

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 514
3072152

BETWEEN MICHAEL JOHN BURT
Applicant

A N D DRUCE NILSEN
Respondent

Member of Authority: David G Beck

Representatives: Naoimh McAllister and Kristin Macdonald, counsel for the
Applicant
Mary-Jane Thomas, counsel for the Respondent

Investigation Meeting: 1 October 2020 at Invercargill

Submissions Received: 1 and 15 October 2020 from the Applicant
12 November from the Respondent

Date of Determination: 10 December 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael John Burt asserts that he was employed by Druce Nilsen (Mr Nilsen) as a deckhand on a fishing vessel FV Motuara operating out of Bluff that Mr Nilsen skippered, from 8 March 2019 to 28 May 2019. There was no written agreement covering the relationship and the now disputed remuneration arrangement was that Mr Burt would receive a percentage of the fishing catch. Mr Burt also claims that he was unjustifiably dismissed.

[2] Mr Nilsen by contrast, denies being Mr Burt's employer claiming that the employer was his father Olaf Nilsen (who according to Maritime NZ leased the fishing vessel from its registered owners) and he has suggested that Mr Burt was a share fisherman or contractor and that in any case if he is deemed to be an employee his personal grievance was raised outside of 90 days.

[3] Mr Burt filed a Statement of Problem with the Authority on 13 September 2019 seeking an order for payment of unpaid wages from 1 April 2019 to 10 May 2019.

[4] Mr Nilsen filed a statement in reply with the Authority on 14 October 2019 that denied the wage arrears but did not contest the issue of who was the employer.

[5] The parties were directed to mediation in October 2019 but Mr Nilsen refused to attend.

[6] Then on 5 February 2020 by letter, now utilising counsel, Mr Burt raised a personal grievance with Mr Nilsen alleging that he had also been unjustifiably disadvantaged and unjustifiably dismissed "on or about 12 May 2019" and was owed unpaid wages calculated on a percentage of the fishing catch.

[7] Mr Nilsen responded to the personal grievance letter on 14 April 2020 denying the substance of the personal grievance, did not consent to it being heard out of time and he claimed that he was not Mr Burt's employer and asserted without any documentation, that Mr Burt's employer was his father Olaf Nilsen.

[8] In an amended statement of problem filed by Mr Burt's counsel on 6 August 2020 leave was sought under section 114(3) Employment Relations Act 2000 to raise the further personal grievances out of time on the basis that Mr Burt did not have a written employment agreement setting out how he could proceed with a personal grievance and that it would be "just" to allow his grievance to proceed.

The Authority Process

[9] Mr Nilsen did not as directed file a brief of evidence or participate in the investigation meeting of 1 October 2020 nor did his father Olaf Nilsen. Subsequently, on being provided by the Authority with submissions from Mr Burt's counsel for comment, Mr Nilsen claimed by

email that he was unaware of the investigation meeting occurring. The Authority had previously provided the investigation meeting notice by the same email address and a directions notice alluding to the investigation meeting date and on 27 June 2020, the Authority using a document server, had delivered to Mr Nilsen's service address a copy of the investigation notice. The notice was accepted by a person identifying as Mr Nilsen's sister.

[10] I am satisfied that Mr Nilsen had adequate notice of the investigation meeting date.

[11] Further, the respondent's counsel made an unsuccessful application to reconvene the investigation meeting and in making a submission on such, acknowledged that Mr Nilsen's non-attendance at the 1 October Investigation meeting was "inexcusable and may be answered by a costs award".¹

[12] At the investigation meeting I heard from Mr Burt and his partner Jess Burt and a submission from Mr Burt's counsel. Given there was a 90 day issue and dispute about the identity of the employer I provided Mr Nilsen with an additional period of time after the investigation meeting to respond to submissions on these issues.

[13] Pursuant to s 174E of the Employment Relations Act ("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

[14] The issues to be decided are:

- (a) Was Mr Burt in an employment relationship and if so, who was his employer?
- (b) If Mr Burt was in an employment relationship, is Mr Burt owed wage arrears and holiday pay for the period he has identified (between 14 March 2019 and 10 May 2019).
- (c) Should Mr Burt's unjustified dismissal and/or disadvantage personal grievance claims be allowed to proceed despite them being submitted outside of the 90 days requirement?

¹ See *Michael John Burt v Druce Nilsen* [2020] NZERA 478, 19 November 2020.

