

NOTE: This determination contains an interim non-publication order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 377
3317280

BETWEEN VSF
 Applicant

AND OIB
 Respondent

Member of Authority: Peter Fuiava

Representatives: Heather Stephens, advocate for the Applicant
 David Watson, advocate for the Respondent

Investigation Meeting: 21 March 2025 in Whangarei and by audio-visual link

Submissions received: 28 March 2025 from the Applicant
 28 March 2025 from the Respondent

Determination: 30 June 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Interim non-publication order and a direction to mediation

[1] The preliminary issue this determination resolves is whether a claim of unjustified dismissal and various claims of unjustified disadvantage were raised within the 90-day notification period of s 114 of the Employment Relations Act 2000 (the Act). As will become apparent, with the exception of one disadvantage claim for which the Authority has no jurisdiction to investigate (which was made under the Health and Safety at Work Act 2015), I have found that the remaining grievances have been raised in time and can be investigated further if required.

[2] However, before progressing matters further to a substantive investigation meeting, I direct the parties to attend mediation within the next 30 working days from

the date of this preliminary determination in an effort to resolve matters cost effectively and at a lower level. To give the parties the best chance of resolving matters between themselves, an interim non-publication order shall apply while matters remain at mediation. As a result, the parties have been respectively referred to in this preliminary determination by randomised abbreviations that bear no resemblance to their actual names.

How was the preliminary issue investigated?

[3] On 30 June 2024, a case management conference was held to discuss the 90-day issue. By agreement, timetabling directions were made for the filing of written submissions and for the setting down of a preliminary investigation meeting. The applicant's case comprised written witness statements from VSF herself, her mother, and her now 18-year-old son who attended the investigation meeting remotely by audio-visual link. For completeness, VSF also provided a reply statement and an indexed bundle of documents.

[4] The respondent's case for the preliminary matter comprised a written witness statement and supplementary evidence from its (then) sole director, ZHP, as well as a witness statement from YQL, ZHP's business partner and (now) co-director of the company. The representatives made brief oral closing submissions that were supplemented with written closing submissions that have been considered.

[5] As permitted by s 174E of 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.

What were the preliminary issues?

[6] The preliminary issues that were required to be investigated and determined are as follows:

- (i) When did VSF raise her personal grievance of unjustified dismissal with OIB?
- (ii) When did the applicant first become aware of her employer's actions that have given rise to the following unjustified disadvantage claims:

- (a) being casually employed but working like a full-time employee;
- (b) not being supplied with a wages and time record after October 2023;
- (c) not being provided with variations to her individual employment agreement dated 21 February 2020;
- (d) not being advised that this agreement had been replaced by a subsequent employment agreement dated 25 January 2021;
- (e) VSF not being made aware that she was an independent contractor and not signing the independent contractor agreement dated 11 February 2024 which was backdated to 23 October 2023,
- (f) that OIB had ceased making PAYE payments to Inland Revenue;
- (g) that OIB had started generating invoices on VSF's behalf as of 23 October 2023;
- (h) that there had been breaches of the Wages Protection Act 1983 and the Holidays Act 2003 as a result of the respondent failing to pay the applicant in accordance with VSF's first employment agreement (21 February 2020);
- (i) that the respondent had breached this agreement by not providing VSF with the necessary safety equipment;¹
- (j) that VSF was offered work as an independent contractor despite her first employment agreement still operating and not being terminated by either party; and
- (k) a breach of the respondent's good faith obligations under s 4 of the Act.

What is the relevant background?

[7] VSF was employed pursuant to an individual employment agreement with OIB dated 21 February 2020. OIB is a limited liability company that undertakes specific sandblasting, painting and coating projects in a city outside Auckland. VSF was a casually employed "SIW Trade Assist" and undertook sandblasting, solvent cleaning,

¹ The Authority has no jurisdiction under the Health and Safety at Work Act 2015.

painting, safety watch and other labouring work for OIB. However, her employment was not continuous and there were periods where VSF was not required to work due to completion of a specific project by the company or due to an injury to her back.

