

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 525
3320520

BETWEEN

SUNHO CHOI
Applicant

EURO PROPERTY
SERVICES LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Michael Kim, counsel for the Applicant
Endijs Heinrihsons, representative for the Respondent

Investigation Meeting: 1 May and 17 June 2025

Submissions and information received: At the investigation meeting and 4 August 2025, from the Applicant
At the investigation meeting and 14 August 2025, from the Respondent

Determination: 27 August 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sunho Choi worked for Euro Property Services Limited (EPS) as a painter/plasterer from 20 March to 25 September 2023 when he says he was unjustifiably constructively dismissed. He seeks remedies for this personal grievance and for personal grievances of unjustified disadvantage relating to his wages not being increased after 90 days employment and not being paid or provided work from late July. Mr Choi also seeks a contribution to costs.

[2] EPS says Mr Choi did not meet the requirements for a pay increase and agreed to pause his employment during a period of business downturn. It says Mr Choi did not

respond to its attempts to contact him about work and that he abandoned his employment.

The Authority's investigation

[3] The Authority has received evidence from Mr Choi and for EPS, Endijs Heinrihsons, EPS' owner, Shannon McKenna, the general manager and Xenita Danielle, the office administrator. Boris Olivares, Allan Hensley and Kristers Karlovskis, employees of EPS provided letters of support.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, the Authority has carefully considered all the material before it, including all information received from the parties and the submissions of their representatives. At the investigation meeting the Authority was assisted by an interpreter of the Korean language.

Issues

[5] The issues for investigation and determination are

- i. was Mr Choi unjustifiably disadvantaged and/or unjustifiably dismissed?
- ii. If so, is Mr Choi entitled to a consideration of remedies sought including:
 - a. Compensation under s 123(1)(c)(i) of the Act;
 - b. Reimbursement of lost wages under s 123(1)(b) of the Act?
- iii. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Choi which contributed to the circumstances which gave rise to his grievance?
- iv. Has EPS breached s 4 of the Employment Relations Act 2000 and s 75 and s 76 of the Holidays Act 2003 and if so, should a penalty be ordered?

- v. Is either party entitled to an award of costs?

The parties' employment agreement

[6] The parties' written employment agreement was entered on 19 March 2023.

The following provisions are relevant to this determination:

5.0 Hours

5.1 The ordinary hours for the position are:

(a) Monday to Friday 7.30am to 4.30pm, with the minimum of 40 hours per week.

5.2 From time to time you will be required to work additional hours, and will be given reasonable advanced notice when this is required.

5.3 There may be times when the Employee shall be required to work extra hours outside the ordinary hours of work in order to perform the job effectively and to meet the demands of the Employer's business. The Employee shall make themselves available to work extra hours if reasonably requested by the Employer.

6.0 Remuneration

6.1 The Employee shall be paid an initial salary of \$28.00 gross per hour ...

8.0 Review

8.1 The Employee's overall job performance will be reviewed annually.

Reviews are a two way process and are intended to be frank and constructive exchange of views to enhance the employment relationship of both parties.

8.2 Initial reviews of remuneration will be completed as described in clause 9.1 and thereafter by 1 June of each year commencing 2019, although such reviews will not automatically mean that the Employee will receive a wage increase.

8.3 After 90 days trial hourly rate will be increased to \$30 and if successful on the performance review, fuel card and company vehicle will be discussed.

Relevant law

The test for justification

[7] In considering personal grievances for unjustified action and dismissal, as here, the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer

and decide, on an objective basis, whether the employer's actions were reasonable. In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b):

The duty of good faith in subsection (1)—
(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

[8] Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.¹

Discussion

(i) *Was Mr Choi unjustifiably disadvantaged – hourly rate?*

[9] During the course of investigating this employment relationship problem the Authority raised with the parties when this personal grievance was raised and if it was not raised within 90-days, whether leave should be granted for it to be raised out of time.² The information and submissions on this issue provided by the parties have been considered.

[10] Mr Choi says he raised this grievance by way of text message on 8 July 2023 when he made inquiry as to when his pay would be increased having completed 90 days of employment and that the issue was raised in the 9 November 2023 letter from his representative to EPS. In the alternative Mr Choi says EPS has impliedly consented to this personal grievance being late raised through its conduct.

[11] EPS says it has not consented to late raising of this personal grievance and has engaged in good faith with Mr Choi and the Authority process.

