The penalty imposed was proportional to the wrongdoing that was being punished.

**Should the penalties imposed be paid to Mr Caswell instead of, or as well as, the Crown?**

[150] Penalties imposed by the Authority are required to be paid to the Crown bank account. However, s 136(2) of the Act permits the Authority to order that some or any part of any penalty imposed may be paid to “any person”.

[151] Mr Caswell has been personally affected by the breaches that occurred. He has suffered loss for which he is unable to be fully compensated. Mr Caswell has carried the burden of bringing these breaches of employment standards to the Authority’s attention and he has had to incur time and expense in doing so. His ability to take legal advice and pursue his wage arrears claims has been hindered by the lack of employment documentation, to the extent he will still likely end up underpaid for the actual hours and public holidays he has worked.

[152] It was therefore appropriate to recognise the adverse effects these breaches have had on Mr Caswell personally by awarding part of the penalty be paid to him. Accordingly, within 28 days of the date of this determination KLQS is ordered to pay Mr Caswell \$3,000.00 of the penalty imposed, with the remaining \$1,000.00 of the penalty to be paid to the Crown bank account.

**Is Mr Caswell owed wage arrears?**

*Shortfall in contractual wages*

[153] Mr Caswell said he had regularly worked in excess of the 40 hours per week that was recorded in his employment agreement. He often worked up to ten-hour days

(with 12 hour days also not being uncommon) and regularly worked in excess of 50 hours per week, without being paid for those extra hours.

[154] Mr Robinson disputed that, but had no employment records to disprove Mr Caswell's evidence about that. Mr Caswell did not keep his own time records. Instead, every month he would sign KLQS's A4 book that recorded his hours of work and the amounts he had been paid for the month. This A4 book was left in the digger on KLQS's work site, but Mr Robinson told the Authority he could not find it.

[155] The best available evidence in order to determine Mr Caswell's wage arrears claim was for the contractual hours and entitlements in his employment agreement to be used to calculate what wages he should have been paid. His statutory entitlements were also applied.

[156] The Authority relied on documented payments, which excluded cash payments Mr Robinson claimed had occurred, but which Mr Caswell did not agree with or did not recall. KLQS had a contractual obligation to pay Mr Caswell's wages into his bank account, so paying him in cash had breached that.

[157] Mr Robinson's calculations as noted on the ASB card statement have been accepted as wages Mr Caswell received. Mr Caswell's bank records show his first wages payment from KLQS was paid into his account on 2 February 2021 alongside the name "R C Robins", with the last payment being made on 28 February 2023.

*What should Mr Caswell have been paid?*

[158] From 24 January 2021 to 16 August 2022 Mr Caswell was to be paid \$25.00 per hour gross, as per his employment agreement. His bank records show he was never paid his full wages, despite working at least 40 hours a week over that period.

[159] On 16 August 2022 Mr Robinson said he increased Mr Caswell's wages to \$1,067.00 gross, which is \$26.68 per hour for a 40-hour week. Although this pay rise was not documented, Mr Robinson told the Authority he had agreed to it. Therefore, the pay rate that must be applied from 16 August 28 February 2023, was \$1,067.00 for 40 hours work in a week.

[160] There were 81 weeks from 17 January 2021 to 15 August 2022. Mr Caswell should have been paid \$81,000.00 over that period, from which total KiwiSaver

contributions of \$4,860.00 should have been deducted and remitted to IRD, consisting of \$2,430.00 CEC and \$2,430 as Mr Caswell's employee KiwiSaver contribution.

[161] There were 28 weeks from 16 August 2022 to 28 February 2023. Mr Caswell should have been paid \$29,876.00 over this period. Total KiwiSaver deductions of \$1,792.56 should have been remitted to IRD over this period, consisting of \$896.28 as the CEC plus \$896.28 as Mr Caswell's employee KiwiSaver contribution.

[162] Had he been paid correctly, then over the period 24 January 2021 to 28 February 2023 Mr Caswell would have:

- (a) Been paid total gross earnings of \$110,876 over the period 24 January 2021 to 28 February 2023. This included an amount for all public holidays on the basis they were not worked, because Mr Caswell could not provide sufficient details of the public holidays he said he had worked;
- (b) Had total KiwiSaver deductions of \$6,652.56 (\$3,326.28 as the CEC and \$3,326.28 as his employee KiwiSaver contribution);
- (c) Been paid total annual holiday entitlements of \$6,402.00 (being \$5,975.20 under s 24 of the HA03 plus \$426.80 under s 25 of the HA03) when his employment ended on 28 February 2023;
- (d) Had total KiwiSaver contributions of \$384.12 remitted to IRD from his annual holiday pay that should have been, but was not, paid to him when his employment ended on 28 February 2023.

