

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 678
3332360

BETWEEN LAUTUSI ISAAKO
Applicant

AND ABS BUILDERS LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Emma Brankin, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting 19 August 2025 at Auckland

Submissions 26 August 2025 from the Applicant
No submissions from the Respondent

Date: 24 October 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lautusi Isaako claims he was employed by ABS Builders Limited (ABS) on 5 February 2024 and was dismissed by ABS on 7 June 2024. He has lodged a statement of problem with the Authority claiming he was unjustifiably dismissed. He also seeks reimbursement of wages, compensation, and wage arrears, as well as reimbursement of legal costs.

[2] ABS has lodged a statement in reply and denies that Mr Isaako was an employee. ABS claims that he was an independent contractor when carrying out work

for it. ABS says it was an informal arrangement and that he left the company voluntarily.

The Authority's investigation

[3] A case management conference (CMC) was held on 12 March 2025 where timetabling directions were made and the matter was set down for an investigation meeting on 19 August 2025.

[4] Apart from lodging a statement in reply and attending the CMC, ABS lodged no witness statements or further documents with the Authority, and took no further part in the Authority's investigation of Mr Isaako's claims. I am satisfied that a copy of the notice of investigation meeting was served properly on ABS on 2 July 2025.

[5] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Isaako and his daughter who answered questions under affirmation from the Authority and his representative. After the investigation meeting Mr Isaako's representative lodged written submissions in the Authority.

[6] 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. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

The issues

[7] The issues identified for investigation and determination are set out in the Mr Isaako's statement of problem and include in summary:

- (a) Whether Mr Isaako was an employee or contractor?
- (b) If Mr Isaako was an employee, was he unjustifiably dismissed?
- (c) If ABS's actions were not justified, what remedies should be awarded, considering:
 - (i) Reimbursement of wages under s123(1)(b) of the Act?
 - (ii) Compensation under s123(1)(c)(i) of the Act?

- (d) Did ABS fail to pay Mr Isaako wages due in accordance with Holidays Act 2003?
- (e) If so, is Mr Isaako entitled to arrears of unpaid wages including payment of holiday pay?
- (f) Did ABS fail to provide wage and time records in accordance with the Act?
- (g) Should penalties be imposed on ABS for breaches of s 4 Wages Protection Act 1983 (WPA), Holidays Act and s 130 of the Act?
- (h) What costs and disbursements should the successful party be awarded?

Background

[8] In 2023 Mr Isaako was employed by Sula Trades Ltd as a builder. He was subcontracted to work for ABS on a building site in Onehunga. Around late January 2024 ABS ceased contracting Salu Trade. Mr Isaako was contacted by the general manager of ABS, Andrey Blinder, who asked him to work for ABS.

[9] Mr Isaako began working for ABS on the 5th of February 2024. He was employed as a builder and was paid \$30 per hour which was the same rate as his previous employment with Sula Trades Ltd.

[10] Mr Isaako stated he never received an employment agreement. He claimed he worked consistently between 7am to 4pm, five to six days per week, averaging approximately 39 hours per week. His role consisted of attaching the framing to trusses, cladding, and finishing jobs. His work was full-time and ongoing, and he did not undertake work for any other employer during his time at ABS.

[11] Mr Isaako always showed up to work ready to complete tasks that he was required to do. He did not have the ability to decide when and where he worked or to choose the tasks assigned to him and he was directly instructed by the leading hand, Mr Lam, who directed his duties on a daily basis.

Dismissal

[12] On 7 June 2024, Mr Isaako telephoned Mr Lam to advise he would not be coming to work that day as he needed to get his truck repaired. Later that day at approximately 7:30 pm, Mr Isaako received a text message from Mr Lam informing

him that his employment was terminated and instructing him to look for work elsewhere.

[13] The text message also stated that while ABS appreciated his work, it was deemed below standard. This was the first time Mr Isaako was made aware that there were any issues with his performance.

[14] Mr Isaako's termination was unexpected, as he received no prior warning, formal review, or opportunity to respond to any alleged concerns about his work.

[15] On June 18th, Mr Isaako formally raised a personal grievance against ABS, challenging his dismissal. He stated he was left with no choice due to the communication from Mr Lam. Mr Isaako stated he requested a copy of his wage and time records.

