

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 528
3147183

BETWEEN DAVID GRAY
 Applicant

A N D MATTHEW LAI
 Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Mathews, advocate for the Applicant
 Alwyn O'Connor, counsel for the Respondent

Investigation Meeting: 8 September 2022 at Christchurch

Submissions Received: 13 September 2022 from the Applicant
 13 and 14 September 2022 from the Respondent

Date of Determination: 13 October 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Gray says he was employed by Matthew Lai from about 8 March 2021. Work involved assisting as a removal worker in a business called “Christchurch Movers”. Mr Gray was not provided with a written employment agreement. However, Mr Lai gave him the phone number of Christchurch Movers’ truck driver (Karl), who then contacted Mr Gray about work.

[2] Mr Gray says he worked for several weeks. There was then an altercation during work on 26 March 2021 between him and the driver. Mr Gray says he was assaulted by the driver. Mr Gray did not return to work following the assault.

[3] Mr Gray through a representative raised personal grievance claims of unjustified disadvantage and unjustified dismissal on 8 April 2021 in an email sent to sales@christchurchmovers.co.nz. An application was later lodged in the Authority. Compensation and reimbursement are sought as remedies for the personal grievances. There is also a claim for a penalty for a breach of s 65 of the Employment Relations Act 2000.

[4] Mr Lai says he never employed Mr Gray, but only gave him a phone number of the Christchurch based driver who was a contractor to one of the companies of which Mr Lai is a director.

The Authority's investigation

[5] The claim as first lodged was against National Movers Limited. Later there was an application to join Mr Lai personally as a respondent. I joined Mr Lai in April 2022, having formed the view that his joinder would allow the case to be more effectually disposed of according to its merits and equities. In May 2022, I struck out the originally named respondent.¹

[6] The joinder of Mr Lai and the striking out of National Movers Limited did not affect the substance of earlier directions in preparation for the investigation meeting. However, Mr Lai did not provide a copy of any contract between National Movers Limited and the driver, prior to the investigation meeting. I also note that Mr Lai did not lodge a statement of evidence.

[7] On 7 September 2022 counsel for Mr Lai sought consent for counsel to appear remotely and for Mr Lai to appear and give evidence remotely. Mr Gray's representative did

¹ *Gray v Lai and National Movers Limited* [2022] NZERA 200.

not oppose the former request but objected to the latter application. There was merit to the objection. However, to avoid the possibility of an adjournment, I allowed counsel to appear remotely and Mr Lai to attend and give evidence remotely.

[8] Mr Gray and Mr Lai both gave evidence and answered questions. Brad Brightwell gave evidence relevant to Mr Gray's claim for compensation. Mr Mathews and Mr O'Connor made submissions.

[9] Following the investigation meeting, Mr Lai provided a copy of a "Contractor agreement" in the name of Wellington Movers Ltd. I take it that the signature is that of the driver Karl. Mr Lai is a director and shareholder of Wellington Movers Ltd. The agreement provides for the company to supply a truck and for the Contract Driver to supply their labour, and to provide and pay an "offsider" if required. However, I agree with the submission for Mr Gray that the document does not establish that the employment relationship was between the contract driver and Mr Gray. Counsel submits that some of Mr Lai's evidence on the point was unchallenged, so must be accepted. I do not accept that submission. A central issue for investigation was who was Mr Gray's employer. Mr Lai was questioned about his evidence that it was the contract driver, not him or his company.

[10] The following issues arise:

- (a) Did Mr Lai employ Mr Gray?
- (b) If yes, did Mr Gray raise personal grievances within time?
- (c) If yes, what was the context for those claims?
- (d) Does Mr Gray have personal grievances?
- (e) If yes, what remedies are proven?
- (f) Is Mr Lai liable for a penalty?

Did Mr Lai employ Mr Gray?