[163] The total amount Mr Caswell should have been paid over the duration of his employment was therefore \$117,278.00 (being \$110,876.00 wages plus \$6,402.00 annual holiday pay). From that amount of \$117,278.00, IRD should have received from KLQS total KiwiSaver deductions for Mr Caswell of \$7,036.68 (being \$6,652.56 from his wages plus \$384.12 from his annual holiday pay on termination). This should have been equally apportioned between the CEC and the employee KiwiSaver contribution.

*What has Mr Caswell been paid?*

[164] The evidence of what Mr Caswell was actually paid over the course of his employment was unsatisfactory, because KLQS failed to meet its contractual obligation

to pay him weekly into his bank account and it did not keep the required employment documentation for him.

[165] Based on a review of the currently available evidence, Mr Caswell has been paid \$85,314.03 over the period 24 January 2021 to 28 February 2023. This calculation is explained below, and was made up as follows:

- (a) \$53,347.58 for period 4 April 2021 to 27 March 2022 as per Elevate summary based on information provided by Mr Robinson;
- (b) \$15,429.54 over the period 1 April 2022 to 28 February 2023 which was based on payments made into Mr Caswell's bank account;
- (c) \$7,754.02 from 2 September 2022 to 23 October 2022, which was identified by Mr Robinson as personal expenditure Mr Caswell made on the ASB card bank;
- (d) \$882.89 for the period "April 2021 to March 2022" which Elevate said had been paid to date to IRD as KLQS's CEC for Mr Caswell;
- (e) \$4,700.00 cash payments which Mr Robinson said he made to Mr Caswell in November 2022.<sup>6</sup>
- (f) \$3,200.00 cash for the four weeks' period from 25 November 2022 to 23 December 2022.

(i) KiwiSaver contributions

[166] No employee KiwiSaver contributions have been remitted to IRD. Elevate said that according to Mr Robinson \$1,600.42 had been deducted as KLQS's CEC from Mr Caswell's wages over the period 4 April 2021 to 27 March 2022. However, Mr Caswell cannot be said to have received that amount, because only \$882.89 of the CEC had been remitted to IRD. KLQS has therefore retained the balance of the CEC it deducted from Mr Caswell's wages.

(ii) Elevate's records

[167] Elevate said that, based on what Mr Robinson had told them, Mr Caswell had been paid \$53,347.58 over the period 4 April 2022 to 27 March 2023.

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<sup>6</sup> Page 12 of respondent's bundle.

(iii) Mr Caswell's bank statements

[168] The Authority used Mr Caswell's bank statements to calculate what he had been paid from 1 April 2022 to 28 February 2023, which was \$15,429.54.

[169] These payments consisted of \$5,197.89 "wages" plus \$500 "drawings", plus \$5,400.00 "dividend interest" from "J C Robins"; plus \$3,465.32 from "J & A Robi"; plus \$866.33 from "A J Robins". The amounts were paid, and described, as follows:

- (a) \$866.30 wages paid on 11 and 19 April and 30 May 2022 from J C Robins;
- (b) \$866.33 wages paid on 7, 14, and 20 June 2022 from J C Robins;
- (c) \$500.00 drawings paid on 25 July 2022 by J C Robins;
- (d) \$800.00 "dividend int" paid on 16, 24 and 30 January 2023 and on 7 and 13 February 2022 by J C Robins;
- (e) \$700.00 "dividend int" paid on 20 February 2023 by J C Robins;
- (f) \$700.00 "dividend int" paid on 28 February 2023 by J C Robins;
- (g) \$866.33 paid on 26 April, 2, 9 and 17 May 2022 from J & A Robi;
- (h) \$866.33 paid on 24 May 2022 from A J Robins;

(iv) ASB card expenditure

[170] According to Mr Robinson's submissions, Mr Caswell charged items to the ASB card totalling \$7,754.02 over the period 2 September 2022 to 27 October 2022, consisting of:

- (a) \$2,531.00 in August 2022;
- (b) \$2,982.29 in September 2022;
- (c) \$2,240.73 in October 2022.

(v) Mr Robinson's evidence

[171] The information on page 412 of the respondents' bundle of documents, which Mr Robinson claimed was a record of what Mr Caswell had been paid, was not signed by, or shared with, him while he was employed by KLQS. Mr Caswell's notes were

mostly not clear enough to be of assistance. The Authority therefore did not rely on this information, other than for the November cash payments (see below).

(vi) Cash payments

[172] While Mr Robinson claimed he had made numerous cash payments to Mr Caswell, these were not all accepted as having been paid by Mr Caswell. Furthermore, the employment agreement did not provide for Mr Caswell's wages to be paid in cash.

[173] The evidence regarding cash payments was too unclear to establish with any certainty how much was paid, how it was calculated, when it was paid or what it was paid for. Mr Robinson's handwritten notes at page 412 of the respondents' bundle were too confusing to be relied on, other than the record he made of four cash payments plus money from the "cash container" totalling \$4,700.00 being paid to Mr Caswell in November 2022.