- (d) If Mr Burt establishes that he has an arrears claim what remedies are appropriate.
- (e) If any remedies are awarded should they be reduced due to any contribution from Mr Burt?
- (f) An assessment of the level of costs to be awarded to the successful party.

What caused Mr Burt's employment relationship problem?

[15] Mr Burt was engaged by Mr Nilsen to work alongside him as a deck-hand on a fishing vessel Mr Nilsen skippered that sailed out of Bluff. The work commenced on 8 March 2019 on terms that are disputed and discussed below – suffice to say Mr Burt considered himself an employee and Mr Nilsen has suggested that he was a contractor and if deemed to be an employee he was not employed by Mr Nilsen. Nothing of the engagement was documented.

[16] The relationship ended after Mr Burt began contesting the payment of his share of the fishing catch on or around 10 May 2019, his request on 24 May for time off in mid-June to undergo knee surgery and he began requesting payslips from Olaf Nilsen, Mr Nilsen's father.

[17] Matters came to a head when Mr Nilsen texted Mr Burt on 27 May saying that he was going out on a fishing trip by himself and he (Mr Nilsen) needed "to think about things". Mr Burt says this trip involved Mr Nilsen engaging another deckhand in preference to him being available. Mr Burt persisted texting Mr Nilsen about his disputed remuneration but his texts were blocked by Mr Nilsen who then resumed texting him in early June requesting a "face to face" meeting.

[18] The dispute culminated in a meeting on 5 June 2019 at Mr Nilsen's request that took place on the fishing vessel. Mr Burt says Mr Nilsen expressed upset at Mr Burt involving his partner Jess texting him regarding the disputed remuneration and a perception that Mr Burt had not adequately cleaned the boat after a recent trip. Mr Burt said Mr Nilsen indicated whilst standing over him and in a loud voice: "I don't want you back on the boat mate". Mr Burt indicated that later on the same day a heated discussion occurred with Mr Nilsen in which Mr Nilsen stood over him and yelled at him indicating if Mr Burt further pursued the issue of remuneration he felt he was owed or discussed this with others around the wharf, then he would "do" him in". Jess Burt recalled Mr Burt being "very shaken" on the day he returned home from the meeting with Mr Nilsen.

[19] Mr Burt related a further incident on 1 July 2019 saying that when Mr Nilsen approached him in the presence of his new employer Mr Nilsen threatened to kill him.

[20] Mr Burt says he considered himself dismissed and he removed his personal belongings from the boat. He subsequently tried unsuccessfully to get Mr Nilsen to attend mediation.

[21] Mr Burt says he sought advice from MBIE's employment services as to how he could recover remuneration he thought that he was owed then without representation he filed an application with the Authority on 25 August 2019 using an online template. The initial application only sought recovery of what he believed were unpaid wages.

[22] Mr Nilsen's statement in reply filed on 14 October 2019 contested the disputed remuneration and claimed that Mr Burt had voluntarily resigned "and there were no contracts" (it was not clear in the response what Mr Nilsen believed the nature of the relationship to be). Mr Nilsen acknowledged that the mediation service had contacted him but he said he was "fishing at the time and so could not partake".

[23] The parties were then directed to mediation by the Authority on 17 October 2019. This mediation did not take place.

[24] Mr Burt then says he sought legal advice in December 2019 and counsel raised personal grievance claims with Mr Nilsen by way of a letter of 5 February 2020 that after reiterating the claim for unpaid wages raised new claims of unjustified disadvantage and unjustified dismissal summarising the allegations as:

Refusing to pay Mr Burt's wages, threatening him and dismissing him were unjustified actions which have significantly detrimentally affected Mr Burt and his young family who have had to relocate as a result.

[25] Mr Nilsen responded to counsel by email of 14 April 2020 claiming that he was not Mr Burt's employer, that he had been a "co-worker of Mr Burt" and that "our employer was my father Olaf Nilsen. Employees can only bring personal grievances against their employer, not third parties or fellow employees".

[26] Mr Nilsen indicated that "Even if I were his employer (which I never have been) I would not agree to Mr Burt raising the grievance out of time".

[27] Mr Nilsen concluded the email after contesting remuneration matters and claiming Mr Burt had engaged in serious misconduct (alleged theft of safety gear) that would have justified a summary dismissal if he had not quit, with “.... I will not be attending mediation with your client on this personal grievance and I trust this has now been resolved”.