[16] On 1 July 2024, ABS's general manager, Andrey Blinder, responded by email and admitted that Mr Isaako's termination was done in an unjustified manner. Then on 6 July 2024, ABS changed its stance and in a further email claimed that Mr Isaako was a "subcontractor" or "occasional worker."

[17] Mr Isaako claimed he was neither an independent contractor, nor an occasional worker. He claimed he was a full-time employee with regular hours and duties controlled entirely by ABS.

[18] On 21 July 2024 Mr Blinder emailed Mr Isaako alleging his work was of poor quality and invoiced him for alleged repairs. The email enclosed photos and stated:

Please find the attached invoice for replacing and fixing the cladding finishing, such as, a scribe, box corners, 18x18 moldings, etc, that you have done with unacceptable poor workmanship, some of the photos are attached. ABS Builders Ltd have been instructed by project managers to replace all of those items. Moreover, we are waiting for another recharge invoice from Signature Construction Ltd for the cost of materials and extra painting that had to be done and will now be forwarded to you to pay. You have to pay directly to the nominated bank account of ABS Builders Ltd.

[19] When reviewing the email and invoice Mr Isaako noticed that the photos sent to him did not match what the invoice had stated and that he had never worked at this site during his time with ABS.

Was Mr Isaako an employee of ABS or an independent contractor?

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

[21] 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:⁵

“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 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....

[22] 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).⁶

[23] The distinction between an employee and an independent contractor was discussed in *Leota v Parcel Express Limited*, where the court said the following:⁷

¹Employment Relations Act 2000, s 6(2).

²Employment Relations Act 2000, s 6(1).

³Employment Relations Act 2000, s 6(3)(a).

⁴Employment Relations Act 2000, s 6(3)(b).

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

⁶*Joshua Gerrard v NEC Boyd Holdings Limited* [2023] NZERA 737.

⁷*Leota v Parcel Express Limited* [2020] NZEmpC 61.

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.

[24] So, I will also need to consider this question in my assessment of Mr Isaako's status. My inquiry must focus on determining the real nature of the relationship between the parties.

The intention of the parties and the employment agreement

[25] The first step is to ascertain what the intention of the parties was when they entered into the relationship.

[26] Mr Isaako submitted that the terms of his employment were based on his oral conversations with Mr Blinder. Mr Isaako believed that he was an employee of ABS, it was his understanding that he was working under the same employment arrangement he had been working under previously for Sula Trades Ltd, and he was paid the same \$30 hourly rate. During the investigation meeting, Mr Isaako gave evidence that the contractor rate was significantly higher than this and he would have wanted \$45 per hour.

[27] Mr Isaako claimed that although he requested a written employment agreement from ABS he was never provided with one.

[28] After questioning Mr Isaako, I accept his unchallenged evidence that it was the intention of the parties that he transitioned from working under an employment relationship with Sula Trades Ltd to working under a new employment relationship with ABS on 5 February 2024.

[29] Next, I must consider the way the relationship operated in practice by having regard to factors, including of control and integration, and to the fundamental test of whether, or not, Mr Isaako was working on his own account.

Control and Integration tests

[30] Mr Isaako claims he was employed to do building work for ABS.

[31] Mr Isaako submitted he was required to work exclusively for ABS and did not seek employment outside of working for ABS. He had no control over his work

schedule, location, or assigned tasks. as he was always given these instructions prior to attending work. He was under the direct supervision of Mr Lam, who gave him instructions on what work to complete and when the jobs needed to be completed by. He stated he could not negotiate his own rate and was paid directly into his bank account by ABS.

[32] These features indicate that Mr Isaako was subject to a high level of control by ABS and fully integrated into the role of ABS's construction and renovation business.

The Fundamental Test

[33] The last part of my analysis is to consider if Mr Isaako was in business on his own account with the ability to manage the work he did to increase or maximise his gain. In essence I must consider if he was an entrepreneur providing labour in pursuit of maximising his own business.

[34] There is no evidence that there was any basis on which he could have engaged another person to carry that work out for him. Although Mr Isaako had his own tools which he used, he also used ABS supplied tools on site which is common for employed builders.