[174] The parties agreed that Mr Caswell was paid in cash up to 23 December 2022, but there was no clear record of what he was paid. Mr Robinson was asked by the Authority to clarify what cash Mr Caswell was paid from 25 November to 23 December 2022, and he responded that Mr Caswell was paid \$3,200.00 in total (being \$800.00 per week for four weeks) from 24 November to 23 December 2022. The amount of \$3,200.00 has therefore been added to Mr Caswell's total earnings.

(vii) Assessment of the evidence

[175] Mr Robinson said Mr Caswell's work ceased on 24 November 2022 but he was still paid up to 23 December 2022. However, Mr Caswell's evidence that he continued to work normal full-time hours for KLQS up to 23 December 2022 was preferred. He then had a two weeks' break over Christmas/New Year, as he had done the previous year, and then started work again for KLQS on 9 January 2023. This was logical and reflected what had occurred previously.

[176] It was not credible that Mr Robinson would arrange for KLQS to pay Mr Caswell for four weeks (24 November to 23 December 2022) if he was not doing any work. It further strained credibility that Mr Robinson's explanation of why he had supposedly ended Mr Caswell's work on 24 November 2022 was because KLQS could not afford to pay him. That position was also fundamentally inconsistent with the "work

contract” Mr Robinson offered Mr Caswell on 9 January 2023 for full time work at the same pay rate KLQS had paid him in 2022.

[177] The January and February 2023 payment information showed Mr Caswell worked his normal fulltime hours from 9 January 2023 to 28 February 2023. Mr Robinson’s evidence that he had “loaned” Mr Caswell the same amount KLQS had been regularly paying him for the work he previously did was not credible. It was also not supported by any loan documentation.

#### *The proposed work contract*

[178] Under the proposed “work contract” Mr Caswell would work 40 hours for an “interest dividend” of \$800.00 gross per week, which would increase to \$900.00 gross per week on 18 September 2023. KLQS would also pay \$30.00 a week to Mr Caswell’s KiwiSaver and it would pay his taxes. Mr Caswell would be entitled to take four weeks’ paid annual leave each year. A final “shareholder dividend” would be paid on completion of KLQS’s annual accounts. The Authority noted that KLQS’s 2022 and subsequent annual accounts had still not yet been finalised.

[179] The parties never agreed to enter into this “work contract”. It was never signed, because Mr Caswell declined to be a shareholder.

#### *Annual holiday entitlements*

[180] Mr Caswell was entitled to four weeks’ paid annual holiday for each full year of employment, with his leave anniversary date being 24 January. He had therefore accrued four weeks’ paid annual holiday from 24 January 2021 to 24 January 2022 plus another four weeks’ accrued annual holiday from 24 January 2022 to 24 January 2023.

[181] There were no holiday and leave records, so the Authority had to rely on the KLQS payroll record at page 91 of Mr Caswell’s documents, which had some holiday information plus additional cryptic handwritten notes on it. Based on the pay records, during his first year of employment Mr Caswell used 12 of his 20 days of paid annual holiday. In particular, he:

- (a) Had one day of paid annual holiday during the week ending 12 December 2021;
- (b) Had two days of paid annual holiday during the week ending 19 December 2021;

- (c) Did not work for the week ending 26 December 2021 but was paid his normal wages. That week contained two public holidays (25 and 26 December), so he must have used three days paid annual holiday over that period;
- (d) Worked six hours during the week ending 2 January 2022. That week had two public holidays (1 and 2 January), so he must have used three days paid annual holiday that week;
- (e) Worked 16 hours during the week ending 9 January 2022 but was paid for 40 hours. That meant he must have used three days paid annual holiday that week. would have worked for two years so therefore had eight weeks of accrued annual holiday.

[182] That meant Mr Caswell must have carried eight days of accrued annual holiday into the 24 January 2022 to 24 January 2023 leave year. Mr Robinson's evidence that Mr Caswell used 30 days of paid annual holiday was not accepted, because it was unsupported by any records and Mr Robinson could not identify what dates this paid leave had supposedly been used. As per s 132(2) of the Act, Mr Caswell's evidence was adopted.

[183] The handwritten notes at the top of the pay records KLQS provided were added by Mr Robinson later and were ambiguous. The first handwritten note stated "paid 4 week. 3465.20" and the second handwritten note stated, "Taken 2 week HP from 2022 CASH \$1732.60". Although it was not clear what these notes related to, \$3,465.20 reflected four weeks' net wages and \$1732.60 reflected to two weeks' net wages based on KLQS's incorrect wages calculations.

[184] These references were too ambiguous to be helpful to the Authority. Mr Caswell had taken a combination of paid annual holiday and paid public holidays over the period with the week ending 19 December 2021 to the week ending 9 January 2022, which was a four-week period. The handwritten note could therefore just represent a rough calculation of how much net wages Mr Caswell had been paid over that same period.