[8] On Wednesday 7 February 2024, VSF asked her manager, ZHP, whether she could use one of her annual leave days for Monday 5 February 2024, a day in which she had been absent from work. ZHP's response was that VSF did not have any annual leave because she was an independent contractor. The response caught VSF by surprise because she was not previously aware that her employment status had changed.

[9] On 11 February 2024, OIB provided VSF with an independent contractor agreement but noticing that it was backdated to 23 October 2023, she refused to sign it.

[10] The following day, on 12 February 2024, VSF met with ZHP and her business partner, YQL, to inform them both that she was not prepared to sign the independent contractor agreement. She was advised that by not signing the agreement, she could potentially end up owing OIB money because independent contractors were paid a higher flat rate of \$29 per hour than casual employees who were paid at a lower rate. It may be noted that VSF's rate as a casual employee was \$25 per hour in August 2021. While the notion that she could be owing money to the company was perceived as a threat, VSF declined to sign the independent contractor agreement.

[11] VSF learnt at the above meeting that OIB had been withholding 15 percent of her wages to pay GST at the end of the financial year. However, VSF has not previously worked as a contractor, was not GST registered, and knew nothing about being self-employed.

[12] On 13 February 2024, OIB provided VSF with a casual employment agreement to sign. YQL stated that this was to acknowledge her preference to revert to working on a casually-employed basis. Later that same evening, VSF received a text from ZHP informing her that she would not be required to work the following day. VSF subsequently sought the advice of her mother about the proposed independent contractor and the above casual employment agreements but was advised not to sign either but to seek further independent employment advice which she did.

[13] With the benefit of that advice, VSF requested ZHP to provide her with a copy of her first employment agreement (21 February 2020) and a copy of her payslips from 23 October 2023 onwards. Although a copy of the abovementioned employment agreement was provided, VSF was advised that she had been emailed her payslips each week and that these recorded the hours she had done for every week worked. On 15 March 2024, VSF was provided with a copy of her payslips which indicate that OIB had been generating buyer invoices on her behalf since 23 October 2023.

[14] On 15 February 2024, VSF received a further text message from ZHP that informed her that there would be no work for her the following day. A similar text message was sent by ZHP on 16 February. VSF says that she was “punished” by OIB for questioning her employment status because she was not offered any further work for the company.

[15] On 30 April 2024, VSF raised her personal grievance of unjustified dismissal and various claims of unjustified disadvantage.

[16] On 7 May 2024, OIB responded to VSF’s personal grievance through its representative Mr Watson who on its behalf denied her grievances and claimed that her first employment agreement (21 February 2020) had been superseded by a second employment agreement on 25 January 2021. This is denied by VSF who maintains that the signature on that agreement is not hers. Mr Watson further claimed that on 23 October 2023, the parties had entered into an arrangement of a contract for services and that this independent contractor agreement had superseded any prior terms and conditions of casual employment. It was claimed that VSF was fully aware of this change and chose to work in this manner from that point on.

What is the relevant law?

[17] Section 114 of the Act sets out what is required of an employee to raise a personal grievance. With the exception of a personal grievance of sexual harassment in an employee’s employment (in which case a period of 12 months applies),² the employee must raise any other personal grievance within the period of 90 days beginning with the date on which the action alleged to amount to the personal grievance

² The Act, s 114(7).

occurred or came to the notice of the employee, whichever is the later. In the event that the employee fails to comply with the relevant employee notification period, the employer's consent or leave from the Authority is required for the personal grievance to be raised out of time.

Discussion

[18] ZHP's written witness statement to the Authority records that in early July 2023 during a tool box meeting, she explained to all of OIB's employees, including VSF and her (then) 17-year-old son, that OIB did not want to employ casual staff anymore but was agreeable to using independent contractors instead. VSF denies such a meeting took place.

[19] ZHP's written statement further records that she had been approached by VSF who wanted to know why her hourly rate was less than her son's. ZHP's response was that this was because the son was employed as an independent contractor whose pay rate of \$29 per hour was higher than VSF's who was a casual employee. ZHP claimed that VSF wanted to be paid the same rate and was subsequently provided with an independent contractor agreement to sign. It is common ground that neither party have signed that agreement.

