

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 381  
3172688

BETWEEN            TUAN DAT (MON) NGUYEN  
Applicant

AND                    COMPLETE HOMES PAINTING  
LIMITED  
Respondent

Member of Authority:    Sarah Kennedy-Martin

Representatives:        Paul Mathews, advocate for the Applicant  
Trang Huyen (Cindy) Cao for the Respondent

Investigation Meeting:    23 November 2022 at Wellington

Submissions Received:    23 November 2022 from the Applicant  
9 December 2022 from the Respondent

Date of Determination:    18 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Tuan Dat (Mon) Nguyen (Mr Nguyen) worked as a painter and labour hand for Complete Homes Painting Limited (CHPL) from 28 April 2020 until the employment relationship ended and he became a contractor to CHPL on or about 9 August 2021. CHPL has two directors, Steven Nguyen and Trang Huyen (Cindy) Cao who both worked in the business. Prior to and during the employment relationship between Mr Nguyen and CHPL, Mr Nguyen also lived in the same house as the directors of CHPL.

[2] Mr Nguyen says his employment was terminated without proper consultation or justification. CHPL say that Mr Nguyen agreed to all the changes and due to concerns about

his performance these were necessary changes. CHPL say there was no dismissal because Mr Nguyen agreed to become a contractor and any actions it took were justified and the process it followed was that of a fair and reasonable employer.

### **Authority's investigation**

[3] The Authority held an investigation meeting for this matter in Wellington on 23 November 2022. Mr Nguyen gave oral evidence and written statements were provided from Sebastian Pian and Ivy Yang. For CHPL, the directors Ms Cao, and Steven Nguyen gave oral evidence along with Steve Harris, Operations Manager and Lam Nguyen who also lived in the same house and had knowledge of the parties to this dispute. CHPL provided a number of additional statements that were not considered to be relevant to the Authority's investigation. Both parties gave final submissions.

[4] Having regard to s 174E of the Employment Relations Act 2000 (the Act), it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[5] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

### **Mr Nguyen's employment at CHPL**

[6] CHPL offered Mr Nguyen work when his previous employment came to an end during the Covid-19 lockdown in 2020. CHPL's director Ms Cao says she gave Mr Nguyen a signed employment agreement saying he was to start work in the permanent and full-time role of painter and general labour hand on 28 April 2020. Ms Cao said they did not need any extra employees at that time but offered work to Mr Nguyen to support him. They shared commonalities in that they were all from Vietnam and Ms Cao and Steven Nguyen tried hard to ensure they looked after the workers of CHPL including migrant workers and some from Vietnam. Mr Nguyen was on an open visa his work was not tied to CHPL.

[7] Mr Nguyen had no basic painting skills, so Ms Cao was involved in his initial induction and training before she took parental leave from the business. Steven Nguyen was also involved in Mr Nguyen's training and then supervised him and the worksites.

[8] In late October 2020 Mr Nguyen was promoted to manager when the previous manager resigned. This meant he was responsible for running jobs on site and co-ordinating staff and materials. He was also responsible for the quality of the work completed. Towards the end of 2020 Steven Nguyen said he was aware of issues with the jobs Mr Nguyen was in charge of but believed Mr Nguyen when he told him it was other people were the cause or were to blame for things like spilt paint or rubbish left on site.

[9] In March 2021, Ms Cao and Steven Nguyen raised an issue on a job with Mr Nguyen after a client complained about the finish. They discussed with Mr Nguyen their concerns because he had been unable to fix the problem even after spending another day working on it. Mr Nguyen disclosed a personal issue and they all agreed to move forward and Mr Nguyen promised he would take more care.

[10] In April 2021 they received a complaint from a staff member about Mr Nguyen. This complaint was never shown to Mr Nguyen. By this stage, the directors of CHPL had asked Mr Harris, who had not long retired as operations manager at a scaffolding company, to work for CHPL as the operations manager. Mr Harris agreed and was included in discussions about Mr Nguyen. Mr Harris also lived at the same house as the directors and Mr Nguyen.

[11] Ms Cao saw Mr Nguyen using his crypto currency app on his phone at work shortly afterwards. A further complaint was received about rubbish being left on a site and in June 2021, some information was received from a builder who worked alongside CHPL's painters. This information was not favourable to Mr Nguyen and included observations about incidents of concern to CHPL and opinions on Mr Nguyen's work ethic and interactions with other employees of CHPL. It was not clear whether this information was ever shared with Mr Nguyen.

[12] In July 2021, they knew Mr Nguyen was running his own online salad business and were comfortable with that so long as he was not doing it during work time. Ms Cao said they had evidence that on more than one occasion he was on his phone during work hours working on his business when he was supposed to be working for CHPL.

