

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 737  
3208699

BETWEEN JOSHUA GERRARD  
Applicant

AND NEC BOYD HOLDINGS  
LIMITED  
Respondent

Member of Authority: Rowan Anderson

Representatives: Robert Morgan, advocate for the Applicant  
Michael McAleer, advocate for the Respondent

Investigation Meeting: 27 July 2023 in Napier

Submissions and further information received: Up to and including 17 November 2023

Determination: 11 December 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Joshua Gerrard was engaged by NEC Boyd Holdings Limited (NEC) to undertake plastering work. Mr Gerrard says that he commenced work on 20 January 2022 and that he was an employee of NEC. NEC asserts that Mr Gerrard was an independent contractor.

[2] Mr Gerrard says that on 13 June 2022, he received a call from Rueben Boyd, the sole director and shareholder of NEC, during which Mr Boyd raised an allegation that Mr Gerrard's actual hours of work did not align with the hours recorded in timesheets submitted by him. He says that the conversation ended with Mr Boyd telling him that he was 'sacked'.

[3] In a letter dated 16 August 2022, Mr Gerrard gave notice to NEC that he had a personal grievance. Mr Gerrard claims that he was unjustifiably dismissed from his employment and seeks compensation for lost wage and for humiliation, loss of dignity, and injury to feelings. NEC claims that Mr Gerrard was not an employee, was not dismissed from employment, and is not entitled to the remedies sought.

### **Issues**

[4] The issues identified for investigation and determination are:

- (a) Was Mr Gerrard an employee?
- (b) Was Mr Gerrard dismissed, or did he resign from his employment?
- (c) If Mr Gerrard was dismissed, was he unjustifiably dismissed?
- (d) If NEC's actions were not justified what remedies should be awarded, considering:
  - (i) Compensation for humiliation, loss of dignity, and injury to feelings; and/or
  - (ii) lost wages?
- (e) If remedies are awarded to Mr Gerrard, should any reduction be made on account of contribution?
- (f) If Mr Gerrard was an employee, is he due payment in relation to any outstanding wages or entitlements?
- (g) Should either party contribute to the costs of representation (if any) of the other party?

### **The Authority's Investigation**

[5] An investigation meeting was held on 27 July 2023 in Napier. Prior to the investigation meeting, in accordance with directions issued at a case management conference on 3 May 2023, written witness statements were lodged by both parties.

[6] Mr Gerrard and Mr Boyd provided written statements. They both gave evidence at the investigation meeting and answered questions under oath or affirmation.

[7] Following the investigation, I sought further information from the parties arising out of issues at the investigation meeting. This included affording NEC the opportunity to provide further information and/or any response as to entitlements claimed by Mr Gerrard said to flow from any finding that there was an employment relationship.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Was Mr Gerrard and employee or independent contractor?**

[9] Mr Gerrard claims that he was an employee of NEC and that he was provided an individual employment agreement (IEA). It is not contested that Mr Gerrard was provided an IEA. However, it is also not contested that Mr Gerrard never signed the IEA.

[10] Mr Gerrard denies being an independent contractor and submitted that the first time it was mentioned was in the email from Mr Boyd on 13 June 2022, that being after he had requested the reasons for termination of his employment.

[11] In assessing whether a person is an employee, s 6(2) of the Act requires the Authority to determine the real nature of the relationship.<sup>1</sup> Such assessment informs consideration of whether the relevant person is employed do work for hire or reward under a contract of service.<sup>2</sup> All relevant matters must be considered, including those indicating the intention of the parties.<sup>3</sup> However, any statements describing the nature of their relationship are not determinative.<sup>4</sup>

[12] Section 6 of the Act requires that the Authority consider all relevant matters. In *Bryson v Three Foot Six Ltd* Blanchard J commented on what “all relevant matters” includes, and referred also to the relevant common law tests as to the assessment of whether a person is an employee:<sup>5</sup>

“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to

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<sup>1</sup> Employment Relations Act 2000, s 6(2).

<sup>2</sup> Employment Relations Act 2000, s 6(1).

<sup>3</sup> Employment Relations Act 2000, s 6(3)(a).

<sup>4</sup> Employment Relations Act 2000, s 6(3)(b).

<sup>5</sup> *Bryson v Three Foot Six Limited (No 2)* [2005] NZSC 34, at [32], Blanchard J on behalf of the Court.

whether the contracted person has been effectively working on his own account (the fundamental test), which were important determinants of the relationship at common law....

[13] The distinction between an employee and an independent contractor was discussed in *Leota v Parcel Express Limited*<sup>6</sup>, where the court said the following:

An employee works for the employer, and the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[14] As is evidence from the above, the Authority must consider all relevant matters in making a determination as to status. That includes any evidence of common intention, how the relationship operated in practice, as well as matters relevant to the control (whether the alleged employee works under the control of the alleged employer), integration (the extent to which they are integrated into the alleged employer's business), and fundamental tests (whether the alleged employee is carrying out business on their own account).

*What were the agreed arrangements?*

[15] It is uncontroversial that Mr Gerrard had been employed by NEC prior to the period of engagement the subject of the Authority's investigation. However, there was initially some confusion as to the timing of that employment.

[16] Mr Gerrard's evidence is that he worked as an employee in 2021 and that he "...left them for similar reasons to [his] current personal grievance...". Mr Boyd's evidence is that Mr Gerrard worked for NEC as an employee between 29 June 2020 and 18 September 2020. He said that that employment relationship ended after Mr Gerrard did not turn up to a job that he was expected at.

[17] I find that that previous period of employment was between June and September of 2020. Notwithstanding his evidence, this is reflected in records produced by Mr Gerrard as to tax deducted from his wages when working for NEC in 2020, a subject I will return to later.

[18] Mr Boyd said Mr Gerrard contacted him again on 2 November 2021, asking if there were any jobs going. Mr Boyd provided an initial offer on 16 November 2021.

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<sup>6</sup> *Leota v Parcel Express Limited* [2020] NZEmpC 61.

There was then some pause in communications following an initial exchange about possible work, and further contact was made in December 2021 and January 2022. The communications between Mr Gerrard and Mr Boyd, primarily in the form of text messages, were provided to the Authority.

[19] Mr Boyd's evidence was that work was offered to Mr Gerrard on the basis that it would be offered when it was available. Mr Boyd referred to a text message dated 16 November 2021 (without correction):

Morning bro,

Hey I've had a think on you wanting to jump on board.

My offer is this \$36.00 an hour labour only. You turn up and do the work. I have work when the jobs are there. I'm generally busy as you know and can offer what I have. I make no promises but can say I have a constant flow of work.....if your reliable and turn up on time and do honest days work then that is all I ask for bro. Let me know if your keen and we'll organise coming on board.

[20] Mr Boyd agreed with Mr Gerrard in that there was some negotiation of the hourly rate and that it was ultimately agreed that Mr Gerrard would be paid \$37.00 per hour, with the possibility of an increase to \$40.00.

[21] On 9 January 2022, following some communication between Mr Boyd and Mr Gerrard as to when Mr Gerrard might be able to start work, they exchanged the following text messages:

**Mr Gerrard** Sweet bro Im keen. Can you send me a email to confirm job offer so I can get another tool grant like last time haha. And ill be keen to start feb 1<sup>st</sup>. Gives me enough time to find a place and car...

**Mr Boyd** I'll send through an offer this week bro...

[22] On 11 January 2022, Mr Gerrard asked that the offer be sent through so he could start finding accommodation and a car, and in order that he could relocate to Hawkes Bay.

[23] On 12 January 2022, Mr Gerrard provided Mr Boyd his IRD number and date of birth. Mr Boyd then emailed a copy of the IEA to Mr Gerrard on 16 January 2022.

[24] Mr Gerrard said at the investigation meeting that Mr Boyd had wanted him to be a contractor, but that he had wanted to be an employee. Mr Gerrard denied the proposition that the IEA was drafted just for the purposes of Work and Income New

Zealand (WINZ). He also said that there were no discussions between him and Mr Boyd about KiwiSaver or tax prior to his commencing work.

[25] Mr Gerrard evidence is that because he received an IEA he believed that he was an employee. It was submitted for Mr Gerrard that there was an onus on NEC to ensure that there was a signed IEA in place prior to work commencing, and that Mr Gerrard was simply disorganised and that he did not get around to signing the IEA.

[26] Mr Boyd said at the investigation meeting that he and Mr Gerrard spoke about employment, conditions, and independent contracting, and that it was agreed the engagement would be a contracting arrangement. Mr Boyd was unable to provide details of those alleged discussions such as could form any reasonable basis for concluding there was such agreement.

[27] Boyd also said he gave Mr Gerrard the opportunity to be an employee, but he declined that when he didn't sign the IEA. I do not consider Mr Gerrard's failure to sign the IEA as indicating an intention that he would be an independent contractor instead.

[28] There was no written independent contractor agreement drafted, nor any reliable evidence provided as to the purported terms of such an arrangement. I do not accept that simply because Mr Gerrard failed to sign and return a copy of the employment agreement that the relationship was one of independent contracting.

[29] I find that, at commencement, there was a mutual intention that the relationship would be one of employment. Whilst there are other factors evidencing that to be the case, I consider the provision of the IEA and absence of any written terms pertaining to an independent contracting arrangement to be significant.

*How did the relationship work in practice?*

[30] The evidence before the Authority does not necessarily reflect there having been strict compliance with the terms and conditions as provided for in the unsigned IEA that was sent to Mr Gerrard. For example, I conclude that the reality of the arrangement was that Mr Gerrard did not work at least 40 hours per week and that he did not expect to do so.

[31] Mr Boyd would send "workflow" text messages to Mr Boyd and to other workers. Those messages provided details of the relevant work locations, the tasks

required to be completed, and the start time for each job. Mr Boyd also sent Mr Gerrard text messages detailing both the start and finish times of jobs for each week period.

[32] Mr Gerrard is an experienced plasterer and was, by and large, left to carry out the relevant work. There was some evidence, although also some dispute, as to whether Mr Gerrard trained other workers on the job. I don't consider those two matters of significance having regard to the nature of the work.

[33] In terms of payment arrangements, there are two significant matters in my view. Firstly, tax was deducted from Mr Gerrard's payments based on 20 percent withholding tax. Secondly, Mr Gerrard did not receive payment of statutory entitlements of an employee during his engagement.

[34] The payslips record that 'WT' was deducted, presumably a reference to withholding tax. Mr Gerrard provided records from Inland Revenue relating to his previous period of employment with NEC in 2020. Those records show that tax deductions were made from payments received from NEC at the rate of 20 percent and were described as schedular payments. There is no apparent difference in the way tax was deducted as between the period of employment in 2020 and Mr Gerrard's engagement in 2022.

[35] NEC provided Mr Gerrard's remittance advice/payslips to the Authority. The payslips reflect that Mr Gerrard was paid at the hourly rate agreed in the IEA. Although the payslips make reference to leave balances and alternative leave, no accrual or payment is shown. No sick leave, annual holidays, or public holidays are recorded. The payslips indicate that the hours of work each week varied considerably, between 14.5 and 54.5.

[36] Mr Gerrard, as is evident from the text messages provided to the Authority, would inform NEC when he would be absent. Mr Gerrard, in relation to his not being paid during such absences, suggested that he thought he simply had no accrued entitlements given his length of service at the time.

[37] While in practice the hours of work, payments, and entitlements differed from those specified in the IEA that was provided to Mr Gerrard, I do not consider that indicates that the nature of the relationship in practice was not an employment relationship as had been intended prior to the commencement of Mr Gerrard's

engagement. In short, there is nothing to indicate that there was in fact a change in the approach to the relationship. I find that there is an absence of evidence that the working arrangements, setting aside the hours of work, were any different in practice to those contemplated at the time the IEA was provided to Mr Gerrard.

[38] When both the evidence relating to the initiation of the arrangement and the actions of the parties afterwards are considered, I find there was a clear mutual intention that the relationship was one of employment.

*Control, integration, and fundamental tests*

[39] Mr Boyd would schedule the work to be performed, would designate the tasks to particular workers, would advise what work was to be undertaken, and advised of the hours to be worked. Such as there was flexibility relating to Mr Gerrard's work, I find it was limited. Mr Gerrard did not set his own schedules, decide when work would be completed or in what order, and nor did he decide the hours of work.

[40] Mr Gerrard was required to apply his skills to the allocated tasks, and in doing so generally had some autonomy as to how he completed the required work. However, this was ultimately at the direction of NEC.

[41] Mr Gerrard, in effect, had no control over the work to be performed. He was assigned particular tasks and carried them out. He said another worker, Joe, would decide who did what if they were on the same job. There is no evidence that there was any basis on which he could have engaged another person to carry that work out for him. He was engaged for his personal skill in plastering and carried out the work on that basis at an hourly rate.

[42] Mr Gerrard said he would keep a log of his hours on his phone and then send them through to Mr Boyd before each Monday and that he would be emailed a payslip weekly. Mr Gerrard was ultimately accountable to NEC for the work undertaken and hours of work, a matter that is relevant to the alleged dismissal.

[43] Mr Boyd's evidence is that Mr Gerrard was not paid for sick days or public holidays. He said that Mr Gerrard did not ask for annual leave when he left. Mr Gerrard said he was not paid the time off because he had no leave accumulated. He said he was paid the normal rate if he worked on public holidays and that he never talked with Mr

Boyd about annual leave. Mr Gerrard accepted that he took time off but said that that was pre-planned or that he otherwise informed Mr Gerrard.

[44] There was a degree of flexibility arising out of Mr Gerrard's approach to work and absences. However, I do not consider that indicative of his being an independent contractor. Indeed, Mr Boyd was informed, albeit in a rather casual manner, of at least many of Mr Gerrard's absences and the reasons for them.

[45] Mr Gerrard said that during his employment he drove his personal vehicle. He also said that he was provided Boyd Plastering clothing to wear at work, including hoodies and t-shirt/singlet. He wore his own safety boots but was provided hi vis clothing. Mr Boyd agreed that he provided tools and hi vis equipment and that NEC had an account that was used for various products, including plastering consumables. He said that the clothing provided was optional and that some items were provided on the basis of NEC health and safety obligations.

[46] While I don't consider the issue as to clothing overly significant, I do consider it of note that there was no contractual arrangement requiring Mr Gerrard to provide equipment as if engaging in business on his own account.

[47] Mr Boyd claims that Mr Gerrard was happy to work as an independent contractor as it gave him more money in the hand. He also said that Mr Gerrard had flexibility as to when he would, and when he would not, work. Mr Boyd made reference to a number of text messages sent by Mr Gerrard advising that he would not be at work for various reasons.

[48] Such as NEC assert that the taxation arrangements in 2022 were such that Mr Gerrard was clearly an employee, I do not accept that to be the case. The evidence indicates that the taxation arrangements were the same during the period in 2020 when Mr Gerrard was an employee.

[49] Mr Gerrard said at the investigation meeting that he would not quote jobs and was just paid by the hour. He was not GST registered, did not invoice NEC for the jobs he was doing, was provided regular work, and he worked where he was required to by NEC. Mr Gerrard said that during his employment he did not work for anyone else and there is no evidence that he did so.

[50] Mr Gerrard was not running his own business; he was engaged personally on an hourly rate to work for NEC. Mr Gerrard was not developing goodwill in the operation of a business on his own account and did not have other clients.

[51] Shortly after the alleged dismissal, at 11.55pm on 13 June 2022, Mr Boyd emailed Mr Gerrard asserting, amongst other things, that he had been engaged as an independent contractor. The email included the statement “[w]e agreed on the rate of \$37 per hour as an independent contractor”. I find that that statement is inconsistent with the basis on which the relevant hourly rate was reached. The hourly rate was agreed prior to, and included in, the IEA.

[52] Mr Boyd suggested that Mr Gerrard started working for another local company on 18 August 2022. He said that it would have been a conflict of interest had Mr Boyd been an employee, but that as he was an independent contractor, and “although it is unethical”, he was free to do so. I do not accept that, including given that the alternative work occurred after the engagement with NEC had ended.

[53] I do not accept that industry practice indicates that Mr Gerrard was in fact an independent contractor, there was no such evidence given by NEC. On that basis, I do not accept industry practice as supporting the position that Mr Gerrard was an independent contractor.

[54] Having regard to all relevant matters, the real nature of the relationship was that of employment and not independent contracting. I consider that the case both on an objective assessment, and when regard is had to the subjective views of the parties.

[55] I find that Mr Gerrard was an employee of NEC.

### **Was Mr Gerrard dismissed from his employment?**

[56] Mr Gerrard claims that he was dismissed from his employment during a phone conversation with Mr Boyd on 13 June 2022. He said that Mr Boyd called him and said that the hours he was working were not correct, and that he had been recording on his timesheets more hours than were actually worked. His evidence was that Mr Boyd did not give him any examples and did not ask him about what work he had been doing on site. In Mr Gerrard’s words, Mr Boyd “...simply said that I was not working the hours I had claimed.”

[57] Mr Gerrard said that Mr Boyd told that he didn't like Mr Gerrard requesting to work alone, something he wanted to do because he felt he was being used by having to train the others, and that the conversation ended with Mr Boyd telling him that he was sacked.

[58] Mr Gerrard said at the investigation meeting that the call lasted about 20 minutes. This is confirmed by the phone records provided, showing the call lasted 24 minutes and 29 seconds. Mr Gerrard said that Mr Boyd had said that he was "stealing hours" and that he would be let go immediately. He said that he asked Mr Boyd "are you going to fire me?" and that Mr Boyd responded, "I have no other choice" and "I can't have someone like you working for my company, I gotta let you go immediately, today".

[59] Mr Boyd said that Mr Gerrard was the one who ended the working relationship. Mr Boyd said, in his reply statement, that he had questioned Mr Gerrard about a job in Johnson Street, Waipawa, and had asked him to provide "...evidence of his work by either text message or phone call." He also said that Mr Gerrard would not provide the information and said that he didn't know and couldn't remember.

[60] Mr Boyd denied saying that Mr Gerrard had been 'stealing hours' during the relevant phone call. He also denied having ever said that Mr Gerrard was fired and said that it was in fact Mr Gerrard who ended the phone call.

[61] A text message was sent to Mr Gerrard by Mr Boyd that same morning at 10.53am. The text message informed Mr Gerrard that Mr Boyd needed to talk to him about the work done at the job in Johnson Street, alleging no sanding had been done, and also raised an issue of allegedly inconsistent hours relating to a job at Dunlop Street. The records provided show that the text message was sent before the phone call that commenced at 10.54am.

[62] Mr Gerrard later that day sent the following text message to Mr Boyd at 4.47pm on 13 June 2022:

Hey Reuben you said after our phone call this morning you would send me a text message with the reasons for firing me. I haven't received it yet. Please send it so I can be clear I'm still unsure please. But that's ok I'm sure I'll understand once you reply. Cheers brother bless you all the best.

[63] Mr Gerrard stated he would not have sent the text message he did if he had resigned. He denied there was any discussion about resignation, when Mr Gerrard

would be finishing up, about notice periods, or about the alleged resignation being put in writing. Mr Gerrard submitted that that confirms he did not resign.

[64] Mr Boyd claims that he continued to offer Mr Boyd work, including by communicating with him on 14 and 15 June 2022. Such as the correspondence indicates that was the case, it is not the full story. Mr Boyd’s email on 13 June at 11.55pm included the following statement, whilst also asking Mr Gerrard whether he would like to be contacted should “...anything come up in the near future that we can use your services for...”:

...  
Moving forward Joshua, you are free to choose the company you work for, however the work I currently have available this week is not suitable for the remuneration you have requested....

[65] I have found that Mr Gerrard was an employee rather than an independent contractor. The above statement is consistent with Mr Gerrard having been told that he was fired or otherwise that there was no further work for him.

[66] Mr Gerrard made enquiries as to the reasons for the dismissal. Mr Boyd and NEC’s response was to assert that Mr Gerrard was an independent contractor and that, whilst there may be work available in the future, none was available that week. NEC’s responses do not indicate that the relationship ended at the initiative of Mr Gerrard. Indeed, Mr Boyd’s email of 13 June 2022 makes no mention of any alleged resignation, nor to any ending of the relationship at Mr Gerrard’s initiative.

[67] Having regard to all of the evidence, I prefer the evidence of Mr Gerrard as to Mr Boyd ending the employment relationship during the phone call on 13 June 2022. I conclude that Mr Gerrard was dismissed from his employment by NEC.

### **Was the dismissal unjustified?**

[68] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether NEC’s actions, and how NEC acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.<sup>7</sup> Also relevant to the Authority’s consideration are the good faith obligations in s 4 Act.

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<sup>7</sup> Employment Relations Act 2000, s 103A.

[69] The onus is on NEC to justify its actions and justification requires the consideration of both substantive and procedural fairness.

*Did NEC follow a fair process?*

[70] In assessing whether the dismissal and NEC's actions were procedurally justified, the Authority must consider the matters set out at s 103A(3) of the Act.

[71] Mr Gerrard submitted that he was not provided relevant information and the ability to respond to allegations that his hours of work were inconsistent prior to being dismissed. NEC denied having dismissed Mr Gerrard and claimed that he was an independent contractor. I have found that Mr Gerrard was an employee and that he was dismissed from his employment.

[72] No evidence was provided as to any investigation of the allegations having been conducted, at least excluding brief reference to some viewing of the job site. I find that NEC failed to carry out a sufficient investigation into the allegations before dismissing Mr Gerrard.

[73] I accept that NEC, in very limited form, raised issues with Mr Gerrard as to perceived inconsistency as between the work performed by him and the hours of work claimed. However, Mr Gerrard was not provided any correspondence detailing the allegations, nor am I satisfied the NEC or Mr Boyd explained their concerns in detail such as would have allowed Mr Gerrard to provide a detailed and considered response.

[74] Such as issues were raised on 13 June 2022, they were raised either immediately prior to, or during, the phone call during which Mr Gerrard was dismissed. I find that Mr Gerrard was not provided a reasonable opportunity to respond prior to action being taken against him. Given that, due to its own failures, NEC were not able to genuinely consider any response that may have been provided by Mr Gerrard had that opportunity been provided.

[75] Mr Gerrard was not informed that the allegations might result in dismissal, he was not afforded the opportunity to be represented, and nor was any formal notification given as to the purpose of the phone call and the possibility of dismissal on 13 June 2022.

[76] NEC raised a number of other allegations in submissions, including:

- (a) That Mr Gerrard had committed social welfare fraud by providing the unsigned IEA to WINZ;
- (b) That Mr Gerrard, in the alternative, repudiated his employment agreement by misrepresenting to NEC that he held a drivers licence;
- (c) That Mr Gerrard committed serious misconduct by being arrested and charged with drink driving while carrying out his employment duties; and
- (d) That Mr Gerrard attempted to persuade Mr Boyd to provide false information to the police.

[77] The above matters were not put to Mr Gerrard during his employment, nor is there evidence suggesting that they formed the basis for Mr Gerrard's dismissal. Even if relevant, I am unable to find that there is a sufficient evidential basis to conclude that any of the above allegations could be substantiated. NEC certainly did not undertake any apparent investigation which may have supported such findings.

[78] I find that the dismissal was procedurally unjustified.

*Was NEC's decision substantively justified?*

[79] Mr Gerrard submitted that he complied with clause 10 of his IEA in completing timesheets. He also said that NEC failed to comply with clause 23.1 of the IEA in that there was no process prior to the dismissal. He said he was provided no evidence of the allegations and given no opportunity to respond to the allegations.

[80] NEC had, prior to the dismissal, raised other issues about Mr Gerrard's work and his recorded hours of work. On 28 February 2022, Mr Boyd sent a text message to Mr Gerrard which included asking Mr Gerrard about the hours he had worked at a job on Scarrott Road and stating that he had been there and considered that only .5 to 1 hour of work had been done. Mr Boyd also sent a text message to Mr Gerrard noting he would need to talk to Mr Gerrard about inconsistent hours at a job at Dunlop Street. Mr Gerrard said at the investigation meeting that the matters were resolved after a phone call with Mr Boyd.

[81] As noted above, Mr Boyd denies having dismissed Mr Gerrard and claims that Mr Boyd was offered further work on the basis that he was an independent contractor. I find that evidence conflicts with there being a justification for the dismissal that I have found occurred.

[82] I find that the decision to dismiss was substantively unjustified.

**Is Mr Gerrard entitled to remedies?**

*Is Mr Gerrard entitled to compensation for lost wages?*

[83] Mr Gerrard seeks compensation for lost wages covering a total period of 17 weeks. Mr Gerrard's evidence at the investigation meeting was that he commenced alternative plastering work on 18 August 2022. He said he applied for jobs by phoning around and following up leads. That employment was obtained within approximately 10 weeks of the dismissal, and I am satisfied that Mr Gerrard took sufficient steps to obtain alternative employment.

[84] I am satisfied that Mr Gerrard lost wages relating to the period 13 June 2022, when he was dismissed, to 18 August 2022, when he secured alternative employment, being a total period of 10 weeks. I calculate that based on Mr Gerard's average daily pay. I am not satisfied based on the evidence provided that Mr Gerrard's loss was any greater than that.

[85] I order that NEC make payment to Mr Gerrard, within 28 days, of \$14,969.50 as compensation for lost wages.

*Is Mr Gerrard entitled to compensation for humiliation, loss of dignity and injury to feelings?*

[86] Mr Gerrard seeks compensation for humiliation, loss of dignity and injury to feelings. It was submitted that an order of compensation starting from \$8,000 should be considered.

[87] In his written evidence, Mr Gerrard stated that it was hard losing his job and that he had to sleep in his car as a result. I am satisfied that Mr Gerrard is entitled to some compensation having regard to impacts of the dismissal and NEC's actions. However, Mr Gerrard provided minimal evidence as to these matters, even when asked about the impact at the investigation meeting. I am satisfied that only a modest award is appropriate in the circumstances.

[88] I order that NEC make payment to Ms Wills, within 28 days, of \$14,000 as compensation for humiliation, loss of dignity and injury to feelings.

### *Contribution*

[89] Section 124 of the Act requires that I consider the extent to which Mr Gerrard's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.<sup>8</sup>

[90] NEC submitted that Mr Gerrard should not receive any compensation because of a high level of contributory fault. That submission relies on allegations of fraud, misrepresentation, and alleged serious misconduct relating to drink driving. There is no evidence that any of those allegations, even if they were established, are of any relevance to the situation giving rise to the personal grievance. Those issues were not raised at the relevant time. Further, such allegations, such as they are submitted to have been contributory, seemingly did not dissuade NEC, on Mr Boyd's version of events, from continuing to offer Mr Gerrard work.

[91] I have found that the dismissal was unjustified on both procedural and substantive grounds. I am not satisfied that there is sufficient evidence that Mr Gerrard's conduct contributed towards the situation that gave rise to his personal grievance. The personal grievance arises from NEC's failure to deal with the situation appropriately. That was its failure not Mr Gerrard's, and I do not consider any of his actions led to that situation.

[92] I decline to make any deduction on the basis of contribution.

### **Is Mr Gerrard due any payment for entitlements relating to employment?**

[93] Clause 40 of the IEA provides that Mr Gerrard would be guaranteed 40 hours per week and would be required to work the same. The schedule to the IEA confirmed that the relevant pay rate would be \$37.00 per hour.

[94] The evidence provided to the Authority as to the hours of work undertaken by Mr Gerrard is not consistent with a stated guarantee of 40 hours work per week contained in the IEA. What is evident is that the reality was that there was a difference between the hours guaranteed in the IEA and the hours of work undertaken. There is no evidence of Mr Gerrard questioning Mr Boyd in relation to this issue at the relevant times. Additionally, Mr Gerrard was absent from work on a number of occasions at his

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<sup>8</sup> Employment Relations Act 2000, s 124.

request. I conclude that the hours actually worked by Mr Gerrard were not other than what was agreed having regard to the operation of the agreement in practice. On that basis, I decline to make any order as to an alleged arrears of wages.

[95] Mr Gerrard claims he is entitled to other payments, including in relation to public holidays and sick leave. I am not satisfied that Mr Gerrard is due any payment for sick leave. There is no evidence that Mr Gerrard made application for paid sick leave during his employment.

[96] In relation to public holidays, Mr Gerrard submitted that he is entitled to additional payment for work performed on those days. The payslips provided record that Mr Gerrard worked on three public holidays, those being Good Friday (3 hours), ANZAC Day (5.5 hours), and Queen's Birthday (7.7 hours). Mr Gerrard was paid at his ordinary hourly rate for work performed on those days.

[97] An employee is entitled to another day's holiday if the public holiday falls on a day that would otherwise be a working day and the employee works any part of that day.<sup>9</sup> There is no evidence that Mr Gerrard received any additional payment or time off in lieu for performance of that work. He is entitled to payment at his relevant daily pay or average daily pay for his last day of employment.<sup>10</sup>

[98] Mr Gerrard's hours of work varied considerably, and I consider it is not practicable to calculate the payment due on the basis of relevant daily pay. As such, Mr Gerrard's entitlement is to be calculated based on his average daily pay.

[99] Mr Gerrard's gross earnings were \$28,441.90 and, having regard to the hours worked according to the payslips issued, Mr Gerrard worked a total of 95 days, or part days. I find that Mr Gerrard is entitled to payment of \$299.39 for each alternate day. As such, Mr Gerrard is entitled to payment of \$898.17 as payment for alternate holidays.

[100] Mr Gerrard is also entitled to payment at time and a half for the hours worked on the public holidays.<sup>11</sup> He worked a total of 16.2 hours and was paid at his ordinary hourly rate. As such, Mr Gerrard is due an additional \$18.75, that being half his hourly rate, for each of the hours worked. The total sum due is \$303.75.

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<sup>9</sup> Holidays Act 2003, s 56(1).

<sup>10</sup> Holidays Act 2003, s 60(2)(b).

<sup>11</sup> Holidays Act, s 50.

[101] Mr Gerrard is due payment for annual holidays in accordance with s 16 of the Holidays Act 2003. No paid annual holidays were taken by Mr Gerrard during his employment. Mr Gerrard's gross earnings during his employment with NEC in 2022 were \$28,441.90. Mr Gerrard was employed for a period of less than 12 months, and as such is entitled to payment in accordance with s 23 of the Holidays Act 2003, which provides for payment at the rate of 8 percent of his gross earnings.

[102] I am also satisfied that Mr Gerrard is entitled to payment of a notice period of two weeks, that being consistent with the term in the IEA. Mr Gerrard worked an average of no more than five days a week and I calculate the notice period as being \$2,993.90 using his average daily pay.

[103] Mr Gerrard is also entitled to payment of 3 percent of his gross income as the employer KiwiSaver contribution. I calculate that as being a total of \$1,496.49 considering Mr Gerrard's gross earnings and the relevant sums due<sup>12</sup>.

[104] I order that NEC make payment to Mr Gerrard, within 28 days, of:

- (a) \$898.17 as payment for alternate holidays
- (b) \$303.75 as unpaid wages for working on public holidays;
- (c) \$2,275.36 as unpaid annual holidays;
- (d) \$2,993.90 as the unpaid notice period; and
- (e) \$1,496.49 as the employer KiwiSaver contribution.

### **Summary of orders**

[105] NEC Boyd Holdings Limited is ordered, within 28 days of the date of this determination, to make payment to Joshua Gerrard of:

- (a) \$14,969.50 as compensation for lost wages;
- (b) \$14,000 as compensation for humiliation, loss of dignity and injury to feelings;
- (c) \$898.17 as payment for alternate holidays;
- (d) \$303.75 as unpaid wages for working on public holidays;
- (e) \$2,275.36 as unpaid annual holidays;
- (f) \$2,993.90 as the unpaid notice period; and
- (g) \$1,496.49 as the employer KiwiSaver contribution.

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<sup>12</sup> Including the sum due as compensation for lost wages.

## **Costs**

[106] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[107] If they are not able to do so and an Authority determination on costs is needed Mr Gerrard may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum NEC would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[108] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>13</sup>

Rowan Anderson  
Member of the Employment Relations Authority

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<sup>13</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).