

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2019] NZERA 54
3037472

BETWEEN ROBERT MAY
 Applicant

A N D SOLIDBUILT CONSTRUCTION
 2017 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Erin Burke, counsel for Applicant
 Andrea Twaddle and Cassie Death, counsel for
 Respondent

Investigation Meeting: 5 December 2018 at Hamilton

Submissions Received: 14 December 2018 from Applicant
 21 December 2018 from Respondent

Date of Determination: 05 February 2019

DETERMINATION OF THE AUTHORITY

- A. Mr May resigned from his employment. He was not dismissed.**
- B. Solidbuilt Construction 2017 Limited (Solidbuilt) is to pay Mr May within 28 days of the date of this determination:**
- (a) \$2,590.80 net in respect of public holidays, underpayments for work performed on public holidays and for alternate days.**
 - (b) \$2,459.03 net in respect of unpaid holiday pay.**

- (c) **Interest on the sums in B (a) and (b) at the rate of 5% per annum from 20 February 2018 to the date of payment, pursuant to section 87(3) of the Judicature Act 1908.**

C. Solidbuilt breached provisions of the Holidays Act 2003 and the Employment Relations Act 2000. Within 28 days of the date of this determination, Solidbuilt is ordered to pay Mr May penalties of \$12,000.

D. Costs are reserved.

Employment Relationship Problem

[1] The respondent, Solidbuilt Construction 2017 Limited, (Solidbuilt) was incorporated as a company on 27 July 2017. Mr Mark Robertson is the sole director and shareholder. In August 2017, the applicant, Mr Robert May, was employed by Solidbuilt as a builder to assist with undertaking renovations on the home Mr Robertson, his partner Ms Nicola Brown and their children live in, in Hamilton.

[2] Following a heated discussion between Mr Robertson and Mr May, on 20 February 2018 about employment related matters, Mr May says he was unjustifiably dismissed. Mr Robertson denies dismissing Mr May. He says Mr May walked off the job following their heated discussion, failed to return and then when Mr Robertson contacted him, he resigned. Mr May agreed to work out a 2 week period of notice, but failed to do so.

[3] Mr Robertson accepts that Solidbuilt did not comply with some of its employment obligations to Mr May. This was accepted early on and steps were taken to address those issues.

The investigation meeting

[4] The investigation meeting into Mr May's claims took one full day in the Authority. Mr May filed a witness statement as did Mr Brendan Plowright. Mr Plowright had worked as an apprentice to Mr May. Mr May was also employed from time to time by the company Mr Plowright subsequently established, Plowright Builders Limited. Mr Plowright was not able to attend the Authority's investigation

meeting. He was interviewed by the Authority following the investigation meeting, by phone. A record of the interview was provided to both counsel.

[5] For Solidbuilt, Mr Robertson and his partner, Ms Brown, filed witness statements. Mr Robbie Edmonds, a builder who had worked for Solidbuilt, filed a witness statement, as did Mr Peter Gyde, one of Mr May's former employers. Mr Gyde participated in the investigation meeting by phone. Mr Peter Callagher, chartered accountant and director of Callagher & Co, Chartered Accountants filed a sworn affidavit.

[6] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[7] As permitted under s 174E of the Employment Relations Act 2000 (the Act), this determination does not set out all the evidence and submissions received. The determination states finding of fact and law, and makes conclusions on issues necessary to dispose of the matter.

The issues

[8] The issues for determination by the Authority are as follows:

- (a) Was Mr May dismissed by Solidbuilt or did he resign?
- (b) If Mr May was dismissed, was it unjustified?
- (c) If Mr May was unjustifiably dismissed, what remedies are available to him?
- (d) If Mr May's dismissal was unjustified, was his conduct a contributing factor which requires a reduction in remedies awarded under s 124 of the Act?
- (e) Is Mr May entitled to outstanding wages and holiday pay?
- (f) If Solidbuilt has failed to comply with employment legislation, including the Holidays Act 2003, is Solidbuilt liable to pay penalties?
- (g) Should either party contribute to the costs of representation of the other party?