[13] As a result of this and the mounting number of issues, the directors agreed that Mr Nguyen should stop working as a painter and work instead with Mr Harris as a scaffolding labour hand and at the same time start learning an accounts/sales manager role for CHPL. Mr Harris was to oversee the scaffolding work and train Mr Nguyen in the sales and marketing

work. They recognised Mr Nguyen had potential and he had a marketing degree and they thought Mr Nguyen could focus on building and maintaining customer relationships and work for CHPL that way.

[14] On 18 July 2021 they met to discuss this proposal and said Mr Nguyen agreed. They did not make it clear why they were offering this proposal. Mr Nguyen on the other hand said he agreed to it because Mr Harris convinced him he needed people to work with him who he could trust. Mr Nguyen also understood that after a month if things went well he would be permitted to work full time as an account manager with a higher wage on top of commission. Mr Nguyen said Mr Harris told him his wage could go up to \$27.00 per hour. Mr Harris denies saying that. Mr Nguyen said he felt better about this role because he had not enjoyed the physical work and he was led to believe it would lead to full time sales/account manager work.

[15] Things did not go well. Mr Nguyen did not like the scaffolding work and alleged Mr Harris was verbally abusive towards him. Mr Harris denied that. Mr Harris said he showed Mr Nguyen the marketing side of the business, introduced him to contacts but he found Mr Nguyen to be unmotivated. The relationship between Mr Harris and Mr Nguyen deteriorated.

#### *The meeting on 6 August*

[16] It was not in dispute that by August Mr Nguyen had not been able to secure any clients for CHPL. This led to a meeting and Mr Nguyen's employment with CHPL came to an end with a view to him transitioning to a marketing and sales role as a contractor.

[17] The meeting where this was discussed took place on 6 August and it was pre - arranged that the directors and Steve Harris would meet Mr Nguyen after work at their home. Mr Nguyen was told he could bring a support person by Mr Harris. The statements are at odds about how the meeting proceeded. Mr Nguyen said he arrived home and walked in the door and Stephen Nguyen started screaming at him demanding to know if Mr Nguyen still wanted to work for CHPL. The directors were unhappy with Mr Nguyen working on his own online food takeaway business in work time even when he tried to explain he only ran his business outside of work time.

[18] Mr Nguyen's statement was that Steven Nguyen then asked Mr Nguyen if he wanted to work full time as a scaffolder or in sales. Mr Nguyen replied that if he had to choose, he would prefer to work in sales. Steven Nguyen told him he could receive five percent

commission from customers' contracts, but he would not receive any base salary, expenses or a company car, just commission. Steven Nguyen said as of 9 August Mr Nguyen would become a contractor instead of an employee meaning he would not receive any leave entitlements, so his accrued leave would be paid out.

[19] The directors and Mr Harris strongly deny Mr Nguyen's statement that Stephen Nguyen started screaming at Mr Nguyen. They say Steven Nguyen arrived home last and they were all seated at the dining room table on chairs and there was no screaming. Stephen Nguyen, was described by Ms Cao as being a very gentle and polite person who would never scream at anyone because it is just not his personality.

[20] Ms Cao explained it was her who offered and explained to Mr Nguyen about the sales position as a contractor that she wanted to offer Mr Nguyen. She explained he would receive five percent of total sales commission but no base salary or expenses because CHPL had spent two week's wages for Mr Harris to train Mr Nguyen.

[21] She had already provided Mr Nguyen with CHPL marketing material such as business cards, shirts, business flyers, a Samsung tablet and his phone bill and petrol during that month were paid for. Ms Cao says Mr Nguyen agreed to terminate his employment contract immediately and move on to a contracting role from the following week. She recalls Mr Nguyen also agreed she could pay out all his work hours and leave entitlements in the next pay run.

[22] Ms Cao's statement was that she did most of the talking at that meeting and I accept that. Her evidence was clear that things had not been working out with Mr Nguyen working as a painter. There were many issues with Mr Nguyen's performance that she and Steven Nguyen were concerned about. From April 2021, when Mr Harris became the Operations Manager, he was also involved in the conversations about problems and issues that arose and what would be best for both CHPL and Mr Nguyen.

[23] The evidence of Ms Cao, Mr Harris and Steven Nguyen was mostly consistent with each other. Their evidence conflicts with Mr Nguyen's in terms of who did the talking at the meeting and whether or not Mr Nguyen consented or agreed to the changes being proposed. Mr Nguyen's evidence was such that it would have looked like he agreed but he says he was put in a very difficult position and required to choose at the meeting. Mr Nguyen said he was scared of Steven Nguyen who had been screaming at him and unsure what his options were or

what he should do. The fact Mr Nguyen was also their flatmate, meaning his accommodation was connected with the directors of CHPL made it difficult for him when the employment relationship became strained.

