

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 430  
3095012

BETWEEN            MICHAEL CHOI  
                                 Applicant

AND                    KAIPARA SCAFFOLDING  
                                 LIMITED  
                                 Respondent

Member of Authority:    Anna Fitzgibbon

Representatives:        May Moncur, counsel for the Applicant  
                                 No appearance for the Respondent

Investigation Meeting:    16 October 2020 at Auckland

Written Record Issued:    19 October 2020

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**ORAL DETERMINATION OF THE AUTHORITY**

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- A. Mr Michael Choi was unjustifiably dismissed by Kaipara Scaffolding Limited (Kaipara Scaffolding). In order to settle Mr Choi’s employment relationship problem, Kaipara Scaffolding is ordered to pay Mr Choi the following amounts within 21 days of the date of this determination:**
- a. Lost remuneration in the sum of \$5,952.75 net**
  - b. Holiday pay in the sum of \$102.40 net**
  - c. Compensation in the sum of \$8,500 under s 123 of the Act**
- B. Costs in the sum of \$2,250 together with the filing fee of \$71.56 are to be paid by Kaipara Scaffolding to Mr Choi within 21 days of the date of this determination.**

**Non-Appearance of the respondent**

[1] The respondent company, Kaipara Scaffolding Limited (Kaipara Scaffolding) did not make an appearance at the Authority's investigation meeting. I am satisfied that Kaipara was aware of the investigation meeting for the following reasons:

- (a) On 15 September 2020, the Authority informed the parties that the investigation meeting would be proceeding on 15 and 16 October 2020. The parties were asked to inform the Authority of any objection to those dates by 16 September 2020. No objection was received.
- (b) On 15 September 2020, Mr Marcus Te Arahi Kapea, the Director of Kaipara Scaffolding emailed the Authority and informed it that he could attend the investigation meeting on the dates proposed.
- (c) An investigation meeting was scheduled for 16 October 2020, and a Notice of Investigation meeting was sent to both parties on the same date.
- (d) Following a reminder from the Authority on 14 October 2020 of the investigation meeting on 16 October 2020, Mr Kapea informed the Authority he would not be attending.
- (e) The Authority issued a direction to Kaipara Scaffolding on 14 October 2020 in which it set out the background facts and informed it that there would be no adjournment of the investigation meeting and it would proceed on Friday, 16 October 2020 at Auckland. The direction also made clear that if there was no appearance by Kaipara Scaffolding the investigation meeting would proceed in its absence. A response was received by the Authority on 14 October 2020 at 3:26pm by Mr Kapea saying, "Thanks for that, we will see you then."

There was no appearance by Kaipara Scaffolding at the Authority's investigation meeting. An Authority officer made contact with Mr Kapea who confirmed that he would not be making an appearance on behalf of Kaipara Scaffolding.

I am satisfied that Mr Kapea chose not to attend the investigation meeting and chose for Kaipara Scaffolding not to participate in the investigation meeting. The Authority's investigation meeting proceeded.

### **Employment Relationship Problem**

[2] Mr Choi says that he was unjustifiably dismissed by Kaipara Scaffolding after complaining to Mr Kapea that he was being mistreated by a fellow colleague, Mr Kapea's cousin, Mr Herewini Hemana. Mr Choi says he suffered hurt and humiliation as a result of the dismissal, which he says was unjustified. Mr Choi seeks reimbursement of lost income, together with compensation as a result of his personal grievance claim. There was no appearance by Kaipara Scaffolding. However, short witness statements were filed by Mr Kapea and by Mr Hemana denying that there was a dismissal.

### **Investigation Meeting**

[3] Mr Choi filed a witness statement and swore on oath that his evidence was true and correct. Mr Kapea and Mr Hemana both filed short witness statements on behalf of Kaipara Scaffolding. However, neither attended the Authority's investigation meeting to swear or affirm that their evidence was true and correct. Therefore, where there has been a dispute in the information that has been provided to the Authority by the parties, I prefer the evidence of Mr Choi.

[4] As permitted under s 174E of the Employment Relations Act (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out along with the Authority's conclusions.

### **The Issue**

[5] The issue for the Authority to determine is whether Mr Choi was unjustifiably dismissed by Kaipara Scaffolding and if he was unjustifiably dismissed, what remedies are available to him.

### **Background**

[6] Kaipara Scaffolding operates a scaffolding company north of Auckland. Mr Kapea is the sole director and shareholder of Kaipara Scaffolding.

[7] Mr Choi is experienced in construction work. Prior to starting work at Kaipara Scaffolding, Mr Choi was on the unemployment benefit. Mr Choi was referred by Angie at Work and Income New Zealand, Orewa (WINZ) to a job vacancy at Kaipara Scaffolding. The position that Kaipara Scaffolding was seeking to fill was that of a scaffolding labourer. Mr Choi was given Mr Kapea's mobile phone number and requested by Angie to make contact with him. Mr Choi rang Mr Kapea and was requested by Mr Kapea to go into the scaffold yard and meet with him.

[8] On 19 July 2019, Mr Choi met with Mr Kapea at Kaipara Scaffolding's yard. They discussed the role. Mr Choi was informed by Mr Kapea that he would be paid \$20 an hour. Mr Choi started work immediately and after approximately three to four days, was asked by Mr Kapea to provide him with his IRD number, tax code and physical address. Mr Choi did so.

[9] In the information provided by Kaipara Scaffolding to the Authority, it claims Mr Choi was a contractor to it. Mr Choi says there was never a discussion about him contracting to Kaipara Scaffolding. He understood that he was an employee.

[10] I do not accept that Mr Choi was a contractor to Kaipara Scaffolding. This is for the following reasons:

- (a) The pay slips provided to the Authority by Kaipara Scaffolding show that PAYE was deducted from Mr Choi's wages. The bank account statements provided to the Authority by Mr Choi show that he was paid wages less PAYE.
- (b) Mr Choi was instructed by Mr Kapea in his scaffolding work.
- (c) Mr Choi has provided the Authority with a screenshot of the WINZ website which shows that despite Mr Kapea's statement that Kaipara Scaffolding only hires contractors, it received a wage subsidy this year for approximately 14 employees. These factors all support Mr Choi's understanding that he was an employee of Kaipara Scaffolding.

### **Unjustified Dismissal**

[11] Mr Choi says that shortly after starting his employment, he was "given a hard time" by Mr Kapea's cousin, Mr Hemana. Mr Hemana is in his 20s and would think that it was funny to push and slap Mr Choi while he was working. Mr Choi says that Mr Hemana became obsessed with Mr Choi's new smartphone and continuously pestered him to look at it and play on it. Mr Choi was not happy about this but in order not to cause any issues, let Mr Hemana have the phone from time to time. However, on 25 July 2019, Mr Hemana took Mr Choi's phone and refused to return it. Mr Choi says he asked repeatedly for the phone to be returned. It was an expensive phone and he wanted it back. Mr Hemana laughed and promised to return it but never did. The phone has never been returned to Mr Choi.

[12] Mr Choi firstly raised issues with Mr Kapea about Mr Hemana's actions towards him after approximately a week of his employment. Mr Choi told Mr Kapea that he was not happy about the way in which he was being treated by Mr Hemana. Mr Choi was told by Mr Kapea

not to be disruptive. Mr Choi raised issues about Mr Hemana again with Mr Kapea on 1 August 2019. He also told Mr Kapea that Mr Hemana had taken his phone and had not returned it.

### **Date of dismissal - 1 August 2019**

[13] Mr Choi says he approached Mr Kapea early on 1 August 2019 at the yard to talk to him again about Mr Hemana and ask for his phone to be returned. Mr Choi says that Mr Kapea became angry and told him to “fuck off and not come back”. Mr Choi says this was humiliating and he was shocked. Mr Choi attempted to resolve the matter after his dismissal but was unsuccessful.

[14] I consider that Mr Choi’s dismissal was unjustified. To be told to “fuck off and not come back” after raising claims with his employer of mistreatment by a colleague, and asking for his phone which had been taken to be returned to him, were not the actions of a fair and reasonable employer. I am satisfied that Mr Choi was unjustifiably dismissed.

### **Remedies**

[15] Mr Choi was in a very difficult position when he was dismissed. Mr Choi does not have close family or friends in New Zealand. Following his dismissal he went to live in the James Liston boarding house for homeless in Herne Bay, Auckland. He stayed there for two months.

### **Loss of remuneration**

[16] Mr Choi has lost income in the 3 month period from 2 August 2019 to 1 November 2019, following his dismissal. The total loss of remuneration is \$8,320 net. This amount is based on a calculation of 13 weeks loss of remuneration of \$640 net a week which Mr Choi had been earning at Kaipara Scaffolding. During this 13 week period, Mr Choi received income from WINZ of \$2,367.25 net. After deducting the income received from WINZ, Mr Choi’s loss of remuneration amounts to \$5,952.75 net.

[17] I order Kaipara Scaffolding to pay Mr Choi the sum of \$5,952.75 net in lost remuneration within 21 days of the date of this determination.

### **Holiday pay**

[18] Mr Choi was not paid holiday pay on his income. Mr Choi received \$1,280 net for the period of his employment by Kaipara Scaffolding. 8% of that figure amounts to \$102.40 net.

[19] I order Kaipara Scaffolding to pay Mr Choi holiday pay in the sum of \$102.40 net within 21 days of the date of this determination.

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

[20] Mr Choi seeks compensation for hurt and humiliation suffered by him as a result of his unjustified dismissal. I am satisfied that Mr Choi was hurt and humiliated by his as a result of his unjustified dismissal.

[21] I order Kaipara Scaffolding to pay Mr Choi the sum of \$8,500 under s 123 of the Act within 21 days of the date of this determination.

### **Costs**

[22] Mr Choi was represented. Accordingly, he is entitled to costs in accordance with the Authority's notional daily tariff of \$4,500 for the first day of an investigation meeting. Mr Choi's matter took half a day in the Authority. I order Kaipara Scaffolding to pay Mr Choi as the successful party the sum of \$2,250 in costs, within 21 days of this determination.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

### **Certificate of Determination**

I direct that pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Mr Michael Choi be provided with a certificate of determination, sealed with the seal of the Authority, recording respectively that Kaipara Scaffolding Limited is ordered within 21 days of this determination to pay Mr Michael Choi the total sum of \$14,555.15 net owing under this determination together with costs of \$2,250 and the Authority's filing fee of \$71.56.