

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 747
3142321

BETWEEN	CHARLES DAVID SIMPSON Applicant
AND	CHRISTIAN HOFF-NIELSEN First Respondent
AND	DARLEEN TANA Second Respondent
AND	E CYLES NZ LIMITED Third Respondent
AND	GREEN WHEELS BLENHEIM LIMITED Fourth Respondent

Member of Authority:	Michael Loftus
Representatives:	Applicant in person assisted by Wayne Hudson on Day 1 Jonathan Corfe, advocate for the Applicant on Day 2 Christian Hoff Nielsen, for the Respondents
Investigation Meeting:	26 January 2023 and 15 September 2023 in Blenheim
Submissions Received:	At the investigation meeting
Determination:	14 December 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Chuck Simpson, claims he was unjustifiably dismissed, albeit constructively, by the fourth respondent, Green Wheels Blenheim Limited (Green Wheels). Mr Simpson also claims he is due unpaid wages with this allegation coming in two parts. The first is that he is yet to be paid for the work he performed at Green Wheels. The second is that he is due further money for a previous period he spent with E Cycles New Zealand Limited (E Cycles) in Auckland.

[2] The respondents deny Mr Simpson was ever employed by either the first, second or third respondents. They accept the fourth respondent, Green Wheels (the operator of a bike shop in Blenheim), did employ him but deny his claims have substance as:

- (a) Mr Simpson was not employed while in Auckland but involved in a process of due diligence with a view, at least at that time, of buying into Green Wheels;
- (b) He was paid while employed by Green Wheels; and
- (c) The decision to resign and leave Blenheim was his and brought about by issues over which Green Wheels had no input or control.

The Investigation

[3] Notwithstanding the initial filing, as reflected in the above intituling, Mr Simpson had cause to reflect on answers he gave in the initial stages of the investigation and his acceptance Ms Tana as not and never had been his employer. He withdrew her as a respondent.

[4] He also had cause to consider and amend his initial written claims which were wider than those described above. He amended them as the process continued, leaving those described above.

[5] A further issue has arisen in that the company with whom there is no dispute Mr Simpson had an employment agreement, Green Wheels, has for the second time been removed from the Companies Register. The first removal, which occurred not long after these proceedings were lodged, was operative between 19 November 2021 and 18 July 2022. The second removal occurred on 19 October 2023 though it was gazetted approximately two weeks prior to the second day of investigation meeting but the Authority was not informed of this.

[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.

Background

[7] Initial contact between the parties occurred when Mr Simpson responded to an advertisement for a position in Queenstown. That did not eventuate though discussions between the parties led to Mr Simpson's appointment to Blenheim. There is, however, debate about the rationale for the appointment which is at the heart of this dispute. Mr Simpson says he was to be employed as a manager all along, while Mr Hoff-Nielsen says it was intended he be an owner, with the manager role arising during the discussions as an interim measure.

[8] On 19 October there was what Mr Simpson categorises as an interview with Ms Tana (Mr Hoff-Nielsen's partner and a co-owner of Green Wheels along with Mr Hoff-Nielsen and Danijel Duvnjak). Mr Simpson says the possibility of a role in Blenheim was raised during the interview and it was described as that of manager though he adds little more. Ms Tana did not give evidence and when asked whether the discussion was about Mr Simpson being engaged as an owner or manager Mr Hoff-Nielsen stated he did not know but would have preferred someone 'with skin in the game'.

[9] Here it should be noted the evidence shows the Blenheim business, Green Wheels, to have been in a state of considerable turmoil with Mr Hoff-Nielsen and Ms Tana having 'fallen out' with Mr Duvnjak. It is clear from the evidence that Mr Hoff-Nielsen sought Mr Duvnjak's removal from the business and it was in this context the possibility of a position in Blenheim arose.

[10] Mr Simpson attended what he describes as a second interview on 23 October with Mr Hoff-Nielsen. He says it was then he was formally offered the job of manager in Blenheim. Mr Hoff-Nielsen vacillated a bit over what was offered, manager or owner capacity, but ultimately said you look for the skills first and then worry about whether someone can get the money. He then conceded it was most likely the position offered was that of manager given that was what was being considered in Queenstown.

[11] Mr Simpson says he replied that he would only take the job if the shop was running with no debt and had money in the bank. Mr Simpson says he was assured that everything was going well and given a profit and loss report showing Green Wheels had a considerable inventory and was making a substantial profit.

[12] Mr Simpson says that subsequent to that, and between 15 October and 18 November, he was employed by Mr Hoff-Nielsen and Ms Tana at shops they owned in Newmarket, Devonport, and Waiheke Island. He says he did not have a formal written employment agreement, and it was for this reason that he cited the two as respondents under a belief they were his employers. As said, he subsequently amended that position by removing Ms Tana as a prospective employer. Mr Hoff-Nielsen, however, remains as a respondent.

[13] Mr Simpson says he "... assumed that my salary would have been based on the amount that was eventually specified in my employment agreement with Blenheim Green Wheels Limited, which was \$50,000 per annum."

[14] It is the respondents' position Mr Simpson was never employed by anyone at this stage but that he was engaged in a process of due diligence during which he was gleaning knowledge of the industry and ascertaining whether or not he would enter it as an owner.

[15] Notwithstanding which is correct, it is clear Mr Simpson was gaining knowledge of the business and this included a visit to Blenheim between 6 and 8 November. He was accompanied by Mr Hoff-Nielsen. Mr Simpson says that at this stage he was seeking information about the business but a failure to produce it started to raise red flags. His concerns led to an email he sent to Mr Hoff-Nielsen and Ms Tana on 10 November. Mr Simpson says it repeated his earlier oral advice he would not go to Blenheim if the shop had any debt or missing inventory. Included therein is the following:

First, I cannot move to Blenheim without first having Marije and Daniel's financial statements, and an independent audit as well. We need all the information before I move my family down to Blenheim. This shop could already be dead. The Smart Motion rep told me today that they are 263 days late on \$4,669 and currently owe \$3,200. Total owed \$7,869. This is just one account. The account was closed for six months from January to July for lack of payment.

[16] The email goes on to say Ms Simpson felt it needed at least four weeks to sort out before advising he was "*... more than willing to help out here in Auckland until we can figure this out, but I don't think this is an easy fix.*"

[17] There is then a reference to Mr Simpson having "reached out to Bill (Mitchell)" who was a previous owner of the Blenheim shop and who still took an interest in its

operation. The two met in Auckland and Mr Simpson says he was advised to stay away from Blenheim until everything had been cleared up and that he make some further industry inquiries.

[18] These issues led to further discussions between the parties and an agreement that Mr Simpson would still go to Blenheim but as an employee. The reasons for this are in dispute with Mr Simpson saying that was always the intention. Mr Hoff-Nielsen says it was a stopgap measure that, hopefully, would not last for more than about six months and had been influenced by the fact Mr Simpson either did not have sufficient money to buy into the business or did not want to risk investing at that stage. Irrespective of which is correct, there is no dispute that at this point an employment agreement was entered into, with Mr Simpson working as “shop manager extraordinaire.”

[19] Mr Simpson says he agreed to this arrangement when he was advised that Mr Duvnjak had finished with the business and exited. It would give him time to ascertain whether the business was viable.

[20] As well as the employment agreement there are some texts which show the parties’ thoughts. Key among those is one from Mr Hoff-Nielsen reading:

Regarding moving and cost till now – we’ve had a talk, Darleen and i what would u say to \$2,500 covering all time spent here and Blenheim with me.
i.e. first pay day when clocking in next week?

[21] Mr Simpson replied

That sounds good.
Look, I’m ready to go.
If you guys can send the contract over ASAP, I will leave early on Monday morning.

[22] Mr Simpson started in Blenheim on 20 November but as is obvious by the claim of constructive dismissal, he subsequently resigned. He attributes that primarily to Mr Duvnjak’s activities and the state of the business.

[23] It would be fair to say that having moved to Blenheim, Mr Simpson’s time there was both short and eventful. There is a lot of correspondence between him and Mr Hoff-Nielsen about the alleged activities of Mr Duvnjak, missing stock and the financial state of the business. On some of these issues the parties agree and on some

they do not. There is also evidence of attempts by Mr Simpson to glean further information from the company's accountant, which was not successful.

[24] At 9.30 pm on 1 December, Mr Simpson resigned via an e-mail which read:

Hi Christian and Darleen,

Thank you for the opportunity to manage your store in Blenheim. It is with careful consideration and much thought that I resign from my current position as manager of Spokesman Cycles, effective immediately.

Please note that Saturday, December 1st, is my last day. My family and I are moving back to Auckland immediately.

Unfortunately the job has not been what I had thought, given the hours and stress involving financial issues, debts owing, and the current problem involving Daniel and his wife.

This is not a situation that I want myself and my family to be involved in.

My decision is final and non-negotiable.

I will be available tomorrow to discuss any questions about my departure to the team.

...

I've enjoyed meeting both of you and I wish you both all the very best in the future.

Best regards, Chuck.

[25] Mr Hoff-Nielsen replied advising it was a big shock to receive that. He also said he "did not know all you may be referring to" before saying "*It's very early days – so early actually.*" The response went on to suggest the two talk and added, "I know you have invested a lot in this – and I'm quite aware some answers could lessen your worries somewhat."

[26] While Mr Simpson now attributes his resignation to the state of the business and Mr Duvnjak's activities, there was also an incident at a rental property he and his family occupied with the family witnessing a domestic violence incident next door. That was referred to in a subsequent e-mail of December 5, which read:

Christian

I want to make sure there is no misunderstanding about my resignation. I forwarded the email from November 10 where I stated my concerns, and you told me in New Market everything was up to date. I told you in the email, if bills weren't paid I was not the right person for the job.

Chaos in business is not a good thing and employees cannot do a good job working in that environment.

I trusted you and you let me down, and my family was greatly affected. Have your children ever seen a Māori man beat his wife in their back yard? My daughter now has that memory.

I wish you all the best. ... Can you please pay me for the two weeks I worked and four nights air BNB at \$760.

Thank you

Chuck.

Analysis

[27] As already said, three claims remain. They are that Mr Simpson is owed wages for the time he worked in Auckland, that he is owed wages for the time he worked in Blenheim and that he was constructively dismissed.

Constructive dismissal

[28] I shall consider the claim of constructive dismissal first.

[1] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal confirmed that constructive dismissal includes, but is not limited to, cases where a breach by the employer causes the employee to resign. The breach must be repudiatory as opposed to merely inconsiderate or causing unhappiness² and there must be a causal link between it and the tendering of the resignation.³ Furthermore the possibility of resignation in response to that conduct should be foreseeable.⁴

[29] 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 Simpson to establish, prima facie, there was such a breach.

[30] In doing so he now relies on a claim Mr Hoff-Nielsen misled him about the situation in Blenheim then did nothing to remedy that when dissatisfaction was raised. The same applies to his complaints about Mr Duvnjak's behaviour.

[31] A significant impediment to that approach problem arises as a result of answers Mr Simpson gave when questioned during the investigation. When asked why he

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² *Wellington etc Clerical Workers etc IUOW v Greenwich* [1982] ACJ 965 at 975

³ *Z v A* [1993] 2 ERNZ 469

⁴ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

resigned his initial answer was that “We had to move from our rental due to the incident”, with the incident being Mr Simpson’s family witnessing the domestic violence incident next door.

[32] Mr Simpson then went on to say he took a day looking for a new rental but prospective landlords wanted a yearly lease. He said he didn’t feel comfortable signing that given the situation in with the shop.

[33] This answer makes it clear the issue foremost in Mr Simpson’s mind and which triggered the subsequent decision to leave was the domestic violence incident and not the situation with the shop. I accept the situation with the shop then influenced the decision but that was only once Mr Simpson discovered he would have to commit to a replacement rental for a year. Simply put. neither Green Wheels not Mr Hoff-Nielsen can be held responsible for the domestic violence incident or the wishes of prospective landlords.

[34] Furthermore the fact Mr Simpson was, at least initially, willing to seek a new rental and stay confirms the situation in the shop, while it may have been causing considerable unhappiness, fell short of being repudiatory. He only changed his mind when he discovered the situation regarding lease terms meaning the causal link is missing.

[35] In the circumstances it is also hard to see how this resignation could have been foreseeable. Mr Hoff-Nielsen would not have turned his mind to the possibility a domestic violence incident might trigger a resignation and this is confirmed by his response – he sought an opportunity to discuss the issues but this was rejected. It is here I also note Mr Simpson was now an employee and the level of responsibility he might hold for the shop’s situation was open to discussion. He chose not to pursue that and, I conclude, proffered a resignation largely attributable to other factors.

[36] For these reasons the clam of constructive dismissal fails.

[37] Here, and for the sake of completeness given the way this claim was approached, I chose to reflect on the fact Green Wheels no longer exists. It was the employer which means there would be no ability to recover remedies if my conclusion had been otherwise. Liability for remedies against a company for a personal grievance

cannot be transferred to a person involved⁵ as can the result of breaches of minimum standards. Similarly, and given Mr Simpson's evidence about the business' state, there would be little merit in once again getting it reinstated to the register – there is nothing of value left.

The wage arrears claims

[38] The answer to claim for wages while in Blenheim the answer is simple.

[39] Mr Simpson is adamant he worked in Blenheim between 20 November and 1 December 2018 inclusive but was never paid. For this he is claiming \$1,923.⁶ Here, and as a quick aside, I note the claim for Airbnb reimbursement in the e-mail of 5 December was not repeated in the statement of problem or during the investigation so it cannot be considered.

[40] By way of defence Mr Hoff-Nielsen says he thought the wages had been paid but accepts he is neither sure or can find nothing to support that contention. It is the employer's responsibility to maintain the wage and time record and absent such record and any evidence of payment I must conclude the money remains payable as claimed.

[41] Mr Simpson claims he worked, primarily in Auckland, in preparation for his move to Blenheim between 25 October and 18 November 2018. For this he is claiming \$4,230.⁷ This is based on salary in his subsequent employment agreement though Mr Simpson states he is unsure who the employer was – Mr Hoff-Nielsen, E Cycles or Green Wheels.

[42] The defence is this was not employment but a period of due diligence in preparation for what was then expected to be Mr Simpson's purchasing of part of the Blenheim business.

[43] Notwithstanding Mr Hoff-Nielsen's criticism of Mr Simpson's efforts during this period there is no doubt he was present, performing some duties and gaining knowledge he would require in Blenheim, predominately at E Cycle premises in Auckland. The issue is whether this was work for an employer in the accepted sense.

⁵ Sections 142W and 142Y of the Employment Relations Act 2000

⁶ Statement of problem at 3(b)(ii)

⁷ Statement of problem at 3(b)(i)

[44] For three reasons I conclude the answer is yes and the claimed wages are due.

[45] The first is Mr Simpson is adamant the discussions leading to his engagement concentrated on the possibility of work as an employee with little or no discussion about ownership. The respondent's do little to contradict that calling no evidence about the discussion of 19 October and being inconclusive as to what was offered on 23 October – they definitely did not directly contradict Mr Simpson's claim when answering questions, instead conceding it was most likely manager.

[46] Second was the evidence of Mr Mitchell which while intended to confirm the arrangement was to be ownership did not go that far under questioning.

[47] The third reason is Mr Hoff-Nielsen's text quoted in [20] above which concedes there should be some payment for the time in Auckland. If the situation was as portrayed by Mr Hoff-Nielsen payment would not be required and, in any event, by this stage there is no dispute the arrangement was one of employment.

[48] That leaves the question of who employed Mr Simpson at this stage. By his own evidence the offer made prior to commencing and for which he was preparing was manager in Blenheim. It follows the employer was Green Wheels and it is that company which is liable for the amount claimed.

[49] That leaves on final issue arises as a result of Green Wheels having been removed from the companies register and no longer existing. It follows it cannot be held to pay the amounts awarded against it.

[50] That said those amounts are wages arising from a breach for which responsibility for payment can be transferred under s 142Y of the Employment Relations Act 2000 (the Act). Being, at the time, a director of Green Wheels who the evidence showed operated as the personification of the company and decisions it made, Mr Hoff-Nielsen is a person involved⁸ to whom responsibility for payment may be transferred. Add to that he was, and remains, a respondent.

⁸ Section 142W of the Employment Relations Act 2000

[51] I consider Green Wheels current status means it is clear it cannot and will not pay. Given the factors above I therefore consider it appropriate leave be granted for the transfer of this debt to Mr Hoff- Nielsen personally and will order payment accordingly.

Costs

[52] While unsuccessful with his personal grievance claim, Mr Simpson has succeeded with his arrears claims. He would in normal circumstances be entitled to an award of costs but that is not something that can transfer under ss 142(W) and 142(Y) of the Act. Add to that Ms Simpson's evidence which strongly suggest an attempt to once again restore Green Wheels to the companies register would be an exercise in futility I conclude costs should lie where they fall.

[53] Should Mr Simpson disagree he has 14 days in which to file a costs application bearing in mind the Legislation Act 2019 extends the due date to 3 January 2024. Should a costs application be received Mr Hoff-Nielsen will then have a further 14 days in which to reply.

Conclusion and orders

[54] For the above reasons I conclude Mr Simpson has succeeded with his wage arrears claims and that liability for payment should pass to Mr Hoff-Nielsen. Accordingly, I order Mr Hoff-Nielsen pay Charles Simpson the sum of \$6,153 (six thousand, one hundred and fifty three dollars) gross. PAYE may be deducted and forwarded to the Inland Revenue Department prior to payment which is to be made no later than Friday 26 January 2024.

[55] Mr Simpson's claim of constructive dismissal fails.

[56] Except as provided in paragraph [53] above costs should lie where they fall.

Michael Loftus
Member of the Employment Relations Authority