[11] Mr Gray saw an ad on Facebook for a removalist at \$20 per hour for Christchurch Movers. Mr Gray's evidence is that he applied for the job on Friday 5 March 2021, then received a call from Mr Lai several hours later. He says that Mr Lai asked him if he would be willing to work that day, but Mr Gray declined. Mr Gray says he was told that the job pays \$20 an hour cash and the hours were not consistent. Mr Gray's evidence is that he offered to start work on any following day.

[12] Mr Gray's evidence is that Mr Lai then called him on Monday 8 March 2021 and asked if he would start work that day. Mr Gray agreed. Mr Lai said that "Karl" would be the driver and would teach Mr Gray what was needed. Mr Lai sent Mr Gray a txt "Karl is the driver [phone number]". Mr Gray then received a call from that number, the caller introduced himself as Karl and asked for Mr Gray's address so he could pick him up that morning. Mr Gray was collected by Karl soon after for his first day's work.

[13] Mr Lai's evidence is that he told Mr Gray during the first call that he would be employed by Karl, the driver. Mr Lai's evidence is that he has "no idea" whether Mr Gray declined the first offer of work, that he was in Wellington and that it was up to Karl.

[14] Mr Gray's call log establishes that he received a call from Mr Lai's number at 12.54pm on Saturday 6 March 2021 (not 5 March) and a second call at 8.19am on Monday 8 March 2021. I asked Mr Lai why he made the second call if it had been up to Karl to employ Mr Gray. Mr Lai told me that he had "no idea" why he called Mr Gray on the Monday, given the passage of time.

[15] There is no reason to doubt Mr Lai's evidence that he does not now recall why he called Mr Gray on Monday morning. However, the second call from Mr Lai is consistent with Mr Gray's evidence that he declined the first offer to work but said he would work on any following day. I accept Mr Gray's evidence and find that Mr Lai called Mr Gray on the Monday to arrange for him to work that day.

[16] There is a dispute between Mr Gray and Mr Lai about whether Mr Lai said that the employer would be Karl. Mr Lai's evidence is that he said that during both calls. Mr Lai says he sent the txt ""Karl is the driver" at 8.23am on Monday 8 March 2021 because people do not have a "pen and paper" and because a lot of people like Mr Gray have to prove they are looking for work. However, Mr Gray had not requested information by txt, nor had he indicated a need to prove he was looking for work.

[17] If Mr Lai had mentioned the driver's name on Saturday, the txt would probably have been sent then. Mr Lai did not need to mention the driver's name on Saturday because Mr Gray declined the offer of work. I do not accept Mr Lai's evidence that during the call on Saturday he told Mr Gray that the employer would be Karl. I prefer Mr Gray's evidence that the driver and his name were not mentioned on Saturday.

[18] In an email to Mr Gray's representative on 14 April 2021, Mr Lai said he received a call from Mr Gray regarding the Police incident and "This is the first and only time that I spoke to Mr Gray". The Police incident was on Saturday 26 March 2021, so that was the date of the call. By that assertion, Mr Lai denied the representative's account that Mr Lai had spoken to Mr Gray on 6 and 8 March 2021. However, Mr Lai's assertion was wrong. That could not be attributed to the passage of time.

[19] In the 14 April 2021 email, Mr Lai qualified the foregoing statement by stating "At times I have passed on his details to people who contact us to enquire whether there is any work available in Christchurch". "His details" referred to Karl, the "contractor" to his "company" in Christchurch. Mr Lai sought to downplay his contact with Mr Gray. However, Mr Lai's contact with had been more extensive. He had received Mr Gray's job application, rang him on the Saturday, rang him again on the Monday, sent him Karl's name and phone number and must have passed Mr Gray's number onto Karl.

[20] Straight after the txt, Mr Gray received a call from Karl. The only direct evidence of Mr Gray's arrangement with Karl is that of Mr Gray. There is no reason to doubt the evidence that it was just about Karl picking up Mr Gray from Mr Gray's address.

