

**NOTE – a non-
publication order is
contained in
paragraph 16 of this
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 625
3112300

BETWEEN	VKU Applicant
AND	PHZ First Respondent
AND	GXE Second Respondent

Member of Authority:	Nicola Craig
Representatives:	The applicant in person No appearance for the respondents
Investigation Meeting:	24 May 2023 at Auckland
Submissions received:	At the investigation meeting and 4, 5 and 15 September and 16 October 2023 for the applicant No submissions received for the respondents
Date of determination:	24 October 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] VKU provided services for PHZ and/or his company GXE (the company). PHZ is the sole director and shareholder of GXE. In light of the non-publication order below, the parties are identified by randomly selected letters which are unrelated to their actual names.

[2] VKU says he was employed by PHZ, was unjustifiably dismissed and is owed wages and holiday pay. PHZ and GXE acknowledge the parties referred to their relationship as one of employment but say in substance it either never was, or after a time ceased being, an employment relationship.

The Authority's investigation

[3] PHZ and his company were initially involved in this matter, instructing a lawyer and lodging a statement in reply and documents. Their representative participated in a case management conference.

[4] Another Member dealt with this matter at an earlier stage. The representative for PHZ and GXE indicated that due to a serious personal situation they had decided not to defend the claim or take any further steps, although still believing that the claim was wrong. The Authority proceeded to hold an investigation meeting on 25 August 2022. Subsequently the matter was allocated to me on 17 March 2023 for continuation of the investigation under clause 16 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[5] I arranged for a check to be made with the representative of PHZ and GXE. Their position regarding non-participation remained the same. A case management conference was arranged with VKU and then an investigation meeting held on 24 May 2023. As expected, there was no attendance by PHZ or for GXE. VKU provided written witness statements and gave evidence under oath, answering questions from the Authority. Submissions were heard at the investigation meeting, with VKU agreeing to provide additional documents. Comment and documents were later filed along with an application for a non-publication order.

[6] With parties' agreement, the Authority had identified the issues to be investigated as falling into two tranches. At the May 2023 investigation meeting there was discussion about the possibility of considering the issues together. The parties were later informed that the Authority anticipated that both tranches, along with costs, could be decided together. Further comment was sought. PHZ's position was that he continued to wish not to be involved. Further submissions and documents were provided by VKU. I decided to deal with all the issues together in this determination.

[7] The last submissions from VKU suggested that I should reject PHZ and GXE's assertions in their entirety as they have chosen not to participate. However,

the Authority is an investigative body required to establish the substantial merits of the case.¹ It has wide powers to accept such evidence and information as in equity and good conscience it thinks fit.² I have considered contemporaneous documents provided by PHZ and GXE. VKU was asked questions at the investigation meeting regarding material in those documents and the statement in reply. However, limited weight can be given to PHZ and GXE's material which was not supported by sworn evidence.

[8] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

Non-Publication Order

[9] At the investigation meeting VKU indicated he wished to seek a non-publication order. In September 2023 an extensive application was filed.

[10] The primary order sought was a total ban on publication of this proceeding. Alternatively, orders preventing the identification of VKU and his current employer were sought.

[11] In summary, the wide ranging grounds provided in support of the application were:

- the likely impact on VKU and his family members of publication
- a health condition affecting VKU which could be impacted by stress
- his life path in recent years and current employment
- factors relating to PHZ
- a lack of public interest in the claims themselves.

[12] The Authority is informed that VKU's current employer supports this application regarding its own and VKU's position.

¹ The Act, s 157(1).

² The Act, s 160(2).

[13] The starting point is the principle of open justice requiring tribunal proceedings and decisions to be open and available to the public. However, there are situations justifying exceptions being made.³

[14] A decision not to publish an entire determination would be a drastic one and most unusual in the context of the Authority. The situation here does not justify such a decision. It is possible to grant more limited orders, as is usually the case with successful non-publication applications, and still ensure that what needs to be protected is protected.

[15] I am satisfied that taking into account all those who could be affected, including emotionally, reputationally and financially, it is in the interests of justice to grant a non-publication order.

[16] On a permanent basis I order that the names and any identifying details of VKU, PHZ and GXE not be published. Any request to access the Authority's file in this matter, other than by the parties, shall be referred to a Member for consideration.

The issues

[17] The issues for investigation are:

- (a) Was VKU in an employment relationship with PHZ and/or GXE and if so, in what period/s?
- (b) If there was an employment relationship, what was the agreement or arrangement about payment?
- (c) Are claims that VKU was disadvantaged due to unjustified action (focused on non-payment of wages and holiday pay) and unjustified dismissal able to be pursued considering the requirement to raise grievances within 90 days and the limitation period?
- (d) If VKU is able to pursue his dismissal claim, was he unjustifiably dismissed?
- (e) If so, what remedies, if any, should VKU receive?

³ *Erceg v Erceg* [2016] NZSC 135.

- (f) Is VKU entitled to outstanding wages and holiday pay?
- (g) Was VKU disadvantaged by unjustified action of PHZ and/or GXE regarding non-payment of wages or holiday pay and if so, what remedies (if any) should he receive?
- (h) Does VKU owe PHZ and/or GXE anything and if so, how much?

The parties established the arrangement

[18] VKU and PHZ had been friends for some time. In 2015 VKU made contact with PHZ seeking a work arrangement. Some external funding was available for VKU's work but there were advantages to him in being an employee. That was what he wanted. PHZ was agreeable to taking VKU on as part of the business he was already operating.

[19] A standard employment agreement template was found online, with the parties agreeing on some adjustments.

[20] At that stage PHZ traded under the GXE name but without the use of "Limited" as there was no company (I refer to this as the business). In August 2016 PHZ incorporated the GXE company. For the sake of completeness I note that PHZ also established another company with a similar name. However, that company's name does not appear on documentation with the Authority and it is no longer registered.

[21] The document signed by the parties at the start of the arrangement is headed "Employment Agreement" and refers in the body to being an individual employment agreement entered into under the Act. The parties are defined as "employer" and "employee" with the work being as a consultant. There are multiple references to matters which are usual in an employment agreement. These included VKU being required to weekly perform at least 32 hours of work and be at the place of work between 9am and 5pm but with flexibility as to start and finish times.

[22] Payment was to be weekly on a piece work basis, referring to the rate in a schedule. Unfortunately, there was no schedule. This seems to have been deliberate. From the evidence it appears the parties understood the funding was to come into the business with a percentage deducted by PHZ and the rest passed on to VKU. The

agreement was put together in a short period. VKU did not have precise percentages in mind at the time of signing. It may be PHZ did not either, so no figure was specified with the parties expecting to operate on a friendly basis to reach agreement.

[23] Broadly speaking the funding followed VKU but was paid through PHZ who provided some services himself to assist with the provision of the funded work.

Employment status test

[24] Employees are those employed to do any work for hire or reward under a contract of service.⁴ The real nature of the relationship is the critical focus when deciding whether someone is an employee or an independent contractor.⁵ I must consider all relevant matters including those which indicate the intention of the parties, although statements made by them about the nature of the relationship are not determinative.⁶

[25] What needs to be undertaken is a broad nuanced assessment, including an examination of the control exercised, whether the person was integrated into the organisation and whether they were really operating a business on their own account.

Intention that VKU be an employee

[26] The parties signed a written employment agreement. Although there was some time pressure, my assessment is that both parties were in a good position to make an informed assessment about the use of an employment agreement document.

[27] At the start of the arrangement at least, the parties intended this to be an employment relationship.

Control and integration

[28] PHZ exercised some control over VKU. VKU recalls him frequently saying that the buck stopped with PHZ. The business provided office systems support. Some initial work on projects was undertaken by PHZ or the administrator with VKU then becoming involved. From that point VKU would undertake the substantial majority of the work with PHZ or the administrator assisting on occasions.

⁴ The Act, s 6(1).

⁵ The Act, s 6(2).

⁶ The Act, s 6(3).

[29] There was a degree of supervision of VKU's work by PHZ although this seemingly declined over time. Each man blames the other for this.

[30] VKU had an email address incorporating the business's name.

[31] The business operated out of PHZ's home. VKU went in regularly to work with PHZ and the administrator on reports to the funders. At other times VKU worked mainly at home or out visiting other places.