[28] Counsel then on Mr Burt’s behalf filed an amended statement of problem with the Authority on 6 August 2020 detailing the various remuneration grievances and in respect of the unjustified disadvantage and unjustified dismissal claims sought a determination pursuant to s 115 “that the applicant can raise personal grievance claims out of time”.

[29] Mr Nilsen did not file a statement in reply nor engage further until after the investigation meeting.

Was Mr Burt an employee and if so – who was his employer?

[30] Mr Burt has indicated that prior to working with Mr Nilsen, he had thirty years’ experience as a deckhand in the fishing industry and had been employed at times as a contractor on a shared catch basis and as an employee. Mr Burt, although having no registered company or being GST registered, had also worked as a contract trapper and claimed to be well aware of the difference between being an employee or a contractor.

[31] To determine whether Mr Burt is an employee or a contractor Section 6 of the Act requires that the Authority examine the true nature of the relationship and assess all relevant factors including applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited*² . If I find Mr Burt is not an employee then I have no jurisdiction to determine his wage arrears claim or personal grievance claims.

[32] The following matters from *Bryson* require my attention:

- (a) The intention of the parties.
- (b) Whether there was any written documentation setting out the terms of the relationship or ‘label’ attached to such.
- (c) An examination of how the relationship operated in context including looking at issues of control and integration.

² *Bryson v Three Foot Six Limited* [2005] NZSC 34 (SC).

(d) Whether overall, it could be reasonably established that Mr Burt was operating a business on his own account; and:

(e) whether there is overwhelming evidence of any industry practice defining contractual relationships.

[33] Normally applying the above factors would involve carefully assessing the evidence of both parties and weighing up various considerations as none are singly determinative.

[34] In this case, because of Mr Nilsen's limited engagement, this will be on an analysis of the evidence that I had placed before the Authority at the investigation meeting. Mr Burt was ably represented by counsel and he provided sufficient information on request during the investigation process. The test applied in context and my findings are discussed below.

Intention of the parties

[35] In the absence of a written agreement determining the intentions of the parties at the commencement of the relationship is problematic. What I have is Mr Burt's evidence on the formation of his relationship with Mr Nilsen that is as follows.

[36] Mr Burt and Mr Nilsen were well known to each other prior to the period in dispute. Mr Burt said that they had been co-workers several times over a seven year period on other fishing vessels and that they both lived in the same community and at times came across each other socially in various settings.

[37] Mr Burt says Mr Nilsen telephoned him in February 2019 as he was looking for a deck hand to go fishing with him on a boat he owned and skippered (FV Motuara). Mr Burt says Mr Nilsen said that he had sacked his previous deckhand after he had crashed the boat and was looking for someone with experience. Mr Burt recalls Mr Nilsen as describing the engagement as a 'job' and asking him if he was available once the boat was repaired.

[38] Mr Burt recalls the details of the engagement were then discussed at Mr Nilsen's home and they agreed to remuneration being on the basis of a share of the catch profit after it was sold to a third party - being 20% for cod and 15% for crayfish. Mr Burt said he had knowledge that this was generally the going rate for a catch share in the Bluff fishing community.

[39] Nothing was put in writing. In his statement in reply to the Authority however, Mr Nilsen mentioned 15% as payment for crays but disputed this had been agreed suggesting that it had been reduced to 10% “after seeing his poor performance of not cleaning boat once in 5 months”.

[40] Mr Burt said that the position agreed was he would work as a sole crew member on the boat under Mr Nilsen’s direction. Hours and days at sea were weather dependent which entailed Mr Burt being available to work ‘as and when needed’ on any day. When at sea, it was agreed working hours would be 5 am until around 6 pm with meals provided and sleeping over on the boat. Working days at sea depended upon catch with cray fishing usually being seven to eight days at sea and cod fishing four to five days.

[41] I find that on balance with the scant information provided, that Mr Burt had no intention of entering into a contracting relationship and viewed the engagements as intermittent employment.

[42] On the limited information provided by Mr Nilsen, it was not clear what form of relationship he had contemplated. Mr Nilsen makes references to not being an ‘employer’ and suggests he was a “co-worker” of Mr Burt’s and his expectation that Mr Burt would pay his ACC levy and personal tax on the catch share proceeds.

[43] However, no invoicing was requested of Mr Burt and after requesting “pay slips” Mr Burt was provided with a weekly pay summary document headed “Employment Details” with tax deducted and his IRD number being recorded and tax code “M” being noted (a general tax code for employees). The summary, also records accumulated holiday pay and sick leave entitlement and under the heading ‘Tax’ uses the term ‘PAYE’.

[44] The pay slip was provided by Mr Nilsen’s father’s accountant who Mr Burt understood was being used to calculate and administer his wages. The payslip has a notation “PAID BY Conchita Trading Trust”.

[45] Mr Burt provided his bank statements and of the payments made to him during the period of working with Mr Nilsen five payments have been made under payer details “Ob Nilsen – O Nilsen Wages Sanford” one was under “Dowling.Domin – Fishing Pay Druce Dana” and another under “Dowling.Domin – D.Nilsen Fishing Wages”.

[46] Mr Burt provided text exchanges with Druce of 20 May 2019 where Mr Nilsen asks him for his IRD number and says you “could ask dad for some cod pay slips”.

[47] Mr Nilsen’s counsel, in submissions without providing any documentary evidence, asserted that Mr Burt worked for Mr Nilsen’s father’s “trust” the Conchita Trading Trust. The Companies Office records show there is a company registered as ‘Conchita Trustees Limited’ showing two directors: Olaf and Jessica Nilsen. At the time of the dispute Druce Nilsen does not appear on the companies register as a director of any company. I conclude that Conchita Trustees Limited is operating as a ‘trading trust’.

[48] A search of the maritime register and contact with Maritime NZ disclosed that the FV Motuara was owned by an unrelated third party and leased to Olaf Nilsen.

[49] Mr Burt provided a sequential text exchange between himself and Olaf Nilsen dated 28 September 2020. It said:

Were you my employer while i was working on the motuara

I was just doing the books for Druce. I see another landing 18/03 Nett to you \$1037.26.

[50] I conclude from the limited information that Mr Nilsen at times used his father (who is based in Queenstown) solely to administer Mr Burt’s remuneration and the manner of the payments is indicative of an employment relationship.

[51] All indicators point to Mr Nilsen not intending to enter a contracting relationship.

The control test

[52] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.³

[53] The timing of each engagement and work allocation was under the control of Mr Nilsen (as skipper of a single crew member boat), he simply directed Mr Burt to undertake the work as and when needed. Mr Burt had no control over when he undertook the work. During each fishing trip it included the necessity to stay away from home overnight and Mr Burt could not engage in alternative work.

³ Gordon Anderson and John Hughes, *Employment Law in New Zealand* (1st ed, Lexis Nexis, Wellington, 2014) at 121: *Humberson v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

[54] Practically, Mr Burt did not have the choice to turn work down and had committed to being available for weather dependent fishing ventures. It is thus reasonable to conclude that Mr Burt accepted work when available and the days and hours and location of work were dictated by Mr Nilsen.

[55] I find Mr Nilsen exercised complete control over the timing and allocation of work and where it was to be performed.

The Integration Test

[56] This test requires a consideration of whether Mr Burt could be viewed as an integral part of Mr Nilsen's business. It is relatively easy to determine this test as without a deckhand Mr Nilsen could not operate his fishing vessel at the capacity he desired. That aside, Mr Burt did not own the boat or have a share in its ownership, he carried out all of the work on the boat using the fishing equipment belonging to Mr Nilsen and he had no flexibility to do otherwise and some mandatory safety equipment was provided by Mr Nilsen.

[57] I find Mr Burt was integral to Mr Nilsen's business.

Fundamental test

[58] Basically the application of this test is a consideration of whether Mr Burt could reasonably be considered to be in business on his own account or performing services on his own account and thus assuming an element of risk in his engagement with Mr Nilsen including profit and loss from any joint venture.

[59] In this regard I found no evidence that Mr Burt ran a business on his own account – he owned no plant or equipment, beyond his own PPE and wet weather gear, did not contract with other fishing operators and all he had to offer was his industry experience - at best, he was a 'dependent' contractor.

[60] Conceptually share fishing could 'on the surface' be categorised as a joint venture in some situations and the Authority has previously held this to be so but in a markedly dissimilar factual pattern⁴.

⁴ See *Coleman v Harbour Holdings Ltd* [2017] NZERA Christchurch 33.

[61] No minimum wage was agreed and Mr Burt's catch share and the financial return were at risk for both him and Mr Nilsen. However, Mr Nilsen skippered the boat, set the terms and he had a significantly disproportionate share of the profit (and risk) - this was not indicative of a joint venture on an equal footing.

