

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 183
3153881

BETWEEN JASON HARDER
Applicant

AND UR PLUMBER WAIKATO
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Kirsten Westwood, advocate for the applicant
Philip Ross, counsel for the respondent

Investigation Meeting: 23 and 24 November 2022 in Hamilton

Submissions [and further 16 December 2022 and 27 March 2023 from the applicant
Information] Received: 16 December 2022 from the respondent

Date of Determination: 14 April 2023

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Jason Harder worked as a trainee plumber for UR Plumber Waikato Limited (UR Plumber or the company).

[2] UR Plumber is a plumbing business owned by husband and wife Chad and Amy Still.

[3] Mr Harder complains that he was unjustifiably dismissed by UR Plumber. The company argues that Mr Harder had already abandoned his employment and repudiated the employment agreement but that it then formally gave him notice that the employment had finished to clarify matters.

How did the Authority investigate?

[4] An investigation meeting was held in Hamilton on 23 and 24 November 2022. Evidence was heard under oath or affirmation from Mr Harder, his mother, a police document examiner Jessica Owen, Mr Still and Ms Still. Ms Owen gave evidence via audio visual link. Submissions and other material were later provided.

[5] UR Plumber had lodged a counterclaim about restraint of trade, with the parties and the Authority agreeing that it would be heard with Mr Harder's matter. However, witness statements and documents for the counterclaim were not lodged as timetabled. The Authority informed the parties that the counterclaim would thus not be heard with this matter. At Mr Harder's investigation meeting UR Plumber's representative indicated that the pursuit of the counterclaim depended on the findings of fact in this matter.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

What are the issues?

[7] The issues for investigation are:

- (a) When did Mr Harder's employment start, in particular was he a volunteer for the first five or so months of his association with UR Plumber in 2020?
- (b) If Mr Harder was an employee from 2020 how many hours of work is he owed for and at what rate?
- (c) Was Mr Harder disadvantaged by an unjustifiable action of UR Plumber in not paying him for his 2020 employment and if so, what remedies (if any) should he receive?
- (d) Was Mr Harder disadvantaged by an unjustifiable action of UR Plumber in refusing him permission to attend block courses for his apprenticeship and if so, what remedies (if any) should he receive?
- (e) Was Mr Harder dismissed and if so, was that dismissal unjustified?

- (f) If Mr Harder was unjustifiably dismissed what remedies (if any) should he receive?
- (g) Did UR Plumber breach its obligations and should a penalty be imposed for failure:
 - (i) to pay wages in the initial 2020 period of Mr Harder's work (s 4 of the Wages Protection Act 1983);
 - (ii) to provide an employment agreement (reference to s 64 of the Act);
 - (iii) to keep or provide wages and time records (s 130 of the Act); and
 - (iv) to pay annual leave in Mr Harder's final pay (s 23 and s 27 of the Holidays Act 2003)?

What is the parties' history?

[8] In about 2013 or 2014 Mr Harder and Mr Still met and became friendly when undertaking their plumbing and gas fitting training at Wintec Polytechnic.

[9] Mr Still proceeded to finish his apprenticeship and was able to work as a plumber. He and his wife had operated a plumbing business when they lived in the Hawkes Bay. In August 2020 they moved back to Hamilton and started UR Plumber Waikato Limited.

[10] Mr Harder did not complete the course. However, he did undertake some plumbing work. In May 2017 he was convicted of trading as a plumber when he was not registered. Mr Harder's probation officer describes Mr Harder as having an extensive history of dishonesty offending. Mr Harder relates this to a long period of drug addiction, which he fronted up about in a 2019 Stuff article.

[11] In mid-2020 Mr Harder was released from prison onto home detention. The detention was undertaken at his mother's house, continuing until January 2021.

What do the parties say about Mr Harder's initial involvement with UR Plumber?

[12] Mr Harder asserts that he was employed by UR Plumber from early September 2020 as an apprentice and he should have been paid. UR Plumber says that Mr Harder was

volunteering, effectively on a work experience type programme, until about early February 2021 when he became an employee.

What is the test?

[13] Employees are defined as those employed by an employer to do any work for hire or reward under a contract of service.¹ A broad nuanced approach is required to assess employment status including consideration of any verbal and written agreement, control, integration in the business, who benefits from the work and whether the person claiming employment status was really in business on their own account.²

[14] Excluded from the employee definition are volunteers who:

- (a) do not expect to be rewarded for work performed as a volunteer; and
- (b) receive no reward for work performed as a volunteer.³

[15] The receipt of benefits will not necessarily indicate reward.

