

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 416

3115517

BETWEEN WALTER VELAZQUEZ
Applicant

AND Hugh Leon Martin, Craig Leon Martin
Respondents

Member of Authority: Philip Cheyne

Representatives: Ashleigh Fechney, for Applicant
Hugh Leon Martin, the respondent
No appearance by Craig Leon Martin

Investigation Meeting: 31 March 2021 and 18 May 2021, at Christchurch

Submissions received: 31 May 2021 from the Applicant
25 May from the Respondent

Determination: 27 September 2021

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. Hugh Leon Martin and Craig Leon Martin are to pay Walter Velazquez \$15,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000. This amount is to be paid by Monday 25 October 2021.**
- B. Hugh Leon Martin and Craig Leon Martin are to pay a penalty of \$2,500.00 for breaching section 130(2) of the Employment Relations Act 2000, in the following manner: \$1,250 paid into a Crown Bank Account; and \$1,250 paid**

to Walter Velazquez. These amounts are to be paid by Monday 25 October 2021.

C. Hugh Leon Martin and Craig Leon Martin are to pay a penalty of \$2,500.00 for breaching section 27(2) of the Holidays Act 2003, in the following manner: \$1,250 paid into a Crown Bank Account; and \$1,250 paid to Walter Velazquez. These amounts are to be paid by Monday 25 October 2021.

D. Costs are reserved, subject to the set timetable for submissions if required.

Employment relationship problem

[1] This determination resolves personal grievance and other claims by Walter Velazquez against Hugh Leon Martin and Craig Leon Martin personally.

[2] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act 2000 (the Act). The Chief of the Authority considers exceptional circumstances exist.

[3] Hugh Leon Martin and Craig Leon Martin are father and son.¹ They were equal shareholders in, and Hugh Martin the sole director of, a registered company called Takeaway Kitchens Limited. The company was incorporated on 8 May 2018, but it was removed from the register of companies on 17 July 2019.

[4] Another company called Kitchen Surplus Limited was incorporated on 5 June 2012 but removed from the register on 10 August 2021. Hugh Martin was its sole director and shareholder. A third company called Economy Kitchens Limited was incorporated on 8 September 2020 and is currently² shown as overdue in its obligation to file an annual return. Craig Martin is its sole shareholder and director.

[5] There is a signed employment agreement dated 23 October 2018 between Mr Velazquez and a company identified as “Take Away Kitchens Limited”. Mr Velazquez says the business he worked in as a Kitchen Joiner continued after July 2019, so after Takeaway Kitchens Limited

¹ I will refer to each of the respondents by their first name and surname, to avoid uncertainty.

² As at September 2021.

ceased to exist, he became employed either by Hugh Martin or by Hugh Martin and Craig Martin jointly. He was last paid in July 2020. Mr Velazquez says that the failure to pay him from then amounts to an unjustified dismissal. Alternatively, he says that an instruction not to return to the workplace amounts to an unjustified disadvantage. He raised a personal grievance through his representative's 30 July 2020 correspondence to Hugh Martin. A claim for reinstatement was not pursued. Claims for compensation and reimbursement as remedies for the personal grievance remain.

[6] Mr Velazquez says his employment agreement provided for 40 hours work each week, but that Hugh Martin and Craig Martin failed to provide him these guaranteed minimum hours. There is a claim for a penalty under the Employment Relations Act 2000 for this alleged breach.

[7] On 30 July 2020, time and wage records together with the holiday and leave records for Mr Velazquez were requested. Mr Velazquez says that Hugh Martin and Craig Martin did not provide his time and wage records or his holiday and leave records. There are claims for penalties for breaches of s 130 of the Employment Relations Act 2000 and s 82 of the Holidays Act 2003.

[8] Mr Velazquez says that Hugh Martin and Craig Martin failed to pay him his annual leave entitlements. There is a claim for a penalty for breach of the Holidays Act 2003.

[9] Mr Velazquez also says that Hugh Martin and Craig Martin breached good faith obligations by not being active and constructive in maintaining the employment relationship.

The Authority's investigation process

[10] The statement of problem was served on Hugh Martin and Craig Martin. A statement in reply was not lodged in time. Hugh Martin and Craig Martin did not participate in the case management conference, despite being offered the opportunity to do so if they provided a contact number. The notice of directions and notice of investigation meeting were served on Hugh Martin and Craig Martin.

[11] On 15 March 2021, Hugh Martin provided a response to Mr Velazquez's claims.³ Hugh Martin attended the investigation meeting on 31 March 2021. Craig Martin did not appear. It soon became apparent that Mr Velazquez required an interpreter to understand and respond properly to my questions. I adjourned the meeting. A further meeting was held on 18 May 2021, with the assistance of an interpreter. Mr Velazquez and Hugh Martin both appeared then, but Craig Martin did not. The meeting proceeded.

[12] On 18 May, Hugh Martin produced a hand-written table headed "Weekly Pay report for Walter", covering January – July 2020. Hugh Martin told me that he wrote out the table after 31 March 2021, from existing pencil written records made during Mr Velazquez's employment. Hugh Martin also said that there were computer pay records and payslips covering the first part of Mr Velazquez's employment. Hugh Martin was directed to produce all time and wage records for Mr Velazquez's employment, by 25 May 2021. Hugh Martin lodged documents by that date. They were copied to Ms Fechney.