*What happened after the 6 August meeting?*

[24] Mr Nguyen says on 9 August, CHPL stopped giving him any work or communicating with him and he received his final pay on or about 31 August 2021. On 13 August, Ms Cao emailed confirming Mr Nguyen's position had changed from employee to contractor working for CHPL in marketing on commission. She set out the terms of the contracting arrangement. Ms Cao says Mr Nguyen did not bring any work to the company.

[25] In late August Mr Harris and Mr Nguyen met and Mr Nguyen expressed he wanted to take Steven Nguyen to court for an unfair dismissal. Mr Harris told Mr Nguyen that he should not take CHPL to court as they had a strong case against Mr Nguyen for breaching his employment agreement. Mr Harris denies he said this. CHPL offered Mr Nguyen some more work while he found new employment but reiterated that Mr Nguyen agreed verbally at the meeting to end his employment contract immediately and start working in sales as a contractor to CHPL.

[26] Mr Nguyen did not take up the offer of additional work for CHPL and moved out of the accommodation he had shared with the directors. New Zealand then went into lockdown on 31 August 2021 and CHPL failed to answer Mr Nguyen's enquiries about whether he would be getting paid or getting the wage subsidy. Mr Nguyen said this was a very stressful time for him and he was under significant financial pressure. In September after no further communication, Mr Nguyen says he had no other option but to find another job. On 29 October Mr Nguyen raised a grievance.

## **Employment status**

*Poor performance at work*

[27] During the time that Mr Nguyen was employed, Ms Cao, Steven Nguyen and Mr Harris gave evidence of Mr Nguyen's progress and painting skills falling below expectations. In time they allege CHPL came to understand Mr Nguyen had been dishonest however, most of that information came after the employment relationship had ended.

[28] By May 2021, Ms Cao said CHPL had received bad comments and reviews from clients related to jobs Mr Nguyen had been involved in. The evidence was that Ms Cao and Steven Nguyen became increasingly concerned about their business. They gave Mr Nguyen many chances and clearly explained each matter to Mr Nguyen. Ultimately, they did not see any change in behaviour from Mr Nguyen. Examples of concerns they said that they discussed with him include:

- Spilt paint and mess left on work sites;
- Rough finish on paint work;
- Mr Nguyen using his crypto currency app and doing work on his online business on more than one occasion;
- Issues with conflict between Mr Nguyen and other employees when he was managing a team; and
- More than one incident with the work van (eg a driving complaint, van parked across a residential driveway).

*The Directors' plan*

[29] Steven Nguyen had originally thought Mr Nguyen would become his 2IC at work sites and they promoted him to manager at Steven Nguyen's suggestion. They saw his potential and that he was good with people but towards the end of 2020 and into early 2021 Steven Nguyen started to be concerned about Mr Nguyen's impact on CHPL.

[30] By June 2021 CHPL had more than one complaint from clients about jobs Mr Nguyen had worked on and the directors' evidence was that they had slowly realised Mr Nguyen was causing problems. They reached that view and concluded they could not give Mr Nguyen any more chances with painting.

[31] Ms Cao and Steven Nguyen worked very hard and were passionate about their business. Ms Cao said Steven Nguyen told her in June after he received information from a builder about observations of Mr Nguyen on work sites, that he wanted to give Mr Nguyen two weeks' notice to terminate his painting and labour hand role. They discussed this with Mr Harris who was overseas at the time.

[32] Instead Mr Harris suggested CHPL allow Mr Harris supervise Mr Nguyen under his direction doing scaffolding, not painting work and suggested they give Mr Nguyen training in an additional role in the business as an accounts/sales manager. This was on the basis they had concluded Mr Nguyen did not like painting, but he did like sales and they knew he had studied marketing. Ms Cao and Stephen Nguyen say that they agreed to give Mr Nguyen a chance working in another part of the company, hoping that Mr Nguyen would improve because they wanted to support him.

[33] Ms Cao explained it in this way:

we mutually agreed that Mon stopped working as a painter and worked as a labour hand for scaffolder and as a sales manager, under Steve Harris' supervision. We highly hope that Mon would work hard and would be successful in this new role.

[34] Steven Nguyen said:

Then Cindy and I thought give him an opportunity to do marketing for the company. Steve Harris told us to let him try for one month in a marketing position in our company not only to make more jobs from clients but also to gain his marketing experience.

[35] Steve Harris said in his written evidence there was a meeting to discuss with Mr Nguyen their thoughts about changing his role but was silent on discussions before the meeting. His oral evidence was not entirely clear but suggested there had been a prior conversation with the directors of CHPL and a decision made to transition Mr Nguyen out of painting to sales and marketing. It seems likely that is indeed what happened because otherwise there would be no point starting to train Mr Nguyen in sales and marketing.

*Was Mr Nguyen's employment ended by agreement?*

[36] From the evidence set out it was clear Mr Nguyen was an employee of CHPL from 28 April 2020 until 9 August 2021 after the meeting where CHPL say there was agreement Mr Nguyen relinquish his employment with CHPL to become a contractor to CHPL. There was also a variation to the employment agreement on 18 July 2021 because Mr Nguyen's role changed from the one recorded in his employment agreement. He was no longer employed as a painter.

[37] Mr Nguyen agrees he did not like the physical work it was apparent there was a degree of acceptance that his work had not been perfect but he says he was not told about all the issues

CHPL raised at the investigation meeting. Mr Nguyen also had responses for many of the issues CHPL raised and it was clear this was not a one-sided conversation between the parties. Ms Cao accepts in hindsight there should have been a written variation to record what was agreed.

[38] I am satisfied the variation to a role that was part scaffolding, and part sales was by agreement but it is clear that Mr Nguyen's employment ended on 9 August by virtue of what was discussed at the 6 August meeting, Ms Cao's email of 13 August and the fact he received a final pay with all his annual leave entitlements paid out. If this was without Mr Nguyen's agreement he says it was a summary dismissal and the actions of CHPL were not justified.

### **Unjustified dismissal**

[39] In considering whether there has been an unjustified dismissal, the Authority is required to apply the justification test in s 103A of the Act. It is required under the test to consider on an objective basis whether the actions of CHPL, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[40] This will include whether any proposal for change was reasonably consulted with Mr Nguyen and whether the issues of concern about him were raised with him, whether he had a reasonable opportunity to respond and whether any explanations were genuinely considered before decisions were made.

[41] Mr Nguyen says he was caught off guard at the meeting on 6 August by the suggestions from CHPL that he chose between scaffolding and sales and marketing. He knew he preferred a move into sales having completed his degree in marketing and accepted he did not find the physical work rewarding and knew that was not for him long term. Mr Nguyen says he did not agree but by his actions at the meeting it may have appeared that he did agree.

[42] CHPL's position was that it was trying very hard to help and support Mr Nguyen who was not only a worker for CHPL, but also the directors' flatmate. However, if the decision to move Mr Nguyen from employee to contractor was justified, CHPL would firstly have been required to address any concerns with Mr Nguyen about his performance and conduct because those concerns formed the basis for moving him away from painting.

[43] Even if CHPL had concerns significant enough to justify changing Mr Nguyen's role or consider ending the employment relationship, it would have been required to comply with the rules for employers who propose making decisions that are likely to have an adverse effect on the continuation of the employment of an employee. These are set out in s 4 of the Act and require affected employees be provided with access to information relevant to the continuation of the employees' employment and an opportunity to comment on the information before the decision is made.

[44] This means there were two ways in which CHPL could have been expected to have acted in the circumstances. Any concerns about performance or conduct had to be raised with the employee. The evidence of the issues and problems with his work and conduct being raised with Mr Nguyen was clear but these stretched back to when he was first employed and likely include examples from when his was being trained. Those types of issues are unlikely to be sufficiently serious to support a proposal to end an employment relationship.

[45] There was also evidence of some more serious concerns, however, these were not known to CHPL at the time it made the key decisions about Mr Nguyen's employment so cannot be taken into account by the Authority in resolving this matter.

[46] The second way in which CHPL fell short in its dealings with Mr Nguyen was observance of the good faith requirements in s 4 of the Act. These were triggered because CHPL proposed initially making significant changes to Mr Nguyen's role and then ending the employment relationship. CHPL could have been expected to communicate the proposal in full to Mr Nguyen and to provide information relevant to that decision which in this case would have had to include the reasons why the directors had reached the conclusion Mr Nguyen could no longer be trusted to work as a painter and that they intended ending the employment relationship.

#### *Procedural fairness*

[47] When considering procedural fairness, the Authority must not determine an action or dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Nguyen being treated unfairly.

[48] There was no reasonable period to allow for consultation. Consultation would require a reasonable opportunity for Mr Nguyen to provide considered feedback about the proposal

and comment before CHPL made any decisions. In addition, even though CHPL wanted to continue a relationship with Mr Nguyen the change from employment relationship to contractor is a significant one and a reasonable employer could be expected to allow time for an employee considering making that transition to seek advice.

[49] As a matter of fairness, it is important when employers make decisions that will impact on an employee's employment, that decisions are not predetermined. By virtue of the directors' evidence, the decision was already made. Their evidence was that they had already discussed giving Mr Nguyen notice because of how dissatisfied they were with Mr Nguyen's work until Mr Harris suggested the alternative. Ms Cao set out the two stages in her evidence that eventually unfolded because these were the options presented to Mr Nguyen at both meetings (a combined role involving scaffolding and sales working and then a purely sales and marketing role).

### **Outcome**

[50] With a clear plan in place prior to meeting with Mr Nguyen to discuss his role and work with CHPL on 18 July and again on 6 August, but not being transparent about the fact CHPL had planned to move him into sales and marketing because of the issues it had with his performance, CHPL's actions could not be justified.

[51] Despite Mr Nguyen's partial agreement, not giving Mr Nguyen an opportunity to contribute to a proposal before a decision was made, that he relinquish the employment relationship and move to a contracting role were also a not minor procedural flaw and resulted in unfairness to Mr Nguyen. An opportunity to seek advice was especially important given the option to move from an employment relationship to a contracting arrangement.

### **Remedies**

[52] Mr Nguyen has been successful in bringing his claim for unjustified dismissal and disadvantage and is entitled to an assessment of remedied for his personal grievance.

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[53] Mr Nguyen seeks \$20,000.00 under s 123(1)(c)(i) of the Act for hurt and humiliation in relation to the unjustified dismissal. Mr Nguyen described losing his appetite, having trouble sleeping after the meeting on 6 August and he was constantly thinking about what happened in the meeting and questioning whether he had done the right thing or whether he had done

anything wrong. He did not know who he could ask for support from. There was financial stress as he navigated moving out of the house and deciding what to do. He also had another two interactions with Mr Harris that he found stressful. New Zealand moved into Alert Level 4 again on 18 August 2021 although stress from this is not attributable to CHPL.

[54] Mr Nguyen described not being able to tell his mother the truth about what happened and that because he felt ashamed and humiliated he did not want to share this with his friends and family. Two of his friends provided statements that confirmed this evidence.

[55] Given my findings above, considering the distress experienced from the decisions made and the process followed by CHPL, the impact on Mr Nguyen and the general range of awards in similar cases, I agree an appropriate award for compensation under s 123(1)(c)(i) of the Act is \$20,000.00.

#### *Lost wages*

[56] The Act permits reimbursement to the employee of a sum equal to the whole or any part of wages or other money lost by the employee because of the grievance. Mr Nguyen seeks lost wages accumulated at the rate of his weekly pay from the date he was dismissed until he secured permanent employment on 13 September 2021. I accept that reimbursement is appropriate in circumstances where there has been an unjustified dismissal and I was provided with evidence of Mr Nguyen's job applications and his income summary from Inland Revenue Te Tari Taake.

[57] Mr Nguyen's wages were \$22.00 per hour by the time his employment ended. The amount Mr Nguyen would have earned at CHPL up until he secured new employment was \$2,288.00.<sup>1</sup>

#### *Contributory conduct*

[58] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

[59] In this case one aspect of Mr Nguyen's conduct contributed to the situation. Firstly, his approach to the painting work. He accepted the physical nature of the job did not suit him,

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<sup>1</sup> \$176.00 per day x 13 days.

and I accept there were repeated conversations about Mr Nguyen's work to the extent it could be said he did not progress from the training stage to a painter who could be relied upon to complete good work and to deal with clients and other employees in a respectful manner.

[60] The failure to reach the required level of competence lies mostly with Mr Nguyen. CHPL appeared to have a realistic expectation of the timeframe in which this could be achieved and was willing to support and train Mr Nguyen. This was causative of the outcome and sufficiently blameworthy to require a reduction of the remedies awarded for Mr Nguyen's grievance. Accordingly, a reduction in remedies is required of twenty-five per-cent.<sup>2</sup>

### **Orders**

[61] Complete Homes Painting Limited is ordered to make the following payments to Tuan Dat Nguyen:

- (a) Lost wages amounting to \$2,288.00 under s 123(1)(b) of the Act; and
- (b) The sum of \$15,000.00 under s 123(1)(c)(i) of the Act as compensation for hurt and humiliation.<sup>3</sup>

### **Costs**

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Nguyen may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum CHPL 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.

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<sup>2</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

<sup>3</sup> \$25,000 less 25 per-cent reduction for contributory conduct.

[63] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>4</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)