[32] On the evidence before me, at least towards the end of the arrangement, the work undertaken by VKU provided a substantial part of the business's earnings.

[33] VKU used his own car on work trips around town but was given a fuel card by the business. He used his own laptop and cell phone which he already owned on appointment. Some other office and work equipment was supplied by PHZ. PHZ also paid other costs in support of VKU's work.

[34] The control and integration tests provide a mixed picture.

Payment and tax

[35] The arrangements about payments could be seen as messy.

[36] VKU indicated to the Authority that payslips were not provided. However, it appeared on closer examination of emails, that he was able to get information from the business's drop box which may have contained payslips. He may not have looked at them. However, VKU was involved with the creation of invoices to funders so had some idea of what money was coming into the business. He focused little on payments to himself.

[37] From VKU's evidence it appears an initial percentage of earnings was paid to him with little discussion about calculation. Then the parties met to talk. VKU was told he was getting a certain (reduced) percentage, with PHZ and the administrator each getting a much smaller portion. VKU thought he should get a higher portion. He was prepared to put up with the arrangement but says he never agreed to it.

[38] A somewhat different picture is presented in the statement in reply - an arrangement where VKU got a third, PHZ a third for his involvement and a third went to the business for outgoings. The contents of meeting notes provided by PHZ which

support that arrangement are disputed by VKU. In the absence of witness evidence to support such an agreement being reached, there is no finding of an agreement.

[39] Working out what VKU was actually paid was not straightforward. Income information was supplied by PHZ towards the end of employment. It appears that information was compiled at the point of supply although presumably drawn from some contemporaneous records, which the Authority does not have. This information shows:

- A higher rate to VKU for a small amount of early income
- Followed by a reduced rate for about a week
- Then a small increase to the percentage rate to VKU for a month
- Then lower rates, depending on work type, for the remainder of the financial year
- Those rates continue for the following financial year and until the termination of employment.

[40] At the time that information was received VKU speaks of feeling a jolt when he saw how little, percentage wise, he had received. VKU objected to PHZ, saying the percentages and changes were wrong and never agreed. He also demanded immediate payment of all monies owing to him. PHZ responded that the money was retained pending formal accounting.

[41] Bank statements from October 2016 onwards show VKU getting a weekly net rate of \$820.34, which equated to a \$1,000 gross rate.

[42] Another aspect of the evidence concerned a retention arrangement which seems to have suited both parties. Effectively PHZ withheld some part of what would otherwise have been paid to VKU. This made PHZ's or the business's earnings look good for banking purposes. VKU needed a certain amount to live on, which was less than he was entitled to. But he had an interest in not currently earning more than his living costs. Both parties understood there would be a divvy up at the end of the arrangement.

[43] There is an email from PHZ during VKU's notice period stating that VKU had asked for:

... weekly payments to you to reflect a modest annual income (for personal reasons) particularly in the first 12 months, you asked for varying amounts to be paid to you based on a piecemeal employee with a modest annual income. These payments were not dependent on the amount of work done by you. They were at your request to reflect a modest annual income. You also at times requested increased (or reduced) amounts depending on what your specific financial needs were at the time...

[44] This explains why for some periods VKU was paid a set weekly rate, not obviously related to the quantity of work he was undertaking, despite the notional piecemeal arrangement. PHZ also gives a couple of examples of periods when VKU asked for a higher weekly rate, which match IRD records.

[45] In terms of tax, PAYE was passed on from PHZ and later GXE, to the IRD on VKU's behalf.

VKU not in own business

[46] VKU did not put capital into the business, other than through the use of some of his pre-owned equipment.

[47] It appears all work opportunities VKU obtained from referrals or clients he knew were run through PHZ's business rather than being undertaken separately by VKU. For short period some work was undertaken by another person, seemingly at VKU's arrangement, although that person's time was paid by PHZ or GXE rather than by VKU.

[48] In terms of tax PHZ and GXE forwarded PAYE. VKU did not pay GST or withholding tax.

[49] VKU was not running his own accounts nor invoicing PHZ or GXE. Initially he had some ability to make more money if he worked longer hours but then the arrangement became one of a flat rate each week.

[50] In conclusion this factor suggests VKU was an employee.

VKU was an employee

[51] When VKU raised his personal grievances, the responses did not make any reference to VKU being a contractor. That argument was raised for the first time in the statement in reply, lodged once PHZ and GXE were represented.

[52] Considering all of the above, including the parties' early intentions to enter into an employment relationship, I conclude that at least initially the real nature of the relationship was VKU being an employee.

[53] VKU knew there was no company involved when he first entered into the arrangement. Initially the employer must have been PHZ as there was no evidence of a relevant company being in existence at that point.

No change in status

[54] PHZ and GXE argued that any employment relationship was somehow exited during VKU's period with the business, presumably with VKU then becoming a contractor.

[55] Different pictures were presented by VKU and PHZ about how the relationship progressed. The statement in reply describes VKU being enthusiastic about the arrangement to start with but then tiring of it and coming into the office less and less.

[56] VKU's description is of PHZ developing other interests outside work and being out of town quite a lot. VKU did have a level of dissatisfaction with some of PHZ's actions or inactions but kept working.

[57] About four months before the arrangement finished, PHZ referred in an email to the business ensuring:

... its obligations (are) fulfilled including the actions of its employees (you may not like the idea of being an "employee" but that's the way it is right now and ultimately, the ... responsibility ... falls on me.

[58] There was no written variation to the employment agreement despite the agreement specifying that variations shall not be effective or binding unless in writing and signed by both parties. The basic arrangement of work coming through the

business, VKU undertaking most of it and the business charging funders continued, even if there were some invoicing hiccups.

[59] I conclude there was no change in VKU's status as an employee.

No change in identity of employer

[60] PHZ was the employer at the start but did that change to GZE once the company was established? PHZ and GXE say it did. VKU argues he remained employed by PHZ.

[61] It is possible with agreement of the parties for an employment relationship to move from one employer to another. Depending on the nature of the arrangements it could be seen as one relationship continuing or two relationships back to back.

[62] The parties' views about the identity of the employer are not conclusive and the real nature of the relationship must be assessed.⁷

[63] VKU told the Authority that he knew a company had been established but did not agree to any change of employer. He thought the company was being established for tax advantage to PHZ.

[64] The statement in reply specifies the relationship changed and from 1 October in VKU's second year with the business he became an employee of the company GXE.

[65] The reason 1 October is specified is not clear. GXE had been established about a month and a half before that.

[66] Only three payslips were provided to the Authority. One from after the company was established but before 1 October is headed with the business name. The second for the first week of October has GXE's proper name on it. The reference down the bottom is to the business name. The third concerns the payment after VKU finished employment and is in GXE's name.

[67] There are many other references in letters and emails in and out of the business to the business name without reference to "Limited". This includes in the email footer of emails sent from PHZ and VKU, both in the business name signature and in the

⁷ *Vince Roberts Electrical Limited v Carroll* [2015] NZEmpC 112.

confidentiality note at the bottom. If a change was notified to the organisations the business dealt with, they did not seem to pick up on it. Their communications continued to use the business name. PHZ did not take up a “Director” title.

[68] The only pieces of documentary evidence which the Authority has referring to the company are the two payslips and IRD records. By contrast letters to governmental bodies and funders from PHZ are on letterhead in the business name with no reference to the company. This includes in May 2017, the month VKU finished work. Similarly with emails.

[69] IRD records show PHZ paying personally until 30 September 2016, then from October payments being made by GXE. VKU’s bank statements show payments received from the business name continuing for the entire period of VKU’s involvement.

[70] There was no written variation to change the employer despite the agreement requiring variations to be in writing and signed. A change in the identity of the employer is one of the most significant changes that can be made to an employment agreement.

[71] I conclude there was no agreement to change the employer and VKU remained employed by PHZ personally.

The arrangement ends

[72] The relationship between PHZ and VKU deteriorated. Neither felt the other was doing his bit.

[73] VKU suggested that there was no indication to him of dismissal being on the cards but accepted after being pointed to documents that there was indication of difficulties. He ultimately accepted that there was disharmony and he had been disillusioned for some time, although he did not necessarily accept that the dismissal related to that.

[74] An email on 16 January 2017 records PHZ’s frustration at VKU’s reported failures to be sufficiently involved in doing his part of the administration and ensuring funds were claimed. PHZ got to the point of saying that if VKU wanted to go back to handling his own administration and not follow the business’s process, he suggests

they talk seriously about parting company. PHZ expresses unwillingness about spending the following year chasing VKU to ensure that the business's position is not financially compromised.

[75] By 19 March PHZ emailed VKU, including a statement that "the time has also come for you to decide whether you want to remain" with the business or not. A lack of contribution from VKU to claims from funders is noted. PHZ continued that VKU should let him "know sooner rather than later so I can organise everything to be finalised if that is what you'd like to do".

[76] At the end of March PHZ sought a weekend catch up with VKU for the preparation of claims to the funders. This had earlier been a usual practice but appears to have fallen away. There were follow up emails. Then an acquaintance of VKU sent an email saying that VKU's internet was not working.

[77] On 17 April VKU responded in detail about concerns he had with the office systems.

[78] PHZ's response the following day gives notice of termination, with employment to end on 19 May 2017. The possibility of agreement to bring the completion of notice forward was raised but not implemented. No specific reason is provided for the giving of notice although PHZ indicates that he does not wish to comment on the previous day's email but if he did there would be other (unspecified) matters which he would raise.

[79] Presumably not coincidentally, the notice period expired the day before the two year anniversary of VKU's appointment.

[80] During the notice period VKU sought details about his pay calculations and deductions. PHZ indicated he would provide them but resisted any suggestion that he needed to give details about the business's financial position. VKU expressed dissatisfaction with the delay in receiving information and mentioned that he had been unjustifiably dismissed. Information was provided via the business's drop box. PHZ kept emailing asking for work on the claims so money could be received, with little sign of response from VKU.

[81] Little or nothing was resolved prior to VKU's employment finishing on 19 May 2017.

Grievances raised in time

[82] During the notice period a VKU email referred specifically to having been unjustifiably dismissed. As the dismissal had not yet been completed, it was too early to raise an unjustified dismissal claim.⁸ He had also been questioning about money outstanding to him.

[83] Then on 16 July 2017 VKU emailed PHZ at length identifying that he had unjustified action and dismissal grievances. Reasons why the dismissal was seen as unjustified were specified and VKU outlined what he would like to see to have the grievances remedied. The unjustifiable action grievance includes reference to failure to pay wages, particularly income less the share for PHZ and the administrator, as well as holiday pay. Other elements mentioned are failure to make available and removal of access to information about VKU's work and earnings.

[84] VKU's last day of employment was 19 May 2017. The 90 days under s 114 of the Act to raise the dismissal grievance runs from the end of employment and thus it was raised well within the time required.

[85] To the extent that concerns about non-payment and any related failure to provide information occurred more than 90 days prior to 16 July 2017 they could not be pursued on the basis of the 16 July email. Any payment or information obligations would likely be on-going and so incidents or failures occurring from mid April until dismissal could be captured and were raised in time.

[86] I conclude that VKU raised grievances about unjustifiable action to his disadvantage concerning payment of sums due on or before termination and unjustified dismissal in time.

Claims not outside limitation period

[87] PHZ and GXE question whether the grievance/s were lodged in the Authority within the limitation period.

[88] Under s 114(6) of the Act a personal grievance may not be commenced more than three years after the date on which the grievance was raised.

⁸ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [28] – [30].

[89] There was a question about when VKU's statement of problem was lodged. The Authority clarified that the statement of problem was received on 16 July 2020 although the letter generated about it was dated 17 July 2020. The date stamp on the statement of problem confirms it was lodged on 16 July.

[90] In line with s 54 of the Legislation Act 2019 I conclude that as the three year period starts from after the date the grievance was raised, the date the grievance was raised does not count for the purposes of this calculation. This is in keeping with the approach under the predecessor legislation, s 35 of the Interpretation Act 1999.

[91] Here time runs from 17 July 2017, being the day after the grievance was raised (16 July). The three year period thus finishes on 16 July 2020. As the statement of problem was lodged on that date, the claim was brought within the limitation period.

Dismissal unjustified

[92] VKU was given notice of dismissal on 18 April 2017 with his last day of work being 19 May 2017. He is critical of the absence of procedure as well as not accepting that there was reason to dismiss him.

[93] In the absence of further evidence, it is likely that the dismissal was motivated by PHZ's views that VKU failed to follow lawful and reasonable instructions. Both parties felt the other was not fully complying with the arrangement.

[94] In dealing with his concerns, PHZ did not act as a fair and reasonable employer could have done.⁹

[95] PHZ had previously expressed some dissatisfaction to VKU but no warnings as such were given. Prior to giving notice of dismissal PHZ did not advise VKU that his employment was in jeopardy, call him to a meeting to specify PHZ's concerns and give VKU a chance to respond.

[96] I am not satisfied on what is before me that PHZ was in a position to properly conclude that VKU was guilty of misconduct. Rather PHZ seemed to react in haste after receiving VKU's 17 April email setting out VKU's own concerns. The dismissal was peremptory.

⁹ The Act, s 103A.

[97] VKU was unjustifiably dismissed.

Dismissal remedy awarded

[98] VKU claims lost wages. He accepts he obtained other work almost the very next day after finishing with PHZ. But the nature of the funding arrangements meant he had a period without pay before money started coming through. This was a similar arrangement to that which he had with PHZ.

[99] Given that VKU was effectively earning money but just agreeing not to be paid until later, I do not consider that he suffered any wage loss. Wages were deferred but appear to have been paid later. This view is reinforced by seeing calculations of money earned coming from funders from July 2017 onwards. If the first three months from there are taken as the earnings coming from the work undertaken in the three months immediately after dismissal, VKU actually did rather better financially in his new employment than he had done with VKU. I conclude that no lost wages are established.

[100] VKU also seeks reimbursement for the difference between his earnings with PHZ and with his subsequent employer. Had he succeeded in establishing that there was an agreement to a higher rate with PHZ, he may have had a claim here. But as will be seen below, he did not.

[101] Compensation for humiliation, loss of dignity and injury to feelings is also sought. VKU describes feeling humiliated, having been dismissed by someone he had known for a long time and had had a good relationship with. He felt betrayed, deeply hurt and suffered some anxiety. I assess \$12,000 being an appropriate amount of compensation subject to discussion of contribution.

[102] PHZ suggests in the statement in reply that a 100% reduction should be made for VKU's contribution to the circumstances giving rise to his dismissal. I do not agree. In order to make a deduction for contribution VKU's conduct must be both blameworthy and causative. It certainly appears that PHZ dismissed as a result of his frustration at VKU's behaviour, making it causative. However, in the absence of more documentation and oral evidence from PHZ I cannot be satisfied where the blame lies between VKU and PHZ. No deduction is made.

Entitlement to additional percentage of income not established

[103] VKU calculated the amount of money earned by PHZ and/or GZE from the major funder for work undertaken primarily by VKU. The amount he received is around a third of that. He seeks payment of a substantially higher percentage which he believes he was entitled to.

[104] I am unable to conclude that there was any specific agreement reached between the parties about the percentage or amount which VKU would be paid. It appears that a higher percentage was initially paid but then the rate reduced. It is not evident that VKU agreed to the reduced rate, and he strenuously denies that he did.

[105] There were discussions about various percentages of the money coming in being paid to him but no agreement.

[106] There was an understanding that there would be a divvying up when the arrangement finished. That occurred on the basis of income summaries provided by PHZ and the resulting sum was paid to VKU. VKU says it should have been more, but that argument primarily depends on there being an agreement about what percentage he received.

[107] The Authority cannot fix terms and conditions of employment, such as pay rates, except in particular limited circumstances.¹⁰ It has not been established that the exceptions apply here. I therefore cannot impose a contractual obligation to pay at a particular rate or percentage share of income into the business.

[108] I have considered whether an unjust enrichment argument could be applied. There is significantly insufficient evidence to make a finding as to what VKU should have been paid. VKU gave the Authority of a specific example of another arrangement but that is not enough, and the nature of the arrangements were also somewhat different in a way which would likely impact on the amount paid.

[109] No contractual or other claim to additional payment above the weekly rate paid and the divvy up amount has been established, other than regarding weeks at the end of employment.

¹⁰ The Act, s 161(2).

Wages owing for April and May 2017

[110] I now turn to whether VKU is owed arrears for wages at the end of his employment.

[111] In an email on 5 May 2017 PHZ states that VKU's weekly pay had recently been stopped because VKU had not been bringing in any income (because invoices were not sent). PHZ's comment matches bank statements which show the last payment during employment as being for the second week of April.

[112] Given the parties' agreement that payment to VKU was not directly related to work undertaken, I do not accept that there was a basis to cease payments. In any event it was not that work was not being undertaken, rather that the invoicing was not occurring.

[113] IRD and banking information support the weekly payment being \$1,000 gross in the later period of employment. This seems consistent with the arrangement for a payment of a modest income.

[114] On the information available, the amount VKU was paid after his employment was the divvy up sum and not wages for his last weeks of employment.

[115] I conclude VKU had five weeks of employment for which he was not paid. At \$1,000 gross a month, that amounts to wage arrears of \$5,000 gross.

Holiday pay owing

[116] VKU says PHZ did not pay out any holiday pay to VKU at the end of their employment relationship. He claims a percentage of what his correct pay should have been.

[117] I have considered whether the final pay, received some months after the employment finished, included a holiday pay element. That will often be the case with final pays. The income details summary and payslip make no reference to holiday pay with the sum appearing to be the divvy up.

[118] In the absence of any holiday and leave records I cannot be satisfied that the final payment allowed for all or some of the holiday pay owing.¹¹ I work from the

¹¹ Holidays Act 2003, s 83.

conclusion that VKU was not paid any holiday pay on termination. There are also no records which establish that VKU took paid leave in the period he worked for PHZ, so I make no deduction for leave taken.

[119] VKU is therefore owed holiday pay for two full years of employment. On the basis of s 24(2) of the Holidays Act 2003 I calculate that VKU's ordinary weekly pay at the end of his employment was higher than his average earnings, so calculate holiday pay on ordinary earnings.

[120] Allowing for four weeks' pay for each year of his two years of service, VKU is entitled to eight weeks of pay at \$1,000 gross per week, totalling \$8,000 gross.

Interest

[121] PHZ must also pay interest on the wages and holiday pay sums outstanding, which should have been paid quite some time ago now.¹² Interest is to be paid from 22 May 2017 being the next working day after the employment finished until the date of payment. It is to be calculated as per the Ministry of Justice's civil debt calculator.¹³

No unjustified action grievance established

[122] Having considered the various claims about payment I complete the discussion about the unjustified actions grievance.

[123] I consider the non-payment grievance somewhat misconceived. I have not found there was a contractual obligation to pay a set percentage of income except as captured by the divvy up agreement. A payment was made on that basis after termination. I have been unable to establish any other obligation regarding the last few weeks' wages and holiday pay. Those matters are best dealt with as wage arrears orders. Any humiliation, loss of dignity and injury to feelings is already captured under the dismissal grievance.

[124] As regards information, PHZ asserts that the business's drop box containing electronic records was available until the week after 18 May 2017. VKU's employment finished on 19 May 2017. I consider it likely that that was the case but

¹² The Act, Sch 2, cl 11.

¹³ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>

that VKU did not access it. I conclude that the unjustified action regarding information in the period from late April 2017 to dismissal is not established.

Claim by PHZ and GXE not established

[125] PHZ and the company sought that VKU pay for amounts they were unable to claim from funders due to VKU's default in informing them about what could be claimed. There is evidence of several emails asking VKU to participate.

[126] I have insufficient information about invoices which were allegedly not sent when they could have been. There is some evidence that after VKU finished, PHZ invoiced and received payments for some of VKU's work.

[127] I conclude there is insufficient evidence to establish a claim against VKU.

Costs

[128] VKU seeks costs on the basis of his own time. The Authority has discretion as to costs and I am not satisfied that this is a case in which costs should be awarded.

[129] VKU has been successful in aspects of his claim and so should be reimbursed for the Authority's filing fee of \$71.56.

Summary of orders

[130] Within 28 days of the date of this determination PHZ is to pay VKU:

- (a) For his dismissal grievance, compensation of \$12,000 without deduction;
- (b) Wages of \$5,000 gross and holiday pay of \$8,000 gross along with interest on those sums; and
- (c) \$71.56 for the Authority's filing fee.

Nicola Craig

Member of the Employment Relations Authority