

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2025] NZERA 522  
3275139

BETWEEN

MILTON CANALES  
Applicant

AND

THERMASHIELD LIMITED  
Respondent

Member of Authority: Natasha Szeto

Representatives: Paul Mathews, advocate for the Applicant  
Michael Leggat, counsel for the Respondent

Investigation Meeting: 16 May 2025 in Wellington

Submissions and further information received: 21 and 23 May 2025 from Applicant  
23 and 27 May 2025 from Respondent

Date of determination: 26 August 2025

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**DETERMINATION OF THE AUTHORITY**

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**The Employment Relationship Problem**

[1] Mr Canales says he was unjustifiably dismissed on the day he was supposed to have started working at Thermashield Limited. After he saw a job advertised for a window installer, Mr Canales says he met with Thermashield’s director, went through a trial day, was interviewed by the company and was offered a role which he accepted. Mr Canales says a migraine stopped him from turning up to work on his first day and when he was able to look at his phone, he saw Thermashield had dismissed him by text message.

[2] Thermashield says it did not employ Mr Canales and the parties “parted ways” on the day Mr Canales was supposed to have started a trial but chose not to turn up. Thermashield says because it did not employ Mr Canales, he cannot have been dismissed.

[3] Mr Canales asks for a finding that he was employed and he seeks compensation for being unjustifiably dismissed as well as lost wages for the day he worked as a trial. Thermashield denies it unjustifiably dismissed Mr Canales and denies he is owed any lost wages.

[4] This determination resolves the issue of whether Mr Canales was employed by Thermashield, whether he worked on 27 March 2023 and should be paid for that day, and whether he was unjustifiably dismissed on 6 June 2023.

### **The Authority's Investigation**

[5] The Authority received written witness statements from Mr Canales and his son Yorick Canales. The witnesses for Thermashield were Richard Nimmo (sole director / shareholder and General Manager) and Katherine Sakey (Mr Nimmo's mother-in-law). All witnesses attended the Investigation Meeting, and answered questions under oath or affirmation.

[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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been carefully considered.

### **Issues**

[7] The issues for the Authority to resolve are:

- (i) Whether Mr Canales was employed by Thermashield Limited.
- (ii) If Mr Canales was employed, whether he was unjustifiably dismissed from his employment.
- (iii) If Mr Canales is found to have a valid personal grievance whether he should be awarded compensation (subject to contribution).
- (iv) If Mr Canales is found to have a valid personal grievance whether he should be awarded lost remuneration (subject to mitigation and contribution).
- (v) Whether Mr Canales should be paid for a day's work on 27 March 2023.
- (vi) Costs and disbursements.

## **Relevant background**

[8] Thermashield is a small company which fabricates and installs aluminium windows. Mr Nimmo is the sole director and shareholder and the General Manager. From March to June 2023, Thermashield's operation consisted of an administrative assistant and three employees. Ms Sakey is Mr Nimmo's mother-in-law. She is retired and carries out administrative tasks for the company from time to time. At the relevant time, Ms Sakey was assisting Thermashield with recruitment and was often onsite at the factory training a new administration assistant.

[9] In early March Thermashield was advertising a job on Seek for a permanent full-time window installer. The job ad stated that the work paid well and was in a good environment with good people.

[10] Mr Canales is an engineer by trade. He saw the job advertised at Thermashield when he was looking for the opportunity to move from his current role which he had been in for eight years. Mr Canales was attracted to the role because it would not involve welding and the Thermashield factory was closer to his home meaning a much easier commute. Mr Canales did not apply through Seek, instead he contacted the company and spoke to Mr Nimmo. He emailed Mr Nimmo his CV and several attachments including a written reference from his current employer.

[11] Mr Nimmo and Mr Canales arranged to meet in person at the factory on Friday 3 March 2023 at the end of Thermashield's work day when the factory would not be in operation. This initial meeting was fairly casual and took place over a beer. Mr Nimmo and Mr Canales discussed the work Mr Canales was doing at his current employment and a specific machine Mr Nimmo was considering importing from China. Mr Nimmo says during this meeting there was a discussion in the kitchen during which Mr Canales gave Mr Nimmo permission to contact his referees. Mr Canales denies this discussion took place. The parties agree they discussed Mr Canales coming back to the factory when it was in operation although Mr Canales understood this would be a paid trial and Mr Nimmo thought Mr Canales would be there to observe the operation.

[12] After this initial meeting, Mr Nimmo and Mr Canales communicated by text to arrange for Mr Canales to come back to the factory on 27 March 2023. Mr Nimmo would not be at the factory because he was away, but Ms Sakey would meet Mr Canales. Mr Nimmo sent Mr Canales a google calendar invitation titled: "RV: Updated invitation Milton / Richard @ Mon 27 March 2023 07:00 – 15:30".

*Factory visit on 27 March 2023*

[13] Mr Canales arrived at the factory at 7:00 am on 27 March. He met with Ms Sakey who was on site training a new administrative assistant. Ms Sakey told Mr Canales that because Mr Nimmo was away, she was in charge and Mr Canales would be dealing with her, or words to that effect. It was a Monday, so the day started with a team meeting to talk about work and Mr Canales was “buddied” with one of Thermashield’s workers. He says he worked alongside that worker until 2:30 pm, taking his work direction and breaks with them. Ms Sakey was in her office for the entire day. At the end of the day, Mr Canales says he popped into Ms Sakey’s office to tell her that he was finished for the day, that he had enjoyed the work and that he hoped to hear from Thermashield.

[14] On 6 April 2023, Mr Canales emailed Mr Nimmo to confirm he had worked a day at Thermashield on 27 March and provide his hours. Mr Canales also noted Ms Sakey had said Mr Nimmo would get in touch with him as they had not discussed “pay rate or whatever”. Mr Nimmo did not respond to this email.