[62] In applying the fundamental test I am also obliged to take into consideration in this context, the objectives set by legislation that at s 3 (a)(ii) of the Act mandates that I acknowledge and address "the inherent inequality of power in employment relationships".

[63] I find that this was not a true 'joint venture' between equal parties and that this type of engagement has the element of a dominant party setting terms.

Taxation Issues

[64] Mr Burt did not invoice Mr Nilsen for his services nor was there any evidence from limited text exchanges that he was asked to do so – Mr Nilsen simply arranged for his father to place money in Mr Burt's bank account based upon his calculation of the catch percentage.

[65] Whilst the 'pay slips' Olaf Nilsen provided to Mr Burt describe the frequency as "weekly" this was not the case and payments for the short period of the relationship were irregular. It was apparent from evidence Mr Burt gave, that the timing of payments was not disputed by him and he understood they would come once Mr Nilsen was paid for his catch by a third party.

[66] It was clear from the pay slips provided that Olaf Nilsen's accountant was deducting PAYE on the amounts paid to Mr Burt but no ACC levy or employer Kiwi saver contributions were made (Mr Burt's Kiwi saver contribution was accounted for).

[67] Mr Burt provided his IR3 tax return that showed overall income from 8 March 2019 to the investigation date that did not include residual tax to pay and it evidenced PAYE deductions matching the amounts in his pay slips.

[68] I can only conclude that money was received by Mr Burt for the services he undertook that was described by Mr Nilsen's agent (his father) as salary and that this is significantly indicative of an employment relationship.

Industry Practice

[69] I have nothing before me from Mr Nilsen to determine what industry practice is and Mr Burt claimed it was mixed with him having been deemed a contractor or engaged as an employee. What is evident and Mr Burt accepted this based on his knowledge of fishing out of Bluff and Nelson, is that being paid a share of the catch is a commonplace arrangement but may not be universal.

[70] Judge Ford in *Sealord Group Limited v Aaron Pickering* notes that share fishing arrangements are common in the fishing industry and in this decision he detailed the one of two typical arrangements for share fishing, where all the parties share in the risk and reward.⁵ However, in this decision Judge Ford did not deem it necessary to traverse various authorities of what constitutes “all relevant matters” for the purposes of s 6(3) of the Act” as in this case a written employment agreement had been produced rather than a “share-fisher contract”.⁶ Nevertheless, Mr Pickering and a Sealord witness did describe as did Mr Burt here, that contracting may be the dominant practice but not exclusively so.⁷

[71] Whilst the Supreme Court in *Bryson* held that industry practice is a factor, it is not conclusive in establishing the intention of the parties and cannot override other factors such how the relationship operates in practice.⁸ Chief Judge Inglis recently in *Leota v Parcel Express Ltd*, suggested that a cautionary approach is warranted to avoid “the tail wagging the dog” in industries that may have contracting as a predominant practice (here the courier industry) but not for all in a particular industry setting.⁹

[72] I have taken widespread industry practice of contracting into account and Mr Burt’s knowledge of such¹⁰ but only as one factor that is outweighed on the particular facts here that strongly point elsewhere in the relationship.

⁵ *Sealord Group Limited v Aaron Pickering* [2015] NZEmpC at [12].

⁶ At [39].

⁷ At [2] and [14].

⁸ At [40].

⁹ *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [38].

¹⁰ See also discussion in *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63 at [124]

Overall finding contractor or employee?

[73] Section 6 of the Act allows the Authority to determine the true nature of the relationship and in these circumstances for reasons discussed in taking the totality of the relationship and how it was formed into account, I conclude that Mr Burt was an employee and not a contractor and I deem him to be the former.

Who was Mr Burt's employer?

[74] Judge Corkhill in *Wilson v Bruce Wilson Painting and Decorating Limited* summarised applicable principles as:

- (a) The onus of proving the identity of the employer rests on the employee (where the employee is putting that fact in 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 relevant communications between the parties; the question to be asked is who would an independent but knowledgeable observer have said was the employer.
- (e) Failure to notify or make an employee aware of the identity of the employer is not conclusive.¹¹

[75] Mr Burt's initial statement of problem identified Mr Nilsen as his employer and Mr Nilsen's statement in reply of 14 October 2019 did not contest this premise preferring to imply that Mr Burt was a contractor.

