

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 411
3081492

BETWEEN MICHAEL COOPER
Applicant

AND OWHIRO BUILDERS LIMITED
Respondent

[2022] NZERA 411
3108672

BETWEEN OWHIRO BUILDERS LIMITED
Applicant

AND MICHAEL COOPER
First Respondent

AND HANGUY CHHUN
Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: John Dean, counsel for Mr Cooper and Ms Chhun
Charles McGuinness, counsel Owhiro Builders Limited

Investigation Meeting: 11 May 2021 at Wellington

Submissions and Information Received: Up to and including 18 June 2021

Date of Determination: 24 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michael Cooper claims he was employed by Owhiro Builders Limited (OBL) from March 2018 until his employment ended on 23 October 2019. On 20 July 2018, he signed a training agreement as an apprentice because he wished to become a qualified builder. He

claims therefore, that until his employment ended on 23 October 2019, he was at all times an employee of OBL.

[2] On 23 October 2019, Mr Cooper says he was advised by OBL that there was no work for him and that he was a labour only contractor whose employment could be terminated at will. He says OBL then terminated his employment. He says this constitutes an unjustified dismissal and claims:

- (a) Lost wages;
- (b) Compensation in terms of s 123(1)(c)(i) of the Employment Relations Act 2000 of \$7,000.00.
- (c) Costs.

[3] OBL defends the matter on the basis Mr Cooper was never an employee. Further, as it is clear from the above intituling, OBL has counterclaimed against Mr Cooper and Hanguy Chhun saying that although it denies Mr Cooper was ever an employee, if indeed it is wrong in that regard, then Mr Cooper breached his implied contractual obligations causing OBL damages and loss as a result of:

- (a) Breaches of a duty of fidelity;
- (b) Breaches of the duty of confidentiality;
- (c) The obligation of good faith (implied and statutory); and
- (d) The obligation not to act against the trust and confidence in all employment relationships. OBL also seeks a penalty.

[4] It says Ms Chhun incited, instigated, aided and/or abetted Mr Cooper's breaches of his employment obligations. It seeks a penalty against Ms Chhun.

The Authority's investigation

[5] The Authority heard from four witnesses, namely Mr Cooper, Ms Chhun, and on behalf of OBL, from Mark Forsyth and Cynthia Pfeffer. Ms Pfeffer was employed as OBL's office manager and bookkeeper following Ms Chhun's departure from the Company. Mr Forsyth is the director of OBL.

[6] As permitted by s 174E of the Employment Relations Act (the Act) this determination has stated findings for fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the evidence and submissions received.

[7] This determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

[8] All the witnesses gave their evidence on oath and were questioned by the Authority and by counsel.

[9] The issues identified requiring determination were as follows:

- (i) Was Mr Cooper an employee or a contractor?
- (ii) If Mr Cooper was an employee, was he unjustifiably dismissed and what remedies should flow?
- (iii) If he was an employee, did Mr Cooper breach his employment agreement? If so, how did Ms Chhun aid and abet in the breaches?
- (iv) If there were breaches, what losses did OBL suffer?

Background

[10] Mr Cooper started employment with OBL in March 2018. It was common ground that Mr Cooper had been a qualified plasterer for a number of years. He says, however, he wanted a change of direction and wished to qualify as a builder. It was also common ground that Mr Cooper was to be an apprentice and on 20 July 2018 he signed the “BCITO Training Agreement”.

[11] The agreement was a templated form of agreement prepared it seems on behalf of the Building and Construction Industry Training Organisation. It is clear from the face of it, it was an apprenticeship agreement and that was in keeping with Mr Cooper’s evidence, namely that he wished towards becoming a qualified builder to add to his other trade qualification as a plasterer. Mr Forsyth and Mr Cooper completed the document and signed it.

[12] There are important matters to note regarding the training agreement:

- (i) The agreement provides (page 4 of the bundle of documents (BOD)):
This document forms part of the employment agreement between the employer and the apprentice/trainee programme.
- (ii) The apprentice/trainee is identified as Mr Cooper.
- (iii) Alongside the statement “*employment arrangement relating to this training agreement*”, the wage box is ticked. An adjacent box titled “*Labour only*” was not ticked.
- (iv) On page 5 of the BOD there are further provisions referring to the agreement forming part of the employment agreement between the parties. Further, it is inherent in the apprenticeship that work tasks are tightly controlled and supervised. Tasks must be ticked off. An apprentice is not free to go off and work on any other building jobs. The apprentice is required to complete a specified number of hours to carry out the apprenticeship.