[35] Mr Isaako stated he was told by ABS to provide invoices as a record of his time sheets to be paid and that ABS withheld 20 percent of his wages for payment of tax.

[36] The payment of tax is a neutral feature and in the circumstances is not determinative of the issue of whether he was an employee whilst working for ABS.

[37] In summary, when considering the fundamental question of whether Mr Isaako was an employee or contractor, the following facts are significant:

- (a) He was paid weekly in respect of an average of 39 hours a week, to be worked between 7.30am-5.30pm up to six days a week.
- (b) He was required to be present at the worksite during the working day.
- (c) He was provided with the means necessary to perform his duties by ABS.
- (d) He had to ask permission from Mr Lam for days off during his employment and was not able to decide when he worked, this included if he was sick or wanted to take holidays. Mr Lam would come to the construction site every day to

guide and supervise him. He would be told by Mr Lam what the working arrangements and tasks would be for the day. Mr Lam also provided guidance on work specifications and requirements. He was ultimately working at the direction of ABS.

- (e) Mr Isaako did not bear any risk of loss, or conversely have any chance of making a profit. He was simply paid for the hours he worked and was expected to work five days a week. He was not able to set his own rate nor take advantage of special pricing for equipment, and he was not required to provide this.

[38] Mr Isaako claims he was not able to accrue any intangible benefit. He worked solely for the benefit of ABS. ABS dealt with the suppliers and clients and to an external observer such as a client, he would not be differentiable from ABS.

[39] These factors indicate that Mr Isaako was an integral part of ABS's business.

Conclusion on whether Mr Isaako was an employee of ABS or an independent contractor

[40] I find no evidence indicating that Mr Isaako was in business on his own account. He was on an hourly rate to work for ABS. 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 not developing goodwill in the operation of a business of his own accounts and did not have other clients.

[41] I note the intention of ABS did not appear to be to commence a genuine contracting relationship with Mr Isaako. ABS failed to establish on the balance of probabilities that Mr Isaako was an independent contractor. I determine that Mr Isaako was an employee of ABS during the period he worked for ABS.⁸

Was Mr Isaako unjustifiably dismissed?

[42] I have found at the time Mr Isaako was dismissed he was an employee of ABS.

[43] On 7 June 2024 Mr Isaako received a text from ABS telling him to look for work elsewhere as his employment with ABS was terminated. ABS stated that they

⁸ *Barry v CI Builders Limited [2021] NZEmpC 82 EMPC 331/2020* para [59-61].

appreciated his work, but that it was deemed below standard. ABS later responded by email on 1 July 2024 agreeing that “it was done unjustified”.

[44] ABS noted in their Statement in Reply that Mr Isaako was not entitled to any compensation as “he himself didn’t show up for a job he needed to redo”, implying that the termination was in response to Mr Isaako not attending work on 7 June 2024. No other reason has been provided by ABS.

[45] In dismissing Mr Isaako ABS followed no process. ABS has not demonstrated that its actions and how it acted in the lead up to Mr Isaako’s dismissal were what a fair and reasonable employer could have done in the circumstances at the time of the dismissal, so it was unable to substantively justify his dismissal. Accordingly, Mr Isaako’s dismissal was substantively unjustified and it was carried out in a procedurally unfair manner.⁹

Remedies

Personal Grievance

[46] As Mr Isaako has been successful with his unjustified dismissal claim I must turn to consider what remedies he may be entitled to. I may award any of the remedies provided for under s 123 of the Act.

Reimbursement of lost wages

[47] Mr Isaako seeks reimbursement of 3 months in lost wages for the earnings he has lost as a result of his unjustified dismissal pursuant to s 123(1)(b) of the Act.

[48] Where the Authority finds that an employee has a personal grievance, and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration.

[49] Mr Isaako was summarily dismissed without notice. Mr Isaako is entitled to be paid his hourly rate at 39 hours per week for the 13 weeks after his employment ended.

⁹ Employment Relations Act 2000, s 103A.