Relevant facts**Mr May's employment**

[9] Mr May is a qualified builder and very experienced. He has been in the building trade for 41 years. His employment arrangements have varied over that time. On some occasions he has been given an employment agreement, on other occasions he has not. He has also worked casually for an hourly rate with holiday pay being paid in addition to his wages and on other occasions the holiday pay has been included in his wages. Sometimes Mr May has opted into the KiwiSaver scheme and with some working engagements he has not. Mr May has worked in other parts of New Zealand, including for 3 years in Christchurch with the rebuild following the earthquakes.

Solidbuilt

[10] In June 2017, Mr Robertson, for Solidbuilt, placed an advertisement in Trade Me seeking the services of a builder. Mr May applied for the position and was successful. Mr May started work in August 2017.

[11] Mr May was employed to do some of the building work on Mr Robertson and Ms Brown's home. Mr May says he started on a trial period and during this time was paid cash.

[12] Mr Robertson denies there was ever a trial period. The agreement reached between Mr May and Mr Robertson from the outset was that Mr May's hours would be flexible and he would text Mr Robertson with hours he worked on Friday each week.

Payment of wages

[13] Initially, Mr Robertson would pay the wages in cash and after a few weeks into Mr May's bank account. However, because of Mr May's poor financial circumstances he regularly asked for payment of his wages to be made every 2 or 3 days, sometimes daily.

[14] This is verified by the bank records produced to the Authority showing wages being paid by Solidbuilt to Mr May.

[15] Ms Brown says on one occasion, just prior to Christmas 2017, Mr May came to the house and asked her for “Christmas pressie money”. According to Ms Brown, Mr May became angry when she told him this was a matter for Mr Robertson. Ms Brown says she felt harassed by him. Ms Brown said she had to contact Mr Robertson who then arranged payment of the money requested by Mr May from his personal bank account.

[16] Mr May accepts that he needed to ask for his wages every few days as he was “financially strapped” at the time.

Solidbuilt’s employment obligations

PAYE deductions

[17] At the time Mr May was offered and accepted employment with Solidbuilt, it was a new company and had not been set up as an employing entity. Mr Peter Callagher, Solidbuilt’s accountant filed an affidavit in the Authority. In it he says that due to industrial action at the Inland Revenue Department (IRD), Solidbuilt’s registration with the IRD and the processing of Mr May’s PAYE were delayed. Rather than taking 7 days for registration, IRD were taking 3 to 4 weeks.

[18] Mr Robertson says Solidbuilt’s employment obligations, including the payment of wages into Mr May’s bank account, deduction of PAYE, accrual of holiday pay and payment of Kiwisaver contributions, were being sorted out by Mr Callagher. Emails between Mr Robertson and Mr Callagher were provided to the Authority. They confirm, in my view that Mr Robertson regularly requested Mr Callagher to inform him of PAYE deductions to be made by Solidbuilt in respect of Mr May. Mr Robertson says he ensured funds for payment of PAYE were set aside so that Solidbuilt was able to comply with its obligations. Mr Robertson says there was never any question that Mr May would be paid what he was legally entitled to.

Provision of employment agreement

[19] Mr May says he was never provided with an individual employment agreement despite his repeated requests for one. Mr Robertson accepts that Mr May was not provided with an employment agreement. However, Mr Robertson says this was because Mr May had offered to provide him with a draft agreement that his friend and former work colleague Mr Plowright used for his employees and which could be

adapted for Mr May's employment. Mr May never provided him with the agreement. I do not accept that Mr May continually requested a copy of an employment agreement.

[20] Mr Robertson accepts it was his responsibility to provide Mr May with an employment agreement. Mr Robertson says he accepted this failure at an early stage of these proceedings.

Mr May's performance

[21] Mr Robertson says Mr May was a skilled builder but was unreliable, was slow and had a number of personal problems, including coming to work under the influence of alcohol, and financial problems.

[22] Mr May accepts that he would have a bourbon from time to time but not while working. He also says he would leave work each day at around lunchtime to drive people who were in difficulties to their appointments, for example appointments at the hospital. Mr May accepts that he had financial issues and for a time towards the end of 2017, a gambling addiction. This meant, at times, he did not have enough money for food or petrol.

[23] Mr Edmonds, who worked with Mr May says he thought Mr May had been drinking at lunch on a couple of occasions. He says on those occasions, Mr May's work was affected. He would slur his words and become dizzy on the job. Mr Edmonds told Mr Robertson he did not want to work with Mr May when he had been drinking. Ms Brown says she often saw empty bourbon cans in Mr May's car and he had asked her to refrigerate his bourbon.