[76] The only direct reference contesting Mr Burt's assertion that Mr Nilsen employed him is a response to counsel's personal grievance letter on behalf of Mr Burt of 5 February 2020 where in an email of 14 April 2020, Mr Nilsen states:

Firstly, I am not now and have never been Mr Burt's employer. I am the skipper of the F.V. Motuara, but have only ever been a co-worker of Mr Burt.

During the time we worked on the F.V. Motuara, our employer was my father. Olaf Nilsen. Employees can only bring personal grievances against their employer, not third parties or fellow employees.

¹¹ *Wilson v Bruce Wilson Painting and Decorating Limited* [2014] 11 NZER 712 at [13].

[77] Following the above response, Mr Burt filed an amended statement of problem on 6 August 2020 again identifying Mr Nilsen as his employer and the respondent party, seeking “[A] determination that he was an employee of the Respondent”. Mr Nilsen did not provide a response to the Authority.

Finding

[78] In objectively observing how the relationship was formed, I find Mr Nilsen initiated contact, he described that he had a ‘job’ for Mr Burt and then concluded the terms of remuneration with him personally. From the outset, Mr Burt had no contact with Olaf Nilsen and objectively it seems he was engaged on a personal basis with no corporate entity being alluded to (at no point in any correspondence has Mr Nilsen suggested Mr Burt was engaged by a company).

[79] When Mr Burt commenced working he was at all times exclusively taking directions from Mr Nilsen.

[80] In the absence of any employment agreement identifying a company as the employer and that Olaf Nilsen has asserted in a text to Mr Burt that he only had a limited role in arranging the administration of Mr Burt’s wages as directed by Mr Nilsen, I only had one indication that another entity may be involved and that was the pay slips that named “Conchita Trading Trust”. I however, have no evidence from Mr Nilsen or Olaf Nilsen to establish what this entity is and how it operates other than as an agent for Mr Nilsen to arrange payment of remuneration to Mr Burt.

[81] I objectively on the balance of probabilities, find Mr Burt’s employer to be Mr Nilsen. Mr Nilsen personally engaged Mr Burt and directed his day to day employment, at times paid him directly and from the limited information available he directed Olaf Nilsen as his payroll administrator.

[82] This clears the way for Mr Burt to recover arrears off Mr Nilsen as claimed and consideration below of his application to have his personal grievances heard ‘out of time’.

The arrears and holiday pay claim

[83] Whilst nothing was documented, Mr Burt asserted that he had been underpaid his share of the fishing catch by \$5,083 gross. The dispute appeared to centre on what percentage of catch was agreed for Crayfish that Mr Burt asserted should be 15% as that was a reasonably common local setting. In Mr Nilsen's statement of reply to the Authority he refers to the percentages and claims that after seeing Mr Burt's poor performance he had dropped the crayfish percentage to 10% this implies that the original agreement was as Mr Burt claims 15%. On this basis I find that Mr Burt is owed the amount he seeks as any variation to what was originally agreed was more likely than not unilateral and an unjustified response to expressed performance concerns.

[84] In addition Mr Burt says he is owed holiday pay for the period 8 March 2019 to 28 May 2019. However, I was provided with copies of pay statements prepared by the Conchita Trading Trust that show Mr Burt was paid holiday pay on a pay as you go basis. I have no further calculated claim but I can allow that holiday pay in the amount of \$406.64 be paid on the outstanding cray catch remuneration of \$5,083. Mr Burt also claimed wages for the two weeks he was 'stood down' awaiting Mr Nilsen's decision on his ongoing employment but no figure to support this claim was provided and it would have to be a percentage of the catch.

The 90 day 'out of time' grievances

[85] Mr Burt is also seeking to establish that he was unjustifiably dismissed and disadvantaged by Mr Nilsen. This claim is more problematic as it was first brought to Mr Nilsen's attention by way of a letter of 5 February 2020 which is over four months beyond when the ninety day period for bringing a grievance to the attention of Mr Nilsen as set out in s 114 of the Act. Mr Burt's counsel did not seek this matter be heard 'out of time' until an amended statement of problem was lodged on 6 August 2020 (an application Mr Nilsen opposes).

[86] In considering whether Mr Burt can pursue his personal grievance out of time, the Authority has to be satisfied that the delay in not raising it was occasioned by exceptional

circumstances and that it the Authority considers “it just to do so”.¹² Section 115 (a) to (d) of the Act and case law guide the Authority’s discretion in this context.