[13] It follows therefore that the agreement between the parties is clear. Mr Cooper was apprenticed to Owhiro Builders Limited. The nature of his agreement with Owhiro Builders Limited was one of employer and employee.

[14] OBL’s evidence in respect of Mr Cooper’s status was straightforward. It acknowledged the references contained in the agreement signalled an employment relationship, but for OBL, Mr Forsyth said he did not read the document carefully enough. He said that Mr Cooper did not act as an employee. He said he came and went more or less as he pleased. He said Mr Cooper kept a record of hours for which he then submitted invoices for and that was the basis on which he was paid.

[15] Mr Forsyth said that there had never been an intention to enter into an employment relationship. He acknowledged that the arrangement ended more or less as Mr Cooper had said although he said he never said there would be no further work for him. He acknowledged that the relationship did not change during the course of Mr Cooper’s time with OBL. In other words, from Mr Forsyth’s perspective, Mr Cooper started work as a contractor and ended as a contractor.

The evidence

[16] The training agreement Mr Cooper signed describes him as an employee. It is in the very nature of an apprenticeship agreement, that the employer would exercise control over Mr Cooper to such a degree, it could never be said he was an independent contractor. Accordingly, unless the parties changed the relationship, it stands to reason that Mr Cooper continued on as an employee until his employment was terminated at the initiation of the employer. It is equally clear that if Mr Cooper is an employee, then there is no defence to the dismissal. In saying that, I have not lost sight of OBL's counterclaim against Mr Cooper and Ms Chhun which will be dealt with separately later in this determination.

Evidence of Mark Forsyth

[17] Mr Forsyth is the sole director of OBL. He is also the CEO of Mōkaoi Kāinga Community Gardens which is owned by the Mōkaoi Kāinga Trust. The Trust is a charitable entity that works primarily with Māori men to rehabilitate them into the community and restore their self-esteem.

[18] Mr Forsyth had a colleague, Justin Rankin, who he described as a third-generation builder. In early 2018 Mr Rankin said he knew someone who had been a plasterer contractor for some 20 years but was keen to get into building. Mr Forsyth said that it was always his idea that OBL could take on apprentices. He gave evidence that he thought Mr Cooper would be a fantastic test case as an apprentice. He recalled sitting down with Mr Kymbrekos from BCITO. He says he asked a number of questions that day and one of them was whether it was okay to take Mr Cooper on as a contractor as opposed to an employee. He says that when he was told that was fine, he signed the apprenticeship agreement. He acknowledged he did not read it.

[19] He said that Mr Cooper's work was entirely self-directed. He said there was always a Master Builder on site to guide him but that he or Justin would allocate tasks round the worksite.

[20] He stated that once or twice a month an inspector would turn up to site, look at what Mr Cooper had done, check that the work was signed off, and then give him a pass for that unit standard.

[21] Mr Forsyth referred to other evidence that he says was indicative of an independent contractor arrangement, including the fact that he said Mr Cooper owned a significant toolkit. Further, he noted that Mr Cooper was paid on invoices.

Evidence of Cynthia Pfeffer

[22] Ms Pfeffer commenced employment after Mr Cooper had finished working for OBL. Her evidence regarding Mr Cooper is naturally after the event and she had no first-hand knowledge as to the relationship between Mr Cooper and OBL. However, she says in her evidence that she concluded that it was Ms Chhun who created the bills in Xero herself without necessarily having an invoice from Mr Cooper. She says “*Mr Cooper’s invoices were drawn up by Hanguy in his name. Hanguy then charged OBL for the time she took doing this. On the invoices that she submitted to OBL for payment she frequently changed a line item “weekly invoicing for ... Micky Cooper.”*”

Evidence of Michael Cooper

[23] Mr Cooper’s evidence was that he always understood he was an employee of OBL. He said that the training agreement required that he be under the control of OBL. He says he understood that he was signing a training agreement under the auspices of the Building and Construction Industry training organisation and that he would be an employee.

[24] Mr Cooper said he didn’t really turn his mind to how he was paid. He said he was never asked to submit a quote or estimate for any type of work but simply recorded his work hours in his work diary which he then sent to Ms Chhun. He confirmed that there was an occasion where Mr Forsyth agreed he would be paid separately for plastering work. This was on the basis that he was a qualified plasterer and could be charged out as a subcontractor in respect of plastering work only.

Evidence of Ms Chhun

[25] Ms Chhun gave evidence that Mr Cooper was an employee, although it was clear that this did not appear to be something to which she had paid a lot of attention. Her evidence was ambivalent as regards Mr Cooper’s status. She confirmed she prepared invoices but said this was simply to record hours and work out pay. She says she did not consider to any great degree whether Mr Cooper was an employee or a contractor.

Mr Cooper's status – analysis and conclusion

[26] I am satisfied on the evidence that Mr Cooper was an employee. He signed an apprenticeship agreement which showed a clear intent that he be an employee. Indeed, Mr Cooper could not have entered into an apprenticeship without it being an employment relationship as the level of control OBL needed to exert over him would in normal circumstances preclude an independent relationship. The fact that Mr Forsyth does not appear to have turned his mind to the differences between an independent contractor arrangement and employment, insofar as it related to the apprenticeship agreement, coupled with the fact he did not read the agreement, rests with him. Further, the evidence of both Mr Cooper and Mr Forsyth was that there was no change to the relationship during the time that Mr Cooper worked for OBL.

Counterclaim

[27] OBL has claimed that if the Authority finds Mr Cooper was an employee (which it denies) then Mr Cooper has breached his contractual obligations causing OBL damages and loss. Specifically, OBL states that Mr Cooper has breached:

- (a) His duty of fidelity;
- (b) His duty of confidentiality;
- (c) The obligation of good faith (implied and statutory); and
- (d) The obligation not to act against the trust and confidence which is in all employment relationships.

[28] The basis of the claim is the allegation that Mr Cooper was in a relationship with OBL's bookkeeper, Ms Chhun, the second respondent. OBL says Ms Chhun has:

- (i) Wrongfully taken OBL's confidential financial information;
- (ii) Accessed the Gmail account belonging to OBL and diverted and/or deleted emails from that account;
- (iii) Deleted or diverted emails relating to Mr Cooper and his contract for services, including emails attaching his invoices to OBL;
- (iv) Acted with Mr Cooper against OBL's interests and in breach of Mr Cooper's obligations;

- (v) Wrongfully took and misused OBL's confidential information and Gmail account to support Mr Cooper in his attempts to sue OBL.

[29] In terms of loss, OBL states these actions:

- (a) Caused losses which were to be quantified at the investigation meeting;
- (b) Caused the loss of business opportunity and reputational damage.

[30] Both Mr Cooper and Ms Chhun denied the allegations. Other than declarations, OBL seeks damages and penalties against Mr Cooper. It seeks a finding that Ms Chhun has incited, instigated, aided and/or abetted Mr Cooper's breaches of his employment agreement. OBL asks the Authority to impose a penalty on Ms Chhun.

Counterclaim analysis and conclusion

[31] For OBL to succeed against Ms Chhun as second respondent it faces two obstacles. First, it must show on the balance of probabilities that Mr Cooper was guilty of the breaches of his employment agreement OBL says he was. If OBL does that, then it must prove that Ms Chhun aided and abetted Mr Cooper in those breaches.

[32] It seems the claims against Mr Cooper are that he presented inaccurate invoices, claiming a higher rate per hour than was agreed to. The problem with that allegation is that simply there is no evidence proving Mr Cooper breached his employment agreement in that regard. Mr Forsyth points to invoices including rates of \$40 per hour, \$45 per hour, \$50 per hour and \$55 per hour. He says he never would have agreed to such rates. He says (para 32 of his evidence): *"I do recall noticing payments to Micky at the \$45 and \$55 per hour rates and I told Hanguy that these rates were not agreed that Micky's maximum rate was \$35 an hour, that she must not pay him over \$35 an hour under any circumstances and that she should recover any overpayments from Micky."*

[33] This is not evidence that Mr Cooper was in breach of his agreement. He says that the agreement was that he would be paid \$35 an hour for his work as an apprentice. He says that when he was asked to do plastering work, OBL would engage him as a subcontractor, and he would charge a different rate of \$55 per hour. He said that any variation from his \$35 hour rate for building work, could only mean that it included overtime. Mr Forsyth disputed there was any arrangement for overtime however, Mr Cooper was adamant payment of overtime was agreed to. Again, it seems that Mr Forsyth was perhaps not keeping as much an eye on matters

as he possibly should have. He was certainly aware that the payments were being made but took insufficient steps to stop them. There was no discussion with Mr Cooper who says there was an agreement regarding overtime and that was the way matters seemed to operate. His evidence was supported by that of Ms Chhun. I cannot find that Mr Cooper breached his employment agreement in that regard.

[34] Mr Forsyth says he also received a complaint from clients that other people knew confidential information including what they were spending on kitchen remodelling. They were angry and said that they were concerned this information came from OBL. It was implied the information came from Mr Cooper.

[35] Mr Cooper however denies the allegation and says it was never ever raised with him. In the face of that denial, there is simply no evidence to link Mr Cooper with any breach of confidence.

[36] Mr Forsyth complains that Mr Cooper would know things he should not know. He says he also seemed to know what clients of OBL were being charged, what Mr Forsyth was paying himself and what the turnover and financial position of OBL was. Mr Forsyth says the only way that information could have got to Mr Cooper was through Ms Chhun.

[37] However, these allegations were not put to either Mr Cooper or Ms Chhun at the time and in the face of their denial again, OBL has simply not presented any evidence on which I could conclude there has been a breach of confidence through the release of confidential information. If there had been, it seems that the responsibility for this would rest in any event, with Ms Chhun not Mr Cooper.

[38] The basis for Mr Forsyth's claims is founded on the fact that Ms Chhun and Mr Cooper were in a relationship during Mr Cooper's employment. Both deny that they were a "couple" (despite Ms Chhun being pregnant with Mr Cooper's child) during Mr Cooper's employment. They say the relationship blossomed quickly once he left his employment. Whilst there is evidence both ways as to when the relationship developed, I do not need to make a finding on that. OBL's counterclaim is based on allegations that Mr Cooper breached his employment agreement. It has not proved on the balance of probabilities that this occurred.

[39] Ms Pfeffer has given extensive evidence covering issues with Xero and Ms Chhun. Allegations included Ms Chhun deliberately withholding financial information and as

discussed already, accessing and sharing information with Mr Cooper. However, it is clear to me that unless OBL can show Mr Cooper breached his employment agreement, then its action against Ms Chhun must fail. This is because the allegation is that she aided and abetted “each of the breaches of Mr Cooper’s employment agreement”. I find there is insufficient evidence to find that Mr Cooper breached his employment agreement and accordingly the claim against Ms Chhun must fail.

Remedies

[40] Having established that his employment ended by way of an unjustified dismissal, Mr Cooper is entitled to an assessment of remedies for his personal grievance.

Lost wages

[41] The Authority must, where an employee has a personal grievance and has lost remuneration as a result, order the employer to pay the lessor of a sum equal to lost remuneration, or to three months ordinary time remuneration.¹

[42] Having reviewed the evidence, Mr Cooper did not obtain new work until March 2020. Mr Cooper’s normal pay was \$35 per hour. This would equate to \$1,400.00 per week. Accordingly, I award a sum of \$18,200.00 on account of lost wages.

Humiliation, loss of dignity and injury to feelings

[43] Mr Cooper has given evidence as to the hurt and humiliation, loss of dignity and injury to feelings he has suffered because of his unjustified dismissal. I accept that a dismissal had a very negative effect on him. He has claimed a sum of \$7,000. Under the circumstances that seems reasonable. I award a sum of \$7,000 as compensation pursuant to s 123(1)(c)(i) of the Act.

Contributory conduct

[44] Under s 124 of the Act, the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the employee contributed to the situation giving rise to the personal grievance. In this case, employment came to an end simply because of OBL’s belief it was not in an employment relationship with Mr Cooper. Further, I have found that there is no aspect of Mr Cooper’s behaviour which could constitute

¹ Employment Relations Act 2000 s 123(1)(b) and s 128(2).

blameworthy conduct, or which would constitute a breach of his employment agreement. Accordingly, I find Mr Cooper did not contribute to the situation which led to the termination of his employment.

Orders

[45] Owhiro Builders Limited is ordered to make the following payments to Michael Cooper:

- (a) Lost wages amounting to \$18,200.00 under s 123(1)(b) of the Act; and
- (b) Compensation amounting to \$7,000.00 under s 123(1)(c)(i) of the Act as compensation for the humiliation, loss of dignity, and injury to feelings suffered by Mr Cooper as a result of his unjustified dismissal.

[46] Owhiro Builders Limited's counterclaim against Mr Cooper and Ms Chhun is dismissed.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Cooper and/or Ms Chhun may lodge and should then serve a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum, Owhiro Builders Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timeframe unless prior to leave to do so is sought and granted.

[48] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate (currently \$4,500) unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Geoff O'Sullivan
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-