[13] During the meeting on 18 May, Mr Velazquez referred to payslips he had received at the start of his employment. Ms Fechney arranged for these to be forwarded to the Authority. As agreed, Ms Fechney lodged submissions in support of Mr Velazquez's claims. They were served on Hugh Martin and Craig Martin. The respondents were to lodge any submissions in reply by 8 June 2021. They did not provide anything. By 28 June, the respondents had still not replied. The Authority sought confirmation from the respondents that no submissions had been sent, but received no reply.

Issues for determination

[14] I should outline Hugh Martin's response. He says that Mr Velazquez was told on 19 June 2020 that the business was ceasing operation and was offered four weeks' severance and holiday pay. He says that Mr Velazquez was offered but declined extra time to take his working hours up to 40 per week. Hugh Martin says he had offered Mr Velazquez the hand-written time and wage records, but Mr Velazquez refused to recognise these as official records. The respondents do not accept that they personally employed Mr Velazquez.

³ I treat this in substance as a statement in reply for both respondents.

[15] The following issues arise:

- (a) Who was Mr Velazquez's employer following 17 July 2019?
- (b) Did the cessation of Mr Velazquez's employment amount to a dismissal?
- (c) Or was Mr Velazquez's employment affected to his disadvantage by any unjustified action by his employer regarding its cessation?
- (d) Does Mr Velazquez have a personal grievance as a result?
- (e) If there is a personal grievance, what remedies should be ordered?
- (f) Are the respondents liable for penalties?

Who was Mr Velazquez's employer following 17 July 2019?

[16] A company is a legal entity in its own right, separate from its shareholders and continues in existence until it is removed from the New Zealand Companies register.⁴ Takeaway Kitchens Limited was removed from the register on 17 July 2019, so it then ceased to exist as a separate legal entity capable of suing and being sued. Takeaway Kitchens Limited has not been restored to the register.⁵

[17] An individual employment agreement must include the name of the employer.⁶ A company must ensure its name is clearly stated in every document that creates a legal obligation of the company.⁷ If a company name is incorrectly stated in that document, every person who issued or signed the document is liable to the same extent as the company, if the company fails to discharge the obligations, except in specified circumstances.⁸ Hugh Martin signed Mr Velazquez's employment agreement, with the employer named as Take Away Kitchens Limited. Ms Fechny submits that "Take Away Kitchens Limited" should be accepted as meaning "Takeaway Kitchens Limited", the company's registered name. I agree.

⁴ Companies Act 1993, s 15.

⁵ Companies Act 1993, s 330.

⁶ Employment Relations Act 2000, s 65(2)(a)(i).

⁷ Companies Act 1993, s 25(1)(b).

⁸ Companies Act 1993, s 25(2).

[18] Ms Fechney also submits that Takeaway Kitchens Limited operated indistinguishably from Kitchen Surplus Limited, Hugh Martin, Craig Martin and Economy Kitchens Limited, so that I should lift the corporate veil. However, that approach is unnecessary. Takeaway Kitchens Limited did not exist when the matters relied on by Mr Velazquez occurred. There is no “corporate veil” to lift.

[19] On 31 March 2021, Hugh Martin told me that he had been unaware that the company had been removed from the register. One would expect that the Registrar took the usual steps involving notification before the company was removed. In any event, the 30 July 2020 correspondence from Mr Velazquez’s representative alerted Hugh Martin to the removal of the company from the register.

[20] There is evidence that Takeaway Kitchens Limited’s status had become an issue during Mr Velazquez’s employment. Hugh Martin sought to employ a French tradesman in the business. A work visa was required. On 18 May 2021, Hugh Martin told me that “we applied but couldn’t get a visa as the company was struck off”. His evidence is that he tried to re-register the company, contacted the companies office, was promised a prompt response but it did not eventuate. If Hugh Martin had attempted to re-register the company, it is likely that there would be some documentary record. Mr Velazquez’s evidence, regarding the employment of the tradesman, was that he thought immigration thought that the company did not exist. I accept Hugh Martin’s evidence that he mentioned this to Mr Velazquez. There is no evidence about the date of this, but it must have been after July 2019 but before Mr Velazquez’s employment ended in July 2020. The business continued to operate as if Takeaway Kitchens Limited still existed.

[21] Given this evidence, Hugh Martin was wrong when he told me in evidence on 31 March 2021 that he had been unaware that the company had been removed from the register. On 18 May 2021, Hugh Martin’s evidence was that he would have learnt within a couple of weeks of the company being struck off the register. I find that he knew within several weeks of 17 July 2020, at the latest, that the company had been removed from the register. It is likely that Hugh Martin told Craig Martin that the company had been removed. Hugh Martin acknowledged in evidence that the business continued to operate regardless of the company being struck off.

[22] Takeaway Kitchens Limited, having ceased to exist as a legal entity on 17 July 2019, could no longer be the employer of Mr Velazquez from that date. Despite that, the same business activity continued and Mr Velazquez continued to work in that business, in an employment relationship. I need to consider who employed Mr Velazquez to do work under a contract of service, after 17 July 2019. It is necessary to consider the real nature of the legal relationship (if any), between Mr Velazquez and Hugh Martin, or Mr Velazquez and Hugh Martin together with Craig Martin.

