

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 90  
3146741

BETWEEN GARY COTTON  
Applicant

A N D DARCEE GOSLING  
First Respondent

GOSLING SOLUTIONS LIMITED  
Second Respondent

ROB RALSTON  
Third Respondent

Member of Authority: David G Beck

Representatives: Lawrence Anderson, advocate for the Applicant  
Darcee Gosling for the respondents.

Investigation Meeting: 25 February 2022 by video link

Submissions Received: 2 March 2022 from the Applicant  
14 March 2022 from Darcee Gosling

Date of Determination: 16 March 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Gary Cotton has asked the Authority to determine the identity of his employer and then deal with a claim he was unjustifiably dismissed. Mr Cotton seeks holiday pay due, lost and arrears of wages and compensation should the Authority determine the dismissal was unjustified.

[2] Darcee Gosling contends that Mr Cotton was employed by Rob Ralston who he says operated as a sole trader and that Mr Ralston had ‘suspended’ Mr Cotton’s period of employment due to a medical issue Mr Ralston had and that it was unsafe for Mr Cotton to work unsupervised. Mr Gosling claimed that Mr Ralston intended to enter into a written employment agreement with Mr Cotton but had not followed this matter through.

### **The Authority process**

[3] Despite not filing briefs of evidence and other associated documentation as directed, Mr Gosling and to a very limited extent Mr Ralston, participated in the investigation meeting as did Mr Cotton. Pursuant to s 174E of the Employment Relations Act 2000 (“the Act”) I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders, but I do not record all evidence and submissions received.

### **Issues**

[4] The issues to be decided are:

- a) Which of the cited respondents was Mr Cotton’s employer?
- b) Once the employer/s is identified then:
  - (i) Was Mr Cotton unjustifiably dismissed?
  - (ii) If there was an unjustified dismissal what remedies are appropriate?
  - (iii) Is holiday pay due and owing and in what amount?
  - (iv) Should any award, if made, to Mr Cotton be reduced by contributory conduct?
- c) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[5] Mr Cotton recalls responding to a Facebook job advertisement posted by Mr Gosling on or around 18 April 2021 to assist with a firewood business then trading as Ignite Firewood. Mr Cotton knew Mr Gosling through a family connection and described him as a step-cousin who he had grown up with.

[6] Mr Cotton commenced employment the next day after being invited to do so by Mr Gosling. On his first day Mr Cotton was introduced to Mr Ralston and says he was told by

Mr Gosling he was going to be directed in his work by Mr Ralston. No employment agreement was provided but a brief description of the job was detailed on a single sheet of paper as:

9-5

5 Day week

22 HR

Fuel 1 way

Weekends off.

[7] Mr Cotton provided Mr Gosling with his bank account details and IRD number. Mr Cotton says Mr Gosling provided him an Ignite Firewood Temuka business card that only had Mr Gosling's name and telephone number on it. At the time, the business operated out of a yard attached to the Red Stag restaurant in Fairlie, South Canterbury. Mr Cotton understood that Mr Gosling owned and ran the restaurant and that Mr Ralston, his partner, lived with him. Mr Cotton says Mr Gosling gave him a timesheet from the restaurant to record working hours. The timesheet was produced for the Authority, and it described the job as "wood splitter".

[8] As context, Mr Gosling explained that the firewood business was not established as a registered company, but he set the operation up and financed it (including plant and equipment and a vehicle) on behalf of Mr Ralston who Mr Cotton reported to. Mr Gosling advised that all banking was directed through his personal account due to Mr Ralston being unable to operate a bank account or company because of previous financial defalcations he had been involved in and addiction issues. Mr Gosling indicated he had taken Mr Ralston in and was assisting him getting established in employment as well as living in a personal relationship with him.

[9] Mr Gosling advertised firewood for sale in the community on his Facebook page and Mr Cotton understood that Mr Gosling would then communicate any orders to Mr Ralston to facilitate delivery. Mr Gosling frankly indicated that this was to shield Mr Ralston from any scrutiny given past reputational issues.

[10] Mr Cotton quickly experienced problems being paid for the work he carried out alongside Mr Ralston. Text exchanges evidenced that Mr Gosling paid Mr Cotton initially in

cash for his first week then for the second week through a bank transfer using Mr Gosling's personal account. The transaction of \$242.05 from Mr Gosling's personal account describes Mr Cotton's wages as a "Bill Payment" and under details it indicates "ignite Fire ignite fire".

[11] After Mr Cotton was not paid for his third week of work, he exchanged texts with Mr Gosling. Mr Gosling indicated he would sort matters including purporting to place Mr Cotton on the restaurant's pay roll system and changing his pay cycle to fortnightly (without seeking agreement) after he had suggested Mr Cotton supply him with a weekly timesheet detailing hours worked.

[12] Mr Ralston did not initially involve himself in any pay issues but participated in later text exchanges when Mr Cotton pressed Mr Gosling to pay him wages due. The increasingly terse message exchanges culminated in Mr Ralston on Thursday 6 May, indicating to Mr Cotton after he had finished working that day: "Hi Gary, there won't be any work tomorrow or Sunday I'll be in touch cheers mate". Beyond this message, no further work was provided to Mr Cotton. Subsequent messages from Mr Ralston were unnecessarily abusive, and objectively likely to cause distress as Mr Ralston and Mr Gosling were aware of Mr Cotton's then fragile state of mind. Mr Cotton then engaged in further messaging both Mr Gosling and Mr Ralston up to 15 May but was unable to resolve pay or ongoing work issues.

[13] By way of a letter of 17 May 2021 utilising his advocate, Mr Cotton raised a personal grievance with Mr Gosling and Mr Ralston claiming he had been unjustifiably dismissed and was owed wages for work previously undertaken.

[14] Mr Gosling says he then engaged an employment consultancy he had been using (Employsure Limited) to respond to Mr Cotton's personal grievance. Unaccountably Employsure responded to Mr Cotton's advocate on 20 May 2021, said they had been engaged by Gosling Solutions Limited and would be responding to the personal grievance in due course. Mr Gosling explained he is a sole director of Gosling Solutions which is a company he set up to run his restaurant. Mr Cotton up until receiving this response says he had no knowledge of Gosling Solutions Limited.

[15] No further correspondence was disclosed by the parties and Mr Cotton's advocate filed the matter with the Authority on 26 July 2021. Employsure indicated to the Authority

on 27 July that they had instructions to accept service on behalf of Gosling Solutions but not Mr Gosling or Mr Ralston. After not providing a statement in reply and asking for an extension to do so, Employsure on 26 August indicated they no longer acted for Gosling Solutions Limited. From this point in time, Gosling Solutions Limited, Mr Gosling and Mr Ralston did not participate and failed to file statements in reply, attend a case management conference and when directed to do so, did not file any evidential briefs or background material.

### **Who was Mr Cotton's employer?**

[16] The principles the Employment Court has adopted when considering the identity of an employer are:

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

[17] In submissions and from evidence, Mr Anderson made no contention that Gosling Solutions Limited or Mr Ralston were the employer's but suggested Darcee Gosling was Mr Cotton's employer. I observe that factors indicating this was so, included:

- The advertisement of the job was a personal Facebook posting of Mr Gosling's.
- Mr Cotton met with Mr Gosling to discuss the job at Mr Gosling's restaurant and that business was clearly unrelated.

---

<sup>1</sup> *Colosimo v Parker* (2007) 8 NZELC 98, 622 (EmpC).

- No employment agreement was provided but Mr Gosling negotiated the key terms of employment with Mr Cotton that were sufficient to establish that he was entering an employment relationship (pay rate, hours of work, job title, starting date, and work location).
- A card was provided with only Mr Gosling's name on it and an ignite firewood logo.
- Mr Cotton supplied Mr Gosling with his IRD number and bank account details.
- Ms Gosling controlled and financed the firewood operation and put out to the local community that it was his operation giving the impression he was a sole trader.
- Mr Gosling took on the responsibility of paying Mr Cotton from his own bank account.
- The firewood operation was distinct from Gosling Solutions Limited save being run from premises belonging to Gosling Solutions Limited.
- Mr Cotton was not aware of Gosling Solutions Limited at the time he was engaged or during his short period of employment.
- Mr Gosling conceded in evidence that Mr Ralston's role was to supervise Mr Cotton.

[18] Mr Gosling suggested in submission that Mr Cotton should have known who he was working for and should have clarified such. In the circumstances of the engagement, I find this to be an unreasonable premise and observe that the provision of a written employment agreement as required by s 63A(2) of the Act is an employer responsibility.

[19] Mr Gosling cited Mr Cotton's attempts to communicate with Mr Ralston as implied acceptance that Mr Ralston was the employer but failed to acknowledge that Mr Cotton only pursued this avenue after first trying to resolve pay matters with Mr Gosling. Further, despite Mr Gosling suggesting Mr Ralston was a sole trader I had no evidence to establish this. In fact, Mr Gosling contradicted his own assertion on this issue by explaining why Mr Ralston was unable to hold himself out to the public as a sole trader due to reputational issues.

[20] Notwithstanding, the key juncture of establishing who is the employer is at the outset of the relationship and not the ending. On the facts, Mr Gosling initiated the offer of

employment and arranged how Mr Cotton would be remunerated. If he was as claims, an agent of Mr Ralston this relationship was not properly disclosed to Mr Cotton.

## **Finding**

[21] On the evidence of how this short period of employment was formed and operated, including admissions from Mr Gosling of his ‘guiding hand’ involvement in the firewood enterprise, I objectively conclude that Mr Gosling was Mr Cotton’s employer, and he unfortunately and inexplicably, took no steps to protect himself from personal liability.

## **Was Mr Cotton unjustifiably dismissed?**

[22] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer’s actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[23] Section 103A details factors that the Authority must objectively measure an employer’s actions against before concluding whether the employer, in context, acted in a fair and reasonable manner. These summarised are:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee.
- (b) Did the employer raised the issues of concern with the employee prior to deciding to dismiss?
- (c) Was the employee afforded a reasonable opportunity to respond to identified concerns; and
- (d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss and
- (e) Any other factor the Authority regards appropriate.