[21] I find that employment was offered and accepted between Mr Lai and Mr Gray during their phone call on Monday morning. This followed from Mr Gray's response to the "Christchurch Movers" ad for a "Removalist NZ\$20 – NZ\$22", which had prompted Mr Lai's first call to Mr Gray on Saturday. Mr Gray's evidence that Mr Lai did not tell him during either call that he would be employed by Karl is more probable than Mr Lai's evidence that he did. There was no indication in the ad that "Christchurch Movers" was offering the "Removalist" position on behalf of a contractor to "Christchurch Movers". "Christchurch Movers" is not a legal entity. I find that Mr Gray was employed by Mr Lai personally to work in a business called "Christchurch Movers".

[22] Mr Gray was employed and worked hours on two or three days per week from 8 March until 26 March 2021. Following the 8 March 2021 call from Mr Lai, work was arranged by Karl who paid Mr Gray in cash. Mr Gray remained a beneficiary throughout. Counsel submits that I should have regard to whether Mr Gray disclosed earnings, when assessing Mr Gray's credibility. However, I prefer Mr Gray's evidence to that of Mr Lai regarding their exchanges about the start of the employment, as explained. I do not accept Mr Gray's evidence about the events on 26 March 2021, but for the reasons given below. Counsel's submission about Mr Gray's credibility is not persuasive.

Did Mr Gray raise personal grievances within time?

[23] An employee who wishes to raise a personal grievance must raise the grievance with their employer within 90 days beginning on the date on which the action alleged to amount to a personal grievance occurred.

[24] Here, Mr Gray says his personal grievances were raised by his representative's 8 April 2021 email sent to "sales@christchurchmovers.co.nz". Mr Gray's complaint was about matters covered by the statutory definition of personal grievances. The email conveyed the substance of Mr Gray's complaint. An employer would know what it was responding to and had sufficient information to respond to the grievance on its merits with a view to resolving it

promptly. To this extent, the email complied with the Act's requirements as explained in *Chief Executive of Manukau Institute of Technology v Zivaljevic*.²

[25] The response sent by "Matthew Christchurch Movers" on 14 April 2021 was that Mr Gray had never worked for "Christchurch Movers", but had been employed "by Karl who is our Contractor in Christchurch". There was some further communication in April 2021 between the representative and "Matthew".

[26] Mr Lai says that, if he is found to be the employer, Mr Gray did not raise his grievance with his employer within time by the 8 April 2021 email (my emphasis). The submission is that receipt by "Christchurch Movers" as the addressee of the email meant Mr Gray's grievance had not been raised with his employer. That is said to be because Mr Lai never received any correspondence addressed in his personal capacity raising a personal grievance with him as the employer. I am referred to two Employment Court judgments.³ In *Start*, Castle J concluded that his earlier statement in *Wilkinson* had not gone far enough, and held at p 211 that the employer must be given some positive notice of the bringing of a claim of a personal grievance.

[27] However, in *Forever Living v Kruesi*,⁴ the Employment Court considered that if an employee's communication reaches the employer, representative or agent through a third party, in circumstances which viewed objectively would have enabled the employer to respond in accordance with the applicable procedure, the employee would have submitted their grievance in time.

[28] In the present case, Mr Lai received and responded to the contended grievance. A "third party" was not involved. It is immaterial that it was received and responded to by Mr Lai for "Christchurch Movers", rather than addressed to and responded to by him

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

³ *Wilkinson v ISL Computer Systems Ltd* [1993] 1 ERNZ 512 and *Start v Forster (T/A The Hutt Pet Centre* [1994] 2 ERNZ 200.

⁴ *Forever Living v Kruesi* [1993] 2 ERNZ 636.

personally. Either way, viewed objectively the employer was able to respond to the substance of the claim.

[29] I find Mr Gray's grievances were raised within time.

What was the context for the personal grievance claims?

[30] The basis for the grievance claim is Mr Gray's evidence about difficulties working with Karl and being assaulted by him.

[31] Mr Gray says that there were issues with what was said to customers about fees. However, that did not affect Mr Gray's employment or any condition of his employment. It is not necessary to say more on the point.