[23] Hugh Martin's evidence is that Takeaway Kitchens Limited owned little equipment. His evidence is that the equipment used in Takeaway Kitchens Limited's business was owned by another company (Kitchen Surplus Limited), of which he was the sole director and shareholder. Kitchen Surplus Limited was removed from the register of companies on 10 August 2021. Hugh Martin says that he "resigned" from business June 2020. He told me that Craig Martin's business commenced in June 2020. Sometimes legal contracts for the sale and purchase of the business in which an employee works can assist with identifying the employer, but not here. Hugh Martin produced no documentary evidence of arrangements between himself, Craig Martin, Takeaway Kitchens Limited, Kitchen Surplus Limited and Economy Kitchens Limited about ownership and transfer of assets used in the business operation in which Mr Velazquez worked.

[24] Hugh Martin told me that Takeaway Kitchens Limited was the tenant of the premises from which the business operated. There is no evidence about whether the landlord was aware that the company had been struck off or what steps were taken to allow the business to use the landlord's premises after 17 July 2019. Hugh Martin's evidence is that Craig Martin is subject to a personal guarantee covering Takeaway Kitchens Limited's obligations to the landlord.

[25] Hugh Martin's evidence is that wage payments made to Mr Velazquez before and after 17 July 2019 were from a bank account in the name of Takeaway Kitchens Limited. His evidence is that both he and Craig Martin are signatories on this account. Hugh Martin produced a copy of a Business Current Account statement for 31 March – 30 April 2020.⁹ It shows the account name as "TAKEAWAY KITCHENS LIMITED", and records payments to

⁹ There is a printed reference to it as "Statement number 00024". Several transactions are redacted.

“Walter Velazquez” on 3, 9, 17 & 24 April 2020. In the bank account information Mr Velazquez produced in evidence,¹⁰ these payments are shown as coming from “Takeaway Kite”

[26] Hugh Martin included a printed report with the statement, showing “Debit” payments to Mr Velazquez as “Payee”, with “wages walter” as “Particulars” between 20 July 2018 and 17 July 2020. These payments are shown in Mr Velazquez’s account as coming from “Takeaway Kite”.

[27] Mr Velazquez’s IRD breakdown for 10 October 2018 to 31 March 2021 records his gross wages and PAYE deductions from October 2018 to August 2019 and for November 2019 against Takeaway Kitchens Limited. The breakdown records Mr Velazquez’s September 2019 gross wages and PAYE deductions against Kitchen Surplus Limited. The IRD breakdown will reflect the information provided to it by Hugh Martin. He did not suggest the report to IRD reflected a change in Mr Velazquez’s employer, or the legal identity responsible for the business in which Mr Velazquez worked.

[28] Hugh Martin told me that Covid-19 wage subsidy payments were applied for in the name Takeaway Kitchens Limited. I had used the MSD COVID-19 2020 wage subsidy employer search facility, but had not identified any payments to Takeaway Kitchens Limited, Hugh Martin and Craig Martin personally or companies showing Hugh Martin as a shareholder or director. When I explained that to Mr Martin, he repeated that the subsidy was applied for and paid in the name of Take Away Kitchens Limited. He said that he had not made the application, he might have asked someone to apply. He then told me that he did not know who had completed the application. Hugh Martin produced the copy of the Business Current Account statement after the investigation meeting (see above) to show a COVID-19 payment from MSD on 6 April 2020. While the statement confirms Hugh Martin’s evidence, it does not assist with identifying the legal identity of Mr Velazquez’s employer after Takeaway Kitchens Limited ceased to exist in July 2019.

[29] I should describe the other documents Hugh Martin produced after the 18 May 2021 investigation meeting. He produced weekly computer payslips for the pay periods ending

¹⁰ Statement of problem annex “C”, covering November 2019 – July 2020.

5 October 2018 to 16 November 2018. Mr Velazquez had already produced computer payslips covering the pay periods ending 26 October 2018 to 14 December 2018. Mr Velazquez had received these with his weekly pay. In total, there are computer payslips covering the pay periods ending 5 October 2018 through to 14 December 2018. The payslips state “Paid By Kitchen Surplus” and include the workplace address.

[30] Hugh Martin also produced a “Pay History” computer print-out for “Kitchen Surplus Ltd t/a Takeaway Kitchens” for the period “1 April 2016 to 31 March 2021”. It shows payment dates from 20 July 2018 to the 14 December 2018 for Mr Velazquez. I checked several of the computer payslips against the “Pay History” report – they match. The “Pay History” report for “Kitchen Surplus Ltd t/a Takeaway Kitchens” and the “Paid By Kitchen Surplus” computer payslips arose from administrative payroll arrangements. They do not detract from the finding that Takeaway Kitchens Limited was Mr Velazquez’s employer until July 2019, as evidenced by the signed employment agreement. They do not assist with identifying the legal entity who employed Mr Velazquez after 17 July 2019.

[31] Hugh Martin produced copies, not the originals, of hand-written documents. These were written by Hugh Martin. First, there are eight weekly payslips covering “4-10-19” to “22-11-19”. It appears that a template was photocopied, with different weekly figures written alongside the fields “Date”, “Types wages – “, “rate”, “Income tax deduction” and “Cashpd into account”. They are headed “Take away kitchens”. The same template was used for “Final Pay” on “30-3-21”.

[32] Second, there is a two page table headed “Walter Velazquez”, with ruled columns marked “2019”, “hrs”, “Gross”, “PAYE”, “Holidays¹¹”, and “Cash Banked”. Dates, not always weekly, in each month are listed under “2019”. Figures are listed in the other columns. Statutory holidays are written in the “Holidays” column against relevant dates. Two payments marked “20 Dec” are identified as “Holiday Pay”.