[16] Whether the organisation was operating an enterprise in which one might expect people to be volunteering is also relevant.⁴

What are the facts?

[17] In August 2020, once on home detention, Mr Harder messaged Mr Still about the possibility of work. Mr Harder knew that it would be “almost impossible” for him to get a job given his criminal history and the fact he was on home detention.

[18] Mr Harder was very keen to complete his plumbing training, become qualified and set up his own business. At this point he had no job and no car. I conclude that Mr Harder was also interested to find a way to get out of the house. He describes himself as willing to offer a free service to UR Plumber to get his foot in the door (to becoming a qualified plumber).

¹ The Act, s 6(1)(a).

² *Bryson v Three Foot Six Limited* [2005] NZSC 34 and *Courage v Attorney-General* [2022] NZEmpC 77.

³ The Act, s 6(1)(c).

⁴ *Below v The Salvation Army New Zealand Trust* [2017] NZEmpC 87 at [80].

[19] At this point, UR Plumber was essentially just Mr Still himself. He did not see the new Waikato business as having sufficient work for an apprentice. Ms Still was reluctant for the company to take on an employee and was also concerned about Mr Harder's criminal history. Mr Still decided he wanted to help Mr Harder by offering him some work experience to assist with the completion of his qualification.

[20] Mr Harder says the agreement they reached was that he would work for tools. Mr Still does not accept that but acknowledges he offered to make Mr Harder a full time employee at the start of 2021 assuming the business was doing satisfactorily. The tools and pay situation are discussed in more detail below.

[21] Approval was needed from the Probation Service for Mr Harder to leave the house. Mr Still describes having to push very hard to get that approval. What is entitled an "Employment Agreement – Home Detention/Residential Restrictions" was signed off in late August 2020 with the Probation Service. I make no finding as to whether anyone from the Probation Service had detailed knowledge of the actual arrangements between Mr Still and Mr Harder.

[22] Mr Harder was not paid regular wages by UR Plumber but rather remained on a benefit from the Ministry of Social Development (MSD). During the following months, both parties contacted MSD about funding programmes, as detailed below.

[23] UR Plumber's business did pick up over time. Mr Harder claims to have worked long hours and been given responsibility.

[24] In late January 2021, UR Plumber offered Mr Harder an employment agreement and subsequently started to pay him weekly via Xero for the hours worked.

[25] The parties clearly intended there to be an employment relationship from February 2021, but was there one before that?

What did the parties agree?

[26] Mr Still and Mr Harder agreed that Mr Harder would operate unpaid in the UR Plumber business until early 2021. At that point if the business had a sufficiently established clientele, he would become an employee and be paid.

[27] Mr Still wanted to pay \$26 or \$27 an hour but Mr Harder was persistent about wanting a higher rate so it was agreed that \$30 an hour would be paid from early in 2021.

Was work performed?

[28] No record of Mr Harder's hours were kept by UR Plumber in this initial period. However, Probation Service records show Mr Harder was granted eight or more hours absence from home for work, including travelling time. Later this was increased to over 12 hours a day. In December 2020 the Service approved Mr Harder working on Saturdays for UR Plumber.

[29] Mr Still describes the business as growing in 2020 but there being periods when he and Mr Harder went to the gym for example or had other time off.

[30] However, even if there were initially some quieter periods, Mr Harder was regularly undertaking work tasks at Mr Still's direction. For example, in November 2020 Mr Still texted Mr Harder with instructions about going to a renovation job.

[31] I accept that at least at times in 2020 Mr Harder was undertaking a full week's work with UR Plumber. The company was benefiting from this work, particularly as Mr Harder had completed a substantial part of the plumbing training and was able to undertake work without constant in person supervision.

What did Mr Harder expect?

[32] The first question from the volunteer definition is whether Mr Harder expected to be rewarded for work performed. Reward is not restricted to monetary reward.⁵

⁵ *Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152 and *Courage v Attorney-General* [2022] NZEmpC 77.

[33] Mr Harder clearly benefitted from accompanying Mr Still to job sites as it enabled him to progress his training. He also benefitted from the freedom of being away from his home detention base. However, those things are not rewards in the sense required.

