

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 238
3205939

BETWEEN SHAUN FARMER
 Applicant

AND PRINTEC DIGITAL SERVICES
 LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person assisted by Ted Aylett
 Kerry Single, advocate for the Respondent

Investigation Meeting: 17 and 18 July 2023 in Tauranga

Submissions Received: At the investigation meeting

Determination: 24 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Shaun Farmer, claims he was both unjustifiably dismissed, albeit constructively, and unjustifiably disadvantaged by reason of his being bullied in the workplace and the employer (Printec) failing to pay for work performed. It follows he also claims he is due unpaid wages.

[2] The claim was originally lodged against Timothy Morgan, Printec's sole director and shareholder but this was later changed with the agreement of the parties.

[3] The claims were denied, originally on the grounds Mr Morgan was not the employer and more latterly on the basis Printec does not accept Mr Farmer's allegations. It asserts "There was nothing done to encourage the Applicant to resign" and adds that in any event Mr Farmer's verbal resignation "was confirmed by the writing of s 149 settlement agreement" which is full and final. It was not till later that

Mr Farmer tried to extort additional monies by producing a subsequent written resignation.

[4] The wage claims are denied on the grounds the overtime claimed was neither required nor approved and the bullying on the grounds it never occurred.

[5] Printec also raised a counterclaim concerning Mr Famer's alleged misuse of its computer systems and the installing of unauthorised software but this was subsequently withdrawn during the investigation meeting.

This Determination

[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 orders made. It has not recorded all evidence and submissions received.

[7] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[8] Mr Farmer was engaged by Printec having been introduced by WINZ in May 2020. Initially the arrangement was in the form of a trial and, according to Mr Farmer, Mr Morgan advised he was acceptable and would be employed with effect 8 June though the employment agreement (IEA) states 9 June.

[9] Mr Farmer says he then asked for an IEA which he got on 24 June though there was no job description attached. He says he asked Mr Morgan to complete it as the work broker who had arranged the engagement was coming to visit. He says Mr Morgan asked he write the job description which he did and the two then signed the IEA before the broker arrived. Mr Morgan agrees he signed the agreement but is unsure whether Mr Farmer did although later answers contradicted this and implied the agreement was not signed. Only an unsigned version can now be found.

[10] The job description specifies a wide range of duties associated with Printec's software design services, customer liaison and marketing. Notwithstanding that, Mr

Farmer says his duties were flexible depending on work demands which increased as time passed forcing him to work overtime with that situation being exacerbated by a reduction in the number of staff engaged by Printec or leave for those who remained.

[11] According to Mr Farmer the initial hours of work were 10am to 6pm and that was later amended to 10.30am to 6.30pm. Mr Farmer says these hours were occasioned by a need to do some graphic design work which was best performed uninterrupted after the shop closed. Mr Morgan accepts these were the agreed hours though attributes them to two reasons - Mr Farmer was incapable of rousing himself any earlier and then badgered Mr Morgan into accepting them.

[12] Mr Farmer is of the view things went well until September or October 2021 when Mr Morgan sought to introduce a new IEA. Mr Farmer says the draft IEA was presented in early October and he responded with a set of documents seeking a number of changes. He says "The main theme throughout is that I would like some of the terms in the new agreement to match more closely to the original agreement of which I was happy with, agreed with, and signed last year." The salient point was that he rejected a suggestion his hours be 8.30am to 5pm and proposed a continuation of 10.30am to 6.30pm.

[13] Contemporaneous documents and Mr Morgan's evidence confirm the proposed change was driven by increasing dissatisfaction with Mr Farmer's hours and, in particular, his start time.

[14] Indeed, and on 11 October prior to receiving Mr Farmer's response to the new IEA, Mr Morgan noted the 10.30 start time in an internal communication before going on to write "Telling customers to come back later when they come here during normal working hours is bloody terrible service and will have to change". He went on to advise he was rewriting the IEA's and "... will be stipulating that everyone starts at 9am so we don't have to make bloody fools of ourselves by telling customers to come back later!!!!".

[15] Mr Farmer says there was also an altercation that day with Mr Morgan screaming at him and again trying to coerce his agreement to the new hours. That said the outcome of the days' events was an email from Mr Morgan advising Mr Farmer that after discussing things with "you" and the others "we think that flexible hours is the

best option for you. This means you can negotiate with the others about your work hours and I don't need to interfere at all.”