[33] The third document in Hugh Martin’s hand-writing is a single page table headed “Weekly Pay report for Walter \$25 pe hrs”. The ruled columns are headed “2020”, “hrs”, “Gross”, “PAYE” and “Pd out”. The last column is blank. Weekly dates in each month are

¹¹ In the January to June 2019 sheet marked “PH6”, this column heading is blank.

listed in the “2020” column. Figures are listed in the other columns. “Layd off” is written in the blank column for the “June 19” row. There is a reconciliation of holiday pay underneath the “Pd out” column.

[34] A fourth single page is headed “Walter Holiday Pay calculations 2019”. It shows a reconciliation of holiday pay for Mr Velazquez for 2019, in Hugh Martin’s hand-writing. The monthly “Cash Banked” total appears to total the weekly net payments in the month. Some of the monthly totals do not accurately sum the weekly payments recorded in the two page table.

[35] Finally, copies of two printed standard form time sheets were provided. Hand-written dates “24/06/19” and “16/09/19” appear alongside “Mondays Date”. The name “Walter Velazquez”, start times, finish times, some breaks and total hours were handwritten in boxes on the printed forms. The hand-writing does not appear to be that of Hugh Martin.

[36] I consider later when these hand-written documents were created. For present purposes, they do not detract from the case for Mr Velazquez that he was employed by Hugh Martin and Craig Martin personally after July 2019.

[37] Mr Velazquez’s evidence is that both Hugh Martin and Craig Martin were in charge of the business throughout the time he worked there, both before and after July 2019. Either of them would tell him what to do or would give him some written instruction. No-one else directed his work. I accept this evidence.

[38] Hugh Martin’s evidence was that he was in charge of the business as the director, not Craig Martin. His evidence was that Craig Martin did not have much to do with running the business from “day 1”. He told me that the company continued to operate its business. However, as will be explained, I am cautious about Hugh Martin’s evidence. From 17 July 2019, the company no longer existed. Hugh Martin and Craig Martin had control over the bank account the business used to continue its operations after then. Craig Martin did not incorporate a separate company until September 2020. These factors count against Hugh Martin’s evidence about Craig Martin’s level of responsibility after 17 July 2019.

[39] In summary, Mr Velazquez continued as an employee performing the same work in the same business after Takeaway Kitchens Limited ceased to exist in July 2019. He performed

his work under the direct control of Hugh Martin and Craig Martin, in furtherance of their business interests. Economy Kitchens Limited was not involved as it did not exist until 8 September 2020. Kitchen Surplus Limited was not Mr Velazquez's employer between October 2018 and July 2019. It was never Mr Velazquez's employer after Takeaway Kitchens Limited ceased to exist. I find that the true relationship Hugh Martin and Craig Martin had with Mr Velazquez after Takeaway Kitchens Limited ceased to exist was jointly as his employer. The terms of employment expressed in the written agreement between Mr Velazquez and Takeaway Kitchens Limited came to be implied by conduct as the terms of the employment relationship between Mr Velazquez and Hugh Martin and Craig Martin.¹²

Did the cessation of Mr Velazquez's employment amount to a dismissal?

[40] From 2018, Mr Velazquez held a work visa for his work with Takeaway Kitchens Limited. In about October 2019, an issue arose between Mr Velazquez and Hugh Martin. I accept Mr Velazquez's evidence that he was concerned about difficulties with Immigration, if his taxes were not properly paid. Mr Velazquez sent a message to IRD on 1 November, concerned that his employer was "not paying taxes and threatens to leave [him] without a job" if he complained. I take from the message that Mr Velazquez had asked Hugh Martin for a payslip, but had not been given one. The computerised payslips had not been provided since December 2018. IRD's response was that his employer, identified by IRD as Takeaway Kitchens Limited, had paid all monthly PAYE deductions to August 2019. In a further message dated 25 November 2019, Mr Velazquez told IRD that he had spoken to his employer, who had sent a payment to IRD. It may be that this is a reference to the September 2019 payment shown in Mr Velazquez's IRD payment breakdown as having come from Kitchen Surplus Limited.

[41] Mr Velazquez's statement of problem at paragraph 1.4 included the claim that the respondents had failed to provide the Applicant with copies of his "leave records". Responding to the statement of problem, Hugh Martin in an email to the Authority on 15 March 2021 stated:

Reference to 1.4

¹² *Jackson v Stonyer* [1999] 1 ERNZ 404.

As for pay records, I do not use a computer to calculate the wages therefore supplied the information in handwritten form. He refused to recognize them as legitimate, Such information is still on file.

[42] Hugh Martin had used “a computer” for payroll purposes until December 2018. On 25 May 2021, Hugh Martin also provided the “Pay History” computer report, referred to above, so was able to access computerised payroll information for that purpose. Hugh Martin’s assertion in the email is incomplete at best, so was misleading at the time to that extent. Hugh Martin said he is dyslexic, but that does not answer my concerns about the reliability of his evidence. I have already outlined Hugh Martin’s inconsistent evidence about when he knew that Takeaway Kitchens Limited had been removed from the register. I should be cautious about accepting Hugh Martin’s evidence, without corroboration.