[20] Despite this, ZHP maintains that VSF's casual employment ended on or about 8 September 2023 with the completion of a specific project but that she was re-engaged to work for OIB again as an independent contractor on 24 October 2023 for a different project. While ZHP's business partner, YQL, had marked that agreement with a commencement date of 23 October 2023, she is unable to recall whether she reminded VSF to come to the office to sign the agreement.

[21] Finally, ZHP states in her written statement to the Authority that she is surprised at VSF's claims that she was completely unaware of the changed status of her employment given that she had asked for a special hourly rate and was paid that rate since November 2023. However, VSF denies asking ZHP to pay her the same rate as her son who had recently left school. She also denies giving OIB and its two directors permission to generate buyer invoices on her behalf from October 2023 onwards.

[22] It was common ground that neither OIB nor ZHP had emailed VSF a copy of those invoices which she saw for the first time in late February 2024 some four months later. When asked at the investigation meeting, YQL, acknowledged that he had nothing in writing from VSF to prove that she had authorised the company to generate buyer invoices on her behalf.

[23] ZHP accepted that she had prepared the buyer invoices and had done so for VSF's 17-year-old son and another co-worker who was of the same or similar age. When asked whether she had emailed the son or the co-worker a copy of their invoices, ZHP stated that she had not done so because she had not been asked. Similarly, VSF could not have asked her employer for this information when she could not have reasonably known that her employment status had changed.

[24] It was the evidence of VSF's mother that her son-in-law was in business on his own as a gib stopper and plasterer for the last 15 years and that he was able to do so because he had the resources to keep that business going. However, in contrast, VSF knew nothing about running her own business and did not own a computer or a printer. She was in regular contact with her daughter and doubted that she could have gone into business on her own without telling her about it first. It was the mother who had cautioned VSF not to sign the independent contractor agreement that was provided with in February 2024 and which was backdated to 23 October 2023.

[25] VSF submits that her personal grievances of unjustified dismissal and her various unjustified disadvantage claims against OIB are not out of time because when she raised her personal grievance with the company on 30 April 2024, she was not aware that her original employment agreement of 21 February 2020 had been superseded by an employment agreement dated 25 January 2021 or an independent contractor agreement with a commencement date of 23 October 2023.

[26] VSF further submits that she only became aware "of all this" as a result of approaching her employer on 7 February 2024 to ask if she could use one of her annual leave days for Monday 5 February 2024. Had that not happened, VSF would not have known that her employment status had changed to that of an independent contractor. Put differently, as it was not until 11 February 2024, when the actions alleged to be

VSF's personal grievance came to her notice, she had 90 days from that point or 11 May to raise her personal grievance with OIB which she did on 30 April 2024.

[27] As mentioned above, the absence of a signed independent contractor agreement from both parties and something in writing from VSF authorising OIB or ZHP to generate buyer invoices on her behalf are to the company's detriment. The absence of this information when combined with VSF's spontaneous response on 7 February 2024 when it dawned on her that her employment status had changed leads me to prefer her evidence. While Mr Watson submitted in closing that a commercial contract does not need to be signed, VSF's signature would have gone a long way in showing that she had consented to the terms and conditions of the independent contractor agreement which, for the reasons given, she has not.

Conclusion

[28] The absence of emails, minutes or other documentary material is not only to OIB's detriment but demonstrates an internal consistency with VSF's claim that she had no knowledge that her status as an employee under a casual individual employment agreement had been superseded by an independent contractor agreement. The first that VSF became aware of her changed employment status was on or about 11 February 2024 and having raised her personal grievances 79 days later on 30 April 2024, she is well within time.

[29] However, there is one disadvantage claim that concerns an alleged breach of the Health and Safety at Work Act 2015 (see [6](ii)(i) above). As the Authority lacks jurisdiction under that Act, that disadvantage claim cannot proceed any further and is dismissed. The investigation of the remaining disadvantage claims may continue but the final number is in need of further refinement as there appear to be an unnecessary splitting up of a broader disadvantage claim into smaller claims. I am in favour of amalgamating these smaller claims for efficiency.

[30] However, that exercise is for another time as the parties are directed to mediation within the next 30 working days from the date of this preliminary determination. If matters do not resolve there, a case management conference will be convened to progress matters to an investigation meeting.

[31] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority