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Finau v Xtreme Construction Limited (Auckland) [2007] NZERA 177 (15 August 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 250/07 5076876

BETWEEN

AND

SIAKUMI FINAU

Applicant

XTREME CONSTRUCTION LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Robin Arthur

Applicant in Person

No appearance for Respondent

10 August 2007 at Auckland 15 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant seeks an order for recovery of wages not paid to him for work done for the respondent in October and November 2006. He also seeks compensation because of the effects not getting paid, which he says included problems meeting rent and loan payments.

[2] The respondent did not lodge a statement in reply and its director, Zane Lowe, opposed the matter being referred to mediation. Instead, he offered to pay part of the wages said to be due at a lower rate. That offer was rejected by the applicant.

Investigation

[3] The matter was set down for investigation meetings on 7 May and 8 June 2007 but both meetings were postponed due to health problems suffered by Mr Lowe. A third investigation meeting was scheduled for 10 August 2007, a date well after Mr Lowe was due to have completed a course of treatment. A Minute issued on 31 May 2007 noted that if he was unable to attend on 10

August, there was ample opportunity to arrange for another representative to attend on behalf of the company.

[4] The notice of investigation meeting was sent to the address for communication for the respondent registered with the

Companies Office - a PO Box number - as previous correspondence had been returned from the address for service. The PO Box number is also given as Mr Lowe's address as director of the respondent in Companies Office records and is his address on copies of correspondence from his doctors that he provided to verify the need for earlier adjournments of the investigation. CourierPost delivery records show that the investigation meeting notice was delivered to his PO Box address where it was collected and signed for in June.

[5] Mr Lowe did not attend the investigation meeting on 10 August 2007. I had a support officer of the Authority contact him by telephone and was told that Mr Lowe said that he was in Sydney awaiting further health treatment. I am satisfied that adequate attempts were made to notify the respondent of the meeting and that no good reasons were notified for further adjournment. Accordingly, I proceeded with the investigation.

The facts

[6] The applicant, under oath, said he had worked for the respondent for a number of weeks through September, October and November 2006. There was no written employment agreement. The work and pay rate was set by the foreman. The applicant was to be paid \$25 per hour. Hours were recorded on a time sheet which was collected by the foreman and forwarded to the respondent's office for payment. For a number of weeks, there was no difficulty with the fortnightly payment of wages. However, for the fortnight of 24 October to 4 November 2006, the applicant was due to be paid for 97.5 hours, a total of \$1,950 net. However, he was paid only \$840 for that work. In the following week, he worked a further 42 hours and expected to be paid a further \$840 wages net.

[7] By this time work on the part of the building project on which the applicant worked was winding down. He was told he would be offered further work but this did not eventuate.

[8] The total amount of net wages said to be owing was \$1,940.

[9] Over the following weeks of November and December 2006, the applicant tried repeatedly to get all wages due from the respondent. His evidence was that Mr Lowe initially agreed to pay the money, but then suggested paying wages due at a lower hourly rate. Payments were promised but not made. Through his lawyer, the applicant attempted to reach a further compromise for

payment but this too was unsuccessful and in late January 2007 the applicant filed his claim for recovery of wages and compensation in the Authority.

Determination

[10] In the absence of any evidence to the contrary from the respondent, I accept the applicant's evidence regarding the hours worked and wages due to him. I find that the respondent was due to pay to the applicant a sum of \$1,940 net for the balance of wages earned in October and November 2006. The applicant is entitled to an order for that amount.

[11] The applicant sought compensation for the effects on him of not having received his wages on time. He says that this included incurring bank default fees because he had insufficient funds to meet loan repayments and hardship for his family which had to rely for some weeks on only the wages of the applicant's wife from her part-time job and the support of their extended family to provide food.

[12] The applicant's claim was for recovery of wages, not a personal grievance for which he may have been entitled to remedies including compensation. Accordingly I am not able to make the award of compensation sought.

[13] However I do accept that the applicant is entitled to an award of interest on the sum due for the period in which the wages due to him remained unpaid. Accordingly, I order the respondent to pay to the applicant interest on the amount of \$1,940 for the period from 1 December 2006 to the date of this determination. Interest is to be paid at the 90 day bill rate, as at the date of this order, plus 2% - that is at the rate of 10.73 per cent. For the 258 day period, the amount to be paid in interest is \$147.14. For the period from the date of this determination until payment of all the amounts ordered, the respondent is also to pay an additional daily amount of 57 cents in interest on the wages due, until the amount due is paid in full.

[14] The applicant is also entitled to be compensated for legal costs of \$100 - that is the amount his lawyer charged for his services in seeking to have the wages paid by the respondent. He is also entitled to be reimbursed the cost of his filing fee in the Authority of \$70.

Orders

[15] Within 28 days of the date of this determination, the respondent is to pay to the applicant the following amounts:

(i) \$1,940.00 net as arrears of wages; and

(ii) Interest of \$147.14 and a further amount of 57 cents for each day from the date of this determination to the date of payment in full of the amounts ordered; and

(iii) \$100 in reimbursement of legal costs; and (iv) \$70 in reimbursement of his filing fee.

Robin Arthur

Member of the Employment Relations Authority

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