[12] The 8 July 2023 text message Mr Choi relies on, does not constitute raising of a personal grievance. It is a bare inquiry as to the application of terms of the parties' employment agreement. The 9 November letter deals with two personal grievances –

¹ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

² Employment Relations Act 2000, s 114.

the claim of unjustified dismissal and an unjustified disadvantage claim relating to the provision of or lack thereof of 40 hours work per week. While I accept the letter refers by way of background to the increase to \$30 per hour on completion of the “90-day trial period” and the resolution sought includes payment at \$30 per hour based on the employment agreement, I do not accept a personal grievance in respect of EPS’ alleged failure to increase Mr Choi’s rate of pay was raised. This is because the grievances raised are explicitly focussed on the alleged failure of EPS to provide 40 hours work per week. This focus is mirrored in the statement of problem. It is fair to say a personal grievance for the alleged failure to increase Mr Choi’s pay rate was not clearly advanced until closing submissions were provided on 16 June 2025. This is raised well outside the 90 days. Leave to raise out of time is not granted. Exceptional circumstances are not established including Mr Choi was able to raise grievances within time. It cannot fairly be said EPS consented to the raising of the grievance out of time given this claim was not made explicit until the conclusion of the investigation process.

[13] If I am wrong and Mr Choi did raise this issue with sufficient clarity and within time, he faces a further and significant obstacle. Issues over the interpretation, application or operation of an employment agreement cannot give rise to personal grievances based solely on disadvantage.³ The matter of whether Mr Choi was entitled to a pay increase after 90 days is such an issue. While I accept Mr Choi found it challenging to raise with his employer the issue of the increase in his hourly rate of pay and he believes the employment relationship suffered as a result, these matters have been folded into the circumstances of how his employment ended. For these reasons Mr Choi cannot advance a personal grievance based on EPS’ failure to increase his pay rate from \$28 to \$30 per hour.

[14] Mr Choi is able to pursue this matter as a wage arrears claim. EPS has been on notice since 9 November 2023 that Mr Choi understood he should be paid \$30 per hour after the completion of 90 days of employment and sought payment at the rate of \$30 per hour from at least 29 July. At the investigation meeting his wage arrears calculation was provided and EPS has had a fair opportunity to understand and respond to this claim.

³ Employment Relations Act 2000, s 103(3).

[15] Mr Choi says EPS breached clause 8 of the parties' employment agreement. He says the clause provides that after the completion of his first 90 days of employment he was entitled to an increase of \$2 to his hourly rate, that is from \$28 to \$30 per hour. EPS says this interpretation is incorrect and the pay increase was dependant on a successful performance review.

[16] How then to interpret the parties' employment agreement? The principles relating to the interpretation of contracts generally apply to employment agreements.⁴ The proper approach to interpretation is an objective one, the aim being to ascertain the meaning the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were in at the time of the contract.⁵

[17] Clause 8.1 provides for an annual performance review process which may result in a pay increase. Clause 8.2 deals with when these annual reviews will be held - the first review was to be held on the first anniversary of employment and in subsequent years on 1 June.⁶ Clauses 8.1 and 8.2 are not relevant to whether Mr Choi was entitled to a pay increase after 90 days employment. Those clauses deal with annual reviews and the triggering event for the first performance review, Mr Choi's first anniversary of employment with EPS, was some months away.

[18] Clause 8.3 provides that after the completion of the first 90 days of employment, which is described as a "trial", there "will" be a pay increase to \$30 per hour. It continues, disjunctively, that on completion of a successful performance review, a fuel card and company vehicle would be discussed.⁷

[19] On an objective reading of clause 8.3 the pay increase was conditional on Mr Choi completing 90 days employment and the company car and fuel card were matters to be discussed at the performance review. The parties have described a performance

⁴ *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428.

⁵ See *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; affirmed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

⁶ The parties do not dispute the reference in clause 8.2 to clause 9.1 is a typographical error and should read "clause 8.1". For completeness clause 9.1 lists statutory public holidays.

⁷ For completion this clause does not meet the requirements of a trial period under s 67A of the Act and there was no suggestion from the parties that Mr Choi to be employed under a statutory trial period.

review in clauses 8.1 and 8.2 – the first to be held on the first anniversary of Mr Choi’s employment and in subsequent years on 1 June.

[20] Mr Choi has met the sole condition for the increase in his hourly rate of pay to \$30 per hour – the completion of 90 days employment. If EPS’ argument was accepted that the pay increase was dependant on a successful performance review, this standard is not established on the evidence. There is insufficient evidence such a review, as described in clause 8.1 was undertaken. Mr Choi received verbal feedback about his performance on the job during the first 90 days of his employment but there is insufficient evidence his pay or conditions were discussed or that his views as to how he was performing were sought or received.

[21] Mr Choi was entitled to be paid \$30 per hour from 19 June 2023. Arrears are due.

(ii) *Was Mr Choi unjustifiably disadvantaged – failure to pay usual wages?*

[22] In late June 2023 EPS experienced a significant business downturn. Mr McKenna said he meet with the team, including Mr Choi, explained there was no work in the short-term and proposed they pause their employment until new jobs were secured to which they all agreed. Mr Choi denies such a meeting occurred or that he agreed to a proposal to pause his employment. I am satisfied EPS communicated to Mr Choi there would be reduced work from 29 June. The evidence does not establish he agreed to the proposal.

[23] Under the terms of the parties’ employment agreement EPS was obliged to provide Mr Choi a minimum of 40 ordinary hours of work per week for which he would be paid at the agreed hourly rate. The proposal to pause Mr Choi’s employment was a variation to that agreement. Clause 29 of the agreement required any variation to the employment agreement to be by mutual consent and in writing.⁸ Further, s 63A of the Act requires an employer, when bargaining a variation to an individual employment agreement, to provide the worker with a copy of the proposal for discussion, advise the worker they are entitled to seek independent advice, give them an opportunity to do so and consider and respond to any issues they raise.⁹ EPS is unable to establish it has met

⁸ The written requirements of the variation clause expressly exclude clause 8.2 annual review and clause 26.4 new employment during redundancy notice period.

⁹ Employment Relations Act 2000, s 63A(1)(d) and (2).

the contractual and statutory requirements in bargaining the variation with Mr Choi. His agreement to the proposal was not recorded in writing and while I am satisfied Mr Choi understood from at least 29 June that usual levels of work would not be provided that is not evidence that he agreed to the proposal to suspend the employment agreement. The evidence before the Authority was during the COVID-19 period EPS dealt with a similar situation involving work not being available for staff. Given this, while EPS is not a large business it could have drawn on this recent experience to guide it through what is accepted was a difficult situation.

[24] EPS argued Mr Choi could have minimised the impact of any breach by using his annual leave balance or requesting an advance of annual leave as offered. This argument is not accepted. Annual leave is to provide employees with the opportunity for rest and recreation.¹⁰ Mr Choi cannot be criticised for not taking annual leave when he did not wish to and was entitled under the parties' agreement to be provided with work.

[25] EPS has proposed Mr Choi was not available to work for it from September because he was working elsewhere. It relies on a recorded telephone conversation with a third party who did not attend the Authority to give evidence. Mr Choi strenuously denies he did any paid work prior to taking up his new employment. He has provided his IRD summary of earnings and text messages and correspondence with the new employer. The evidence provided to the Authority on balance supports that Mr Choi started new employment on 26 September and that up to then he was available to perform work for EPS.

[26] Has Mr Choi suffered disadvantage in his employment because of the breach of condition? Yes. EPS did not provide work in breach of the employment agreement and did not pay Mr Choi. Further, it did not engage in an open and constructive manner, as it was obliged under the duty of good faith, to discuss the proposal with Mr Choi in a way in which he could fairly engage. For example, the proposal was not put to him in writing and his agreement was not sought in writing having taken advice if he so choose. This has disadvantaged Mr Choi because EPS' actions did not allow him to actively engage in a proposal which had a significant impact on him that is, the ongoing

¹⁰ Holidays Act 2003, s 3(a).

provision of work and pay under the parties' employment agreement. This personal grievance is established.

(iii) *Was Mr Choi unjustifiably constructively dismissed?*

[27] On 26 September 2023 Mr Choi took up new employment. It had been two months since he had been paid wages or provided work by EPS. Over that period there had been some communication between the parties:

- (i) on Saturday 31 July Mr McKeena sent a message on the work group chat – there was not much work available in the coming weeks, employees could take annual leave or apply for an advance of annual leave to “...substitute for time off”;
- (ii) on 9 and 16 August Ms Danielle messaged Mr Choi asking if he wished to use annual leave because, she wrote, he had not been provided any hours of work in the preceding respective week;
- (iii) Mr Choi replied day of receipt declining the offers – “No I don't want it. Thanks” and “No that's fine. Thanks for reminding”;
- (iv) on 16 August Mr McKenna sent the following message to the group chat, which included Mr Choi:

Hello Team.

As you probably realised things have slowed down. We're doing our best to find work and it looks like there is some work on the horizon. But that horizon is still at least three weeks away at present moment. We will understand if you want to find other work as there's not much else we can do right now.

- (v) On 23 and 30 August Ms Danielle, on behalf of EPS contacted Mr Choi recording he had not worked any hours in the previous weeks and asking if he wished to use his annual leave;
- (vi) Mr Choi replied day of receipt declining the offer – “Hi No im fine thanks” and “No im fine thanks”;
- (vii) then on 5 September Mr Choi messaged Ms Danielle requesting his payslips for the final communication; and
- (viii) in late October EPS processed and paid Mr Choi's final pay.

[28] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.¹¹

[29] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.¹²

[30] This is an unusual situation - Mr Choi did not resign from his employment with EPS or raise a concern with his employer about the non-payment of his wages prior to commencing his new employment. In his evidence to the Authority Mr Choi said he waited for contact from EPS about resuming work and when he received no contact, he did not consider a new job until 22 September when he was contacted by a former colleague about working at his business. He said he did not consider another job sooner because he was waiting for more work from EPS and the atmosphere in the job was good as was the commuting distance from his home.

[31] Unjustified constructive dismissal is not established. Though EPS was significantly in breach of the parties' employment agreement in failing to pay wages, as found above, the evidence shows both EPS and Mr Choi understood the employment relationship remained afoot through until at least late September. Mr Choi accepted a new job not because he understood his employment with EPS was over as result of the breach but because, on his evidence, he had not heard further from EPS about more work, and he thought this might be because he had inquired about wage rate increasing and he had heard other workers had told EPS he was working elsewhere. He did not contact EPS with these concerns and made no contact with EPS after 5 September. If

¹¹*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

¹²*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

Mr Choi was aware EPS may have misapprehended his circumstances, as it appears, and he wished the employment relationship to continue, he had the opportunity to clarify those issues with EPS and to do so would be consistent with the obligation of good faith that he owed his employer.

[32] On an objective assessment Mr Choi's employment with EPS ended when he started another job. Mr Choi has not established he was unjustifiably constructively dismissed.

Remedies

[33] Mr Choi has established a personal grievance for unjustified disadvantage. He is entitled to a consideration of the remedies sought. He has also established a claim for wage arrears.

Wage arrears and reimbursement of lost wages

[34] Under the terms of the parties' employment agreement Mr Choi was entitled to be paid \$30 per hour from 18 June 2023. He was also entitled to be paid for a minimum of 40 hours per week. He is entitled to be reimbursed a total of \$364.00 (gross) from 18 June to 28 July.¹³ For the seven-week period weeks ending 6 August to 17 September 2023 Mr Choi is entitled to be reimbursed his usual wages of \$1,200 (gross) per week being the minimum sum he would have received under the terms of the parties' employment agreement but for the breach. The one day sought for the week ending 24 September is not allowed. The total reimbursement sum ordered is \$8,400 (gross) plus arrears of \$364.00. Holiday pay is to be calculated on the total arrears at 8%.

Compensation for humiliation, loss of dignity and injury to feelings

[35] Mr Choi said he borrowed money from his siblings during the period he did not receive his usual wages which caused him shame. He said he experienced uncertainty and stress which has had an ongoing negative impact on him and his family. I am satisfied the circumstances of Mr Choi's personal grievances have caused him harm under each of the heads of s 123(1)(c)(i). Mr Choi is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$12,000.

Contribution

¹³ \$2 per hour x 182 being total hours Mr Choi worked from 18 June to 28 July 2023.

[36] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[37] Mr Choi's actions did not contribute to the personal grievances. The circumstances which resulted in EPS's found breaches of the parties' employment agreement decision were matters within its control. While I accept the change in business circumstances presented significant challenges to EPS these were not matters over which Mr Choi had any control or direct knowledge or input and did not release EPS from its obligations to Mr Choi. For example, EPS's failure to follow the variation mechanism within the employment agreement and as required by law, were not matters Mr Choi could control. His declining to take annual leave is dealt with above. His failure to engage with EPS about resuming work has been considered in respect of his unsuccessful claim of unjustified constructive dismissal.

[38] Mr Choi has not contributed in a blameworthy way to the circumstances which have given rise to his established personal grievance.

Should penalties be ordered for breach of good faith and breaches of the Holidays Act?

[39] Mr Choi has been compensated for found breaches. In all the circumstances this is not a matter which warrants a penalty order.

Summary

[40] Within 28 days of the date of determination Euro Property Services Limited is to make the following payments to Sunho Choi:

- a) \$12,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- b) \$8,400.00 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000;
- c) arrears of wages of \$364.00; and

d) holiday pay calculated at 8% on the total of \$8,764.00.

Costs

[41] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Choi may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Euro Property Limited will then have 14 days to lodge any reply memorandum.

[42] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. 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.

Marija Urlich
Member of the Employment Relations Authority