### **Applying factors identified by the Act**

[24] I find on the facts, that Mr Gosling paid scant attention to all the above factors. Mr Gosling took no steps to ascertain why Mr Ralston had not continued to offer Mr Cotton on-going work and took no responsibility to resolve wage arrears issues raised by Mr Cotton. There was some suggestion that Mr Ralston was unable to carry on the business due to a debilitating medical condition, but I was provided with no documentary proof of this. I have considered Mr Gosling's suggestion that Mr Cotton was not "fired or dismissed from his position at Ignite Fire wood" because a text from Mr Cotton of 7 May 2021 indicating: "Looks like you no longer require my services, here is my hours for the week. Can you please get the money to me asap." I find the reference to this communication unpersuasive of any consent to the termination of employment – Mr Cotton made an observation that invited a clarification that was not forthcoming.

[25] Mr Gosling allowed the employment relationship to end without raising any issues of concern about Mr Cotton's work and he breached the oral employment agreement he had entered to provide ongoing work for Mr Cotton. In assessing the situation and perception of Mr Cotton that he was dismissed, a useful approach is what the Employment Court summarised in *Cornish Trucks & Van Lines v Gildenhuis* that:

The test is an objective one; was it reasonable for somebody in Mr Gildenhuis' position to have considered that his or her employment had been terminated? <sup>2</sup>

### **Finding**

[26] I find in all the circumstances that Mr Cotton was objectively entitled to consider his employment was at an end and on both substantive and procedural grounds he was summarily unjustifiably dismissed and is owed wage arrears and is entitled to remedies.

---

<sup>2</sup> *Cornish Trucks & Van Ltd v Gildenhuis* [2019] NZEmpC 6 at [45].



## **Remedies**

### *Lost wages/Arrears*

[27] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Cotton should I find that he has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[28] Here I find Mr Cotton's lost remuneration was attributed to the personal grievance. Mr Cotton disclosed documentary evidence that he struggled to find alternative employment until 6 October 2021, and such was on a part time basis. Mr Cotton claimed three months lost wages.

[29] In view of the unjustified dismissal finding Mr Cotton is entitled to lost wages that I fix at thirteen weeks. In calculating the amount, it was not clear that forty hours of work per week was available as the hours appeared to fluctuate. On an equitable calculation I fix the weekly hours as an average of 35 per week and at \$22 per hour this is a sum of \$10,010 gross.

[30] In addition, I find that as claimed, Mr Cotton was owed an accumulated amount of arrears of wages (two unpaid weeks) and holiday pay at 8% amounting to \$961.57 gross.

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

[31] Mr Cotton and his partner gave evidence of the impact of the summary dismissal (without any outstanding holiday pay and wages owed being paid) and the uncertainty it created at a difficult time to find immediate alternative employment. Mr Cotton described a strain on his relationship with his partner and son and an impact on his self-confidence.

[32] I balance this with the fact that Mr Cotton had a pre-existing health issue but this was partially exacerbated by his former employer's conduct and abusive communication.

[33] Mr Cotton's GP described his mood being much better around two months after his dismissal and Mr Cotton says it improved also when he secured alternative employment, but he says he was still anxious up until this point.

[34] I consider that Mr Cotton was humiliated by the conduct of Mr Ralston and Mr Gosling took insufficient steps to deal with this.

### *Finding*

[35] Considering all contextual factors including that this was a relatively short period of employment, the evidence adduced, and awards made by the Authority and Court in similar situations and considering the claim made in submissions, I consider Mr Cotton's evidence warrants compensation of \$8,000 under s 123(1)(c)(i) of the Act.<sup>3</sup>

### **Contribution**

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

[37] Overall, I find Mr Cotton did not contribute to the situation giving rise to the personal grievance. Mr Cotton cannot be blamed for the deficiencies in communication that robbed him of any opportunity to respond to issues that led to his employment ending.

---

<sup>3</sup> See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

## **Outcome**

[38] I have found that:

- (a) Darcee Gosling was Gary Cotton's employer and is personally liable for the following orders and remedies
- (b) Gary Cotton was unjustifiably dismissed and disadvantaged by the way his employment with Darcee Gosling was terminated.
- (c) Darcee Gosling must pay Gary Cotton the sums below:
  - (i) \$10,010 gross lost wages.
  - (ii) \$830.45 arrears of wages.
  - (iii) \$131.12 gross unpaid holiday pay.
  - (iv) \$8,000 compensation without deduction under s 123(1)(c)(i) of the Act.

## **Costs**

[39] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to make an agreement on costs. If no agreement is achieved, Mr Cotton has fourteen days following the date of this determination to make a written submission on costs and Darcee Gosling has a further fourteen days from the date of service of Mr Cotton's submission to provide a response. Costs will not be considered outside this timetable unless prior leave is sought to do so.

[40] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate (\$2,250 for a half day) unless circumstances or factors, required an upward or downward adjustment of that tariff.

David G Beck  
Member of the Employment Relations Authority