[185] The Authority has treated the period from 24 December 2022 to 8 January 2023 as a holiday period. There were four public holidays over that period, so Mr Caswell would have used six days' annual holiday if he had been paid correctly for that period

(27-29 December 2022 and 3-5 January 2023). However, Mr Caswell was not paid over that period, so his accrued annual holiday entitlement did not decrease.

[186] Mr Caswell was also entitled to be paid eight percent of his total gross earnings from the period 25 January to 28 February 2023, in accordance with s 25 of the HA03.

[187] Mr Caswell was paid weekly in arrears. His bank records show he was paid \$800.00 “dividend interest” on 16, 24 and 30 January 2023, and he was paid \$700.00 “dividend interest” on 20 and 28 February 2023. This covered the work he did from 9 January to 28 February 2023. None of these payments were recorded as being a “loan”. This evidence corroborated Mr Caswell’s account that he had returned to work as normal, and worked 40 hours a week for KLQS from 9 January 2023 to 28 February 2023.

[188] Had Mr Caswell been paid correctly from, (the day after his leave anniversary date of 24 January 2023) 25 January 2023 to 28 February 2023, then he would have been paid \$5,335.00 being \$1,067.00 gross per week for five weeks. Mr Caswell was therefore entitled to be paid \$426.80 holiday pay under s 25 of the HA03 for the period from 25 January 2023 to 28 February 2023.

[189] There was no credible evidence to establish that Mr Caswell had taken any paid annual holiday over the period 24 January 2022 to 24 January 2023. He had carried over eight days of accrued annual holiday from his first year of employment (2021/2022) and he had also accrued another 20 days annual holiday during his second full year of employment.

[190] That was a total of 28 days of unused accrued annual holiday that he was to be paid for under s 24 of the HA03. His ordinary weekly pay was \$1,067.00 when his employment ended on 28 February 2023, so he should have been paid \$5,975.20 for his accrued annual holiday entitlements pursuant to s 24 of the HA03, which was \$213.40 per day based on \$1,067.00 per week.

[191] Mr Caswell’s outstanding annual holiday entitlement when his employment ended on 28 February 2023 was \$6,402.00, being \$5975.20 under s 24 plus \$426.80 under s 25 of the HA03.

*Attempt to cash up annual holiday*

[192] There was a record in Mr Caswell's bank account that he had received \$2,465.00 "holiday pay" into his bank account on 21 December 2021. This suggested KLQS had made a lump sum payment to 'cash out' some of Mr Caswell's annual holiday entitlement.

[193] Section 28A and s 28B of the Holidays Act 2003 (the HA03) are relevant to this payment on 21 December 2021, which is problematic for the following reasons:

- (a) Mr Caswell had not worked for at least 12 months when this payment was made on 21 December 2021, so he was not entitled to cash out any annual holiday as at that date.
- (b) Mr Caswell had not made a written request to cash up any annual holidays.
- (c) This transaction was also not documented, so there was no way to know how many days annual holiday the payment had been cashed up.
- (d) The amount paid indicated it was well in excess of the one week of annual holiday that could be 'cashed up'.

[194] Accordingly, s 28B(2) of the HA03 applied, meaning this payment on 21 December 2021 did not reduce Mr Caswell's annual leave balance.

*IRD deductions from Mr Caswell's wages*

[195] It was KLQS's responsibility as Mr Caswell's employer to ensure that it calculated, deducted and remitted to IRD the correct legally required deductions that should have been made from his wages. This included the correct PAYE, the ACC levy and KiwiSaver contributions, along with any other applicable deductions that had to be made. That has not occurred.

[196] Accordingly, Mr Robinson in his capacity as KLQS's sole director, is ordered to take the necessary steps to ensure that within 28 days of the date of this determination KLQS has remitted to IRD all of the deductions that have already been made from Mr Caswell's wages, and all of the deductions that were legally required to be made from the wages Mr Caswell has been awarded in this determination.

### *Finding on wage arrears*

[197] KLQS is ordered to pay Mr Caswell wage arrears of \$31,963.97, being the amount he should have been paid of \$117,278.00 (wages \$110,876.00 plus holiday pay \$6,402.00) less what he has actually been paid, which was \$85,314.03.

### **Should interest be awarded on Mr Caswell's wage arrears?**

[198] KLQS has had the benefit of the use of Mr Caswell's money, both in terms of what was deducted from his wages but not passed on to IRD and regarding the wage arrears it has improperly retained for its own use, to Mr Caswell's considerable detriment.

[199] KLQS is ordered to pay Mr Caswell interest on his wage arrears of \$31,963.97 from 28 February 2023, until he has been paid in full for all of the wage arrears he is owed. Interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website.

### **Did KLQS breach employment standards?**

[200] Section 5 of the Act sets out the definition of "employment standards". These include s 64 of the Act which requires an employer retain a copy of the individual employment agreement.

[201] KLQS provided the original signed employment agreement to Work and Income, so it did not retain a copy and therefore could not produce one to the Authority. That was a breach of KLQS's obligations under s 64 of the Act.

[202] Employment standards includes the provisions of the WPA which requires an employee to be paid their wages in money without deduction. That did not occur in Mr Caswell's case, because he has not been paid his full contractual wages weekly into his bank account, which should have occurred for the duration of his employment. KLQS has therefore breached the WPA.

[203] The breaches by KLQS of s 130 of the Act and s 81 of the HA03 have already been identified by the Authority. KLQS has also breached the HA03 by failing to pay Mr Caswell for his correct public holiday entitlements and his correct annual holiday entitlements in the pay period following the end of his employment on 28 February 2023, as required by s 27 of the HA03.

[204] KLQS has engaged in multiple breaches of employment standards, which have consisted of breaches of the Act, the HA03 and the WPA.

**Was Mr Robinson a person involved in the breach of employment standards that has occurred?**

[205] Mr Robinson, as KLQS's sole director, admitted that he had personal responsibility for running the company. It was his job to ensure that KLQS met its legal obligations as an employer. He was directly responsible for the breaches that occurred because they arose due to his specific acts and/or omissions.

[206] Mr Robinson is a person who was involved in each breach of employment standards by KLQS that occurred, because he aided, abetted and directly and knowingly caused these breaches to occur. Accordingly Mr Robinson was a person involved in the breaches of employment standards that have occurred, as defined by s 142W of the Act.

**Should Mr Caswell be granted leave to pursue Mr Robinson personally for any wage arrears or other money that KLQS owed but was unable to pay him?**

[207] KLQS's accountant Mr Subritzky gave evidence that KLQS did not have the ability to make payment of any award that the Authority may make in favour of Mr Caswell. Mr Robinson also said the same.

[208] However, the accounts that were provided to the Authority that KLQS show that KLQS owned land. Mr Robinson also gave evidence that it "owned land that was worth millions". No independent valuations of KLQS's assets or of the land it owned were provided to the Authority. It was unclear whether KLQS's liabilities exceeded the value of all of its assets.

[209] Based on the currently available evidence, it appeared that KLQS at least on a cashflow basis was insolvent and had secured creditors who could potentially lay first claim over KLQS's assets were it to be placed into liquidation, IRD was also still owed money by KLQS.

[210] Section 142Y of the Act enabled the Authority to grant leave to an employee to recover from a person who is not the employee's employer any wages or other money payable to the employee if there has been a default in payment of wages or other money, (as has occurred here); the default was also due to a breach of employment standards (as has occurred here); and the person who the employee sought to recover the money

from had been found to be a person involved in a breach of employment standards, within the meaning of s 142W of the Act, as Mr Robinson had.

[211] Accordingly, it was appropriate for Mr Caswell to be given leave to pursue Mr Robinson personally to recover any wage arrears or other money that KLQS owed Mr Caswell, but which it was unable to pay him.

### **Did KLQS breach its good faith obligations to Mr Caswell?**

[212] Section 4(1A) of the Act provides that the duty of good faith is wider than the implied mutual obligations of trust and confidence that are inherent in the employment relationship.

[213] Good faith requires the parties to be “active and constructive in establishing and maintaining a productive employment relationship which the parties are, among other things, responsive and communicative”, see paragraph 4(1A)(b) of the Act.

[214] Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision that could adversely affect the ongoing employment of an employee to provide the employee with access to information and an opportunity to comment on it before a final decision is made. That did not occur before Mr Caswell was dismissed on 28 February 2023. KLQS breached its good faith obligations to Mr Caswell.

### **Did Mr Caswell raise his personal grievance claims within the 90-days’ time limit required by s 114(1) of the Act?**

[215] Mr Caswell’s personal grievance claims against KLQS were initially raised by his lawyer in a text message to Mr Robinson on 28 February 2023. This followed on from emails Mr Caswell’s lawyer had sent Mr Robinson on 28 February 2023 outlining what the specific concerns were. The disadvantage grievance related to an ongoing situation that continued up to the end of Mr Caswell’s employment.

[216] Mr Caswell also raised his unjustified disadvantage and unjustified dismissal claims in a personal grievance letter dated 14 March 2023. Mr Caswell’s personal grievance claims were raised with KLQS within 14 days of them arising, which was well within the 90-day time-limit required by s 114(1) of the Act. Accordingly, the Authority has jurisdiction over Mr Caswell’s personal grievances.

### **Was Mr Caswell unjustifiably disadvantaged in his employment?**

[217] KLQS unjustifiably disadvantaged Mr Caswell when it failed to make the correct legally required deductions from his wages and remit those KiwiSaver deductions/contributions to IRD. Some of the deductions that KLQS did make from Mr Caswell's wages have still not been paid to IRD. Other deductions were not made at all.

[218] KLQS was contractually obliged, and also required by the KiwiSaver Act 2006, to deduct three percent from Mr Caswell's wages as the CEC and three percent as his employee KiwiSaver contribution and remit that to IRD. KLQS failed to deduct the correct amount of CEC from Mr Caswell's wages and it also failed to remit all of the CEC it had deducted from his wages to IRD. KLQS has therefore kept Mr Caswell's money to use for its own benefit.

[219] KLQS also failed to deduct or remit any of Mr Caswell's employee KiwiSaver contribution to IRD.

[220] KLQS's failures have adversely affected Mr Caswell's KiwiSaver balance and it has also deprived him from receiving interest on his KiwiSaver contributions. Mr Caswell has also been deprived of the market movements that would have increased his KiwiSaver account. For example, Mr McDonald said that Mr Caswell's KiwiSaver account had a seven percent increase over the six-month period from 1 January 2021 to 30 June 2021.

[221] Mr Caswell has faced significant stress and worry because his IRD records are not correct due to KLQS's failure to make the correct deductions, and its failure to remit all of the deductions it had made from his wages to IRD. Mr Robinson did not respond well to Mr Caswell's attempts to raise concerns that he had not been paid his correct KiwiSaver, and it caused increasing tension between them.

[222] Mr Caswell said that although his KiwiSaver was not a large amount, it essentially represented his life savings. For his contributions to not to be paid correctly for the duration of his employment represented a serious disadvantage to him, both in terms of his total balance in his KiwiSaver account and regarding the interest that he eventually earned on his contributions.

### **What remedies should be awarded for the disadvantage grievance?**

[223] KiwiSaver is Mr Caswell's only form of savings. The fact that KLQS had not dealt with his legally required deductions correctly has been a source of significant stress and distress to Mr Caswell since 2022, which continues because these problems have still not been resolved.

[224] Mr Caswell said he was particularly concerned because if something happened to him, all he had to give his son to help him in life in the way of savings was his KiwiSaver. Mr Caswell described himself as the opposite of a financially rich man, so his KiwiSaver was very important to him.

[225] Mr Caswell is awarded distress compensation to reflect the harm, stress and injury to feelings he has suffered as a result of KLQS's breaches of his employment agreement and the KiwiSaver Act 2006 that unjustifiably disadvantaged him.

[226] KLQS is ordered to pay Mr Caswell \$4,000.00 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings his unjustified disadvantage grievances have caused him.

### **Was Mr Caswell dismissed?**

[227] Mr Robinson told Mr Caswell on 23 February 2023 that if he did not sign the shareholder documentation, then his work would end.

[228] On 28 February 2023 Mr Robinson ended Mr Caswell's employment. Mr Robinson communicated his decision to Mr Caswell by phone and also visited Mr Caswell in his house bus on KLQS's work site, and reiterated that there was no more work for him to do, and he would not be receiving any more work so the relationship was at an end.

[229] This amounted to a dismissal, because it was a sending away of Mr Caswell, and an ending of the employment relationship, which had occurred at KLQS's sole initiative.

### **Was Mr Caswell's dismissal justified?**

[230] Justification is to be objectively assessed in accordance with the justification test in s 103A(2) of the Act. This required the Authority to objectively assess whether

KLQS's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Caswell was dismissed.<sup>7</sup>

[231] A fair and reasonable employer is expected to comply with its statutory obligations. These included the s 4(1A) good faith obligations and the four procedural fairness tests set out in s 103A(3) of the Act. A fair and reasonable employer is also expected to comply with its contractual obligations.

[232] Mr Caswell's employment agreement did not contain a notice period, so reasonable notice was required for a dismissal. For a forestry worker in his position two weeks' notice would be reasonable. However, Mr Caswell was dismissed without notice or pay in lieu of notice. There was no good reason for KLQS to have summarily dismissed Mr Caswell because there was no wrongdoing by him.

[233] KLQS did not have a good reason for dismissing Mr Caswell. His decision to not be a shareholder in KLQS was not a fair and reasonable ground for summary dismissal. There was work available which KLQS wanted Mr Caswell to do, but only if he agreed to be a shareholder.

[234] Mr Caswell had made it clear to Mr Robinson in 2022 that he did not want to be a shareholder of KLQS, because he did not understand what that would involve. Dismissing Mr Caswell for not agreeing to be a shareholder in 2023 was unjustified. It was not what a fair and reasonable employer could have done in all the circumstances.

[235] KLQS also failed to follow a fair or proper process before it dismissed Mr Caswell. There was no process at all. Mr Robinson made the unilateral decision that he was going to close the quarry so that there would be no work for Mr Caswell to do. Good faith obligations were not complied with. Nor were any of the four procedural fairness tests in the Act complied with. These failures fundamentally undermined KLQS's ability to justify Mr Caswell's summary dismissal.

[236] Mr Robinson had presented Mr Caswell with a "work contract" dated 9 January 2023 that provided for full time work, thereby undermining any potential argument that there was a genuine redundancy situation. Mr Robinson also admitted that there was sufficient work for Mr Caswell to continue working on a full-time basis from February

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<sup>7</sup> Section 103A(2) of the Act.

2023 onwards. That is what would have occurred if Mr Caswell had agreed to sign the shareholder documentation. Mr Robinson was trying to compel him to sign.

[237] Accordingly, KLQS was unable to justify Mr Caswell's summary dismissal as it was procedurally and substantively unjustified.

### **What remedies should Mr Caswell be awarded for his dismissal grievance?**

#### *Mitigation*

[238] Mr Caswell described attempting to find new work in Northland. He said he was looking for any work that he could do at all, even if it was part time in order to supplement the benefit he was receiving. Jobs were usually found through word of mouth and who you know rather than through formal job applications in his line of work. He said he struggled at the best of times with words and letters. He therefore made personal approaches to many people, but without success.

[239] Mr Caswell approached many different people in an attempt to find work doing car spraying, boat spraying, manual labour, mechanical work, painting and other work like that. Unfortunately, he was unsuccessful. He completed some work at a local tyre shop where he was paid in kind with a new battery for his truck which had a value of \$285.00.

[240] He also undertook some rust repair work for a friend's bus, for which he was paid \$200.00. Mr Caswell is still looking for permanent work and he has found it very difficult. Mr Caswell told the Authority that Mr Robinson had approached multiple people in the community and bad mouthed him, which Mr Caswell believed had adversely affected his ability to obtain new employment.

[241] Mr Caswell's evidence that he attempted to mitigate his loss was accepted, so he is entitled to an award of lost remuneration.

#### *Lost remuneration*

[242] Mr Caswell sought lost remuneration for 15 months, which represented his actual loss up to the Authority's investigation meeting.

[243] Section 128(2) of the Act requires the Authority to order an employer to "pay the employee the lesser of a sum equal to the lost remuneration or to three months'

ordinary time remuneration”. Section 128 (3) allowed the Authority to award more lost remuneration than that provided for by s 128 (2) of the Act.

[244] It was appropriate to award Mr Caswell six months’ lost remuneration which reflects the difficulties he had finding work in Northland with his experience and skills, in light of his summary dismissal, which would likely have adversely affected his reputation in terms of obtaining new work.

[245] Accordingly, within 28 days of the date of this determination KLQS is ordered to pay Mr Caswell \$27,742.00 lost remuneration under s 128(3) of the Act to compensate him for the remuneration he lost as a result of his unjustified dismissal. This award of lost remuneration was calculated based on wages of \$1,067.00 per week for 26 weeks.

[246] KLQS is ordered to deduct and remit to IRD the correct legally required deductions, such as PAYE, ACC levy and KiwiSaver contributions (both the CEC and the employee’s KiwiSaver contribution) and remit them to IRD for the benefit of Mr Caswell’s account from all wages it paid him. This applied to wages it has already paid him, to the wage arrears he has been awarded in this determination, and to the lost remuneration payment he has been awarded in this determination.

#### *Distress compensation*

[247] Mr Caswell said that “John’s action of terminating my employment literally sent my world upside down and I am still nowhere fully recovered”. He was clearly still obviously suffering at the time of the investigation meeting in April 2024.

[248] Mr Caswell said he had worked incredibly hard for KLQS and had shown absolute loyalty throughout his employment. Mr Caswell said that he felt kicked in the guts for his efforts by being dismissed because he would not agree to become a shareholder in KLQS. Mr Caswell said he took a lot of pride in the work that he did for KLQS and was a hard worker. He felt deeply betrayed because lost his job even though he had done nothing wrong.

[249] Mr Caswell’s dismissal had a devastating effect on him both mentally and financially. He struggled with his self-esteem, confidence and ability to function on a day-to-day basis with even basic tasks. Life became extremely difficult for him and he became depressed.

[250] Mr Caswell has struggled to put food on the table and a roof over his head for himself and his son. He had no financial safety net when he lost his job. Mr Caswell had to borrow money from friends and family to try and keep him and his dependent son afloat. He described himself being in a precarious position both mentally and financially.

[251] Mr Caswell said he is still looking for permanent work. He believed that had been hindered because his reputation has been damaged locally by Mr Robinson.

[252] Mr Caswell said he has had to operate mainly hand to mouth to try and support himself and his young son. He has been unable to secure another permanent job and has only managed to find odd days of work here and there on a barter basis. He has even had to barter for food and has relied on loans and handouts from friends and family, which he found demeaning and embarrassing.

[253] KLQS is ordered to pay Mr Caswell \$22,000 under s 123(1)(c)(i) of the Act to compensate him for humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

#### **Should remedies be reduced on the grounds of contribution?**

[254] Having established that Mr Caswell has successful personal grievance claims, s 124 of the Act required the Authority to assess whether he contributed to the situation that gave rise to either of his personal grievances.

[255] Contribution denotes blameworthy conduct. There was no evidence of wrongdoing by Mr Caswell. Accordingly, there was no basis on which to reduce the remedies Mr Caswell's has been awarded.

#### **What costs and disbursements should be awarded?**

[256] Mr Caswell as the successful party is entitled to a contribution towards his actual legal costs. Costs are reserved as there has been a without prejudice except as to costs (Calderbank) offer.

[257] The parties were unlikely to be able to agree on costs, so Mr Caswell should lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that costs memorandum, the respondents will then have 14 days to lodge any reply costs memorandum. On request by either party,

an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[258] 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>8</sup> The parties are therefore invited to identify factors that should result in the notional starting tariff being adjusted, such as the effect of any Calderbank offer(s).

## **Summary of outcome**

### *IRD liabilities*

[259] Information lodged by Mr Subritzky on 19 April 2024 showed that KLQS still had outstanding PAYE and KiwiSaver contributions for money it had already deducted from Mr Caswell’s wages which KLQS had still not remitted to IRD. It was unclear if Mr Caswell’s ACC levy had been correctly paid by KLQS to IRD, so if it had not, then that needed to occur.

[260] The Authority’s finding that the employment relationship between Mr Caswell and KLQS continued from 24 January 2021 until 28 February 2023 meant that KLQS was also legally required to calculate, deduct and remit the correct legally required deductions (such as PAYE, KiwiSaver and ACC levy) from Mr Caswell’s wages, and then remit these amounts in full to IRD. KLQS was not legally entitled to retain any of the deductions it made from Mr Caswell’s wages for its (or Mr Robinson’s) benefit.

### *Findings and orders*

[261] The Authority made the following findings and orders:

- (a) Mr Caswell was a more credible witness than Mr Robinson;
- (b) KLQS employed Mr Caswell from 24 January 2021 until 28 February 2023;
- (c) KLQS failed to keep wage and time records, and holiday and leave records, for Mr Caswell in breach of s 130 of the Act and s 81 of the HA03;

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<sup>8</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)

- (d) KLQS is ordered to pay total penalties of \$4,000.00 for its breaches of the Act and the HA03 regarding its failure to keep and produce employment documentation for Mr Caswell;
- (e) Within 28 days of the date of this determination, KLQS is to pay Mr Caswell directly \$3,000 of the total penalty imposed with the \$1,000 balance of the penalty to be paid to the Crown bank account;
- (f) Within 28 days of the date of this determination KLQS is ordered to pay Mr Caswell wage arrears of \$31,963.97;
- (g) KLQS is to pay interest on Mr Caswell's wage arrears of \$31,963.97 from 28 February 2023 until that amount has been paid in full. Interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website;
- (h) KLQS engaged in multiple breaches of employment standards;
- (i) Mr Robinson is 'a person involved in the breaches of employment standards' that occurred, as defined by s 142W of the Act;
- (j) Mr Caswell has been granted leave by under s 142Y(2) of the Act to recover from Mr Robinson personally any wages or other money that KLQS owes Mr Caswell, but which it was unable to pay him;
- (k) KLQS breached its good faith obligations to Mr Caswell;
- (l) Mr Caswell's disadvantage and dismissal personal grievance claims were raised within the 90-day time limit required by s 114(1) of the Act;
- (m) KLQS unjustifiably disadvantaged Mr Caswell by failing to deduct and to remit to IRD the correct deductions that had to be made from his wages, such as PAYE, ACC levy and KiwiSaver contributions (both the compulsory employer contribution and the employee KiwiSaver contribution);
- (n) Within 28 days of the date of this determination, Mr Robinson has been ordered to take all necessary steps in his capacity as KLQS's sole director to ensure the correct deductions have been made from Mr Caswell's wages and remitted to IRD;

- (o) Within 28 days of the date of this determination KLQS is ordered to pay Mr Caswell \$4,000.00 distress compensation for his successful unjustified disadvantage grievance claim;
- (p) KLQS unjustifiably dismissed Mr Caswell on 28 February 2023, without notice.
- (q) Within 28 days of the date of this determination KLQS is ordered to pay Mr Caswell \$51,876.00 as remedies for his successful unjustified dismissal grievance, consisting of:
  - (i) \$22,000.00, distress compensation under s 123(1)(c)(i) of the Act;
  - (ii) \$2,134.00, being two weeks' unpaid notice, as "reasonable notice";
  - (iii) \$27,742.00, being six months' lost remuneration under s 128(3) of the Act;
- (r) Mr Caswell did not contribute to the situation that gave rise to his successful personal grievance claims, so his remedies were not reduced under s 124 of the Act.
- (s) Costs will be determined on the papers, in accordance with the timetable in this determination.

Rachel Larmer  
Member of the Employment Relations Authority