[16] According to Mr Farmer that meant he continued to work 10.30 to 6.30 till July 2022 when a new manager arrived and soon announced Mr Farmer's hours would change to 9am to 5pm as the others were working those hours. Mr Farmer states that as the other two technical staff were then away on leave he agreed, though under protest and only until they returned. He adds one effect was that his hours increased as he was covering a multiplicity of jobs.

[17] On 12 August, and with some of the staff having returned from leave, there was a discussion about on-going hours. The outcome was recorded in a note written by Mr Farmer which states “I will start at 10am (previously started at 10.30am but I am fine to start 30 minutes earlier while Lisa is away or still short staffed)...” and the evidence suggest that is what then occurred.

[18] Notwithstanding these events the issue of Mr Farmer's start time remained a source of contention with, for example, messages from Mr Farmer in October advising that as all technical staff had now returned he was reverting to the agreed 10.30 start. Mr Morgan replied he wanted reasons for what he now characterised as a request to work outside normal working hours.

[19] On 25 October Mr Morgan advised the starting time was now 9.00am before another message in which he asked Mr Farmer come and discuss his “late starting request” and stated he would be sending a record of the conversation “to my employment lawyer who will need your reasons”.

[20] Further tensions arose around this time concerning security around closing the shop and access to security cameras.

[21] Around this time Mr Morgan asked Mr Single to draft a new IEA for Mr Farmer. This he did and it was passed to Mr Morgan, along with a letter dated 6 November and signed by Mr Single, for presentation of both to Mr Farmer. Crucial to this dispute is the fact the IEA specified the hours of work as being 9am to 5pm, Monday to Friday. The letter is premised on a belief, which Mr Single's evidence suggests he still holds, that the parties never signed an IEA. Indeed, he says Mr Farmer was adamant he had never signed the original IEA when they subsequently met but that is denied by Mr Farmer and Mr Single says the discussion as to what happened “got cloudy”. A later

letter from Mr Single contradicts this evidence and accepts the agreement was signed (see [39] below).

[22] The letter of 6 November went on to advise a written IEA was required by law but that Mr Farmer was entitled to seek independent advice. It also advised that according to its content it would supersede any previous arrangements and Mr Single would meet with Mr Farmer to explain its content.

[23] The meeting occurred on the 8th with Mr Single describing it as a “general hi chat” at which the need for an IEA and the content of the draft was discussed. He says he considered there were only minor changes but accepts considerable discussion ensued. The parties differ as to exactly what was said though one key point stands out. That was the hours of work were the key issue and Mr Farmer was not happy.

[24] Mr Farmer says he felt he was being unfairly coerced and clearly stated he wanted his then current hours to continue. Mr Single agrees with the second point and I have to conclude his oral evidence would support a view Mr Farmer was being pressured. He accepts he told Mr Farmer a 10am start did not suit the business and was not convenient. He says Mr Farmer raised the fact he suffered from insomnia and could support that with a medical certificate. Mr Single says his response was “don’t bother as you can get a medical certificate for anything”. He also says he suggested Mr Farmer look at ‘gaming’ to which Mr Farmer said no.

[25] Mr Single states Mr Farmer raised the possibility of redundancy to which he said “that was not going to happen” as a small company could not afford such an extravagance. Mr Single says Mr Farmer then asked what would happen if he didn’t sign, to which he replied Mr Farmer was free to get advice but the position on both hours and redundancy would not change. Mr Single’s evidence is the question was then repeated to which he said “neither [hours nor no redundancy] will change so do you want to stay or should you look for another job”.

[26] Mr Single says the conversation went on a bit until Mr Farmer said he’d resign. Mr Single said in written evidence that he asked whether Mr Farmer wanted to think about that and was told no and that he’d made his mind up. He says he then advised he would go and discuss it with Mr Morgan. In oral evidence nothing was said about Mr Farmer stating there would be no reconsideration and when he then discussed it with Mr Morgan the later simply said “let him resign”. Mr Single adds Mr Morgan said he

could go that day and would not need to work out a notice period. He says Mr Morgan asked he find a suitable way of finalising the resignation with respect to notice and holiday pay.

[27] Mr Single says he then went back and told Mr Farmer his resignation was accepted to which Mr Farmer asked if that meant he did not have to come in the following day. Mr Single say he replied “that’s correct and nor would he have to come any other day as he was no longer employed”.

[28] Mr Single says Mr Farmer then brought up a bullying complaint he had earlier raised to which he, Mr Single, advised one instance is not bullying which requires ongoing or repeated events. He accepts Mr Farmer then raised a claim regarding an entitlement to overtime. Mr Single says he said he would investigate.