*The 17 April meeting*

[15] On 11 April 2023, Ms Sakey texted Mr Canales asking him to come in to talk about the job. A date for the meeting was moved to 17 April but Mr Nimmo was away on business and could not attend. Mr Canales asked Ms Sakey whether it would be an issue that Mr Nimmo was away, and Ms Sakey said via text:

If you want to talk to Richard then call him today because he leaves tomorrow. The reason you need to see me is because I am doing the hiring.

[16] The parties’ recollections about what happened at the 17 April meeting vary significantly. Mr Canales described the meeting as a job interview. He says he met with Ms Sakey and they discussed wages, with Ms Sakey saying Thermashield could pay him what he was on at his current role for the first month after which his wages would increase to \$30.00 per hour. Mr Canales told Ms Sakey that he did not want to work more than three days a week, but the days would be flexible and he could work more if work demand was high. They discussed the working hours. Mr Canales says at the end of the meeting they shook hands, which he took to be an agreement.

[17] Ms Sakey described the meeting as a “meet and greet”. She recalls discussing Mr Canales’ current wages but says she did not and would not have agreed to a pay-rate and would not have agreed to increase Mr Canales’ wages to \$30.00 per hour after a month. Ms Sakey says if Mr Canales had offered his hand at the end of the meeting she would have shaken it, but she makes no more of it than that. At the end of the meeting, it was agreed that Mr Canales would get back to Ms Sakey by that Friday. Ms Sakey sent a message to Mr Nimmo confirming that she had met with Mr Canales that morning and “he is going to get back to me Friday”.

[18] On 21 April 2023, Mr Canales texted Ms Sakey:

Hi Katherine, Milton here, sorry for the late reply and thank you for your attention and understanding. I would like to take the job and join you there. I’ll talk to my boss next Wednesday about the time needed to leave. If you like we can talk

[19] Ms Sakey responded:

Thanks Milton! I appreciate you getting back to me and look forward to working towards a start date. Let’s talk once you have worked through the logistics of your departure from your current job. We are looking forward to you joining us!

[20] Less than a week later on 26 April Mr Canales talked to the production manager at his (then current) job and they discussed notice and his last day. Mr Canales told Ms Sakey his production manager had asked if he could wait until the end of May. Ms Sakey acknowledged this text by thanking Mr Canales for letting her know.

[21] Ms Sakey returned to Australia on 11 May and several texts from Mr Canales to Ms Sakey on her Thermashield cell phone on 17 and 19 May went unanswered. On 20 May, Mr Canales then emailed Mr Nimmo at the company and advised that he had tried to contact Ms Sakey about his start date “since she told me to deal with her”. Mr Nimmo asked when Mr Canales would like to start and Mr Canales confirmed 6 June as his start date. On 22 May 2023 Mr Nimmo responded “Katherine told me that you needed to complete a month before coming to us...See you on the 6<sup>th</sup>”.

[22] Mr Nimmo then put an invitation in his calendar to remind him of Mr Canales’ start date and emailed it to Mr Canales. The invitation was titled: “Invitation: Milton

starting at ThermaShield @ Tues 6 Jun 2023 07:00 – 07:30”. Mr Canales responded: “I don’t get, is this an invitation for half hour that day” to which Ms Sakey responded:

Richard put it in his calendar like that to remind him of your starting date, nothing else! It’s your first full day of work with Thermashield!

*6 June 2023*

[23] On 6 June, Mr Canales says he woke up with a blinding migraine and could not contact Thermashield to advise he would not be at work at 7:00 am as anticipated.

[24] Mr Nimmo added Mr Canales to a work WhatsApp group at 6:09 am. At 7:15 am, Mr Canales had not turned up at the factory and Mr Nimmo texted Mr Canales to ask whether he would be in with Thermashield that morning. At 7:46 am or thereabouts, Mr Canales left the WhatsApp group. In response to this, Mr Nimmo emailed Mr Canales at 7:48 am to ask Mr Canales if he was okay and whether he was still coming in that day. Having not received a reply around an hour later, Mr Nimmo sent Mr Canales a series of texts:

(8:44) No call, just no show, I think you may have done us a favour

(08:48) You could have at least said you were not joining us. The success in ones life is the result of either action or inaction, good luck ahead!

(09:08) Just had a very interesting chat to Kevin. I am VERY pleased you will not be joining us, we have definitely dodged a bullet here! Enjoy your word [world] in the shadows!!!

[25] Mr Canales says he saw Mr Nimmo’s texts just after 10:00 am when he was able to get to his phone. He responded straight away to Mr Nimmo:

(10:08) You, just don’t know anything, you don’t even know why I didn’t respond, you still owe me a day work. And Katherine never respond my messages.

[26] That afternoon at 2:45 pm, Mr Canales texted Mr Nimmo “I would like to talk to you”. Mr Nimmo did not respond. Mr Nimmo next contacted Mr Canales two weeks later.

[27] Mr Canales started a new role working in a café around the beginning of July. On 11 August Mr Canales sent Thermashield a letter raising a personal grievance for unjustified dismissal. Thermashield responded on 9 September after being reminded by Mr Canales' representative on 7 September that the company had not responded.

### **Was Mr Canales employed by Thermashield?**

*What is the law?*

[28] An employee may bring a personal grievance claim against their employer or former employer.<sup>1</sup>

[29] The definition of “employee” under the Act includes a person intending to work.<sup>2</sup> A person intending to work is defined as:

**person intending to work** means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning

[30] A contract of service can only be formed by offer and acceptance. There must be agreement on every term legally essential to formation of the contract and an intention to be bound.<sup>3</sup> However, a strict contractual approach is not required in the employment context. The Employment Court has held:<sup>4</sup>

In a general sense, the Act departs from a strictly contractual approach to employment, with its emphasis being on the relationship between the parties. Nevertheless, the requirement that, for there to be an offer and acceptance, the offeror must intend to be legally bound, is consistent with the concept of an employment relationship. Where parties have not yet begun to act on that relationship, the only thing tying them together is any understanding or agreement between them. If one or both of the parties do not intend to be bound by that understanding or agreement, it seems implausible to describe the situation as an “employment relationship”, giving rise to the rights included in the Act, including the right to bring a personal grievance.

[31] The Employment Court has cautioned there is a difference between the formation of the relationship and the articulation of the terms of the relationship:<sup>5</sup>

It is elementary to employment law that there is an important distinction between the formation of the employment contract itself and the formation or articulation of its terms. The employment contract can be and often is formed in an informal way by conduct, or words of agreement and conduct. There is no requirement for writing at the

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<sup>1</sup> Section 103 of the Act.

<sup>2</sup> Section 6(1)(b)(ii) of the Act.

<sup>3</sup> *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433.

<sup>4</sup> *Edwards v Laybuy Holdings Ltd* [2023] NZEmpC 188 at [49].

<sup>5</sup> *Baker v Armourguard Security Limited* [1998] 1 RTNZ 424 (EmpC) at pg 10.

formation stage...the defendant lost sight of this distinction and confused negotiation of the detailed terms with the formation of the contract.

[32] Also relevant to the current matter, there is an issue about Ms Sakey's authority to offer Mr Canales employment on behalf of Thermashield. Express authority requires specific evidence. A general definition of ostensible authority is contained in the case of *Savill v Chase Holdings (Wellington) Ltd*,<sup>6</sup> which reports decisions from the High Court, Court of Appeal and Privy Council.<sup>7</sup>

...ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority; and that the representation, when acted upon by the third party, operates as an estoppel, precluding the principal from asserting that he is not bound. The representation which creates ostensible authority may take a variety of forms; but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has.

[33] The conduct or representation relied on must be at a sufficient level of seniority to bind the principal.<sup>8</sup> Ostensible general authority cannot arise in a case where the authority is known to be limited.<sup>9</sup>

[34] A person can be made an agent by being placed in a situation where they are understood to represent and act for the principal.<sup>10</sup> The Employment Court has set out the following principles for determining ostensible authority:<sup>11</sup>

Ostensible means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? At least that the chairperson had been deputed to advertise the vacancy and manage its being filled. All one needs to ask is how did the applicant come to be dealing with these people on behalf of the respondent? The answer is that the respondent put them there for the purpose of dealing with the applicant. The fact that between them and the respondent there is a limitation of authority unknown to the applicant cannot be allowed to affect his position. It was up to the respondent to notify him of the existence of the limit.

[35] Determining whether Mr Canales was an employee of Thermashield at the relevant time requires me to determine the real nature of the relationship between the

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<sup>6</sup> *Savill v Chase Holdings (Wellington) Limited* [1989] 1 NZLR 257.

<sup>7</sup> Above n6, quoting Robert Goff, L.J. at pg [30].

<sup>8</sup> Above n6 at pg [32].

<sup>9</sup> Above n6.

<sup>10</sup> *Nelson v Porirua Community Law Resource Centre Inc* [1993] 2 ERNZ 1109 (EmpC) at pg [11].

<sup>11</sup> Above n10 at pg [17].

parties<sup>12</sup> by considering all relevant matters including any matters about the parties' intentions. Statements about the nature of the relationship are not determinative.<sup>13</sup> All relevant matters includes the written and oral terms of the contract between the parties and how the relationship operates in practice.

### *Submissions*

[36] Mr Canales says he approached Thermashield about the job that was advertised. After he initially dealt with Mr Nimmo, it was Ms Sakey who offered him employment on behalf of Thermashield. Mr Canales says his dealings with Ms Sakey as Thermashield's agent began with the 13 April text in which Ms Sakey confirmed Mr Canales needed to see her because "I am doing the hiring". Mr Canales says he was not aware of issue like job titles or authority within the company. Mr Canales discussed specific terms of employment with Ms Sakey in the 17 April meeting and Ms Sakey gave him a limited time until 21 April to accept the offer of employment, which he did. Mr Canales also says Mr Nimmo's communications with him from 20 May confirmed the arrangement.

[37] Thermashield says Mr Canales was not and could not have been employed by it for the following reasons:

- (i) There was no individual employment agreement.
- (ii) There was no offer and acceptance – key terms had not been agreed including the services to be provided (hours / days; permanent / fixed term or casual employment) and the rate of remuneration.
- (iii) Ms Sakey was not authorised to hire anyone and any agreement or understanding was between Ms Sakey and Mr Canales and was not binding on the company.
- (iv) Mr Canales had not been through Thermashield's hiring process which required a formal trial to be completed, supervised by the Factory Manager and/or Mr Nimmo.
- (v) Mr Canales did not have the right qualifications for the role that had been advertised.

[38] Thermashield says Mr Canales had approached Thermashield outside the Seek process, and Mr Nimmo says he was considering whether the company had a role for

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<sup>12</sup> Section 6(2) of the Act.

<sup>13</sup> Section 6(3)(b) of the Act.

Mr Canales on a part-time basis in the nature of a casual “odd jobs” position for a few hours a week with a lot of flexibility. Thermashield says it was not considering Mr Canales for the permanent window installer position because Mr Nimmo had doubts that Mr Canales would be physically able to carry out the job.

[39] Thermashield says Ms Sakey has never been employed by or contracted to the company and has never been paid by it. She is now retired and has worked on and off for the company since about 2020, mostly to train administrative staff and help with the business structure, quoting, recruitment and to write correspondence. Ms Sakey said she had no intention of hiring anyone until Mr Nimmo returned. Her assistance with recruitment was limited to helping with the Seek job listing, shortlisting and with interview questions.

#### *Analysis*

[40] Based on the evidence before the Authority, I find Mr Canales was an employee of Thermashield, being a person intending to work. The timeline of relevant events is as follows: Mr Canales met with Mr Nimmo at the beginning of March 2023 in response to the job advertised on Seek for a window installer. He then had a one-day trial in the factory on 27 March, followed by an interview with Ms Sakey on 17 April. Ms Sakey, who had authority to act on behalf of Thermashield, offered Mr Canales employment which Mr Canales accepted on 21 April. Mr Nimmo confirmed the employment and scheduled Mr Canales’ first day of work for 6 June.

[41] These findings are based on the specific factual circumstances of this matter, applied to the legal framework, which I set out in more detail below. Where there is a conflict in evidence, I have to decide which evidence I prefer based on an assessment of credibility. I rely on the guidance provided by the District Court in *R v Biddle*<sup>14</sup> that was cited with approval on appeal to the High Court.<sup>15</sup> The key aspects of this guidance applicable to the present matter are consistency of witness evidence, as well as how reasonable, plausible and probable the evidence is.

#### *Thermashield had a window installer job available*

[42] Mr Canales first approached Thermashield because he saw the job advertised on Seek for a window installer. Thermashield gave evidence that it did not necessarily

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<sup>14</sup> [2015] NZDC 8992.

<sup>15</sup> *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

have a vacancy but kept the job advertisement going to see whether it could attract additional employees. Irrespective of the recency of the advertisement, Thermashield has not suggested it had any roles other than a window installer available at the relevant time. I am not persuaded by Mr Nimmo's evidence that he did not know Mr Canales had contacted him because of the advertised role and that Mr Canales was interested in the window installer role. Any doubts that Mr Nimmo may have had about Mr Canales' physical capacity to carry out the role were not raised with Mr Canales.

*Mr Canales completed a work trial*

[43] Mr Canales says he worked on 27 March 2023 from 7:00 am to 2:30 pm, for which he expected to be paid. One of his claims relates to wage arrears for this day.

[44] Thermashield says 27 March was an observational day and no pay had been agreed. It further says the claim to be paid only emerged with the amended statement of problem two years after the liability allegedly arose and it had never had Mr Canales' tax status or bank account to enable it to make any payment.

[45] I accept Mr Canales' evidence that he was in the factory on 27 March to work which is consistent with the calendar invitation Thermashield sent to Mr Canales scheduling his attendance at the factory from 7:00 am until 3:30 pm (although he acknowledges he finished an hour earlier at 2:30 pm). Mr Canales says he assembled a window, drilled cavities and put a lock on a door. Mr Canales expected to be paid for this day and in a follow-up email to Thermashield ten days later on 6 April told the company he "did work on the 27 of March from 7am to 2.30pm". Thermashield did not respond. In his text to Mr Nimmo on 6 June, Mr Canales again raised that he was owed for a day's work.

[46] Thermashield has not called any evidence to refute that Mr Canales was at the factory and working the hours he claimed mere days later. Ms Sakey says she was at the factory on 27 March but did not observe Mr Canales' work or note the hours he was there. Mr Nimmo never checked with the factory manager about whether Mr Canales' claim to have worked 7:00 am until 2:30 pm was correct. Thermashield did not take steps to obtain Mr Canales' tax status or bank account to enable it to make any payment to him, but I do not find that a compelling reason to conclude Mr Canales was not working and had no expectation of being paid.

*Ms Sakey was authorised to offer Mr Canales employment on behalf of Thermashield*

[47] After Mr Canales had the initial meeting with Mr Nimmo, Ms Sakey took over dealing with Mr Canales. I accept that Ms Sakey did not have express or actual authority to act on Thermashield's behalf, but I find she did have ostensible authority for the following reasons:

- (i) As Mr Nimmo's mother-in-law and because of her own business background and management expertise, when Ms Sakey did work for Thermashield she was there in a senior capacity within the company. Ms Sakey gave evidence that on previous occasions when Mr Nimmo was away, she had been into the factory to be his "eyes and ears" if any issue arose.
- (ii) Ms Sakey had her own Thermashield email address and used a Thermashield work cell phone.
- (iii) Ms Sakey was present at the factory on 27 March when Mr Canales worked there while Mr Nimmo was away. When Mr Canales arrived, Ms Sakey told him that he would need to talk to her because she was the one in charge.
- (iv) When Mr Canales sent an email on 6 April to Mr Nimmo, Ms Sakey responded by texting Mr Canales on 11 April. In the text, Ms Sakey confirms she is from Thermashield and asks Mr Canales to come in to talk about the job.
- (v) Mr Nimmo said in evidence that while he was away in Australia on business, Ms Sakey was "able to see [Mr Canales] to talk further about his level of interest and intentions".
- (vi) When Mr Canales asked to postpone the meeting with Mr Nimmo on 13 April, Ms Sakey arranged for Mr Canales to meet her on 17 April. Ms Sakey told Mr Canales she would be at the factory Monday and to come in at 11am. Thermashield did not tell Mr Canales he would need to wait for Mr Nimmo to return. As part of this text exchange, on 11 April Ms Sakey expressly told Mr Canales that the reason he needs to see her is because she is doing the hiring.

[48] Ms Sakey represented that she had the authority to act in Mr Nimmo's absence because she had told Mr Canales that she was in charge and she was the one doing the

hiring. Ms Sakey accepts she used the words “I am the one doing the hiring” in the text, although at the investigation meeting she categorised this as a “poor choice of words” because she had given Mr Canales “the wrong impression”. If Ms Sakey exceeded her authority in what she represented to Mr Canales, that is a matter between her and Thermashield. Thermashield is not able to avoid liability to Mr Canales because it is unhappy with Ms Sakey’s actions.

[49] However, the representation did not just come from Ms Sakey. Mr Nimmo also represented that Ms Sakey had authority to represent Thermashield in dealing with Mr Canales because he passed Mr Canales’ 6 April email to Ms Sakey to respond to (which she did by text). When Mr Nimmo returned to work in May, he did not contradict Mr Canales’ impression that he was supposed to deal with Ms Sakey. In an email on 20 May, Mr Canales told Mr Nimmo that he was only emailing Mr Nimmo because he had already tried to contact Ms Sakey: “she told me to deal with her, I text her in regard to the starting date”. Mr Canales expressed to Mr Nimmo he was “nervous” and “hope(d) the communication between [Mr Nimmo] and Katherine is clear”, to which Mr Nimmo responded that Ms Sakey had told him Mr Canales would need to complete a month with his (then) employer and he would see Mr Canales on the 6<sup>th</sup>. This communication confirmed to Mr Canales that he was correct to deal with Ms Sakey.

[50] The most plausible version of events based on the evidence before the Authority is that Ms Sakey was Mr Nimmo’s “eyes and ears” in the factory when he was away. Mr Nimmo passed Mr Canales’ enquiry to Ms Sakey to deal with and in Mr Nimmo’s absence Ms Sakey was in charge and was the one doing the hiring for Thermashield. This is what Ms Sakey represented to Mr Canales and it was reasonable that Mr Canales believed this. At no stage did Mr Nimmo or Ms Sakey communicate to Mr Canales that there were limitations on her authority. For these reasons, I find Ms Sakey had authority to offer Mr Canales employment with Thermashield.

*Ms Sakey offered Mr Canales employment at Thermashield and he accepted*

[51] On 17 April Ms Sakey and Mr Canales had a discussion about terms of work with Thermashield. There is some disagreement about whether this meeting was 40 to 45 minutes long or 15 to 20 minutes. Nothing ultimately turns on this point.

[52] The two most significant terms discussed were pay and part-time work. Mr Canales had signalled to Mr Nimmo on 6 April that he wanted to discuss pay rate at

this meeting when he emailed Mr Nimmo saying: “Katherine told me you would get in touch with me. As we didn’t discuss pay rate or whatever in relation to the job.” Because Mr Canales’ highlighted that pay rate was going to be an issue, I accept his evidence this was discussed at the meeting on 17 April. Ms Sakey acknowledges they discussed Mr Canales’ pay rate at his (then current) employment, but says she did not agree to a pay rate on behalf of Thermashield. While I am not persuaded a specific pay rate was confirmed, I find that Mr Canales left the 17 April meeting with an understanding that he would start at Thermashield on the same pay rate he was on with his (then) employer. However, I also accept Thermashield’s evidence it did not agree to increase Mr Canales’ rate to \$30.00 per hour after a month because that was close to what its top fabricators and installers were earning and Ms Sakey would not have agreed to that.

[53] Both parties accept they discussed Mr Canales’ interest in part-time work. Mr Canales says he told Ms Sakey he wanted to work three days a week but could “scale up” if needed. Ms Sakey did not recall a specific conversation about hours but she acknowledged Mr Canales wanted part-time work because of his commitments to caring for his mother. I therefore accept Mr Canales’ evidence on this point. Mr Canales also told Ms Sakey he would have to give at least a month’s notice at his current employment and Ms Sakey later passed this information on to Mr Nimmo. Ms Sakey says Mr Canales showed her pictures of his welding work.

[54] Based on all of the above, I prefer Mr Canales’ evidence and his categorisation of the meeting as an interview which ended with an offer of employment. While it is correct to say that not all the terms had been settled, that does not prevent an employment relationship being formed. I find the key terms that were agreed were the services to be provided (window installer role), a proposal for Mr Canales to start on his current pay rate and that the work would be part-time.

[55] The communications that followed were consistent with an offer of employment having been made by Ms Sakey and Mr Canales accepting the job. This is because Ms Sakey gave Mr Canales a deadline of 21 April to get back to her. Both Ms Sakey and Mr Nimmo were aware that Mr Canales was going to get back to Ms Sakey by 21 April because Ms Sakey advised Mr Nimmo of this. Mr Canales then texted Ms Sakey “I would like to take the job and join you there”. Ms Sakey’s response the same day acknowledged Mr Canales’ acceptance of the offer, and acknowledgment that Mr Canales would have to work out his departure date from his employment.

[56] The plain language used, the text communications and email invitations all confirmed Mr Canales' reasonably held view that he had been offered and accepted the window installer job at Thermashield and his starting date was to be confirmed based on his (then current) employment commitments.

*The job offer was not for casual employment and was not conditional on further pre-employment checks*

[57] At this point, Ms Sakey says she assumed Mr Canales was accepting a casual role with Thermashield. I am not persuaded. Using the *R v Biddle*<sup>16</sup> assessment, there was no reasonable basis for Ms Sakey's assumption because by this stage, Mr Canales had contacted Thermashield in response to its Seek advertisement for a window installer, provided his CV to Mr Nimmo outlining his experience in welding, machining and fabrication, had an initial meeting with Mr Nimmo where they discussed machine operation, spent virtually a full working day at the factory working alongside an operator on 27 March, had a meeting with Ms Sakey where they had discussed Mr Canales' experience and his current pay rate and she had seen pictures of his welding work, and they had exchanged a number of text messages and emails. These actions were consistent with Mr Canales seeking permanent employment as a window installer and were not consistent with Mr Canales seeking casual employment doing "odd jobs" for "pocket money" as Mr Nimmo put it.

[58] Thermashield also says it could not have offered Mr Canales employment because a number of steps were required to have been satisfied before it would make such an offer. Mr Nimmo told the Authority he would want to be satisfied about a potential employee's capability before committing to an offer of employment including work under observation such as a supervised trial with Mr Nimmo or the Factory Manager, contacting referees and preparing an employment agreement. While that may have been Thermashield's usual process, Thermashield did not communicate this to Mr Canales. There is no evidence to substantiate Thermashield's position that Mr Canales' employment offer was conditional on a successful trial being completed, referees being contacted or the provision of an employment agreement. To the contrary, the emails Mr Nimmo sent to Mr Canales, including one that asked: "when would you like to start?" were consistent with the start of employment, rather than the start of a scheduled work trial.

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<sup>16</sup> [2015] NZDC 8992.

[59] Again applying the test in *R v Biddle*<sup>17</sup>, I do not find Mr Nimmo's evidence that he thought Mr Canales was just seeking an "odd jobs" role for "some pocket money" plausible. Mr Nimmo had an initial phone discussion with Mr Canales, Mr Canales had sent a follow-up email attaching his CV and references and had made several visits to the factory. Thermashield's submission that Mr Canales would have been required to complete a further supervised trial as part of pre-employment screening is inconsistent with its stated belief that Mr Canales was applying for an "odd jobs" role.

*Mr Nimmo's conduct confirmed the employment and the offer was not withdrawn*

[60] Ms Sakey says she did not talk to Mr Nimmo about Mr Canales when he returned. This is because, as Ms Sakey put it, "there was nothing to tell". Ms Sakey also says in the correspondence that followed between herself and Mr Canales she "made some wild assumptions" and there was a misunderstanding between herself and Mr Nimmo about whether Mr Canales had been employed. Ms Sakey says she assumed that 6 June would be Mr Canales' first day of work but this was a "bad choice of words".

[61] However, the representations did not just come from Ms Sakey. Mr Nimmo's conduct reinforced Mr Canales' belief that he had been offered and accepted employment with Thermashield. Mr Nimmo, who unquestionably had actual authority to act on behalf of Thermashield confirmed Mr Canales' employment by asking him: "when would you like to start?". Mr Nimmo confirmed that Ms Sakey had passed on the information that Mr Canales would need to complete a month at his current employment before coming to Thermashield. Mr Nimmo then sent Mr Canales (and Ms Sakey) a calendar invitation for 6 June starting at 7:00 am, which was the same start time as other staff at Thermashield. Mr Nimmo did not respond to Mr Canales' concern that the invitation appeared to be only for half an hour and he did not correct Ms Sakey when she told Mr Canales that it was to be his first full day of work with Thermashield. Mr Nimmo also told his Thermashield team on WhatsApp that Mr Canales would be joining them that day and asked the factory manager to let Mr Nimmo know what Mr Canales needs. Mr Nimmo then added Mr Canales to the WhatsApp group. Viewed objectively, there is no evidence to support Mr Nimmo's assertion that 6 June was meant to be just a trial. His actions were consistent with Mr Canales starting permanent employment with Thermashield on 6 June. Mr Nimmo's texts on 6 June were also

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<sup>17</sup> [2015] NZDC 8992.

consistent with Mr Canales starting permanent employment on that day when he wrote to Mr Canales: “you could have at least said you were not joining us”.

[62] Based on the evidence before the Authority, I am not persuaded by Thermashield’s narrative. Its various explanations provided to the Authority are inconsistent. If there were misunderstandings and miscommunications between Mr Nimmo and Ms Sakey about whether Mr Canales was offered employment and if so, on what basis, Mr Canales played no part in this. At no stage prior to 6 June did Thermashield attempt to resile from or withdraw the offer of employment made to Mr Canales on 17 April.

*Conclusion – Mr Canales was an employee of Thermashield*

[63] Based on the evidence before the Authority, I conclude that Mr Canales met the definition of an employee under the Act as a person intending to work. Mr Canales worked one day as a trial on 27 March 2023 for which he expected to be paid. He had two meetings, consisting of a meeting with Mr Nimmo at the beginning of March and an interview with Ms Sakey on 17 April 2023. Ms Sakey offered Mr Canales the window installer role on 17 April. On 21 April 2023 Mr Canales accepted the role. Mr Canales gave notice to his (then current) employer and organised a start date with Thermashield. The offer Thermashield made was not conditional and was not withdrawn prior to Mr Canales’ scheduled start date of 6 June. Thermashield’s conduct over this time was consistent with its intention to enter an employment relationship with Mr Canales. From the date of his acceptance of the offer on 21 April 2023, Mr Canales was an employee of Thermashield being a person intending to work. He was consequently able to bring a claim of unjustifiable dismissal.

**Was Mr Canales unjustifiably dismissed?**

*Was Mr Canales dismissed?*

[64] The long-established definition of dismissal is that it is termination of employment at the initiative of the employer.<sup>18</sup> It requires an unequivocal act, which amounts to an actual dismissal or a constructive dismissal. In the case of an actual dismissal, the unequivocal act will be a statement amounting to a sending away.

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<sup>18</sup> *EN Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 at [20].

[65] It is clear the employment relationship between Mr Canales and Thermashield ended after the communications on 6 June. The issue is where responsibility for his termination properly lies.<sup>19</sup>

[66] Mr Canales says he was dismissed based on the text messages sent to him by Mr Nimmo. He says the “world in the shadows” text ended the employment relationship.

[67] Thermashield says there was no employment relationship, so it could not have dismissed Mr Canales. However, Thermashield says if the Authority was to find there was an employment relationship, there was no dismissal. There was no sending away and Thermashield says after it had made its dissatisfaction with Mr Canales’ non-attendance and non-responsiveness known, Mr Canales decided not to pursue work with the company and the parties simply “went their own ways”.

[68] I do not accept Thermashield’s submission that there was a parting of the ways, which suggests a mutual agreement and understanding that the relationship would end. Based on the evidence before the Authority, I find Thermashield ended the employment relationship by the texts it sent to Mr Canales on 6 June, and in particular, the text that read: “I am very pleased you will not be joining us, we have definitely dodged a bullet here”. While Mr Nimmo said the texts would not necessarily have signalled the end of the employment from his perspective, the clear intention of the texts was to advise Mr Canales that he was not welcome to work at Thermashield based on the information Mr Nimmo had obtained from Mr Canales’ previous employer. This conclusion is reinforced by Thermashield’s conduct following the texts: Mr Nimmo did not respond to Mr Canales’ text later that day saying he would like to talk to Mr Nimmo. There was no meeting of the minds – Thermashield unilaterally determined the end of the employment relationship. For all these reasons, I find Mr Canales was dismissed by Thermashield.

### ***Was the dismissal unjustified?***

[69] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether Thermashield’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

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<sup>19</sup> *New Zealand Cards Limited v Ramsay* [2012] NZEmpC 51.

[70] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act and determine whether Thermashield:

- a. Sufficiently investigated the allegations against Mr Canales before dismissing or taking action against him (having regard to resources available to it);
- b. raised the concerns it had with Mr Canales (including giving him relevant information) before dismissing or taking action against him;
- c. gave Mr Canales a reasonable opportunity to respond to its concerns before dismissing or taking action against him;
- d. genuinely considered Mr Canales' explanations before dismissing or taking action against him (the decision was made without predetermination).

[71] The Authority may take into account other factors as appropriate and must not find a dismissal to be unjustifiable solely because of minor defects that did not result in the employee being treated unfairly.<sup>20</sup>

[72] Mr Canales says he reached out to talk to Mr Nimmo but his request was ignored. He also says Thermashield contacting his previous employer was a violation of the duty of good faith. Mr Canales says Thermashield dismissed him without following any process including raising any concerns it had with him before taking action.

[73] In its evidence, Thermashield says Mr Canales consented to Mr Nimmo contacting his (then current) employer because he provided a written reference from him. Mr Nimmo also gave evidence about a range of concerns he had about Mr Canales. Mr Canales had not "pitched up" after Mr Nimmo had signalled to his team that Mr Canales would be joining them. Mr Nimmo did not believe Mr Canales had a migraine on 6 June. However once Mr Nimmo had spoken to Mr Canales' former employer, the issues they discussed then eclipsed any issues about a migraine and not turning up to work and Mr Nimmo decided Mr Canales was going to cause future problems and would not be working for Thermashield.

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<sup>20</sup> Section 103A(5) of the Act.

[74] Based on the evidence before the Authority, Thermashield has not acted as a fair and reasonable employer could. Mr Nimmo did not give Mr Canales the opportunity to explain why he had not turned up to work, instead sending a series of escalating text messages to Mr Canales and contacting his former employer. I am not persuaded Mr Nimmo made the call as a pre-employment check because I have found Mr Canales was already unconditionally employed by Thermashield and there was no expectation of further pre-employment checks being carried out. I am also not persuaded Mr Nimmo made the call in good faith because irrespective of whether Mr Canales had given Mr Nimmo implied permission to contact his former employer when they first met, Mr Nimmo only did so when he was already “dissatisfied” with Mr Canales’ non-attendance and non-responsiveness. Mr Nimmo did not tell Mr Canales he was considering, or had decided to, contact his former employer. The conclusion I draw from the evidence is that Mr Nimmo was seeking to confirm his concerns about Mr Canales’ lack of suitability for the job and the phone call to Mr Canales’ employer did that. While Mr Nimmo was evasive about what was said in the phone call, he accepts he did not raise any of these issues with Mr Canales at the time. Ultimately, the reason Thermashield dismissed Mr Canales was because of what was said in the conversation between Mr Nimmo and Mr Canales’ former employer.

[75] For these reasons, I conclude Thermashield did not fully and fairly investigate any allegations with Mr Canales before taking adverse action against him. It did not raise the concerns it had, or give Mr Canales any opportunity to respond. Thermashield has not acted as a fair and reasonable employer could because it has not followed any process before dismissing Mr Canales. Based on the above, I find Mr Canales was unjustifiably dismissed.

#### **Should Mr Canales be paid for his work on 27 March?**

[76] Mr Canales says he worked on 27 March 2023 from 7:00 am to 2:30 pm, for which he expected to be paid. Thermashield denies Mr Canales worked that day and says he was there to observe.

[77] I have already set out above that I accept Mr Canales’ evidence that he was in the factory on 27 March to work with the expectation of being paid. I accept that he actually carried out work and was not in the factory purely to observe. Mr Canales claims wage arrears of seven hours’ work at the (then) applicable minimum wage which

was \$21.20 per hour.<sup>21</sup> This is an appropriate amount to claim given that Mr Canales and Ms Sakey did not have a discussion about wages for the job until a few weeks after the trial day. Mr Canales' claim amounts to \$148.40 (gross) and I order that to be paid.

### **Remedies**

[78] I have found Mr Canales was unjustifiably dismissed from his employment and he is therefore entitled to an assessment of remedies.

[79] Mr Canales seeks:

- (a) Compensation under s 123(1)(c) of the Act for humiliation, loss of confidence, loss of dignity and injury to his feelings.
- (b) Reimbursement of lost wages under s 123 (1)(b).

