

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2025] NZERA 44
3272399

BETWEEN MICHAEL ORMSBY
Applicant

AND BLUELAGOON NZ
LIMITED
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Dave Cain, advocate for the Applicant
Ronan Ferey for the Respondent

Investigation Meeting: 13 December 2024 in Gisborne

Submissions received: 13 December 2024

Determination: 28 January 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michael Ormsby was employed by Bluelagoon NZ Limited (BLL) as a truck driver and digger operator in May 2023. Ronan Ferey is the sole director and shareholder of BLL. Mr Ormsby says he was unjustifiably dismissed when Mr Ferey sent a series of messages on Facebook Messenger saying he could no longer afford to pay Mr Ormsby. Mr Ormsby also claims he was unjustifiably disadvantaged after the first week when he was given no more work and no wages were paid.

[2] Mr Ferey accepts Mr Ormsby was an employee but says the overall relationship was more complicated because Mr Ferey and Mr Ormsby are related and the offer of work had the potential to turn into a business opportunity for Mr Ormsby. The business

opportunity was dependent on an associate of Mr Ferey having work and when a contract did not come through as expected and it rained, Mr Ferey was no longer in a position to pay Mr Ormsby's wages.

[3] Mr Ferey accepted there was no work offered or wages paid between Mr Ormsby's last day of work on 4 June 2023 and the Facebook message on 29 June 2023 which brought their arrangement to an end but says it was a casual employment relationship so there was no obligation to provide work to Mr Ormsby. He also says Mr Ormsby resigned at an earlier date.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Ormsby and Mr Ferey. They answered questions under oath or affirmation. A letter was received from Ugo Sanchez, an associate of Mr Ferey about the accommodation. Mr Ormsby's representative gave oral and written closing submissions.

[5] 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.

The issues

[6] The issues requiring investigation and determination were:

- (a) Was Mr Ormsby an employee, and if so, was he dismissed or was he a casual employee with no expectation of ongoing work?
- (b) Was Mr Ormsby unjustifiably disadvantaged by not being paid wages?
- (c) If dismissed, and BLL's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering lost wages and compensation under s123(1)(c)(i) of the Act?
- (d) If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Ormsby that contributed to the situation giving rise to his grievance?

Mr Ormsby's employment with Blue Lagoon Limited

[7] Mr Ormsby had previously worked for Mr Ferey. In approximately April 2023, Mr Ferey contacted Mr Ormsby in Tauranga and offered him a job in Gisborne driving

trucks as part of the clean up after Cyclone Gabriel. Mr Ferey says the arrangement was much more than just the employment relationship because they are related and in his mind this was a bigger opportunity and could have led to a business opportunity for Mr Ormsby.

[8] Mr Ormsby understood he was employed as a truck driver and digger operator from his first day of work which was 29 May 2023. He was driving and delivering big loads of firewood, with an element of beekeeping promised to him later in the year. Mr Ormsby worked previously in Mr Ferey's bee keeping business and had not enjoyed what he described as "the sort of uncertainty and poor conditions that I had experienced previously" namely, the accommodation that was provided last time which involved a composting toilet and a shipping container.

[9] For that reason, Mr Ormsby says when Mr Ferey contacted him about new work, he declined the first offer because the accommodation on offer was the same as last time. He ended up accepting an offer of employment a couple of days later because Mr Ferey offered him good accommodation, a work ute and full-time permanent work at \$35.00 per hour.

[10] Although Mr Ormsby had had a difficult period and some time on ACC due to a knee injury, which he says was from the previous period of employment with Mr Ferey, he was working full time in Tauranga and had a seasonal contract with ongoing work until the end of the year. He resigned from that job to take up the opportunity with BLL in Gisborne.

[11] Most of their negotiations as to the terms and conditions of employment were over text and Facebook Messenger. There was initially no written employment agreement until Mr Ormsby sent a handwritten draft setting some key terms including wages and the role description. He also drafted a further agreement expanding on the terms covering accommodation and the work vehicle because they became contentious between the parties. Mr Ferey signed and returned that document.

[12] Mr Ferey does not dispute there was an employment agreement, albeit an oral one to start with, but he says it was a casual agreement meaning there was no obligation to provide work or pay wages when no work was offered.

[13] Mr Ormsby had a week between jobs before driving to Gisborne to start work with Mr Ferey. Nonetheless Mr Ferey wanted Mr Ormsby to come as soon as possible. A week before he travelled Mr Ferey told him the house in the city was not ready to move into. Mr Ormsby says he later found out there was no house in the city, instead he was to share room with Mr Sanchez and although Mr Sanchez was initially away, there was no key provided. Instead a communal key was outside for everybody to share. As he was driving to Gisborne they exchanged messages about the work ute not being ready. Mr Ormsby was very unhappy about this.

[14] On 1 June, after only three days work, Mr Ormsby messaged Mr Ferey indicating the job was not for him and said he was going to head home after completing a couple more days work. His evidence was this was because Mr Ferey had breached their agreement about both the accommodation and the work vehicle. He felt let down by Mr Ferey because in his mind he had made it clear what he was willing to accept in terms of those two things. His car also did not have a warrant and Mr Ferey had promised him the use of a work vehicle which was not ready.

[15] Mr Ferey relies on that message to say Mr Ormsby resigned after only two days of work. At this point I note Mr Ferey responded to the message saying he needed Mr Ormsby to cover for at least a month then it could all be sorted out when Mr Ferey returned from overseas.

[16] It transpired Mr Ferey left to travel overseas with Mr Sanchez on holiday two days after Mr Ormsby started work. Mr Sanchez had been doing the bulk of the truck driving Mr Ormsby was now employed to do. The accommodation Mr Ferey arranged for Mr Ormsby was a room in Mr Sanchez's flat and I understood they were to be sharing a room when Mr Sanchez returned. Mr Sanchez, provided a letter saying the accommodation was safe and suitable but does not address the single room issue.

[17] Mr Ormsby decided to record in writing their agreement because he was worried as Mr Ferey was overseas by this stage:

Work contract Blue Lagoon NZ Limited / Michael Ormsby

13/6/23 Digger/Truck driver Gisborne region

-\$35/hr

- 4x4 work vehicle for work use and travel to shop for food + supplies around town

- Room accommodation paid for in Gisborne.

[18] There are no signatures on the first written agreement but it is consistent with what was agreed in messages between them before Mr Ormsby agreed to accept the job. Mr Ferey signed and returned a different agreement which set out Mr Ormsby's terms regarding the accommodation and work vehicle:

Work Ute

4x4 with suitable cab space

Work ute comes with work ute/vehicle standards. Fuel care, RUC Maintenance etc provided by bluelagoonsurfer. Personal use around Gisborne town comes under work ute standard. But out of town use/personal I will pay for that. ie fuel RUC. This will be for a period from 5/06/2023 – 31/12/2023. The BT50 will fall under these conditions till the change over of the new vehicle. Whenever that takes place in tis time period. If in this period the vehicle needs to be used for work another one must be provide in its place ie if work ute need to go bush must be swapped with BT40.

Accommodation

Self contained unit or flatting with 1 other. Own bathroom and toilet required. PRIVACY NEEDED. If this is not in place by 4/7/2023, self contained hotel room is required 5/7/2023 till accommodation standards are met. This will be covered by Bluelagoonsurfer. If employment looks to continue on a permanent basis in Gisborne ie I choose to move from home, down then this will end.

[19] Prior to that agreement being returned Mr Ormsby says he worked for one week (29 May to 2 June) completing 53 hours and 10 hours the following Monday before his work hours suddenly dropped. There was no work over the next three weeks (5 June to 23 June) and Mr Ormsby was left without an income.

[20] Mr Ormsby and Mr Ferey communicated via messages over this period. On 14 June the written agreement about the ute and accommodation was returned signed by Mr Ferey. On 29 June 2020, Mr Ormsby says his employment was terminated via Messenger without notice because Mr Ferey could no longer afford to pay wages.

[21] Mr Ferey says he was trying hard to make the arrangement work from overseas and wanted Mr Ormsby to think about the long-term opportunity but with all the rain, he said there was no work and a contract his contact was relying on did not come through. He says he found himself in a position where he could not pay Mr Ormsby.

[22] Mr Ormsby moved back to Tauranga with his parents and he found the whole situation very stressful. He says he had worked his whole life apart from the period on ACC and ended up having to go on a benefit, which was something he had never had to do before. He spent approximately five weeks on a benefit applying for jobs which

he found very hard. He felt let down by Mr Ferey and that he was simply used him to cover the workload while Mr Ferey was away on holiday in Mexico.

[23] Mr Ormsby raised a personal grievance with BLL on 19 July 2023 and lodged his application in the Authority on 9 January 2024.

Was Mr Ormsby dismissed or was he a casual employee?

[24] Mr Ferey accepted there was an employment relationship but says Mr Ormsby was a casual employee. Casual employment denotes employment where the employee is employed when and if needed, and where there is no particular expectation of continuing employment. There is conversely no obligation on the employee to accept any particular engagement or offer or work from an employer.

[25] They both agreed, the plan was employment with Mr Ormsby starting as a truck driver and digger operator because an opportunity had opened up post the cyclone and in Mr Ferey's words things were going good and the work was flowing. Mr Ferey paid for Mr Ormsby to attain a new licence in Tauranga before he started to assist with the proposed work for BLL.

[26] The written agreement drafted by Mr Ormsby supports the longer term nature of their arrangement in that the work vehicle was to be provided as was accommodation unless Mr Ormsby chose to relocate to Gisborne, contingent on "if the employment looks to continue on a permanent basis in Gisborne", then the requirement for accommodation would end.

[27] This is consistent with the messages in May showing Mr Ferey telling Mr Ormsby the offer was for longer term and not just for the bee season. The written agreement dealt solely with the work vehicle and accommodation as terms of employment but all other terms of employment were agreed over Messenger and orally.

[28] Based on the written agreement, the parties evidence and their messages, on balance I find their agreement was for permanent full time work. It is accepted there was reference to the weather so there may have been some flexibility in the hours, had their agreement been recorded correctly in writing as BLL was required to do. Had it been recorded more formally the provisions in the Act would have required flexibility

to do with the weather to be covered in the agreement and to have a set amount of guaranteed hours recorded.

[29] The finding that employment was permanent rather than casual is supported by the fact Mr Ferey asked Mr Ormsby to come to Gisborne to take up a long term opportunity and Mr Ferey knew Mr Ormsby was leaving full time employment and moving to take up this opportunity. There was some suggestion hours could be flexible, by virtue of the comment about another worker doing six to 16 hour shifts and a comment about weather, but they did not discuss work being offered by Mr Ferey only when it was available or that Mr Ormsby could also turn work down if he did not want to accept work on any given day.

[30] It is unlikely from the messages between the parties that it was intended Mr Ormsby be able to decline work when offered which confirms the agreement was for permanent full time work.

Did Mr Ormsby resign?

[31] Mr Ferey, accepting there was an employment relationship, says Mr Ormsby resigned over the messages they exchanged on 31 May and 1 June after only three days of work. However, the messages then show them negotiating the accommodation and the work vehicle further and Mr Ormsby staying in Gisborne at Mr Ferey's request:

Mr Ferey I need you to cover Ugo for this month at least, and we can sort out the rest when I get back.

Mr Ormsby Unless you can meet these previously discussed requirements I'm afraid the answer is no. Whether you choose to not give me money for work done and leave me stranded on the side of the road right now is up2you.

Mr Ferey You're on your own there for this month so privacy is 100%

Mr Ormsby No privacy

...

Mr Ferey So this is what I can do. At Ugos until he gets back, I'm enquiring for other accommodation as I explained to you. You have the bt50 til Ugo gets back, I'm currently working on a 4x4 you can have for the rest of the year, it's in Tauranga but needs something fixed so it'll take a couple of weeks to sort out at least. You can have that vehicle all yours to do whatever. Once I get it fixed. And yes I can pay once we sort this out.

Mr Ormsby I'm actually feel really let down by you that you have me come down here and this is what's happening. You said you had ute

and accommodation sorted. 2bh I just really want to go home right now.
Morning cuz. I'm going to have to communicate with Selwyn today that unfortunately our contract negotiations broke down and this is my last day.

[32] They exchanged some heated messages and had a phone call following which Mr Ormsby said he was working for two weeks until he found a job then he was going home. The written agreement about the vehicle and accommodation was signed and returned on 14 June.

[33] What transpired was they continued talking and Mr Ormsby stayed on but was given no more work on account of the weather. That was at least three weeks in which the weather was said to have affected Blue Lagoon's ability to provide work for Mr Ormsby. It was unclear from the evidence why a truck driving role required work to halt when it rained.

[34] Mr Ormsby continued to ask about work until he received the following message from Mr Ferey on 29 June:

Its pretty simple. I can't afford it and there's no money coming in like I expected so we can't carry on the way it is. You're not getting enough work and I'm losing money. So we can wait until something happens with that contract with Selwyn that was supposed to happen weeks ago but in the meantime this has to stop I don't have the money to throw at this. I'm struggling to pay my bills right now had to borrow money from someone. I can't carry on that's simple. It's not ideal for any of us but it is what it is.

[35] They exchanged some more messages before Mr Ormsby replied:

You have reneged on a signed contract. And now I'm struggling like fuck with no money.

Mr Ferey replied:

No I haven't, the stream of work and income hasn't come so its out of my control. I can't pay you to stay home. I can't afford it I don't have money to throw in the air.

[36] Mr Ferey's evidence on behalf of Blue Lagoon was that he was reliant on a third party to pay him and without that he was no longer able to pay Mr Ormsby's wages. Mr Ferey also said he paid for Mr Ormsby to get his class four licence for this job leaving him with no worker and out of pocket for the driver course and the accommodation he had arranged. He gave evidence of his view Mr Ormsby was making unreasonable demands of him, such as the accommodation and the work vehicle

and despite Mr Ferey's best efforts within days Mr Ormsby had said he wanted to go home to Tauranga and did not want the job anymore. The inference being that Mr Ormsby was being unreasonable.

[37] However, Mr Ormsby was unhappy about the accommodation and the work vehicle and ultimately those arrangements were initially agreed and the messages between the two show that. On arrival Mr Ormsby discovered Mr Ferey had reneged on what they had agreed verbally. Mr Ormsby decided to stay after Mr Ferey talked him out of leaving and they signed an agreement in relation to accommodation and the work vehicle. Mr Ferey's signature on that document shows Blue Lagoon agreed to those terms. The written agreement occurred after a second round of negotiations.

[38] The law in relation to dismissals says there must be a clear statement of dismissal. The classic definition of dismissal is found in *Wellington, Taranaki & Marlborough Clerical v Greenwich*.¹ That case makes it clear that the termination of employment must be at the initiative of the employer and this approach has been followed in many cases since.

[39] While Mr Ormsby did say he was resigning when the accommodation and work vehicle were not as agreed they continued discussions and at Mr Ferey's request, coupled with a further offer regarding the accommodation and vehicle, Mr Ormsby stayed on.

[40] I do not consider Mr Ormsby to have resigned because Mr Ormsby in fact stayed four more weeks at Mr Ferey's request and his evidence, that he was ready and available for work during that period was not challenged. I find Mr Ormsby was dismissed when Mr Ferey sent the messages saying he could not afford to continue to pay him because that message amounts to a clear termination of employment at the initiative of the employer.

Was Mr Ormsby's dismissal justified?

[41] The fact Mr Ferey was reliant on Mr Ormsby working to generate income to be able to pay Mr Ormsby's wages, clearly put Mr Ferey in a difficult situation but his evidence was that there was an employment relationship between Mr Ormsby. BLL

¹ *Wellington, Taranaki & Marlborough Clerical v Greenwich* (1993) ERNZ Sel Cas 95 AC at 103

was required to comply with the minimum obligations on employers including complying with the terms and conditions of employment, paying wages, the accrual and payment of holiday pay, providing written employment agreements specifying the agreed hours of work and wages and an explanation of the services available for the resolution of employment relationship problems.

[42] It also includes a mandatory obligation to consult if an employer is proposing to make a decision that will have an adverse effect on the continuation of an employee's employment² which appears to be what Mr Ferey was communicating in his messages conveying he was no longer able to pay wages.

[43] The test for justification is set out in s 103A of the Act and includes consideration of whether the employer raised their concerns, gave the employee an opportunity to respond to those concerns and genuinely consulted before making a decision.

[44] None of those things happened in this case and while this was a small company with Mr Ferey being the sole director and shareholder, Mr Ferey accepted there was an employment relationship. That being the case it was not open to BLL to simply stop paying wages in the context of full-time permanent employment and then dismiss Mr Ormsby summarily and without notice.

[45] Mr Ormsby was in Gisborne for approximately five weeks. He worked a total of 53 hours in his first week of employment and 10 hours on the Monday of the second week for which he received \$1,200.00 and then \$350.00 by way of direct credit into his bank account on 4 June. There were no pay slips and there are no wage and time records.

[46] In these circumstances Blue Lagoon has been unable to justify its actions and I find Mr Ormsby's dismissal was unjustified and he was disadvantaged by having no wages paid to him after the first week of work. He is entitled to consideration of remedies.

² Employment Relations Act 2000, s 4 (1A)(c).

Remedies

[47] Mr Ormsby seeks lost wages and compensation together the wage and holiday arrears he is due with interest.

Compensation

[48] Mr Ormsby seeks compensation for humiliation, loss of dignity and injury to feelings caused by his unjustified dismissal grievance. His evidence was that as a consequence of Mr Ferey's actions on behalf of BLL he suffered stress, hurt and upset. He felt extremely let down when Mr Ferey failed to honour their agreements and then to have his employment terminated in the way it was after such a short period of time. This was particularly so after he had resigned from his employment in Tauranga to take up the opportunity.

[49] He was reliant initially on family to support him financially which was difficult and finding himself on a WINZ benefit for the first time, he found especially embarrassing. His mental health was impacted as was his physical health in that he says he suffered from elevated blood pressure.

[50] In addition to the impact of the dismissal, there was loss of dignity and injury to feelings when Mr Ferey failed to honour the agreements they had reached and then no work was provided for three weeks, and no wages were paid. Mr Ormsby was left with no income and no meaningful work.

[51] The timings are also relevant because Mr Ormsby's start date and then dismissal a month later coincided with Mr Ferey's overseas holiday and Mr Ormsby says he was left feeling he had been deceived by Mr Ferey.

[52] A separate disadvantage was claimed for non-payment of wages. I consider it appropriate to make a global award of \$20,000.00 under s 123(1)(c)(i) of the Act for both the unjustified disadvantage and dismissal.

Wage and holiday arrears

[53] Mr Ormsby was employed for a calendar month from 29 May to 29 June 2023 which is equal to four weeks and three working days. During this period he was paid

\$1,550.00 and BLL has failed to account to Inland Revenue and make Kiwisaver contributions.

[54] Given the nature of the agreement being an oral one and the short period of employment I have calculated arrears based on a standard 40 hour week. Wages for the total period of employment are calculated as \$6501.60 which comprises \$6,020.00 in wage arrears plus 8 per-cent holiday pay in the amount of \$481.60. After deducting \$1,550.00 that he was paid, Mr Ormsby is due \$4,951.60 in arrears.

Lost wages

[55] Mr Ormsby sought five weeks lost wages from 29 June to when he started new employment. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration.

[56] Reimbursement is appropriate in these circumstances where there has been an unjustified dismissal and the loss is a consequence of that. I accept Mr Ormsby's evidence he had to travel back to Tauranga and made considerable efforts to find new employment. His new employment started on 7 August. Five weeks lost wages at \$35.00 per hour amounts to \$7,000.00.

[57] The Authority has the discretion to award interest under clause 11 of the second schedule to the Act. Interest is to reimburse someone for the loss of the use of the monies to which there is an established entitlement. It is appropriate where a person has been deprived of the use of money to make an award for interest.

[58] Given the nonpayment of wages during employment I consider that an order for interest to be paid on the outstanding wage and holiday arrears up until the date this is paid to be appropriate. Interest is to be calculated in accordance with schedule 2 of the Interest on Money Claims Act 2016 using the civil debt interest calculator.³

³ www.justice.govt.nz/fines/civil-debt-interest-calculator/

Penalties

[59] Penalties were sought for failure to pay wages when they became due,⁴ failure to pay accrued holiday annual leave entitlement at the end of employment⁵ and failing to keep and provide wage the time records⁶. That action was commenced within 12 months. The maximum penalty against a company is \$20,000.00 and with three breaches the starting point would be \$60,000.00.

[60] Given the financial situation of the company alluded to by Mr Ferey, and the fact there is no previous similar conduct, I decline to award a penalty in this case. However, this determination can be taken into consideration should there be any further breaches by BLL of minimum entitlements for employees.

Contribution

[61] Under s 124 of the Act, contribution to the situation that gave rise to the personal grievance must be considered. The non-payment of wages, failure to provide work and unjustified dismissal were all unilateral actions of the employer and Mr Ormsby has therefore not contributed to the personal grievance.

Summary of orders

[62] Bluelagoon NZ Limited is ordered to pay Michael Ormsby within 28 days of this determination:

- (a) Compensation in the amount of \$20,000.00, with no deduction.
- (b) Lost wages in the amount of \$7,000.00 (gross).
- (c) Wage and holiday arrears in the amount of \$4,951.60 (gross) plus interest for the period commencing 9 June 2023 until payment of wage and holiday arrears.

[63] Bluelagoon NZ Limited is also ordered to pay unpaid Kiwisaver contributions to Mr Ormsby within 28 days of this determination.

⁴ Wages Protection Act 1983, ss 4 and 14.

⁵ Holidays Act 2003, ss 27 and 75.

⁶ Employment Relations Act 2000, ss 130.

[64] I have not dealt with unpaid PAYE however, within 28 days of this determination Bluelagoon NZ Limited to pay either unpaid PAYE to Inland Revenue against Mr Ormsby's account or alternatively account to Mr Ormsby in that amount.

Costs

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

[64] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Ormsby 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 Mr Ferey 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.

[65] 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.⁷

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁷ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1