[34] Both men acknowledge there was no discussion between them when the arrangement was agreed in August 2020 about monetary remuneration being paid. Mr Harder did not expect to receive money.

[35] There is a dispute about whether there was an expectation of reward in goods. Mr Harder says that he and Mr Still agreed that rather than payment in money, Mr Harder would be recompensed in tools. His evidence was not entirely consistent about whether the tools were solely to be purchased over the period he was unpaid or the entire time until he completed his training. Mr Harder's evidence was that he would get \$20,000 worth of tools from UR Plumber. However, this seems inconsistent with a text message from August 2021 where Mr Harder refers to giving the business four months' free labour so that he could have time off to attend polytechnic courses to complete his qualification.

[36] Mr Still does not recognise that there was any agreement reached about recompense in tools, saying he would not have made such an agreement when the company's fortunes were not clear.

[37] Given the fact the company was newly established in the Waikato it is more likely there was no fixed agreement about Mr Harder being recompensed in tools during the initial time he was gaining experience with the company. Even if bought at trade rates, a commitment by UR Plumber to provide a substantial quantity of tools was unlikely so I do not accept Mr Harder's evidence of an agreement that he would be paid \$20,000 in tools.

Was Mr Harder rewarded?

[38] The second part of the volunteer definition covers whether Mr Harder actually received a reward. Tools could potentially be seen as a reward.

[39] The evidence regarding the receipt of tools was not particularly satisfactory. Some tools were provided to Mr Harder although this did not start until some time into Mr Harder's

time with the company. Mr Harder was not able to provide specific details of when tools were given to him and given that deductions for tools from his pay did not start for some time after wage payments began, it seems likely that tools were mostly provided after February 2021. Some of the tools were also agreed by both parties to be gifts, rather than reward for work. There was no satisfactory evidence of a particular connection between the tools and Mr Harder's performance of work.

[40] Mr Harder received a few occasional sums of cash from Mr Still on behalf of UR Plumber - \$50 or \$100. Mr Harder accepts there was no agreement at the start that he be paid any cash. The company describes these as irregular ex gratia payments not linked to actual performance of work, either in terms of particular jobs or time spent working. Mr Harder agrees. There was a \$1,000 payment at Christmas which had a charitable nature, recognising the time of year and Mr Harder's situation of being on the benefit.

Conclusion

[41] There was no expectation of the receipt of money as that was not discussed and occasional money given not related to particular work. Mr Harder was on a benefit. Mr Harder has not established agreement of a particular expectation regarding tools. The evidence was not sufficient to establish that tools were given in reward for work in the relevant period.

How about other factors?

[42] Mr Harder operated under Mr Still's control and was clearly not running his own business. He wore a UR Plumber uniform. After an initial period, the company provided Mr Harder with a work van. UR Plumber identified the hours Mr Harder was needed. He messaged through photos to Mr Still of work underway or completed.

[43] The Probation Service needed information on Mr Harder's hours and work location to manage his sentence. The arrangements with the Service provide some support for there being an employment relationship. Its "Employment Agreement – Home Detention/Residential Restrictions" document, suggests an employment relationship but is

actually not in the nature of a usual employment agreement.⁶ Rather it incorporates an acknowledgement about Mr Harder's offending, limits on his movements, reporting and checking requirements. It appears the Service did not require a copy of a written employment agreement between UR Plumber and Mr Harder. There was no such agreement in place in 2020.

[44] References in messages and notes from the probation officer to "work" and "employment" suggest she thought it was employment.

[45] The situation with MSD points in the opposite direction. Mr Harder was on an unemployment benefit before the arrangement with UR Plumber commenced. Mr Still knew that. Mr Harder continued on the benefit until the point where he started being paid wages by the company in February 2021. This suggests he did not see the initial arrangement as employment.

[46] Both parties contacted MSD about possible funding arrangements, in ways which suggest neither regarded this 2020 arrangement as employment. In December 2020, with Mr Harder's agreement, UR Plumber contacted MSD seeking to have Mr Harder put on its Mana in Mahi programme. That provided for a subsidy for employers taking on full time employees and supporting them towards receiving a formal industry qualification. Mr Still indicated that Mr Harder was to start on 1 January 2021. As it turned out the programme did not cover third year trainees.

[47] Later Mr Harder sought a grant from MSD for a basic tool set. This funding was to help people get started into work. It was paid to him in about January or February 2021. There was evidence that the formal start date of Mr Harder's subsequent employment was postponed by agreement to allow the MSD payment to be received first.