[50] Mr Isaako is entitled to \$15,210.00 (gross) in lost wages pursuant to s123(1)(b) ERA of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[51] Mr Isaako gave evidence about ABS's decision to dismiss him and the process leading up to that decision. Mr Isaako stated that the abruptness of the termination caused significant distress to both him and his whanau, particularly as he had to support his whanau who relied on his income from ABS to meet their financial obligations. His family has missed out on a lot of family meetings, outings and interactive activities with his family due to his financial circumstances

[52] He said he found it hard to get over how he had been treated He said he had withdrawn from social interactions and had struggled with his confidence. He had avoided meeting friends and family because of the shame and pressure of unemployment.

[53] I determine that an appropriate award to compensate for the effects on him, accepting his evidence, was \$15,000.00. ABS is ordered to pay to Mr Isaako compensation of \$15,000.00.

Contribution

[54] Under the Act I am required to consider if remedies should be reduced for blameworthy conduct by Mr Isaako that contributed to the situation giving rise to his grievance.¹⁰ Mr Isaako was unjustifiably dismissed and did not contribute to his dismissal, and warrants no reduction in remedy.

Wage arrears- holiday pay

[55] ABS failed to pay Mr Isaako public holiday pay, and annual leave entitlements. Further ABS failed to provide accurate wage and time records; however I accept Mr Isaako's calculation for what is owed.

¹⁰ Employment Relations Act , s 124.

Public Holidays

[56] Mr Isaako is entitled to payment of five public holidays (Waitangi Day, Easter Friday, Easter Sunday, Anzac Day, Kings Birthday) at 8.5 hours per day, being \$1,275.00 (gross).

Annual Holidays

[57] ABS is to pay Mr Isaako's annual holiday pay of 8 percent for his period of employment of 18 weeks. (18 x \$1,170.00 per week = \$21,060 x 8% = \$1,684.80).

[58] ABS is to pay Mr Isaako's \$1,684.80 (gross) annual holiday.

No penalty in relation to ABS's breaches of the Holidays Act 2003, Wages Protection Act 1983 and Employment Relations Act 2000.

[59] The application for penalties in relation to ABS's breaches of the Holidays Act 2003 and Wages Protection Act 1983 are statutorily barred, as they were not raised until the lodging of Mr Isaako's closing submissions on 26 August 2025, outside the 12-month time limit.¹¹

[60] In regard to failure to provide wages and time records, I do not find in the circumstances of this case that the breach is sufficiently serious to warrant a penalty to be imposed under s 130 of the Act. The Authority orders against ABS to pay arrears to Mr Isaako was sufficient enough to address Mr Isaako's claim. Accordingly, no penalty order is made against ABS.

Summary of orders

[61] ABS Builders Limited is ordered, within 28 days of the date of this determination, to make payment to Lautusi Isaako;

(a) \$15,210.00 (gross) as reimbursement of lost wages of 3 months' salary; and¹²

(b) \$15,000.00 as compensation for hurt humiliation and injury to feelings;¹³ and

(c) \$1,684.80 (gross) for annual holiday pay; and

¹¹ Employment Relations Act 2000, s 135(5), Wages protection Act 1983, s 13(1), Holidays Act 2003, s 75

¹² Employment Relations Act, ss 123(1)(b) and 128.

¹³ Employment Relations Act, ss 123(1)(c).

(d) \$1,275.00 (gross) for public holiday pay.

[62] There is no counterclaim before the Authority in relation to the alleged money owing to ABS by Mr Isaako for remedial work, as such no offset can or should be made.

Costs

[63] As ABS was not represented and did not participate in proceedings, it is not appropriate to reserve costs in the circumstances.

[64] Mr Isaako is entitled to a contribution to his costs as he has been successful. When considering costs, the starting point is the Authority's daily tariff, which is \$4,500 for a one-day investigation meeting. The investigation meeting was completed in half a day.

[65] ABS did not actively engage with proceedings did not appear at the investigation meeting. In the circumstances it is appropriate to award \$2,250 in costs.

[66] Accordingly, within 28 days of the date of this determination ABS Builders Limited is ordered to pay Lautusi Isaako \$2,250 in costs and reimburse the application of fee of \$71.55

Andrew Gane
Member of the Employment Relations Authority