**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

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

[2022] NZERA 489
3137193

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| | BETWEEN | ANTHONY PORIMA<br>Applicant |
| | AND | LOGGERTECH NZ LIMITED<br>Respondent |

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| Member of Authority: | Michael Loftus |
| Representatives: | Ira White, advocate for the Applicant<br>Libby Brown, counsel for the Respondent |
| Investigation Meeting: | 13 April 2022 at Napier |
| Submissions Received: | 20 April and 13 May 2022 from the Applicant<br>5 May 2022 from the Respondent |
| Date of Determination: | 28 September 2022 |

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## DETERMINATION OF THE AUTHORITY

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### Employment Relationship Problem

[1] The applicant, Anthony Porima, claims he was unjustifiably dismissed, albeit constructively, by the respondent, Loggertech NZ Limited (Loggertech), on 1 November 2020. He also raises a number of other claims.

[2] Loggertech denies the claims saying Mr Porima resigned of his own volition and the other claims lack substance.

### This Determination

[3] 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.

[4] 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**

[5] Mr Porima commenced with Loggertech on 6 January 2020 as a Tree Feller/Skidder. Other than the events now canvassed as the reasons for Mr Porima's resignation and his claim of constructive dismissal the parties make little comment about how the relationship went other than Mr Porima's acknowledgement that, at least initially, all was well.

[6] On 1 November 2020 he sent a text reading:

> Just listened to a voice message I got the job I went for. Friday will be my last day as I need to do a medical on Monday the following and they want me to start on the weds. Thanks for giving me the opportunity to work for you and your company.

[7] It was acknowledged with a text reading *Ok ute return tomorrow* to which Mr Porima replied *Yo ok.*

[8] As events transpired Mr Porima's last day was the Thursday as he neither attended nor advised his absence on Friday 6 November.

[9] Having left, Mr Porima then sought advice and instructed his advocate to write to Loggertech. This occurred on 16 December 2020 though the letter was preceded by a telephone call from Ms White. The letter advised the raising of *a personal grievance* along with claims regarding outstanding payments with the following accusation being levelled:

(a) Mr Porima was bullied with him having been called a "girl", "just another Maori" and subject to a number of other put-downs;

(b) That he suffered a breach of confidentiality with colleagues allegedly being told by Clifford Fellingham (Loggertech's sole director) that he was not paying Mr Porima's annual leave to teach Mr Porima a lesson;

(c) Loggertech failed to provide an Individual Employment Agreement.

(d) Loggertech failed to provide PPE equipment or an allowance to maintain PPE.

(e) Loggertech unlawfully deducted $400.00 from Mr Porima's pay on 12 November and also made deductions from annual leave entitlements.

(f) Loggertech failed to pass a deduction of $30.00 to Work and Income New Zealand (WINZ);

(g) There was an underpayment as Loggertech paid a travel allowance of 2 hours per day when actual time taken was alleged to be 2.5 hours one way per day;

(h) Mr Porima was not provided with the required rest break times each day; and

(i) Mr Porima's use of a company vehicle was rescinded without consultation.

[10] Loggertech responded, via counsel, denying the claims.

[11] By the time an amended statement of problem was lodged the claim regarding a breach of confidentiality had been removed while the claims regarding deductions and the failure to pay various allowances (PPE and travel) had been quantified along with an additional one concerning a chainsaw allowance. The amount sought under this head totalled $20,714.17 though over $14,000 of that related to travel time.

**Discussion**

[12] While there are others, Mr Porima's prime claim is that he was constructively dismissed.

[13] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*[1] the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign. There must be a causal link between the employer's conduct and the tendering of the resignation[2] and the possibility of resignation in response to that conduct should be foreseeable.[3]

[1] *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)
[2] *Z v A* [1993] 2 ERNZ 469
[3] *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[14] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Mr Porima to establish, prima facie, there was such a breach.

[15] When asked to explain why he felt compelled to resign Mr Porima cited a list of issues similar to those enunciated in the statement of problem and [9] above; namely bullying; a lack of designated work breaks; the issues with PPE and a failure to pay allowances. He also expressed a concern about safety given an alleged lack of brakes on a piece of equipment know as a skidder.

[16] Loggertech, aside from denying the veracity of the claims, asserts it had no knowledge of any of these allegations until after Mr Porima had left. While that might, if correct, provide a defence against the constructive dismissal claim it raised another potential issue which is the possibility that some of Mr Porima's claims might, if established, constitute unjustified disadvantages pursuant to s 122 of the Employment Relations Act 2000 (the Act) and this possibility was alluded to by Loggertech. That may well be attributable to the fact the original letter of grievance did not specify which of the grounds for a personal grievance specified in s 103 of the Act were being invoked, instead claiming an employment relationship problem and breaches of the Wages Protection and Holidays Acts before citing the issues with which Mr Porima took issue then advising he was still working through the claims.

[17] Clarity was, however, then provided via an amended statement of problem which stated "To be clear for the Respondent, the Applicant is raising a claim for unjustified dismissal (constructive)." Given that, the fact natural justice requires a party be put on notice of the perils it faces, and that there has not, on behalf of the applicant, been any suggestion I apply s 122 I consider the grievance confined to being a claim of unjustified dismissal.

[18] One of the reasons Mr Porima cited as leading to his conclusion he could no longer remain was a view he had been subjected to what he labelled as abuse and which the letter of grievance called bullying. When asked to explain this claim Mr Porima referred to the two comments cited above – "just another Maori" and his being called a "girl" before adding there was another about not "breeding em tough". He evidenced one instance of each but also stated that the "girl" comment was made after the employment had ended and when he asked for his holiday pay. That makes it hard to accept that even if it was actually said, the last alleged comment could have been a factor in reaching the decision to resign.

[19] Also of concern when considering what comments or events contributed to the decision to resign was an unsigned written statement offered in support from someone who did not appear to give evidence. It makes various allegations about a telephone conversation on 30 July 2021 and alleges Mr Fellingham made abusive and inappropriate comments but Mr Porima did not allude to these allegations in his evidence and had little to say about it when asked.

[20] With respect to the other two comments he accepted each was only uttered once which, while unacceptable assuming it happened, is unlikely to constitute bullying which, in normal parlance, reflects ongoing and repetitive behaviour. To that I add the fact that when asked if he had challenged the comments as inappropriate Mr Porima answered "nah, never". Mr Porima also accepted there was an element of banter in the workplace and he "sometimes" gave as good as he got but perhaps the most telling admission was that he did not, at the time, consider the comments to be of consequence. This evidence makes it hard to conclude these events constituted repudiatory, as opposed to inconsiderate or improper, conduct as the concept of constructive dismissal requires.[4]

[21] Here I also note Mr Porima confirmed he knew he had a new job when he resigned and acknowledged he had been interviewed some two weeks earlier saying he needed certainty he could support his family before resigning. While that might be the case, the fact he could remain till he had secured a new job raises further question about whether Loggertech's conduct was truly repudiatory.

[22] Mr Porima also complains that work breaks were taken between work cycles known as decks as opposed to being scheduled and the way they were managed contributed to the decision to resign. That said, Mr Porima accepts that while often taken near machinery he was operating he did have breaks though it was then the evidence got a bit confusing. He says he was told breaks were a self regulating matter and to take them when it suited his work. He then accepted he did this before saying, a couple of questions later, that he didn't have time. He also accepted that he was on his own perhaps 75% of his working time and self-managed.

[23] Again, Mr Porima accepts he never raised this as an issue so given he accepts he did have breaks, or at least the ability to take them, it is once again difficult to see how there has

[4] *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 at 975

been a default on the part of the employer, especially to the extent it could influence a decision to resign.

[24] In a similar way, and despite originally claiming in the letter of grievance that PPE was not provided, Mr Porima accepts it was. Instead, he now says it either did not fit or was not new. Unfortunately for Mr Porima that approach was then undermined by two subsequent answers. The first was that early in the employment he told Mr Fellingham he was going to buy some items of his own to which the latter advised he could do as he pleased. The second is that Loggertech also bought a brand new helmet, ear muffs and visor for him though eh considered that irrelevant as he had already decided to buy his own.

[25] While Mr Porima is now seeking reimbursement for his purchases, he accepts he did not claim reimbursement at the time, waiting instead till after he had resigned.

[26] Having considered this evidence I concluded PPE was provided so there was no breach. Nor can Mr Porima now complain he incurred expense in this regard as the evidence is that it was the result of his own decision. Finally I also conclude this alleged deficiency could not, as is now being claimed, have influenced the resignation given that when he was asked how this affected the decision, Mr Porima answered "I don't know".

[27] The other issue that Mr Porima says influenced his decision to resign was a failure to pay two allowances and here he mentioned a chainsaw maintenance allowance and travel allowances.

[28] With respect to the chainsaw maintenance allowance Mr Porima says that when he was offered the job he and Mr Fellingham agreed he would be paid $50 a day but states the actual payment was less. Mr Fellingham's evidence is he made a casual comment along the lines of there was an allowance of "around $50 for a full day" which was consistent with his normal practice of $6 per hour and that is $48 for an 8 hour day.

[29] Mr Porima's evidence did not support his claim there was an agreement he receive a daily allowance of $50 per day. He initially said the agreement was confirmed by text but when asked to produce it he proffered one which mentioned there would be an allowance but did not specify a rate. It was then his evidence changed with Mr Porima stating the rate was agreed at a meeting at Mr Fellingham's home after the texts where sent but that was then

undermined by his acceptance that that discussion related to some casual work performed prior to the permanent offer.

[30] Mr Porima states he expected to be paid a travel allowance as Loggertech provided a vehicle in which staff could travel to and from various worksites. In his own words "I wanted to be paid as we were in a work vehicle so it was working" and the amount sought is, as already said, based on a claim the travel took just over 2 and a half hours each way.

[31] Loggertech's response is most workers are normally required to get themselves to a workplace but in recognition that commercial plantations are not normally close to residential areas it provides a transport service and pays a travel allowance of $56 per day. Given that is paid tax free it equates to about two and a half hours pay.

[32] The problem for Mr Porima is that in making this claim he relies upon the "allowances" provision in the IEA he says he never saw nor signed. It is his evidence nothing was actually agreed but in any event I note the clause in the IEA states the travel allowance shall be "up to one hour per day". Mr Porima got more than this. Another problem, putting aside the fact it is normally the employee who must get themselves to the workplace, is that Mr Porima only worked at one site and google maps suggests the actual travel time was one and a half hours each way.

[33] The bottom line is Mr Porima accepts he had no contractual entitlement to the amount now sought. There cannot therefore have been a breach, let alone one that induced a resignation.

[34] The claim Mr Porima added about faulty brakes on the skidder was not supported by his oral evidence. Indeed, he was unable to identify when or for how long he performed this role let alone detail or provide evidence of the faults he alleged.

[35] For the above reasons I conclude Mr Porima has failed to establish he was constructively dismissed having failed to establish the veracity of each of the alleged breaches he claims contributed to the decision to resign. In addition, I also note that he would fail with respect to the foreseeability requirement given his acceptance he raised none of the issues about which he now complains while in employment. Indeed, his resignation text records "Thanks for giving me the opportunity to work with you and your company".

***Other matters***

[36] In addition to the issues which Mr Porima says contributed to his decision to resign other matters were also raised. For the sake of completeness these shall be addressed.

[37] Mr Porima claims he was never given an IEA despite asking as he was interested due to concerns he had about various allowance payments. He says the first time he saw the IEA was when Ms White passed it on to him after he left Loggertech's employment and with that he takes exception. That is because it is signed and he disputes ever having done so, claiming the document is fraudulent and supports this claim with the assertions of a handwriting expert who did not, however, appear to give evidence.

[38] Mr Fellingham says he gave Mr Porima an IEA early in the employment and often asked for it to be signed and returned. He says it wasn't and in the end he got exasperated and after a morning safety meeting shortly after work recommenced after the covid lockdown he printed another copy, wrote Mr Porima's name on it and demanded he sign which he did.

[39] Ultimately this disagreement need not be decided as even were I to accept Mr Porima's version of events it is his evidence no disadvantage ultimately arose and there is no evidence this contributed to his decision to resign.

[40] Mr Porima also complains he had the use of a company vehicle unilaterally removed. Loggertech accepts Mr Porima sometimes used the vehicle but say this was because the employee into whose care it was charged allowed this to occur without Loggertrech's permission or knowledge while he was no leave for three weeks. Mr Fellingham says a couple of weeks later Mr Porima approached him advising his personal vehicle had broken down and asked if he could use the vehicle to get himself to the normal pickup point. Mr Fellingham says he agreed but on the proviso there be no private use and it is this that is relevant to another dispute regarding deductions from Mr Porima's pay.

[41] Returning to the alleged loss of the vehicle which I take no further given Mr Porima's acceptance he had no contractual right to its use and that once again it did not concern him until after he resigned – indeed when asked about his response when asked to return the vehicle he accepted it was simply "yip, ok".

[42] The deductions which Mr Porima challenges were as follows: $400 for road user charges when using Loggertech's vehicle for private purposes; $200 for an overpayment and $200 for an advance on pay. That these were made was accepted by Loggertech though they then attempted to justify them. They claimed they were made are in accordance with Mr Porima's IEA and two occurred some time ago but were not challenged at the time thus confirming their veracity.

[43] The deduction clause upon which Loggertech relies is a general one simply saying the employee authorises the employer to make deduction for whatever reasons. That means the issue of whether or not the IEA was signed is irrelevant with that being due to the fact the Court has previously held that reliance on general deduction clauses is insufficient and deductions must be clearly identified and approved[5] and this has since been confirmed in the Wages Protection Act 1983 at s 5(1A). Approval must be in writing and here there is no evidence of compliance with this requirement. The deductions were therefore unauthorised and payment is required.

[44] Mr Porima also claims he had annual leave improperly deduced with this stemming from arrangements Loggertech made to address the difference between the government's 80% wage subsidy and Mr Porima's full wage during the covid lockdown.

[45] It is Loggertech's evidence Mr Fellingham telephoned Mr Porima on 24 March to discuss the subsidy and that he advised that as Mr Porima was yet to accrue an entitlement to annual leave he would offer to make up for the loss of pay by allowing Mr Porima to use leave in advance. Mr Fellingham say Mr Porima verbally agreed and as Mr Porima then left before becoming entitled to leave it was proper that a commensurate deduction be made from the amount owing in lieu of an incomplete year.

[46] Mr Porima denies there was any such conversation is occurred though that difference need not be determined. That is because even if Mr Fellingham is correct Loggertech's approach cannot succeed. That is because there was nothing in the governments subsidy arrangement that permitted the arbitrary reduction of an employees pay to match the wage subsidy. The full wage remained owing.

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[5] For example *Jonas v Menefy Trucking Ltd* [2013] NZEmpC 200 at [62]

[47] That said it was possible for an employee to agree some other arrangement such as Loggertech says occurred here but that would require clear evidence of some change to the terms of employment. None exists and even if it had it would not suffice. That is because holiday pay is wages and, as discussed above, a deduction must be authorised in writing and there is none in this instance.

[48] That though raises the issue of how much is owing as Mr Porima was, by his own evidence, unwell and incapable of working during the first three weeks of the lockdown. That said the evidence is he was paid regardless and in the absence of an authority to deduct, the amount deducted remains payable. Even then there is some issue as Mr Fellingham, in his evidence, says 30 hours pay was deducted which was worth $2,731.92.[6] While 30 hours pay at Mr Proima's hourly rate is significantly less than this, his final payslip indicates the amount cited by Mr Fellingham was the amount deducted. It shall therefore be the amount payable.

[49] Mr Porima says money was deducted from his wages for forwarding to WINZ but complains this did not occur. Loggertech accepts there was an issue with delayed payments but they were subsequently made. With that Mr Porima agrees now saying he only raised it to illustrate the difficulties he had communicating with his employer. While that be may so, no issue remains so I take this no further.

**Conclusion and Orders**

[50] For the above reasons I conclude Mr Porima's claim he was unjustifiably dismissed fails.

[51] In reaching this conclusion I also found he was not due money for various allowances he claimed such as chainsaw maintenance or travel.

[52] He was however successful with respect to claims regarding unauthorised deductions from his pay and as a result I order the respondent, Loggertech NZ Limited, pay Anthony Porima the sum of $3,513.92 (three thousand, five hundred and thirteen dollars and ninety two cents).

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and given the mixed success, either party may seek

[6] Mr Fellingham;s evidence at [65]

an Authority determination by lodging a memorandum within 14 days of the date of issue of this determination. From that date the other party will have 14 days to lodge any reply memorandum.[7]

Michael Loftus
**Member of the Employment Relations Authority**

[7] www.era.govt.nz/assets/Uploads/practice-note-2.pdf