[32] Mr Gray says that he was told they needed to get customers to sign before work was started so they were not liable for any damage. His evidence is that he later found out that Mr Lai was not insured. Mr Gray's evidence probably is based on a lack of knowledge or a lack of understanding about the carriage of goods provisions in the Contract and Commercial Law Act 2017 that apply to the carriage of goods in New Zealand. In any event, these issues did not affect Mr Gray's employment or any condition of his employment.

[33] Mr Gray's evidence is that on 17 March 2021 Karl drank some alcohol after work and offered him and another worker a drink. Karl later took Mr Gray home. However, that does not establish that Mr Gray's employment or any condition of his employment was affected to his disadvantage.

[34] Mr Gray's evidence is that on Thursday 25 March 2021 when he picked him up for work at the start of the day, Karl was either really hung over or drunk. After the first job, Mr Gray says that Karl fell asleep parked up in "the car". Mr Gray eventually told Karl that he would not work with him in that "state", they made it back to Karl's house and Mr Gray called Mr Lai (using Karl's phone) and told him that Karl was sick. Mr Gray then left. Karl called an hour later, told him that the customers had to move out of their house and Mr Gray

then agreed to help with that work. Mr Gray's phone log shows calls from Karl's number that afternoon.

[35] Mr Gray's evidence is that on Friday 26 March, Karl was drinking alcohol when he picked up Mr Gray. Karl continued to drink on the way to the first job. After the job, Karl and the other worker had some drink offered by the customer. Mr Gray wanted to go home. They all left, but an argument developed enroute. Mr Gray's evidence is that Karl pulled over and told him to leave the job if he did not like it. Mr Gray got out, slammed the door and walked away. His evidence is that Karl got out of the truck, ran towards him and assaulted him. The other worker called Karl back to the truck and they left without Mr Gray.

[36] Mr Gray called the police. While he was waiting for the police to arrive, Mr Gray called Mr Lai to report the incident. A short while later, Mr Lai called Mr Gray, but the call was unanswered. Mr Gray called Mr Lai about 45 minutes later. Later that evening, Mr Gray sent a txt message to Mr Lai asking for pay for the three hours that he had worked that day. There was no response. These calls and the message are evidenced by Mr Gray's phone log.

[37] Police attended, spoke to Mr Gray, spoke to a witness, took Mr Gray home, took photos of Mr Gray's head and face, went to Karl's house but did not locate him, called and spoke to Mr Lai, called and spoke to the other worker, then later called and spoke to Karl. These steps are documented by the senior constable and there is no reason to doubt that he accurately recorded his involvement.

[38] Mr Gray's evidence is that Karl lunged at and hit him in the face, knocking his glasses to the ground. He says that while he went for his glasses, Karl kept punching the top and back of his head. Mr Gray's evidence differs to what police noted him saying at the time. Police noted Mr Gray saying he was grabbed, punched three times in the head, stepped back, then was hit three or four more times over the top and rear of his head. He was then pushed into a bush where he lost his glasses.

[39] Police noted Karl and the other worker denying the assault. I give no weight to that. However, the senior constable noted that when he saw Mr Gray shortly after the call to police, there were no obvious injuries and Mr Gray did not appear to be in pain or discomfort. The four photos in evidence were taken about an hour after the alleged assault. The photos show no swelling, bruising or bleeding. I disagree with Mr Gray's evidence that the photos show damage to his nose and the right side of his face. Mr Gray claimed to have his own photos, but he did not produce them in evidence. Mr Gray's evidence was that he was punched "quite hard 7 or 8, possibly 9 on a 10-point scale". It is likely that there would have been swelling, bruising or bleeding clearly apparent in the police photos, if Mr Gray had been punched as he claimed.

[40] Police also spoke to a woman who had witnessed the incident. The woman told police that she saw an argument between two men, one lunge at and shove the other but did not see any other assault.