Was Mr Harder an employee in 2020?

[48] What was the real nature of the relationship? An objective assessment is needed as to whether there was an employment relationship from September 2020 or whether Mr Harder was a volunteer.

⁶ It does not contain all the content requirements set out in s 65(2) of the Act.

[49] The parties verbally agreed that Mr Harder would not be paid for his initial time with UR Plumber. There was no written employment agreement for the 2020 period. The position is reinforced by Mr Harder making no attempt to object to non-payment in the four to five months that he was with UR Plumber, before wages started.

[50] It has not been sufficiently established that Mr Harder expected to be rewarded for his work or received reward for it.

[51] Under other circumstances it seems most unlikely that someone would volunteer in what was essentially an apprentice role. Apprentices usually operate under training contracts and apprentice training agreements and are paid.⁷ Mr Harder instead operated with no regular pay for some months. The previous connection between Mr Harder and Mr Still does not seem sufficient to explain the situation. A plumbing business is not an organisation in which people would usually volunteer. But what has to be factored in here are:

- (a) Mr Harder being in a difficult position regarding work. He had a history of convictions including for dishonesty, a prison record, was currently on home detention and had not finished his plumbing apprenticeship; and
- (b) Mr Still establishing a new business.

[52] I conclude that the parties agreed and the real nature of the relationship was a volunteer arrangement with Mr Harder agreeing that he would not be in paid work until early 2021. He was a volunteer until that point.

[53] As I have found Mr Harder to be a volunteer prior to February 2021 he cannot bring a disadvantage claim about UR Plumber's action in not paying him during that period or if he can, the company's action was not unjustified. His payment grievance is not established.

What happened about an employment agreement?

[54] The grievance letter and statement of problem, both from during the time Mr Harder was represented, assert that Mr Harder was never provided with an employment agreement.

⁷ Industry Training and Apprenticeships Act 1992.

However, Mr Harder now agrees with UR Plumber that in late January 2021 a written agreement was provided to him.

[55] From there the parties deviate. Mr Harder says he had concerns about the agreement not being customised, lacking anything about callouts and after hours work, so returned it unsigned, awaiting a revised copy. None came.

[56] An agreement appearing to be initialled and signed by Mr Harder on 1 February 2021 and initialled by Mr Still was provided to the Authority by UR Plumber.

[57] The Stills gave evidence that Ms Still emailed the document to Mr Harder on 29 January 2021. She confirmed preparing the agreement and made any amendments to it.

[58] According to Mr Still he saw Mr Harder sign the agreement, standing up. Mr Harder's representative did not put to Mr Still the suggestion that he had forged the signature. UR Plumber's counsel did so and Mr Still denied it.

[59] The Stills' evidence was that Mr Still told his wife it had been signed, she thinks in early February 2021, with him giving the document to her as she usually did the paper filing.

[60] Mr Harder categorically denies that he signed the agreement. For Mr Harder it is submitted that his signatures must have been falsified by someone for UR Plumber. Mr Harder says that the document is not the same as the one he was given and returned.

[61] Support for Mr Harder's evidence came from messages between him and his mother in August 2021. He refers to there being "legally no contract" and "the original contract had things k [*presumably I*] wasn't happy about, we were meant to renegotiate and he never brought me a new contract."

Document examiner's evidence

[62] Mr Harder's representative sought evidence from Ms Owen, a very experienced expert document examiner for the Police. She was provided with two signatures from Mr

Harder's employment agreement with another employer as a comparison to the questioned agreement with UR Plumber.

[63] Ms Owen's opinion is that the two signatures in the UR Plumber agreement are simulations, meaning copies of Mr Harder's signature. This suggests that it was not Mr Harder who signed the agreement. However, Ms Owen accepts that they could be an auto-simulations, where a person simulates their own signature. She puts the odds of this as low, as people attempting to make a copy tend to incorporate large differences from their usual signature, which are not evident here.

[64] Ms Owen maintained her evidence despite extensive questioning from UR Plumber's representative. Suggestions such as whether the writer was under the influence of alcohol or drugs, was standing up or under emotional, physical or mental pressure did not vary Ms Owen's view that the signatures were simulations. Being shown additional signatures from Mr Harder's driver's licence and credit union card also did not persuade her to change her view.

Motivation

[65] There seems little reason for anyone from UR Plumber to have copied Mr Harder's signature in February 2021 although there could have been some motivation after Mr Harder finished and Mr Still thought Mr Harder was trying to take the company's clients. There was evidence by way of background of Mr Still having a clean criminal record.

[66] The scenario of Mr Harder deciding in early 2021 to auto-simulate his signature, giving 'plausible deniability', also seems far-fetched. However, Mr Harder was likely already planning his own future business once he became a registered plumber. The employment agreement contained a restraint of trade clause, detrimental to Mr Harder.

[67] UR Plumber pointed to Mr Harder's background to support the creation by him of 'plausible deniability' as being credible. Mr Harder had been bankrupted in 2010 and a history which, by his own admission, includes multiple prison sentences, twenty years of drug addiction, and convictions for fraud and theft. He also owed a large amount of court fines.

Other documents

[68] There are what appear, on the basis of the dates, to be two emails sending an offer letter and employment contract to Mr Harder. Up the top they appear to come from Mr Still but at the bottom there are what may be standard email signatures from Ms Still and then Mr Still. The emails have identical contents, including more unusual features such as the use of “&” between the offer and contract references. Strangely the emails are both sent on Fridays at 1.42pm, but one is dated “Jan 29th” and the other “Feb 26”.

[69] There are also two versions of the employment agreement with some differences, one signed and one unsigned. The explanation provided for UR Plumber was that the unsigned document was missing a couple of pages. That and the reversal of several pages offers some explanation but there is at least one content difference – the job title in the signed document includes the word “Apprentice” whereas the unsigned one does not. Ms Still thinks that she added the reference to “Apprentice” before the document was signed.

[70] Mr Still mentions Mr Harder requesting an electronic copy of the employment agreement and sending one through in late February. There was also mention of the deferment of the start date for employment as Mr Harder wanted to access the cash grant for tools.

Conclusion

[71] Ms Owen’s evidence was compelling, including her rejection of the prospect of auto-simulation.

[72] UR Plumber points to Mr Harder’s credibility being seriously dented by his convictions history. I do note that on the information available, his dishonesty convictions were not of as particularly similar nature to an auto-simulation of signature.

[73] However, given the unusual identical nature of the 1.42pm emails and the different versions of the agreement document, I cannot satisfactorily reach a conclusion at this stage that Mr Harder faked his own signature. The issues identified above will need to be further explored if the agreement is to be relied upon by UR Plumber in other proceedings.

[74] For present purposes both parties accept that a version of the agreement was offered to Mr Harder and although he may have raised some specific concerns, he was aware of the terms offered and kept working.

Was there a failure to provide an employment agreement?

[75] Mr Harder's statement of problem identified that Mr Harder was never provided with an employment agreement said to be in breach of s 64, with a penalty sought.

[76] As described above, the evidence established Mr Harder was provided with a proposed employment agreement. Section 64 obliges the employer retain a signed copy of the employment agreement. Despite the difficulties identified with the document, UR Plumber held unsigned and signed versions of the agreement. It is difficult to see how a breach of s 64 of the Act can be established.

Could UR Plumber legitimately make deductions for tools?

[77] UR Plumber provided Mr Harder with tools. These were a mixture of gifts, spare tools held by Mr Still and new tools bought by the company. It was the latter which UR Plumber sought payment for.

[78] Mr Harder noticed in an April 2021 payslip that \$50 a week had started to be deducted from his pay for tools. Although Mr Harder says he did not think he should have to pay for the tools, he acknowledges that he did not complain about these deductions as he wanted to ensure he could finish his apprenticeship.

[79] Mr Still says UR Plumber tried to help employees out by getting them set up with tools and that deductions for these are a standard practice in the industry. The amount deducted depended on his assessment of what the employee's family could afford to pay each week. Mr Still does not suggest that there was any agreement by Mr Harder to deductions but relies on Mr Harder's failure to object during his employment.

[80] Under s 4 of the Wages Protection Act the general rule is that wages must be paid without deductions. An exception is if the employee consents to or requests a deduction in writing, as set out in s 5 of that Act. Here there was no written consent or request by Mr

Harder for these deductions to be made and the employment agreement document does not provide for consent. UR Plumber breached s 4 of the Wages Protection Act.

[81] There are several different figures suggested to be owing to Mr Harder. The most reliable is the final Xero pay slip which gives a year to date deduction figure of \$1,100. UR Plumber Waikato Limited is to pay Mr Harder \$1,100 within 28 days of the date of this determination for unlawful deductions. Interest on that sum is also to be paid from 2 September 2021 being the final pay date, until the date of the payment calculated according to the Ministry of Justice's civil debt calculator.⁸

[82] Having breached the Wages Protection Act, UR Plumber is liable to a penalty. I do consider that some penalty should be imposed. The payment of wages without unlawful deductions is an important worker's right.

[83] When assessing what the penalty should be, I consider the factors set out in s 133A of the Act, as well as the decisions in *Borsboom v Preet PVT Limited*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁹

[84] Each deduction was for a relatively modest amount of money but the practice went on for some months. Mr Harder did receive tools. Mr Still understood such deductions to be an industry practice and did not focus on the need for consent or request. There is no evidence of previous breaches. A modest penalty should be imposed. I am not satisfied that Mr Harder should receive a portion of this penalty. UR Plumber is to pay the Authority to be forwarded to the Crown account a penalty of \$500 within 28 days of the date of this determination.

How did the employment relationship progress?

[85] Mr Still describes a deterioration in Mr Harder's attitude after the home detention ankle bracelet was removed. He met with Mr Harder at a café and asked him whether he

⁸ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

⁹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

liked the job. Mr Harder said he would not be here if he didn't love it. Mr Still expressed his concern about the change in Mr Harder's attitude. Mr Harder does not accept the accuracy of Mr Still's description of a change.

What happened at Melville High School?

[86] It was somewhat difficult to get a clear chronological picture of events regarding the termination of Mr Harder's employment.

[87] Mr Harder and Mr Still were involved in an altercation at the school where UR Plumber was carrying out work.

[88] There was some confusion on Mr Harder's part about the timing of dismissal events. It appeared from the witness statements of Mr Harder and his mother that the school incident was the immediate precursor to dismissal.

[89] Mr Harder's witness statement puts that incident as occurring after he had attended a polytechnic block course in August 2021. However, text messages from Mr Harder's mother to Mr Still indicate the school incident occurred prior to 14 July 2021. Mr Still's evidence was that it happened on 9 July 2021, which appears correct given the text evidence. It appears Mr Harder's timing was based on messages a few days later between his mother and Mr Still which suggested his employment may have finished.

[90] I note that in June 2021 Mr Still and his wife suffered a family tragedy, losing a child. Mr Still was off work for a couple of weeks.

[91] The parties disagree about who the aggressor was on 9 July. Mr Harder was upset, just having had a serious argument about a personal matter on the phone. Mr Still arrived at the school to see how the project was going. He told Mr Harder that his work van had to be cleaned up. A heated exchange with swearing followed.

[92] Mr Harder left the area to cool down. When he returned, he and Mr Harder both ended up with their fists at least partially raised. A builder intervened and Mr Harder left

the site. Clearly this was an event which should not occur in an employment or a school context.

[93] Mr Harder did not turn up for work for several days, making no contact with Mr Still. Mr Harder had left his work and personal phones in the van which Mr Harder had to have removed from the school. Mr Still phoned Mr Harder's partner on 14 July trying to track him down.

[94] Mr Still mentions the possibility of regarding Mr Harder as abandoning his employment. However, he did not take that approach at the time, wanting to give Mr Harder a chance. Although Mr Still describes being unimpressed with someone trying to punch their boss, this was the first major argument the two had had.

[95] On 14 July Mr Harder's mother messaged Mr Still asking to communicate confidentially. Mr Still confirmed she could but noted that Mr Harder had left the company. This relates to Mr Harder being absent without leave. Mr Harder's mother was concerned that her son was not himself and she had been told he was back on the P.¹⁰ At the investigation meeting Mr Harder's mother indicated that she now believed he was not on P at this time.

[96] Mr Still was also concerned, having thought Mr Harder's behaviour was deteriorating. In the end he agreed to let Mr Harder return to work.

What happened in August 2021?

[97] A disadvantage grievance claim, as well as the events leading up to the termination of Mr Harder's employment, concern his attendance at polytechnic training courses.

[98] Mr Harder had initially indicated to Mr Still that he would need to attend two courses to complete his training, which would each require a week away from work. In about early August Mr Harder had a week off work to attend the first course.

[99] Quantity and timing issues arose about the outstanding training requirements.

¹⁰ Methamphetamine.

[100] At some point which Mr Harder was not able to be specific about, he was told he had to attend more courses. He tried to downplay these as re-sits or parts of courses he had failed before. However, what he indicated to Mr Still was that he had to do about four or five courses, compared to the two he originally specified.

[101] On 16 August 2021, having just completed the first course, Mr Harder told Mr Still that in a few weeks he needed time off to do two one-week September courses back to back.

[102] Mr Harder's understanding was that if his training was not completed by December 2021, he would have to go back to the beginning and start again. Whether this was a timing restriction, a payment issue or something else was not entirely clear. Mr Harder initially indicated during the Authority investigation meeting that he had already paid for the 2021 courses but then said that the course costs had been paid on his behalf.

[103] In any event, Mr Harder indicated to Mr Still that he wanted to finish the training in 2021 so he could go out into business on his own next year. I accept Mr Still's evidence that Mr Harder also said he needed to now be doing his own cash jobs to get money to set up his own business. Mr Still told Mr Harder that he could not use UR Plumber's work van for that.

[104] Mr Still was unhappy as he had originally been told it was only two week-long courses and now it was suddenly more, with Mr Harder insisting they had to be completed that year. Mr Still wondered if Mr Harder had misled him about what requirements were left.

[105] Mr Still checked with Skills NZ and was told Mr Harder did not need to attend the courses in 2021 or restart his programme. It is possible that this was because of an apprehension of Covid impacts. Hamilton and the rest of Aotearoa went into level 4 lockdown, the highest level, for the second half of August 2021.¹¹

[106] That evening Mr Still messaged Mr Harder that Skills NZ said they will have to run block courses in 2022 because not everyone had finished the qualification. Mr Harder responded insistently that it had to be the two block courses in September:

¹¹ Plumbing was an essential service, so UR Plumbing continued to operate.

For me, that's it. I'm not worried about everybody else. I'm saying I wanna be done this year. That's it bro. It's 2 weeks and a 5 days for my baby".¹²

[107] Mr Still responds:

Algud bro do it your way then good luck.

[108] Mr Harder responds with a thumbs up sign. Mr Still messages that he will scoop up the van in the morning. A little later Mr Still messages:

It's been a long time coming my bro this just ain't the place for employment for you.
Still like to be friends but you need to go out on your own and because you don't listen to anyone not even me I can't help you anymore brother
You're a Rogue my bro.
But I believe you will do well bro.
I've done all I can for you.

[109] Mr Harder replies:

You could have given the 2 weeks like I asked, so not all.
All good
Clear the money up that you owe me, with no bullshit and we're smooth sailing.
Receipts for tools etc, amount paid to date.

[110] It may be that some messages were responding to earlier ones but are not sent before the other person sent another message. Mr Still messages:

Na sorry bro I'd should have done with the Melville High School.
I thought your attitude will have changed.
You[r] Pride has eaten you up
Sorry my bro but you don't listen And don't want to change Sorry bro I can't work with that
All
Moneys will be paid out that's owed

[111] Mr Harder messages:

There is a reason you argue with EVERYONE, Customers, contractors, suppliers, tradesmen. EVERYONE. That's out the gate! They ALL wrong?

[112] Mr Still messages:

Good luck my bro I am the boss

¹² The baby reference appears to be to the qualification or new business.

That's good bro but it not your time right now to build your own chapter.
You need to finish your apprenticeship you can't skip the process
It's like getting given your patch usually those fullas run away because they haven't earned it
There is a process in life Jason
You're not ready for business yet
You just have to wait be patient like the rest of us did.

[113] Mr Harder texts that he will take the tools out of the van when Mr Still was there, to save any discrepancies.

[114] On 17 August Mr Harder did not come into work. The van was picked up. Mr Harder messaged that he had left his wallet in the van. Mr Still asked Mr Harder to bring back his (presumably UR Plumber) t-shirts and some tools. Mr Harder responded twice during this exchange with a thumbs up symbol.

[115] Mr Harder comments via text to his mother that if UR Plumber does not pay him his holiday pay "it's unfair dismissal". Mr Harder texted his mother on 19 August saying that he was supposed to have received his holiday pay as Ms Still said she was doing it that day. Mr Harder was being paid into his mother's bank account. She messaged that the pay had not come in.

[116] There was a delay in the holiday pay payment. On the evidence before me Mr Harder then consulted employment advocates, who made contact with Mr Still. Mr Still understood there was a suggestion that he had already terminated Mr Harder's employment. Without seeking advice, Mr Still thought he should issue a formal statement that the employment had come to an end.

[117] On 25 August 2021 Mr Still emailed. Although it was sent to Mr Harder the content refers to him in the third person. For example, "[a]s discussed we have decided to terminate Jason Harder's Contract". It goes on to refer to discussions with Mr Harder about his attitude, verbal abuse and deliberately disobeying instructions and trying to fight the business owner.

Was there a dismissal?

[118] Submissions for Mr Harder describe a sending away by text with Mr Still arriving the following day to collect the work van. In particular the message that begins “It’s been a long time coming my bro this just ain’t the place for employment for you...” is relied on.

[119] I consider the better interpretation of events by an objective observer to be Mr Harder and Mr Still agreeing that the employment would finish as there was an apparent variation in Mr Harder’s course requirements to those originally agreed, with him insisting on completing them in 2021 and wanting to undertake cash jobs so he could go into business on his own account in 2022.

[120] The situation had changed. Mr Still did not want to release Mr Harder at short notice for unexpected extra time that year when the course could be completed next year. Nor did he want to allow the use of UR Plumber’s van for Mr Harder’s cash jobs. Neither of these views were unreasonable.

[121] Mr Harder and Mr Still did not find consensus on how to meet both parties’ wishes with Mr Harder staying in the job. This was a termination by mutual agreement on 16 August 2021.

[122] As it turned out Mr Harder was agreeable only as long as his holiday pay was received straight away.

[123] The creation of Mr Still’s impression, during a discussion with Mr Harder’s employment advocates, that a formal notice was needed, does not change the fact that the employment relationship had already been brought to an end.

[124] I conclude that there was no dismissal. Mr Harder does not succeed in his claim that he was unjustifiably dismissed, that there was a breach of good faith by UR Plumber associated with that dismissal, or that he was unjustifiably disadvantaged by the failure to release him for the courses.

What about wages and time records?

[125] Mr Harder's representative asked UR Plumber on 27 August 2021 for his wages and time records. There was no response.

[126] When Mr Harder was receiving wages, UR Plumber sent him via email from Ms Still, payslips created when she did the pay run using Xero. The payslips provided contained a substantial amount of the information required for wages and time records under s 130 of the Act – Mr Harder's name and postal address, the number of hours worked in each pay period and the pay for those hours along with the wages paid and method of calculation.

[127] The missing items are an identification of his usual kind of work and the fact that he was employed on an individual employment agreement. Regardless of the signature issue, the employment agreement document offered to Mr Harder contained that information. However, even if the payslips and employment agreement satisfy the requirement to keep the record, those documents were not supplied to Mr Harder's representative when the request was made. UR Plumber thus breached s 130(2) of the Act. The company is liable to a penalty under s 130(4).

[128] The next question is whether a penalty should be imposed. The timing of the request for the records is significant. The Stills had recently lost a child. In those circumstances, I am not persuaded that the failure to provide records in August 2021, which would largely have covered what was in the payslips sent to Mr Harder, should result in a penalty being imposed.

Is holiday pay owing?

[129] In his witness statement Mr Harder said that, having taken no holidays when employed, UR Plumber did not pay him any holiday pay in his final pay.

[130] However, an examination of his final pay slip shows that to be incorrect. He was paid around \$2,500 gross in holiday pay, taking into account about 18 hours of paid holiday time taken when working. Mr Harder accepted this at the investigation meeting.

[131] This claim also relates to holiday pay owed on top of any wages due for the September 2020 to January 2021 period. As I have found there are no wages owing for that period, there is no holiday liability.

Summary of Orders

[132] Mr Harder's personal grievance claims are not established.

[133] UR Plumber breached s 130 of the Act and s 4 of the Wages Protection Act but no penalty is imposed.

[134] UR Plumber made unlawful deductions from Mr Harder's wages and is within 28 days of the date of this determination:

- (a) to pay Jason Harder \$1,100 for deductions along with interest on that sum;
and
- (b) to pay the Authority, to be forwarded to the Crown account, a penalty of \$500.

Costs

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

[136] Any party seeking costs should lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party 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.

[137] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.¹³

Nicola Craig
Member of the Employment Relations Authority

¹³ See www.era.govt.nz/determinations/awarding-costs-remedies.