[80] Mr Canales says the impact on him has been devastating and long-lasting. Mr Canales says the text messages he received from Mr Nimmo on 6 June 2023 were "horrendous" and his employment was terminated in a horrific way. He had acted in reliance on his employment with Thermashield by resigning from a job he had held for eight years. He says the whole situation has been stressful and he remains affected. He says he was terminated without explanation and felt a sense of guilt like he had committed a crime.

[81] Mr Canales' son gave evidence of the impact on his father. He says that even two years later, the events keep coming back for him. He says Mr Canales endured significant emotional and psychological distress. It was embarrassing that he was let go for no reason and was not given a chance and the situation has damaged Mr Canales' dignity and self-esteem.

[82] Thermashield says any working relationship it had with Mr Canales was very short-term and the Court has cautioned against substantial compensation in such matters.

[83] Based on the evidence of Mr Canales as expressed in his statement and the statement of his son, I accept that the impact of the dismissal was significant and that Mr Canales suffered humiliation, loss of dignity and injury to his feelings. I have considered the general range of compensation awards in other cases and standing back

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<sup>21</sup> <https://www.employment.govt.nz/pay-and-hours/pay-and-wages/minimum-wage/previous-min-wage-rates>.

to objectively assess the impact as best I can, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$10,000.00, subject to contribution.

*Lost wages*

[84] Under s 123(1)(b) of the Act, the Authority is able to order that the employee be reimbursed a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128 of the Act provides that the Authority must order the employer to pay lost remuneration or three months' ordinary time remuneration where the Authority determines an employee has a personal grievance and has lost remuneration as a result of the grievance, although there is a discretionary power in s 128(3) of the Act to award a greater sum.

[85] When assessing the appropriate award for lost remuneration, the applicable principles are that full financial losses set the upper limit on an award of compensation, and there is no automatic entitlement to full compensation. Moderation is required. Precision is difficult and awards of compensation "will inevitably involve a broad brush approach".<sup>22</sup>

[86] Mr Canales claims lost wages from 6 June to 30 June 2023 – a total of 3.6 weeks for 24 hours per week (three eight-hour days<sup>23</sup>), at the rate he was paid by his previous employer of \$26.68 per hour. This amounts to \$2,305.15 (gross). In terms of mitigation, Mr Canales says he rang companies looking for work and was not out of work for a long period of time.

[87] Thermashield says Mr Canales has not produced evidence of when he actually obtained employment and the evidence about Mr Canales' lost earnings including attempts to mitigate is unsatisfactory and contradicted by official records. Thermashield says based on records provided, the Authority cannot safely conclude that Mr Canales lost any earnings as a result of any personal grievance.

[88] The default position where an employee has lost remuneration as a result of a grievance is that the employer is to pay three months' ordinary time remuneration where the Authority determines an employee has a personal grievance.

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<sup>22</sup> *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, para 36.

<sup>23</sup> Based on ordinary working hours of 7:00 am until 3:30pm with a half-hour lunch break.

[89] I accept Mr Canales found work relatively quickly after he was dismissed as a result of accepting a job in another industry and therefore he does not claim loss beyond the end of June 2023. He has acted appropriately to mitigate his loss. I consider the amount Mr Canales claims is modest and appropriate and \$2,305.15 (gross) should be paid, subject to contribution.

### **Contribution**

[90] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Canales may have acted in a way that contributed to the situation that gave rise to his grievance.<sup>24</sup>

[91] Mr Canales says he did not contribute in any way to his dismissal – the reason for his dismissal was what was discussed between Mr Nimmo and his former employer which was never put to him.

[92] Thermashield says Mr Canales' contributory conduct cancels out any award made to him. Thermashield alleges Mr Canales misled the company about his last day at his previous employment, he did not offer an explanation for not showing up at work on 6 June at the time and he removed himself from the WhatsApp group without explanation. Thermashield says this conduct justifies a one third reduction in remedies.

[93] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:<sup>25</sup>

- (i) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (ii) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[94] The Court also stated:<sup>26</sup>

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

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<sup>24</sup> Section 124 of the Act.

<sup>25</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

<sup>26</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

[95] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[96] I have concluded the reason Mr Canales was dismissed was because of what was said in the conversation between Mr Nimmo and Mr Canales' former employer. However, I find that Mr Canales did contribute to the situation giving rise to his grievance because he did not show up for his first day of work with Thermashield on 6 June and did not provide an adequate explanation for his non-attendance, which escalated the situation. In saying this, I find the evidence does not substantiate Mr Canales' contention that he was so incapacitated by a migraine that he was unable to contact Thermashield before his scheduled start time of 7:00 am on 6 June. There was no medical information available to show that Mr Canales was prone to suffering from incapacitating migraines in June 2023 and there has been no satisfactory explanation given for how Mr Canales was able to leave the WhatsApp group if he was unable to use his phone as he says. I accept Thermashield's submission that leaving the group required a "conscious act on his part" and is inconsistent with Mr Canales' account that he was unable to use his phone to contact Thermashield on the morning of 6 June.

[97] While I have found Thermashield's actions were not justified, for the reasons given above I find Mr Canales' actions contributed to the situation giving rise to his personal grievance, such that it is necessary to reduce the remedies payable to him. Considering issues of causation and proportionality, my assessment is that a 20 percent reduction in remedies is required.

## **Orders**

[98] I order that within 28 days of the date of this determination Thermashield Limited is to pay Milton Canales:

- (i) Compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act in the amount of \$8,000.00 (\$10,000.00 minus 20 percent contribution).
- (ii) Reimbursement of lost wages under s 123(1)(b) and s 128 of the Act in the amount of \$1,844.12 (gross) (\$2,305.15 minus 20 percent contribution).
- (iii) Lost wages for one day's pay \$148.40 (gross).

## **Costs**

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

[100] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Canales may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Thermashield will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[101] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>27</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>27</sup> 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)