[41] The photos, the police note of what the woman reported having seen and the senior constable's observations cause me to reject Mr Gray's evidence of the incident on Friday 26 March 2021. I find that there was an argument between Mr Gray and Karl, Mr Gray got out of the truck, Karl took exception to him slamming the truck door, got out of the truck himself, followed then lunged at and pushed Mr Gray. That was the extent of the assault.

[42] Mr Gray's evidence is that he went to the hospital on Sunday 28 March 2021 and was diagnosed with concussion, facial bruises and a fractured nose. The form produced in evidence supports the diagnosis. While it records a diagnosis on Sunday 28 March 2021, it does not show that the injuries were probably caused during the incident on 26 March 2021.

[43] Mr Lai did not reply to Mr Gray's request for payment. Mr Gray received a sarcastic txt message from Karl on 27 March 2021, but did not respond. Mr Gray said "I am not employed" when asked at the hospital about his employment status. Mr Gray explained that in evidence by referring to his representative's 8 April 2021 email conveying his constructive dismissal claim.

[44] As above, there were two discussions between Mr Gray and Mr Lai on 26 March 2021 after the incident. Mr Gray's evidence is that he told Mr Lai what had happened, that Mr Lai said that it did not sound like Karl's normal behaviour, that he then told Mr Lai about covering for Karl the day before and Mr Lai said that could not have been the truth.

[45] Mr Lai's evidence is that Mr Gray introduced himself saying "You don't know me, I work with Karl". I do not accept that evidence. Following the job application, Mr Gray had received two calls and a txt message from Mr Lai. Mr Gray knew that Mr Lai passed on his phone number to Karl. He then worked with Karl in Mr Lai's business. Mr Gray spoke to Mr Lai on 25 March 2021. Mr Gray would not have started the call to Mr Lai on 26 March 2021 by saying "You don't know me".

[46] Mr Lai also told me that Mr Gray called him and told him about the "claimed assault". However, Police noted that Mr Lai told them he was not aware of the incident, but Mr Lai had already spoken twice to Mr Gray before then.

[47] In any event, as at 26 March 2021, Mr Lai was aware of Mr Gray's claims that he had been assaulted by Karl in the course of being transported home from work, that Karl had been drinking alcohol while working and that the matter had been reported to police.

Does Mr Gray have a personal grievance?

[48] Grievances of unjustified disadvantage and unjustified dismissal were raised with Mr Lai and are set out in the statement of problem. However, Mr Gray's representative submitted that the claimed grievances align and I agree. The problem is best analysed as a claim of unjustified dismissal alone, as it addresses all the elements of the unjustified disadvantage claim.

[49] Counsel submits that, if Mr Gray was employed, it was only a "very casual" arrangement. However, the evidence is that Mr Gray worked on 2 or 3 days per week,

starting from Monday 8 March 2021. I find that the employment was ongoing, but with variable days and hours of work depending on business requirements.

[50] The employment ended after the incident on 26 March 2021. Mr Gray was not offered any further work by Christchurch Movers. I find that this amounted to a dismissal, as the employment ended at the initiative of the employer.

[51] On 8 April Mr Gray through his representative claimed a constructive dismissal and advised that the communication could be taken as Mr Gray's resignation. However, given the finding of a dismissal, it is not necessary to make any specific findings about whether there was a breach of duty by the employer of sufficient seriousness so that it was reasonably foreseeable that Mr Gray would resign, and a constructive dismissal.

[52] Mr Lai's defence was based on denying an employment relationship, disputing Mr Gray's account of the incident on 26 March 2021 and disputing Mr Gray's complaint about Karl drinking at work. Mr Lai did not advance an alternative case of justification.

[53] It is clear from the police notes of their conversation with Mr Lai that he doubted the veracity of what he had been told by Mr Gray. However, Mr Lai did not sufficiently investigate the 26 March incident or the drinking claims. He did not raise any concern he had regarding Mr Gray, gave him no opportunity to respond to concerns and did not consider any explanation.

[54] I find that Mr Lai's dismissal of Mr Gray was unjustified and that Mr Gray has a personal grievance.