[87] Counsel for Mr Burt in submissions cited s 114(c) as a predominant factor which details an exceptional circumstance to include where the employee’s employment agreement does not include an explanation of the process to resolve employment relationship problems. In Mr Burt’s case he had no employment agreement so this exception is easily met.

[88] I then have to consider whether it is just to allow the grievance to proceed out of time.

[89] On the latter issue, I had no substantive submission from Mr Burt’s counsel other than suggesting:

.... the Respondent will not be disadvantaged by the delay, that the delay was not occasioned by the Applicant and that it is in equity and good conscience to grant leave to raise personal grievance out of time.

[90] Mr Burt in an affidavit filed after the investigation meeting (15 October 2020) clarified his actual date of claimed dismissal was 5 June 2019.

[91] Mr Nilsen’s counsel did not specifically address the fact that no employment agreement was in place in the context of opposing the application to have the matter heard out of time or raise any issues of whether it would be unjust to allow such.

Discussion

[92] Applying what is in effect a two stage test I find Mr Burt could not have been aware of his obligation to raise a personal grievances within 90 days as he had no employment agreement.

[93] Whilst Mr Nilsen may legitimately contend that the absence of an employment agreement was because of his mistaken belief that Mr Burt was a contractor he did not document the terms of this alleged arrangement.

[94] I find that Mr Nilsen has breached an obligation to what I have found was an employment relationship and the first limb of the equation contained s 115(c) is made out as an exceptional circumstance. The Court in *Bryson v Three Foot Six Ltd* adopted a similar

¹² Section 114 (4)(b) Employment Relations Act 2000.

approach in a leading authority that likewise involved an employer unsuccessfully claiming that a contracting arrangement was in place.¹³

[95] The second limb is contained in s 114 (4)(b) that after determining whether an exceptional circumstance exists I must then consider whether it is ‘just’ to allow the grievance to proceed out of time. There is little comprehensive guidance in case law on this latter requirement and it is an intensely factual question but given that the exceptional circumstance granted involves is a breach of a statutory provision¹⁴ such an inquiry should proceed on a principled basis. Some guidance from the Court of Appeal in *Commissioner of Police v Creedy* is that an approach to the test “must be in accord with the general scheme and purpose of the Act” and “consistency of approach” is important.¹⁵

[96] On the latter, under s 3 of the Act a factor I must take into account is to recognise the inherent inequality of power in the employment relationship that in this context I have already found that there was a dominant party (the employer) setting the terms of engagement.

[97] I accept there has been considerable delay since Mr Burt was allegedly dismissed but I have no evidence that Mr Nilsen’s circumstances have changed in the interim and the delay was not caused by Mr Burt apart from a significant gap between raising his personal grievance via counsel for unjustified dismissal and counsel seeking to have the matter heard out of time by a formal application to the Authority (the amended statement of problem). Conceptually though such delays between when a personal grievance letter identifies a matter and an application to the Authority are not unusual and given I have no evidence that this will significantly prejudice Mr Nilsen I will discount this factor.

[98] At the investigation meeting I also heard evidence from Mr Burt that suggested his personal grievance for unjustified dismissal was arguable and Mr Nilsen’s alleged actions require some scrutiny.

¹³ *Bryson v Three Foot Six Ltd* [2006] ERNZ 781 at [38] – [55].

¹⁴ Section 65(2)(a)(vi) Employment Relations Act 2000 requires that an individual employment agreement “must include” – “a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised”.

¹⁵ *Commissioner of Police v Creedy* [2007] ERNZ 505 at [22].

Finding

[99] I find that in the circumstances that Mr Burt's personal grievances raised in the amended statement of claim can proceed out of time and in accord with s 114 (5) of the Act the parties are directed to mediation.

Summary

Arrears and holiday pay

[100] **I find Mr Burt has established an arrear of wages claim, in the amount of \$5,083 (gross) and \$406.64 (gross) outstanding holiday pay on that amount. I order Druce Nilsen to pay these amounts.**

Leave to raise personal grievance out of time

[101] **I find that Mr Burt has made out grounds for his personal grievance against Druce Nilsen to be heard out of time and pursuant to s 114 (5) of the Act I direct the parties to mediation to seek to mutually resolve the grievance.**

Costs

[102] Costs are at the discretion of the Authority but here Mr Burt established his predominant claim and has obtained compensatory remedies.

[103] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[104] If no agreement is achieved, Mr Burt has fourteen days following the date of this determination to make a written submission on costs and Mr Nilsen has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority