

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 465  
3293839

BETWEEN

LAFAAUA TOFETE  
Applicant

AND

MASTER STROKE DECORATORS  
LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Hayley Johnson, advocate for the Applicant  
No appearance for the Respondent,

Investigation Meeting: 18 June 2025 in Christchurch

Submissions Received: 27 June 2025 from the Applicant  
None from the Respondent

Date of Determination: 1 August 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Lafaaua Tofete was employed as a painter/labourer by Master Stroke Decorators Limited (MSD) from 22 May 2023 until his employment ended in disputed circumstances on or around 16 January 2024.

[2] Mr Tofete is alleging actions and/or omissions of MSD including no provision of a written employment agreement and a failure to deliver on a commitment to set up an apprenticeship, have unjustifiably disadvantaged him and that he was unjustifiably

dismissed when MSD wrongly placed reliance on his temporary absence when he was unwell, as being abandonment of his employment.

[3] In contrast, MSD has accepted they initially sought to bring Mr Tofete's employment to an end due to their perception he had abandoned his employment but upon discovering this error they sought to rectify the situation but say then Mr Tofete failed to engage with them, confirming his wish to no longer work for MSD.

[4] Mr Tofete using an advocate, raised a personal grievance with MSD by letter of 23 February 2024. MSD through their representative responded on 2 March, asserting that no personal grievance action existed and claiming Mr Tofete abandoned his employment. MSD indicated they were unwilling to attend mediation.

[5] The matter was then subject of an Authority application of 30 April 2024; Mr Tofete sought lost wages, compensation for distress and a penalty for the non-provision of an employment agreement. MSD was initially represented and filed a reply to the Authority application on 17 May 2024. The Authority directed the parties to mediation on 21 May but MSD did not participate despite eight mediation dates being suggested that led to the mediation service closing the file on 23 December 2024.

[6] Thereafter, Mr Tofete's advocate apprised the Authority of a lack of resolution in February 2025 and a directions conference was held on 28 April 2025. No one from MSD attended the directions conference and they failed to provide evidential statements as directed or to participate any further.

### **The Authority investigation**

[7] At the half a day investigation meeting, I heard evidence from Lafaaua Tofete and his friend Mariana. No one from MSD attended. All parties provided written statements and answered questions during the investigation meeting. Given the complexity of the issues and evidence provided, submissions were timetabled. After the investigation meeting the Authority messaged MSD's sole director Cole Allnutt apprising him of the investigation meeting taking place; that the Authority had heard evidence from Mr Tofete; and outlining the need for any additional submissions by 27 June. Mr Tofete's submission was received

on 27 June but none was provided by MSD. I am satisfied that MSD's director, Mr Allnut, was provided several opportunities to participate in the Authority investigation. The failure of Mr Allnut to provide a personal statement and appear before the Authority to answer questions has hampered my investigation.

[8] As permitted by s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and, make orders but I do not record all evidence and submissions except to observe the applicant assisted in giving evidence and a submission that I have carefully considered. Overall, as signalled to the parties given the unusual factual context including that although tenuous, the parties were still in an employment relationship; in investigating this matter I will be utilising s 160(3) of the Act. This provision allows the Authority to "concentrate on resolving the employment relationship problem, however described."<sup>1</sup>

### **Issues**

[9] The issues to be decided are broadly:

- (a) Was Mr Tofete unjustifiably dismissed or did he resign?
- (b) Has MSD breached any terms of employment or good faith duties owed to Mr Tofete sufficient to establish he was unjustifiably disadvantaged?
- (c) If any of Mr Tofete's claims are established what if any, compensatory remedies, or penalties should be awarded?
- (d) If Mr Tofete is successful in all or any elements of his personal grievances should the Authority reduce any remedies granted because of any contributory conduct?
- (e) How costs are to be resolved.

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<sup>1</sup> Employment Relations Act 2000, Powers of Authority - s 160(3).

### **What caused Mr Tofete's employment relationship problem?**

[10] After relocating from Australia where he worked for a logistics company, Mr Tofete commenced working for MSD in mid-May 2023. Mr Tofete learned of the job from a friend who also worked at MSD. Mr Tofete recalled being briefly interviewed by Mr Allnutt and then undertaking a one week 'trial' before being offered a job as a painter's assistant. No employment agreement was provided by MSD. Mr Tofete says the business was a small one with up to five other workers and Mr Allnutt at times worked in the business. Mr Tofete says an attraction to agreeing to work for MSD was Mr Allnutt offered to set up an apprenticeship for him to become a qualified painter. This offer being made, was confirmed in MSD's statement to the Authority as being conditional on funding being provided to MSD. No further detail was provided on where the funding was going to be sourced from and Mr Tofete says he was unaware of this detail.

[11] Mr Tofete recalled receiving an email of 23 May asking him to provide his IRD details; complete a Kiwi-saver form and a new employee form. He recalls providing these documents to MSD on 28 May but says no other terms of employment were documented.

[12] Mr Tofete recalled working alongside MSD's painters and that his work involved: painting; surface preparation; vacuuming and cleaning prepared areas; gap filling and water blasting exterior areas. Mr Tofete says his usual working hours were 8am to 4pm (occasionally 9am to 5pm) and he worked Monday to Friday and was paid \$24 per hour. With additional time worked, Mr Tofete asserted his average weekly hours were 46. No wage and time records were provided by MSD despite Mr Tofete's advocate requesting them in their 23 February 2024 personal grievance letter. However, Mr Tofete was provided with detailed weekly payslips and he acknowledged in evidence, that he was always paid on time and had no outstanding pay issues.

[13] Mr Tofete described enjoying his work for the first six months and getting positive feedback from Mr Allnutt, who he says constantly reassured him about placing him in an apprenticeship. However, on 3 December 2023 while at work, Mr Tofete received a text message from Mr Allnutt that indicated:

Hi la, sorry I have some bad news, I won't be able to put through your apprenticeship, as My funding has changed.. I'll explain abit more tomorrow. But thought I 'd give you a heads-up

[14] Mr Tofete says he was devastated by the above message and on returning to work the next day, although he encountered Mr Allnutt, he did not discuss the matter further. When pressed about whether Mr Allnutt was generally approachable (he confirmed he was) and why he had not pursued a discussion to get a fuller explanation, Mr Tofete could only explain he felt hurt and betrayed and, that his trust in his employer had been destroyed.

[15] Thereafter, Mr Tofete says his mental well-being began to significantly deteriorate. Mr Tofete's friend corroborated this, saying he seemed heartbroken by the withdrawal of the apprenticeship prospect and became withdrawn and closed down in communications.

[16] On 6 December, Mr Tofete experienced a stomach bug and says he provided a medical certificate to MSD and was provided three days paid sick leave. Also on 6 December, Mr Allnutt emailed all his workers a notice of seasons' greetings indicating their last working day would be Wednesday 20 December and the business would reopen on Monday 15 January 2024.

#### *Events leading up to ending of employment relationship*

[17] Mr Tofete worked the week of 9-14 December but on Monday 18 December he did not attend work and made no contact to explain why. Mr Allnutt texted on that evening asking for an explanation and whether Mr Tofete was "keen for work tomorrow". Mr Tofete texted back asking for the work location, was provided with it but inexplicably failed to turn up for work on 19 and 20 December. Mr Tofete says he acknowledged he did not contact Mr Allnutt about his absences saying he was still emotionally distressed about the apprenticeship issue and was brooding on his job retraining prospects being bleak. Mr Tofete's text suggested Mr Allnutt should not place his lack of communication at issue suggesting when other workers displayed poor communication, no sanctions were applied.

[18] On 4 January 2024, Mr Tofete received a final pay slip but at the investigation meeting he says he did not at the time, take it as a signal that brought the employment to an end as he thought it was just his final holiday pay for the year ending.

[19] Mr Tofete says on Saturday 12 January, he experienced a “family emergency” and had to leave town. He says he rang Mr Allnut to explain his situation but received a message “I’m busy Whatsup”. Mr Tofete did not pursue communication further that day.

*13 -17 January exchanges*

[20] On 13 January at 8:17am Mr Tofete texted Mr Allnut:

Im going to Wellington today for a family emergency, will be back for work on Wednesday, just letting you know. Going to Welly tomorrow.

[21] Mr Allnut responded at 9:05am with:

We paid your holiday days thinking you’d finished with us. As u never contracted [sic] me on the last week of work Imao. Well you just didn’t turn up.

[22] Mr Tofete then replied at 1:26pm:

My bad for not giving coms, i had my reasons for not turning up. Just like the boys when they don’t give coms or don’t turn up.

So you paid me out thinking I was finished? How is this professional? As a business owner to treat employees such. How could you treat me like this and not give SAME treatment to the rest of the crew/ it was only 2 days and you crucify me like this? What goes around comes around.

[23] Mr Allnut responded by pointing out only Mr Tofete and one other was employed and, other workers were either casual or contractors. Mr Allnut requested Mr Tofete call him on Monday 15 January – a request he repeated by text on 15 January. Mr Allnut made two unreturned calls to Mr Tofete on the evening of 16 January. Mr Tofete says he returned to Christchurch on 16 January and was aware Mr Allnut was trying to contact him..

[24] Mr Tofete then recalled an early morning telephone conversation with Mr Allnut on Wednesday 17 January (the day he was due back at work) - it lasted 14 minutes. MSD’s account of this call (detailed in the 2 March 2024 response to the PG letter) was that Mr Allnut offered ongoing work and identified where that would be and suggested Mr Tofete contact the site foreman to arrange transport. It was suggested by MSD Mr Tofete agreed to making the contact and to continue working but he did not follow up on this and then went ‘incommunicado’ and did not return to work until the 23 February personal grievance letter was received by MSD.

[25] Mr Tofete's written evidence confirmed the 17 January call took place but did not detail the conversation beyond saying no formal arrangements were made and he was confused about whether he was still employed after receiving his final payslip without an accompanying explanatory letter confirming Mr Allnutt's belief he had abandoned his employment. However, when pressed during the investigation meeting that objectively Mr Allnut was offering him continued employment, Mr Tofete said while Mr Allnutt tried to offer him ongoing employment he did not agree to return to work because Mr Allnutt had betrayed him and all trust had been destroyed over the apprenticeship issue. Mr Tofete's friend also confirmed that after the call he told her Mr Allnutt had offered him ongoing work and that he had declined this and appeared distressed by events.

### **Assessment**

[26] It was apparent from Mr Tofete's evidence that the abandoning of what he thought had been a firm commitment to provide him with an apprenticeship was a central issue in his decision to spurn Mr Allnutt's offer of continuity of employment on 17 January. In addition, Mr Tofete's evidence was his mental health significantly declined from 3 December 2023 when Mr Allnutt communicated that the apprenticeship would not proceed. Mr Tofete provided no corroborating medical evidence as he did not consult a medical practitioner and says he much later recovered his equilibrium by regular physical activity despite struggling to find alternative employment for 32 weeks (Mr Tofete provided evidence of multiple unsuccessful job applications).

[27] Whether the failure to arrange the apprenticeship constituted a breach sufficient to bring the employment to an end I will discuss below but first I deal with the absences of Mr Tofete at the end of year and his delayed return to work in the new year.

[28] Mr Tofete acknowledged his poor communication as to his absences in the last week of December 2023 and thereafter. While this may be so, the tone of Mr Tofete's explanatory text of 13 January (para 22 above) was objectively passive/aggressive and he did not elaborate on why he felt aggrieved which was the reason he did not turn up for work. MSD was entitled to a fuller explanation if only to give Mr Allnutt an opportunity to elaborate on why the apprenticeship offered was not proceeding.

[29] Further, Mr Tofete's characterising his unauthorised absence during January as being a family emergency, emerged in questioning during the investigation meeting as being significantly misleading. Mr Tofete says he travelled to Wellington because his sister happened to be visiting New Zealand and he wanted to see her and participate in a family gathering. Mr Tofete did not make this clear at the time nor did he seek annual leave.

[30] I was also struck by Mr Tofete's evidence that when he received his final pay notice on 4 January, he had not considered that as ending the employment relationship. He appears to have tried to rely upon this later but it is clear that Mr Allnutt made an honest mistake in getting the final pay made up and he did not then seek to impose this as an ending of the employment relationship. Objectively, in the face of Mr Tofete's continued absence for what he misleadingly portrayed as a family emergency, MSD's Mr Allnutt could be viewed as a tolerant and patient employer.

[31] The key was the 17 January exchange, that again objectively, can only be viewed as Mr Tofete resigning by his refusal of the offer of continued employment. Mr Tofete cannot rely upon the notice of final pay he says he received on 4 January, as being a dismissal as it is evident that this was a reasonable mistake that was corrected by MSD and incidentally at the time, Mr Tofete did not regard it as a dismissal.

[32] A submission was made that Mr Allnutt's message of 13 January was a 'clear and unambiguous sending away'. I find this not to be the case as the messages between 12-17 January when read together, show Mr Allnutt seeking clarity and showing patience and Mr Tofete initially not expressing a concern he had been dismissed, then stating he would return to work on the Wednesday and then changing his mind. The evidence also disclosed that Mr Tofete largely contributed to the confusion about his availability for work by his lack of communication when it was reasonably expected he should apprise his employer of his situation and the taking of unauthorised leave in the guise of a family emergency.

### **Finding**

[33] I find Mr Tofete was not unjustifiably dismissed.

## **The unjustified disadvantage claim and/or breach of good faith?**

[34] In *Spotless Facility Services NZ Ltd v Mackay*, the Employment Court sets out the definitional elements of an unjustified disadvantage claim as:

Turning to the statutory definition of a disadvantage grievance, s 103(1)(b) of the Act allows an employee to bring a personal grievance if the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer. The issue of whether the action in question is unjustified requires a consideration of the test of justification as provided in s 103A of the Act.

The meaning of “conditions” of employment is well established. It includes all the rights, benefits and obligations arising out of the employment relationship; the concept is necessarily wider than the terms of an employment agreement.

I also observe that the statutory context within which this assessment must arise includes the obligation in s 4(1A)(b) that the parties be active and constructive in establishing and maintaining a productive employment relationship, in which they are, amongst other things, responsive and communicative.<sup>2</sup>

[35] The definition above envisages that obligations may arise incidentally out of an employment relationship that are not recorded in an employment agreement. Mr Tofete's advocate has submitted that:

The apprenticeship formed the basis of Mr Tofete's employment expectations. Its unilateral withdrawal, without consultation or fair process, constituted a fundamental variation of the employment arrangement and created a clear unjustifiable disadvantage under s 103(1)(b).

This also breached s 63A(2) of the Act, as the variation was made without providing an opportunity to seek independent advice, and s 4 of the Act, which requires parties to act in good faith, including not misleading or deceiving each other.<sup>3</sup>

### **Assessment**

[36] The first issue is to determine in the absence of an employment agreement and no other documentation, whether the offer of an apprenticeship and its commencement timing

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<sup>2</sup> *Spotless Facility Services Ltd v Mackay (No2)* [2017] ERNZ 64 at [49] – [51].

<sup>3</sup> Applicant's Closing Submissions, Hayley Johnson, 27 June 2025.

was made and relied upon by Mr Tofete as a fundamental term of the employment arrangement he entered.

[37] The evidence suggests Mr Tofete was looking for employment at the time he was engaged and was encouraged to accept the job offered by the offer of the apprenticeship. Mr Tofete says, and I accept the validity of his evidence, that he was seeking to train in an alternative career and improve his long-term earnings prospects. He indicated he was not seeking an unskilled job. I objectively find that once he discovered after six months working and getting positive feedback on his work, Mr Tofete was devastated by the withdrawal of the offer to proceed with the promised apprenticeship.

[38] While I did not hear from MSD's Mr Allnut, his message to Mr Tofete of 3 December 2023 saying he could not "put you through your apprenticeship", logically presupposes it was offered at the outset. I also find there was a good faith obligation placed on Mr Allnut to better communicate the reasons behind the abandoning of the commitment made to Mr Tofete in a timely manner and perhaps exploring other training options beyond just saying let's discuss this further. Mr Allnut failed in this basic good faith obligation to be communicative in seeking to preserve the employment relationship.

[39] Likewise, Mr Tofete did not raise the issue or his distress about the decision with MSD until his personal grievance was lodged on 23 February 2024. This was raised within 90 days as per s 114 of the Act. MSD's response to the personal grievance of 2 March simply failed to address the central issue of the apprenticeship offer and MSD compounded matters by refusing to attend mediation either voluntarily or when directed. It was not until 17 May 2024 in responding to Mr Tofete's Authority application, that MSD without then proffering any supporting evidence or documentation, asserted the apprenticeship offer was conditional on available funding.

[40] The objective test to apply, is to examine on the limited evidence MSD's approach to the apprenticeship offer and then assess as per s 103A of the Act if their actions "were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred".

[41] I found the limited explanation of MSD to be less than credible and objectively Mr Allnutt must have been aware that Mr Tofete had relied upon the apprenticeship offer and was seeking to work beyond labouring tasks.

[42] While the apprenticeship terms and its timing were not documented this could reasonably have been due to the lack of a written employment agreement or offer of employment. These omissions and the subsequent action of not proceeding with the apprenticeship I find disadvantaged Mr Tofete as a lost opportunity and caused him detrimental distress and uncertainty about the employment relationship's ongoing prospects.

[43] In concluding MSD did not act appropriately as a fair and reasonable employer, I have considered the fact that they are a small business but given their nonparticipation in my investigation I was not provided with sufficient evidence to consider this a significant ameliorating factor.

### **Finding**

[44] Having found that MSD acted inappropriately in their dealings with Mr Tofete, I determine that he has established an unjustified disadvantage claim and is entitled to a consideration of remedies. Given Mr Tofete's resignation and the circumstances involved an award of lost wages is inappropriate but he is entitled to be compensated under s 123(1)(c)(i) of the Act for "humiliation, loss of dignity and injury to feelings". I must also consider if a penalty for MSD's failure to provide a written employment agreement is appropriate or not. These claimed remedies are discussed below.

#### *Compensation for hurt and humiliation.*

[45] Mr Tofete and his friend gave compelling evidence of the negative impact of MSD's withdrawal of a commitment made to offer an apprenticeship on his mental wellbeing and the uncertainty and distress it created at a time.

[46] Mr Tofete was entitled to feel he had been treated unfairly and was not provided with a timely and adequate explanation why the apprenticeship could not proceed. This is at issue when objectively, MSD having a committed and trained extra painter could have been an asset to the business. These were actions that undermined the ongoing nature of the

employment relationship and were not acts of a fair and reasonable employer. Mr Tofete understandably felt distressed by the turn of events leaving him isolated and confused. Mr Tofete says he suffered a mental health episode but sought no medical assistance. However, his partner gave compelling evidence that Mr Tofete became withdrawn and socially isolated and very upset at his lack of a new career opportunity. I was also convinced by Mr Tofete's evidence that he felt deeply hurt and humiliated by MSD's abandonment of their stated commitment to provide an apprenticeship.

### **Finding**

[47] I am convinced that at the time, Mr Tofete suffered unnecessary humiliation, loss of dignity and injury to feelings but has now moved on and improved his personal health and found alternative employment. I have to however, consider the factor that the ending of the employment relationship was objectively not at MSD's volition.

[48] Considering all the circumstances I consider that Mr Tofete's evidence warrants compensation of \$8,000 under s 123(1)(c)(i) of the Act.

### **Penalty for failing to provide an employment agreement.**

[49] This matter relates to a straightforward failure of MSD without an explanation, to provide a written employment agreement (a requirement under s 61A(2)(a) of the Act).

[50] In the circumstances, the Authority pursuant to s 133 of the Act has authority to award a penalty for the identified statutory breach (up to a maximum of \$20,000 per breach) and must consider matters outlined in s133A of the Act. In applying these factors including having regard to the Act's object of amongst other guidance, the need to address the inherent inequality of power in employment relationships <sup>4</sup> I find it is appropriate to award a penalty for the identified breach as it disadvantaged Mr Tofete in not setting out clearly essential terms of the employment relationship.

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<sup>4</sup> Employment Relations Act 2000, Section 3(a)(ii).

[51] In considering the quantum of the penalty however, I consider it should be moderate given the size of the business but it should serve as a deterrent and spur to MSD to ensure such a breach is not repeated.

### **Finding**

[52] For the uncontested breach of not providing an employment agreement I award a penalty of \$1,000 and find it appropriate that this amount be paid in full to Mr Tofete.

### **Contribution**

[53] Section 124 of the Act states that I must consider the extent to what, if any, Mr Tofete's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. I have considered in this context the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*.<sup>5</sup>

[54] Mr Tofete had a reciprocal good faith duty to be active, communicative, and responsive in keeping MSD apprised of the reasons for his absence from work including his deeply held dissatisfaction at the apprenticeship not progressing. He failed in this duty and given his evidence that he had no intention of returning to work at his perceived 'betrayal' all this did was unnecessarily prolong and contribute to the dispute. However, given I have found the predominant causative factor was the manner by which MSD handled the issue of the ongoing security of Mr Tofete's employment and I have not awarded any lost wages, I consider no reduction in the remedy for the disadvantages caused by MSD, is appropriate as the detriment to Mr Tofete pre-dated the alleged unjustified dismissal.

### **Orders**

[55] I have found that:

- a. Lafaaua Tofete was not unjustifiably dismissed but he was unjustifiably disadvantaged in his employment with Master Stroke Decorators Limited.

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<sup>5</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

b. Master Stroke Decorators Limited is ordered to pay Lafaaua Tofete the amounts below within 28 days of this determination being issued:

(i) \$8,000 compensation without deduction pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and:

(ii) Pursuant to s 133 of the Employment Relations Act 2000, a penalty in the amount of \$1,000 without deductions to Lafaaua Tofete.

### **Costs**

[56] Costs are reserved.

[57] The parties are encouraged to resolve any issue of costs between themselves.

[58] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Lafaaua Tofete may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Master Stroke Decorators Limited will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[59] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>6</sup>

David G Beck  
Member of the Employment Relations Authority

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<sup>6</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)