[29] Mr Single says he then advised that as there did not appear to be a written IEA and no prospect one would now be agreed “the preference would be to have a settlement agreement signed off which would finalise all matters between Printec and him”. He says they discussed this and he advised he would prepare a draft which they would meet to discuss on 10 November.

[30] It is Mr Farmer’s evidence he did not resign on 8 November but he accepts the issue arose as a result of Mr Single’s comments about finding another job. He says he asked to have the 9th to consider it, though this is denied by Mr Single. He accepts he was told he did not have to work and states he was, from that point, locked out of the workplace and it was his inability to return to work which eventually led to the written resignation he tendered on 5 December.

[31] Printec accepts Mr Farmer was no longer able to work but attributes that to the fact he had already resigned. It views the subsequent written resignation as an attempt to extend the notice period and be paid accordingly.

[32] In the interim further correspondence passed and Messrs Single and Farmer met on 10 November though that was largely about the proposed settlement agreement with Mr Farmer advising he needed to seek advice before accepting. Printec couch this slightly differently saying Mr Farmer agreed “subject [to] having it looked at by a lawyer”.

[33] The settlement itself is in the form of a s 149 agreement requiring certification by an MBIE mediator. It provides Mr Farmer tendered his resignation effective 9 November at which point he was entitled to 28.18 days holiday pay. It also provides the parties will not disparage the other; that Printec had agreed to pay 2 weeks in lieu of notice but that the above payments would be made on a fortnightly basis to assist cashflow. It was finally recorded that this was in full and final settlement of all matters between the parties.

[34] The first subsequent substantive email was sent by Mr Farmer to Mr Single on the evening of 9 November and dealt with his overtime claim. Of note is the admission, repeated in oral evidence, that he kept 2 logs of the hours he worked – an official one upon which his pay was based and a second private one which records greater hours but which had not previously seen the light of day. That said at this stage that admission only related to one recent entry with the email suggesting it was only now coming to light in order to avoid drama with Mr Morgan “while we’re sorting everything out”.

[35] Further emails followed regarding outstanding holidays with Mr Farmer stating he had 28.18 days of holiday left with that then being the figure used in the proposed settlement. Further correspondence then arranged the meeting of 10 November.

[36] On 14 November Mr Farmer emailed Mr Single indicating he was having difficulty obtaining legal advice. The email also records “When I mentioned last Wednesday I was thinking of resigning, nothing is actually finalised yet obviously, still wanting to keep all options on the table, as I won’t decide on a course of action until going through it with the lawyer.” He adds that if he does sign the agreement the date of resignation would have to change. The email again reiterates he had not yet resigned and remained available to work, though “as per your advice I will stay on paid leave until everything is sorted.” Finally, he complains that despite requests for information from Mr Morgan about recent accounts etc he could no longer check anything as he’d been locked out of Printec’s systems despite the fact he hadn’t yet resigned.

[37] The reply was “I understand what you are saying and we can sort that out after you have seen your lawyer.”

[38] The following day, 15 November, Mr Farmer wrote advising he’d spoken to a lawyer and been told “the notice of settlement isn’t really a deal at all, they are just giving you the bare minimum required by the employment act. The issues of overtime

and the bullying haven't been addressed at all". An extract from an MBIE website followed before he went on to challenge the notice period and claimed others had left due to bullying with monetary settlements. He then stated he was not yet asking for compensation for the bullying but simply wanted what he was due for the hours "he had logged". He claimed 176.6 hours of overtime which he had recorded before again referring in some detail to another ex-employee's settlement.

[39] From there things deteriorated with the party's positions becoming entrenched. On 21 November Mr Single wrote a long letter advising he was representing Printec. The letter accuses Mr Farmer of selective memory but accepts his alleged acceptance of the proposed settlement was subject to having it looked at by a lawyer. It rejects the wage claims taking issue with the second unofficial record and its divergence from the official one. Notwithstanding the doubt he still expresses as to whether the original IEA had been signed, Mr Single goes on to accept it was and notes the IEA required an employee be both asked to work overtime and then agree but there was no record of any such request ever being made.

[40] The letter then asserts Mr Farmer had resigned and all that remained was for him to seek advice as to how that would be recorded and finalised. Issue is then taken with Mr Farmer's knowledge of the other ex-employees' settlement and he is accused of wrongly taking and using that information. The claim of bullying is also denied.

[41] The letter closes by advising Mr Farmer would receive a certificate of service and that "The Settlement Agreement as negotiated is required to be signed and returned" by 24 November so it could be signed by the employer and forwarded to a mediator for ratification.

[42] It wasn't, though Mr Farmer advised he was still seeking support. That prompted a further letter on 29 November primarily addressing Printec's concerns that Mr Farmer had used a letter to Mr Morgan concerning the other employees' settlement. It advised "due to the time you are taking to obtain legal advice, we are investigating..." and demanded an explanation as to how, why and when Mr Farmer removed what was confidential information.

[43] Mr Farmer replied asking when did the investigation commence and whether or not he was suspended. He also claimed the investigation into his bullying complaint was not conducted in good faith.

[44] The reply came on 5 December and opened with “My letters to you are not for debate or discussion.” Reference is then made to the settlement document before the following:

There will be no further response until either our request for information regarding the removal of documentation that you have no authority to have is provided by you, so the employer may consider if he will take the matter further or not.

Or if the Settlement Document is signed and returned, then the matter is at a close”.

[45] That was followed by the resignation which was, in the circumstances, surprisingly conciliatory. It opens with advice it is the first and only notice of resignation; that it is required in writing by the IEA and that the contractual notice period means the last day would be 2 January 2022 (sic). It asks that should Printec require work be performed during the notice period it advise in writing. There is then a paragraph advising Mr Farmer had enjoyed working at Printec and why. It closes by advising Mr Farmer still had property at Printec as he had, since 8 November, only been on paid leave.

[46] Mr Farmer attributes the tone of the letter to the fact he only really thought about the circumstances of his departure after he left, largely as a result of only being paid two weeks notice and it was then he realised he had been forced from his job.

[47] The grievance was raised almost immediately.

Analysis

[48] As said in opening Mr Farmer claims he was both unjustifiably dismissed, unjustifiably disadvantaged and wages remain unpaid.

[49] Dealing with the dismissal first. A dismissal is a sending away and, notwithstanding the claim of constructive dismissal, that is what I conclude occurred – this was an actual dismissal.

[50] As an aside I also conclude the original IEA was signed. Mr Farmer is adamant that was the case and Mr Single, as the Printec’s representative stated the agreement had been signed in his letter of 21 November and Mr Morgan’s evidence on the issue, while confused, fell short of denying Mr Farmers claim.

[51] The IEA provides that “The employee might end their job by resigning” or that the employer might end the job for good reason and after following a fair process. It further provides that the party ending the employment must do so on four weeks notice in writing. Mr Farmer never gave such notice prior to 5 December and any confusion that might have arisen during the conversation of 8 November should have been removed by his email of 14 November, especially as Mr Single acknowledges the resignation, if given, was conditional and the condition was yet to be met.

[52] Here I also note a conclusion a resignation was not given on 8 November. First Printec accepts it was, if given, conditional and the condition had not been met. Second, the evidence is Mr Single had suggested resignation, thus setting Printec up for a classic constructive dismissal in the event it was, and his oral evidence leads me to conclude he heard what he wanted to hear.

[53] Notwithstanding the fact there was no proper resignation Printec proceeded as if there was. It told Mr Farmer he was no longer required at work and removed his ability to access both the workplace and its systems. It also proceeded to process what was intended to be Mr Farmer’s final pay, albeit in a way that gave rise to confusion by virtue of the fact it did so via fortnightly payments for reason of its own choosing.

[54] That is a sending away – it is a dismissal and it effectively occurred on 8 November, operative the next day. Given it was done in reliance on a resignation that had not been given it must lack good cause as required by the IEA. It must also lack due process given, the pressure being applied to force a change of hours, followed by the employer suggesting resignation and capped off with evidence which shows Printec fell well short of meeting the procedural requirements of s 103A(3) of the Employment Relations Act 2000 (the Act).

[55] It follows the dismissal, which was actual as opposed to constructive, is unjustified. Here I note I advised the parties this approach was a possibility. I also note that had I not found an actual dismissal on 8 November I undoubtedly would have found Mr Farmer was constructively dismissed on 5 December. Aside from the fact the idea of resignation was first aired by the employer, giving an employee a choice of remaining with a significant, imposed and non-negotiable alteration to the hours of work or resignation along with the caveat the choices are not for debate or discussion is no choice at all. It would constitute a constructive dismissal.

[56] The conclusion Mr Farmer was unjustifiably dismissed raises the question of remedies and for this breach he sought compensation pursuant to s 123(1)(c)(i) of the Act. He did not seek lost wages pursuant to s 123(1)(b) but did claim the two weeks his notice was short, along with 16 days pay to take his employment to the date of resignation.

[57] The claim for 16 days cannot stand given the conclusion dismissal actually occurred on 8 November. The claim for outstanding notice can. The contract clearly states 4 weeks yet only two were originally paid. The evidence, while confused, suggests this may now have been rectified but if it hasn't two weeks notice remains due.

[58] Turning to compensation. No figure was mentioned and the evidence supporting the claim of hurt and humiliation was surprisingly sparse – indeed it was close to non-existent. That said I accept hurt must arise from an unjustified dismissal, especially in circumstances such as those described above. Notwithstanding the lack of evidence current award levels lead me to conclude \$12,000 is appropriate.

[59] The key disadvantage claim was that Mr Farmer had been bullied but when asked to explain the bulk of his oral evidence concentrated on two events during which he is alleged to have been screamed at. One of those was as far back as early 2020, while the second was the event of 11 October 2021 (see [15] above).

[60] Two events, while perhaps inappropriate, do not constitute bullying which most definitions suggest requires an ongoing course of action. In any event both were never raised as formal grievances at the time and s 114 of the Act now precludes them proceeding as stand alone claims.

[61] There was also a claim Mr Farmer had been bullied by way of the employer's attempts to change his hours but these too must fail. The evidence is that while sometimes reluctantly, the core hours Mr Farmer worked and the changes thereto were accepted by him until the events that led to his termination in late 2022. Those have already been addressed via his success with the dismissal claim and the evidence is the previous discussion over change occurred in early August 2022. Again s 114 means this cannot proceed as a stand alone grievance.

[62] There was a claim the employer disadvantaged Mr Farmer by creating problems where none existed and that it treated him unfairly with regard to allowing leave. The

evidence is, however, these issues arose early 2022 but were not formally raised until the claim was lodged in December. Again s 114 intervenes.

[63] Finally Mr Farmer claimed he was disadvantaged by the delayed production of his original IEA. That was in 2020 and s 114 again prevents the claim progressing.

[64] Turning now to the arrears claims. With this I have difficulty for three reasons.

[65] The first is Mr Farmer's admission his calculations are based upon a second log he maintained secretly and about which the employer was unaware. If the records were accurate he had a duty to raise the issues at the time and not store up the claim until after cessation while willingly accepting the remuneration paid.

[66] The second issue is the IEA. It provides that overtime payments require the employer ask overtime be performed and the employee then agreeing to work it. There is no evidence either event occurred or that overtime was ever required.

[67] To the contrary it is here the third reason arises and that is the unchallenged evidence of Mr Ramsey, a witness for Printec. He accepted he knew Mr Farmer might be working additional hours though this might have been confused by the fact that for a period he also lived on the premises. That said it is Mr Ramsey's uncontested evidence that whenever Mr Farmer raised a view he might have to work extra hours he expressly replied Printec could not afford it and did not want the work done. While Mr Ramsey conceded Mr Farmer would simply ignore his instructions, I cannot sanction payment for work that is not due pursuant to the IEA and which the employer expressly stated should not be performed.

[68] Similarly a claim for a days sick pay on 14 November (which was categorised as annual leave) cannot succeed given the conclusion dismissal had already occurred.

[69] That said there is one claim with which Mr Farmer will succeed. That is for reimbursement for the use of his private car pursuant to the IEA and which Printec concedes occurred. The amount involved is \$68.40 being 72km at the then applicable rate of 95 cents a kilometre.

[70] Finally, there had been a claim regarding unpaid annual leave but this was not mentioned or pursued when Mr Farmer was asked to confirm and outline his claims in oral evidence. Nor was it mentioned in closing. It is my understanding this has been

resolved but if not, Mr Farmer still has some years in which he can pursue this single issue.

Conclusion and Orders

[71] For the above reasons I conclude Mr Farmer has a personal grievance in that he was unjustifiably dismissed. He is also due an unpaid reimbursement though the bulk of his unpaid money claims fail. As a result, I order Printec Digital Services Limited pay Shaun Farmer:

- (a) Two weeks pay, being the balance of the notice period and provided it has not already been paid; and
- (b) A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- (c) A further \$68.40 being reimbursement of expenses.

[72] Costs are reserved though I note that while Mr Farmer was assisted, I understand Mr Aylett is not a remunerated advocate. This implies Mr Farmer, while successful, was self represented which means recoverable costs are likely limited to the Authority's filing fee of \$71.56. That is payable in addition to the sums ordered above.

[73] Should either party disagree and an Authority determination on costs be needed that party may lodge, and then serve, a memorandum on costs within 28 days of the issue of this determination. From the date of service of that memorandum the other party will have 14 days to lodge any reply.¹

Michael Loftus
Member of the Employment Relations Authority

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