Remedies for the personal grievance

[55] There is a claim for \$23,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[56] I treat with some caution Mr Gray's evidence in support of the claim, given my finding about him exaggerating the incident. A friend gave evidence about the effect on Mr Gray. His evidence is that Mr Gray in the months following the end of the employment became a lot less social, mostly stayed in his room except for necessities and was not himself at all. He now thinks that Mr Gray was depressed. That is a lay-person's description, not a diagnosis. I accept this evidence.

[57] The low level of proven harm suffered by Mr Gray as a result of the dismissal is consistent with the very short duration of the work and the lack of fixed days and hours. Compensation of \$7,500.00 is sufficient to remedy the proven harm.

[58] There is a claim for reimbursement of lost remuneration for three months at \$220.00 per week. Where I determine that an employee has a personal grievance and that they have lost remuneration as a result, I must order payment of the lesser of a sum equal to that lost remuneration or to 3 month's ordinary time remuneration. I accept Mr Gray's evidence that he was paid \$20.00 per hour for the hours he worked. Given that, I accept that \$220.00 per week is a reasonable estimate of Mr Gray's lost remuneration and that the loss continued for at least three months, as claimed. Mr Gray had no income from employment in that period. The MSD benefit he received is not relevant for present purposes. Mr Gray is entitled to compensation of \$2,860.00 (gross) for lost remuneration.

[59] Where I determine that an employee has a personal grievance, I must consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance in a blameworthy manner, and reduce the remedies accordingly.

[60] On the foregoing findings, Mr Gray exaggerated the incident between himself and Karl, but I accept that Mr Gray's claim about Karl drinking at work (including driving) are proven. The incident arose because Mr Gray raised with Karl his concern about Karl's drinking. However, the situation that gave rise to the unjustified dismissal was Mr Lai's view that Mr Gray was not an employee of the business Christchurch Movers. That was why

Mr Gray was not offered any further work. Mr Gray did not contribute to that situation, so remedies cannot be reduced under s 124 of the Employment Relations Act 2000.

Penalty claim

[61] Mr Lai did not provide Mr Gray with a written employment agreement, so breached s 65 of the Employment Relations Act 2000. There is a claim for a penalty.

[62] Mr Lai's breach was inadvertent. I accept that Christchurch Movers and Mr Lai intended that the contractor driver would engage any additional labour required under the agreement. The difficulty for Mr Lai in this case arises because he did not properly arrange matters in that way in his dealings that led to Mr Gray's employment for the business Christchurch Movers. Mr Gray did not suffer any specific loss or damage and Mr Lai did not gain from the breach. Mr Lai has not been found by the Court or the Authority to have been involved in similar conduct previously.

[63] Mr Gray seeks 50% of any penalty. However, the substance of his employment relationship problem was the personal grievance claim. The harm to him has been remedied by the compensation awards. If a penalty was ordered against Mr Lai, there would be no grounds to order a portion of it to be paid to Mr Gray.

[64] The objects of the Employment Relations Act 2000 would not be advanced by imposing a penalty in the circumstances of this case, nor would they be undermined. The above finding of a breach is sufficient to deter Mr Lai in the future. I decline to impose a penalty.

Summary and orders

[65] Mr Lai employed Mr Gray. Mr Gray was unjustifiably dismissed and has a personal grievance. He is entitled to compensation as remedies for the grievance. Mr Lai breached s 65 of the Employment Relations Act 2000 but I decline to impose a penalty.

[66] Matthew Lai is to pay David Gray \$7,500.00 compensation, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[67] Matthew Lai is to pay David Gray \$2,280.00 compensation, pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

[68] Costs are reserved. If the matter is not resolved between Mr Gray and Mr Lai, a party who claims costs may lodge and serve a memorandum, within 14 days. The other party may then lodge and serve a memorandum in response within a further 14 days. I will determine costs on the papers.

Philip Cheyne
Member of the Employment Relations Authority