[43] Mr Velazquez’s evidence is that every time he asked for a “salary receipt”, Hugh Martin refused him. Hugh Martin says the Mr Velazquez “refused to recognise them as legitimate”. His evidence at the investigation meeting on 18 May was that copies of the payslips were all “on file”. The only handwritten “Weekly Pay slip” information in the form of a payslip produced after the investigation meeting was for the weeks 4/10/19, 11/10/19, 18/10/19, 25/10/19, 1/11/19, 8/11/19, 13/11/19 and 22/11/19. Mr Velazquez told me that Hugh Martin hand-wrote some “pay information” for him, but he did not have “it”. He thought Hugh Martin would have a copy. I will assume that Hugh Martin hand-wrote out the abovementioned payslips on or about the specified dates, perhaps in response to Mr Velazquez’s requests. Mr Velazquez’s concern was their informality, compared to the computer payslips that had stopped in December 2018. The concern informs Mr Velazquez’s message to IRD on 1 November 2019 that “He doesn’t want to give me my payslips either”.

[44] Mr Velazquez’s evidence is that, after these events, Hugh Martin got him to do work that was not part of his job description such as selling items, saying that he needed the money to pay the tax. Hugh Martin also instructed Mr Velazquez to do some gardening. He says that Hugh Martin told him that he was helping him and that Mr Velazquez should thank him. Mr Velazquez says that on one day Hugh Martin threatened to cancel his visa. Hugh Martin denied threatening to have the visa cancelled. I conclude that there is insufficient evidence to find that any threat was made. Similarly, there is insufficient evidence to find that Hugh Martin said that Mr Velazquez would have to return to his country if “God wanted [him] to go back”. While

Hugh Martin might have directed Mr Velazquez to do the additional tasks and might have made the earlier comment attributed to him, those matters played no part in later events.

[45] I accept Mr Velazquez's evidence that things continued, sometimes with Hugh Martin and Craig Martin treating him like a friend and sometimes with them blaming him for things he had not done, until the Covid-19 lockdown. Mr Velazquez did not work over the Covid-19 lockdown period, but received wages each week. He was paid at \$765 (gross) for the weeks of Friday 3, 10, 17 & 24 April 2020, just over 80% of his pre-lockdown standard weekly wage of \$950.00. His evidence is that they told him not to come to work. Mr Velazquez's evidence is that he thought this was "strange", but I accept the arrangement must have reflected compliance with the Covid-19 lockdown workplace restrictions. Although it is not alleged in the statement of problem, Mr Velazquez's evidence is that he returned to work after the Covid-19 lockdown ended. He did not identify the date. I accept Mr Velazquez's evidence that Craig Martin told him to return to work. Weekly payments to him returned to \$950.00 (gross) on 1 May 2020, reflecting his return to work. New Zealand returned to Level 3 lockdown from 28 April 2020.

[46] Mr Velazquez's evidence is that one or two weeks after lockdown ended, he went to work after the weekend and was told that there was no work for him. Mr Velazquez did not identify that date. When pressed by Hugh Martin's question, he disputed that it would have been seven weeks, insisting that it would have been a maximum of two weeks after lockdown. Mr Velazquez sent a message to IRD at 9.29am on Tuesday 16 June about his PAYE tax refund for the year to 31 March 2020. It does not assist to establish the date or what happened, regarding the end of the employment.

[47] Hugh Martin says in his reply and in evidence that on 19 June 2020 Mr Velazquez was "adequately informed" that he was retiring, that the business was ceasing to operate, that he was offered four weeks' severance pay and holiday pay, therefore ending his on-going employment. Mr Velazquez was asked to leave the premises and take his belongings. Hugh Martin says that Mr Velazquez refused to do this. His evidence is that another employee would have overheard the exchange, but he made no arrangement for evidence to be taken from that person. Hugh Martin says that this was seven weeks after lockdown ended.

[48] Mr Velazquez sent a message to Hugh Martin on Saturday 11 July. It read “Will be in Monday”. The response was “Ok. How are you and your wife?” Mr Velazquez answered “I have to pick up the hand saw”. I take from the messages that Mr Velazquez had not recently been at work. However, the statement “Will be in Monday” does not read as if Mr Velazquez had been away from work for nearly two months, if I was to accept his evidence of the timing of events. As a result, I find that the exchange with Hugh Martin that ended Mr Velazquez’s employment was on or about 19 June 2020.

[49] Hugh Martin did not dispute that Mr Velazquez had been dismissed as a result of that communication. However, there is a dispute about what was said.

[50] Mr Velazquez received his weekly wage (\$950 gross, \$817.00 net) on Friday 19 June, Friday 26 June and Friday 3 July 2020. He did not receive a payment on Friday 10 July. The 11 July message did not mention the non-payment. Mr Velazquez received a payment on Monday 13 July. Friday was usually payday, but Mr Velazquez’s bank records do show some variability.

[51] Mr Velazquez did not receive any wages on Friday 17 July. Mr Velazquez sent a message to Hugh Martin on 17 July: “Good morning Leon.¹³ You didn’t deposit my salary this week”. On 24 July Mr Velazquez messaged Hugh Martin “Hello leon, you did not deposit my salary today”. On 25 July Mr Velazquez sent another message: “Hello leon, i don’t have my salary yet”.

[52] Two later messages read:

Hello lion, if you can not pay my salary you have to aply for the government help

...

I found out that there are people working in black in the company. You don’t pay my salary but you do pay those people. If you do not respond, I will have to report my situation to the authorities.

¹³ Hugh Martin is known as “Leon”.

[53] Hugh Martin did not respond to these messages. Hugh Martin claims that “Walter was baiting us in an effort to go down this legal track”. His evidence is that these text messages were “a sham”. Hugh Martin told me “It was like he was playing games – I refused to cooperate”. He also described it as a “set-up”. Hugh Martin said in evidence:

I didn't pay [his] final pay on time. I withheld holiday pay until I found what this was about. Frankly, it would have been paid if I hadn't received the personal grievance [claim].

[54] Mr Velazquez's evidence is that “Suddenly one day, he came to say I don't have any more job for you”. Mr Velazquez was referring to Hugh Martin. He went on to say “He told me that the company stopped work”. During the second investigation meeting, Mr Velazquez summarised this as “they told me there wasn't work for me. Then I later received notification that I wasn't working there anymore.” I find from this evidence and the last txt message that Hugh Martin did tell Mr Velazquez, on or about 19 June 2020, that the company was ceasing work.

[55] I do not accept Hugh Martin's evidence he told Mr Velazquez that he was retiring, that Craig Martin was taking over the business and that he would be given “4 weeks' standard pay”. If matters had been communicated in that way, Mr Velazquez would have known that business activity would continue. His last text message more than a month later was that he had “found out” that others were working. If matters had been communicated in accordance with Hugh Martin's evidence, Mr Velazquez would have known that on 19 June. It is unlikely that Mr Velazquez sent his texts as a “sham” in order to concoct a version of events that he knew to be untrue.

[56] I find that Mr Velazquez was jointly employed by Hugh Martin and Craig Martin but was dismissed by Hugh Martin on or about 19 June 2020.

Does Mr Velazquez have a personal grievance?

[57] Ms Fechny for Mr Velazquez raised his personal grievance claim on 30 July 2020. Hugh Martin and Craig Martin must show that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time. That is assessed by considering the factors set out at s 103A(3) and (4) of the Employment Relations

Act 2000. A fair and reasonable employer would comply with the statutory duty of good faith and their contractual obligations.

[58] The duty of good faith¹⁴ requires an employer, who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment, to give the employee access to relevant information and an opportunity to comment before the decision is made. Here, Hugh Martin and Craig Martin did not comply with this duty. Hugh Martin told me that his "only slip-up" was "no paperwork". Assuming it is correct that Hugh Martin "retired" and that Craig Martin took over the operation of the business, they did not tell Mr Velazquez of that plan and give him an opportunity to comment, before Hugh Martin dismissed him.

[59] The written employment defined redundancy as "when an employee's role is no longer needed". It goes on to provide that "If after a good faith restructuring process the employee is made redundant" they would be given notice to end the employment. No redundancy compensation was payable paid. Ending employment required "giving 10 working days notice in writing". Again on the assumption that changed business arrangements created a redundancy situation in respect of Mr Velazquez's role, he was not given "notice in writing" of the termination of his employment.

[60] I must not determine a dismissal to be unjustifiable solely because of defects in process if they were minor and did not result in the employee being unfairly treated. The failure to comply with the statutory duty of good faith and to comply with the contractual requirement for written notice meant that Mr Velazquez was treated unfairly. He was left in a state of significant uncertainty, as evidenced by his text messages on and after 17 July.

[61] Hugh Martin and Craig Martin also did not comply with the provisions in the employment agreement covering "restructuring situations". The arrangement between them for Hugh Martin to retire and for Craig Martin to take over the business came within the "Employee protection provision" in the agreement. Mr Velazquez was entitled to the process set out in the

¹⁴ Employment Relations Act 2000, s 4(1A).

agreement. Hugh Martin and Craig Martin did not comply with the steps set out in the agreement.

[62] It follows and I find that Mr Velazquez was unjustifiably dismissed and has a personal grievance against his former employers, Hugh Martin and Craig Martin.

[63] It is not necessary to separately consider whether an unjustified disadvantage grievance arose as a result of the termination of Mr Velazquez's employment.

What remedies should be ordered?

[64] There is a claim for lost remuneration. I accept that Hugh Martin probably retired in about June 2020 or shortly after. The joint business endeavour between Hugh Martin and Craig Martin, which had employed Mr Velazquez following the removal of the company, ended about then. There was no prospect that Mr Velazquez would continue to be employed by them jointly, because they no longer jointly operated the business. At that time, Hugh Martin and Craig Martin could have properly consulted with Mr Velazquez and would have then been in a position to justifiably terminate his employment in accordance with the employment agreement that permitted them to end employment for redundancy on 10 working days' notice.

[65] Mr Velazquez received three weeks' wages in addition to the payment on Friday 19 June for the week's work: 26 June, 3 July and 13 July. If Hugh Martin and Craig Martin had properly attended to their statutory and contractual obligations as to information disclosure, consultation and consideration in good faith it would not have taken very long. They probably would have been able to give Mr Velazquez notice on or before 26 June. I take from this analysis¹⁵ that Mr Velazquez probably did not lose any remuneration as a result of his personal grievance. It follows that he is not entitled to reimbursement under s 128 of the Employment Relations Act 2000.

[66] There is a claim for \$30,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. Mr Velazquez's evidence is that he was scared he would lose his visa and that caused a lot of stress. His sleep was disturbed and he ate little. He was afraid he was going to be deported. He had to sell personal possessions to get some money. Mr Velazquez cancelled

¹⁵ Applying principles summarised in *Butler v Ohope Chartered Club Inc* [2021] NZEmpC 80.

his gym membership and stopped socialising. He rarely left his accommodation. Mr Velazquez was ashamed because financial circumstances affected his ability to support his family overseas. He found it difficult to obtain replacement employment, so these problems continued for a time. Mr Velazquez's concerns were made worse because Hugh Martin did not respond to his communications. Mr Velazquez also encountered difficulties with IRD because his employer had not accounted properly to IRD. Mr Velazquez's sense of insecurity caused by the dismissal is apparent in his messages to IRD in July 2020 and later. There is no reason to doubt Mr Velazquez's evidence, as described. I also note that these effects diminished after Mr Velazquez obtained replacement employment, commencing in later September 2020. I fix compensation of \$15,000.00 as the amount required to remedy the hurt, humiliation and injured feelings that resulted from the personal grievance.

[67] Mr Velazquez did not contribute in a blameworthy way to the circumstances giving rise to his grievance.

Arrears

[68] It was raised in submissions that there was a discrepancy between the hourly rate of \$25.00 shown in the written employment agreement and the hourly rate of \$20.00 paid, as evidenced by the computer payslips. A claim for arrears was advanced.

[69] The difficulty now with a claim for arrears of wages is that the employer at the relevant time was the company, but it no longer exists.

[70] It appears that all wages paid to Mr Velazquez from July 2019 were at the rate of \$25.00 per hour. There is no evidence that Hugh Martin and Craig Martin paid Mr Velazquez at less than \$25.00 per hour during the period they employed him.

[71] There are several other elements to the arrears claim. The written employment agreement provided "The employee will work 40 hours each week on Monday to Friday". Despite that, Mr Velazquez was often engaged and paid for 38 hours per week. Variation in hours is apparent from the computer payslips and the Pay History report up to December 2018. Similar variation is recorded in the time and wage information for 2019 and 2020 produced by Hugh Martin. The net wage payments shown in Mr Velazquez's bank information covering

November 2019 to July 2020 also evidence some variation but often payment of a weekly net amount based on 38 hours at \$25.00 per hour.

[72] I conclude that the terms of employment between Mr Velazquez and Hugh Martin and Craig Martin that came to be implied by conduct after the company ceased to exist included the same variability in hours of work as had been the practice previously. It follows that a claim against Hugh Martin and Craig Martin for arrears of wages based on fix hours of 40 per week while they were the employer cannot succeed.

[73] There is also a claim for payments, based on the employment ending on 12 August 2020. The argument is that the employment ended when Mr Velazquez lodged proceedings in the Authority, following the lack of communication from Hugh Martin. This part of the claim cannot succeed, given the earlier finding that Hugh Martin terminated Mr Velazquez's on or about 19 June 2020.

[74] There is a claim for arrears of holiday pay. To an extent, it covers holiday pay accrued prior to the company's removal from the register. However, Hugh Martin and Craig Martin are liable for holiday pay entitlements from the date they became the employer.

[75] I take 17 July 2019 as the commencement date for Mr Velazquez's employment with Hugh Martin and Craig Martin. Employment was terminated before Mr Velazquez became entitled to annual holidays. He was entitled to holiday pay at the end of his employment, calculated under s 23 of the Holidays Act 2003.

[76] The 2020 hand-written table produced by Hugh Martin records payments of \$22,410 gross from 9 January – 24 July 2020. The 2019 hand-written table records payments of \$19,000.00 from 19 July 2019 to 20 December 2019. Together these total \$41,410.00. Holiday pay at 8% equates to \$3,312.80.

[77] The tables record holiday pay of \$2,788.50 in December 2019. This needs to be brought to account as holiday pay paid in advance, for current purposes. Adjusting for that, there was a shortfall of \$524.30 in holiday pay due at the end of the employment.

[78] It is common ground that Mr Velazquez was paid and received another payment on or about 31 March 2021. There is a hand-written payslip dated "30-3-21" showing gross of

\$2,440.92. Part of this payment was the notice period that Hugh Martin withheld until the first investigation meeting. However, it also includes his calculation of arrears of holiday pay. The holiday pay component exceeds \$524.30. No further entitlement to holiday pay is established.

[79] While I accept the tables can be treated as sufficiently accurate as to payments for these calculations, I deal with when they were created in what follows.

Are the respondents liable for penalties?

[80] There is a claim for penalties for breach of the Employment Relations Act 2000 and for breach of the Holidays Act 2003.

[81] Ms Fechny, acting for Mr Velazquez, requested his wage, time and annual leave records in accordance with the Employment Relations Act 2000 and the Holidays Act 2003. The request was sent to Hugh Martin t/a Takeaway Kitchens by email on 30 July 2020. Ms Fechny sent a follow-up email on 5 August 2020. This was also sent to a second email address. In the absence of any response, the present proceedings were lodged.

[82] Under s 130(2) of the Employment Relations Act 2000, every employer must, upon request by an employee or their authorised representative, provide that person immediately with access to or a copy of the time and wage records. Under s 82 of the Holidays Act 2003, an employer who receives a request by an employee's authorised representative must comply as soon as practicable with the request by allowing access or providing a copy of the employee's holiday and leave record.

[83] The hand-written payslip dated "30-3-21" was produced by Hugh Martin on 31 March 2021. The 2020 "Weekly Pay report" was produced by Hugh Martin on 18 May 2021. On 18 May, Hugh Martin told me that there were "existing pencil records that had been made during Mr Velazquez's employment". A table covering 2019 was produced after the 18 May 2021 investigation meeting. No explanation has been offered to explain why the 2019 and 2020 tables were not provided in response to the July 2020 request, at the time of the August 2020 commencement of the proceedings, or for the first investigation meeting. The copies produced in evidence do not appear to have been compiled periodically week by week at the dates of the payments. It is likely that Hugh Martin drafted the tables in response to notices of direction.

In any event, I find that Hugh Martin and Craig Martin breached s 130(2) of the Employment Relations Act 2000 and s 82 of the Holidays Act 2003 by not providing access or a copy promptly in response to the requests. Hugh Martin and Craig Martin are liable for a penalty of up to \$10,000.00 for the breach of s 130(2) of the Employment Relations Act 2000 and a penalty of up to \$10,000.00 for the breach of s 82 of the Holidays Act 2003.

[84] A penalty was not sought for the non-compliant nature of the records that were eventually produced, so it is not necessary to say more about that.

[85] There is a claim for a penalty for the failure to pay Mr Velazquez's holiday pay. Section 27 of the Holidays Act 2003 required Hugh Martin and Craig Martin to pay Mr Velazquez his holiday pay in the pay that related to his final period of employment. Mr Velazquez was dismissed on or about 19 June 2020. The employment agreement permitted the employer to pay in lieu of notice, to reassign duties or not require the performance of work during a notice period (following discussion). If Hugh Martin had told Mr Velazquez that he was retiring, had given him four weeks' notice but had not required him to perform work, then had continued to pay over the next few weeks, the latest by which all holiday pay should have been paid was with wages for the week ending Friday 17 July 2020. As explained earlier, I do not accept that Hugh Martin explained that to Mr Velazquez. Mr Velazquez left work as instructed on or about 19 June, wage payments continued until 13 July 2020, then stopped. Holiday pay was not finally paid until 31 March 2021. Hugh Martin and Craig Martin breached s 27 so are liable to a penalty of up to \$10,000.00 under s 75 of the Holidays Act 2003.

[86] In determining the appropriate penalties, I must have regard to all relevant matters including those set out at s 133A of the Employment Relations Act 2000. The breaches relate to employment standards, so cannot be regarded as insignificant. Ignoring the request for records and not paying Mr Velazquez's holiday pay must be regarded as intentional conduct by Hugh Martin and Craig Martin. I note Hugh Martin's evidence that he withheld the holiday pay until he "found out what this was all about" and that he would have paid it if he had not received the personal grievance claim. The records request was probably ignored because Hugh Martin and Craig Martin had not properly kept such records. Hugh Martin and Craig Martin took no steps to mitigate the defaults until forced to through these proceedings. Mr Velazquez was in the position of some vulnerability, given his visa was tied to employment by Takeaway

Kitchens Limited. Hugh Martin and Craig Martin (or associated companies) have not previously been found to have engaged in similar conduct.

[87] I globalise the breaches of s 130(2) of the Employment Relations Act 2000 and s 82(2) of the Holidays Act 2003 and will deal with it as a breach of the former Act. On that basis, Hugh Martin and Craig Martin are liable for a penalty of up to \$10,000.00 for the failure to provide records. The intentional nature of the breach and the vulnerability of Mr Velazquez are recognised by setting a penalty at \$5,000.00. Eventually, the tables and some hand-written payslips for the period after the company ceased to exist were produced. More significantly, there is no history of such breaches. I reduce the level of the penalty by 50% to account for these factors. That results in a penalty of \$2,500.00.

[88] Hugh Martin and Craig Martin are liable for a penalty of up to \$10,000.00 for the breach of s 27 of the Holidays Act 2003. Again the intentional nature of the breach and the vulnerability of Mr Velazquez are recognised by setting a penalty at \$5,000.00. All holiday pay relating to the period after the company ceased to exist has now been paid. That, and the absence of prior breaches are recognised by reducing the penalty to \$2,500.00.

[89] There is a submission that part of the penalties should be paid to Mr Velazquez. I agree that he was affected both by the lack of response to the information request and by the failure to pay him holiday pay. These effects are not properly addressed otherwise, so I consider that 50% of each penalty should be paid to Mr Velazquez.

Summary

[90] Mr Velazquez was employed by Hugh Martin and Craig Martin jointly, after Takeaway Kitchens ceased to exist. Mr Velazquez was unjustifiably dismissed by Hugh Martin on about 19 June 2020. Mr Velazquez is entitled to compensation of \$15,000.00 as a result.

[91] The claims for arrears do not succeed.

[92] Hugh Martin and Craig Martin breached the Employment Relations Act 2000 and the Holidays Act 2003 and are liable for penalties of \$5,000.00 in total, half of which is to be paid to Mr Velazquez and the remainder to the Crown.

[93] Costs are reserved. Submissions in support of a claim for costs may be lodged and served within 28 days. Hugh Martin and Craig Martin may lodge and serve any submissions in response within a further 14 days.

[94] There is a submission for a compliance order, to ensure payment of the orders made in this determination. That is supported by reference to the respondents' failure to properly engage in the investigation process. A compliance order was not sought in the statement of problem. Hugh Martin and Craig Martin have not failed to observe or comply with the Authority's orders made by this determination. Enforcement of the orders may not be necessary. Even if I had power at present to order compliance, it would not be appropriate to do so.

Philip Cheyne
Member of the Employment Relations Authority