[24] From the evidence it is more likely than not that Mr May came to work after drinking alcohol, on a number of occasions. His work performance and time keeping were affected as a result.

[25] Mr Robertson became concerned about the hours Mr May was recording as being worked by him. He was also concerned about Mr May's personal issues, including financial pressures and drinking alcohol which appeared to be impacting his work. Mr Robertson raised these matters with Mr May in November 2017 and believed they had been resolved.

[26] Mr May says he believed he was not being paid for all the hours he was working. He began keeping a record on his phone of his hours of work.

Events of 20 February 2018

[27] Mr May says he approached Mr Robertson in the work carpark between 11am and 1pm on 20 February 2018. He said he wanted to talk to him about his wages and time records, and outstanding wages. He says he had asked about these regularly and was ignored by Mr Robertson. Mr May says Mr Robertson flew into a rage and began yelling and screaming at him. Mr May says Mr Robertson told him to “fuck off and don’t come back.” Mr May says he remained calm and asked if they could talk about it another time. Mr May said Mr Robertson then began a second wave of screaming at him, then marched towards him and stood over him in an intimidatory manner. Mr May thought he was going to be hit by Mr Robertson.

[28] Mr May says he stood his ground and tried to settle Mr Robertson down. Mr Robertson did not calm down, but rather yelled at Mr May that he was an alcoholic, an addict and that no one wanted to work with him. Mr May says he was told to “Just get out of here”. Mr May says he was confident he had been told to leave, so he got in to his car and left.

[29] Mr Plowright says he remembers coming home that day. Mr May was living in Mr Plowright’s garage at the time. Mr Plowright says Mr May was “quite distraught”. He asked Mr May what was going on and Mr May told him “I just got fired, I just got bloody fired”. He didn’t know why and told Mr Plowright that Mr Robertson had “lost it”¹. Mr Plowright told Mr May that he needed to speak to Mr Robertson about it. Mr Plowright was unable to give the Authority any details of the argument between Mr May and Mr Robertson or what words were used by Mr Robertson. Mr May did not speak to Mr Robertson about it.

[30] Mr Robertson denies Mr May’s version of events. He says it was he who approached and spoke to Mr May on 20 February 2018. He says he wanted to speak with Mr May about his concerns about his performance, hours of work and his drinking which was impacting his performance.

¹ Transcript of interview of Mr Plowright by the Authority

[31] Mr Robertson says Mr May was working in the carport on 20 February 2018. As he started to talk, Mr May stopped him and gave him a record of hours and said he was owed \$1200. Mr Robertson says this was news to him. Mr Robertson says there was no yelling or shouting as claimed by Mr May. Mr Robertson took the records from Mr May, went away and checked them against the work hours already paid to Mr May. Mr Robertson also checked the CCTV footage which recorded Mr May working. Mr Robertson formed the view that Mr May was working less hours than he was claiming.

[32] Mr Robertson went back to speak to Mr May about it. There was an argument which became heated. However, according to Mr Robertson there was no screaming or yelling. Mr Robertson told Mr May to “fuck off for the day” which he says was common language. His intention was that Mr May cool off so they could address the issues in the morning. Mr Robertson wanted some assurances from Mr May about drinking and the hours he was working and the hours he was claiming. However, there was no intention to dismiss Mr May and he was not dismissed. Mr Robertson left. A few weeks earlier following an argument with Mr Edmonds, Mr May left work, returning the next day. Mr Robertson expected Mr May would do the same and come back the next day. He did not.

Phone calls

[33] Mr May says he received a missed call on 22 February 2018, but could not identify it. He says there was no telephone discussion with Mr Robertson.

[34] Mr Robertson denies this. He says he rang and spoke to Mr May on 22 February 2018 about what had happened on 20 February 2018. It was a short conversation during which Mr Robertson raised Mr May’s attitude with him and said he couldn’t have it. Mr May responded that he was “better off just leaving”. Mr Robertson asked Mr May to work out his 2 weeks’ notice. Mr May never returned to work.

[35] On 26 February 2018, Mr Robertson rang Mr May, the phone rang once and there was no voice mail service so he was not able to leave a message. Mr May did not return the call. Mr Robertson says Mr May resigned, he was not dismissed.

[36] Mr Edmonds says Mr May is a skilled builder. However, a few weeks before Mr May left, around Waitangi Day they had had a heated argument about the way to

cut the batons for the house. Mr May left following the argument. Mr Edmonds recalls being told by Mr Robertson around 20 February 2018, that he had given Mr May 2 weeks' notice. Mr Edmonds says the word "sacked" was not used.

Phone records

[37] The phone records show that there was a phone call by Mr Robertson to Mr May lasting just less than 1 minute on 22 February 2018 at approximately 1pm. There was also a call from Mr Robertson to Mr May of 4 seconds on 26 February 2018 at just after 3pm.

Tools

[38] Mr Robertson says after the discussion on 20 February 2018, Mr May did come back to work to borrow some tools from Mr Edmonds. Mr May asked Mr Robertson for his tools and they had an amiable discussion.

Credibility issues

[39] This matter is to be determined on issues of credibility. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one version or another.

[40] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. This was very difficult as on almost every key issue, Mr May disputed Mr Robertson's version of events and Mr Robertson disputed Mr May's version of events.

[41] During the investigation meeting, I found Mr May's evidence to be unconvincing and unreliable. Having reviewed the evidence, including the documentary evidence, I have found areas of Mr May's evidence which simply do not seem credible. I found the witnesses called on behalf of Solidbuilt to be credible witnesses, supporting Mr Robertson's version of events.

[42] Where there is a dispute in the evidence I have preferred the evidence of Mr Robertson as being, on balance, the more credible evidence.

First Issue**Was Mr May dismissed or did he resign?**

[43] It is my view, that it is more likely than not that Mr May resigned. He was not dismissed. Mr May denies receiving phone calls from Mr Robertson following the events of 20 February 2018. However, the phone records show that there were calls by Mr Robertson to Mr May's phone on 22 and 26 February 2018.

[44] During the course of the conversation on 22 February 2018, Mr May told Mr Robertson he would leave. Mr Robertson asked him to work out two weeks' notice. Mr Edmonds recalls Mr Robertson telling him that he had given Mr May two weeks' notice to work out, shortly after the events of 20 February 2018.

[45] Mr Plowright, a close friend and long term colleague of Mr May's was not able to give the Authority any details of the conversation between Mr May and Mr Robertson which caused Mr May to consider he had "been fired". Mr Plowright could not remember what time of the day the discussion occurred.

[46] 89 days after leaving Solidbuilt, through his counsel, Mr May raised a personal grievance claim of unjustifiable dismissal with Solidbuilt, that he was of the view he had been unjustifiably dismissed. I do not consider this action to be consistent with Mr May's view he had been unjustifiably dismissed by Solidbuilt on 20 February 2018. It is my view that for the above reasons it is more likely than not that Mr May resigned. Given this finding, there is no need to investigate issues (b), (c) and (d).

Fifth Issue**Is Mr May entitled to outstanding wages and holiday pay?**

[47] Mr Robertson accepts that he failed to ensure that Solidbuilt complied with some of its obligations as Mr May's employer, namely, to provide Mr May with an employment agreement and time and wages records. Solidbuilt failed to pay Mr May holiday pay due to him because there was a dispute over the amount due.

[48] Mr Robertson says that Mr May was employed as a builder to assist with the renovations of his own home. Mr Robertson says that he agreed with Mr May that at the end of each week, Mr May would tell him what his hours were by text and Mr May would receive payment into his bank account.

[49] Mr Robertson says that Mr May was under financial pressure and he pestered Mr Robertson repeatedly for payment of his wages and asked that they be paid every two or three days. This was not convenient but Mr Robertson did pay Mr May his wages every two to three days. Mr Robertson says Mr May was paid for all the hours he worked and that no outstanding wages are owing to him.

[50] On the balance of probabilities it is my view that there are no outstanding wages owing to Mr May. The bank accounts provided by Solidbuilt show wages being paid to Mr May. Payments were based on Mr May's frequent texts telling Mr Robertson hours of work and amounts to be paid to him. Payments were made accordingly. When asked by the Authority to provide copies of these texts, Mr May was unable to do so.

[51] Mr May did not claim he was owed outstanding wages for almost 3 months. This behaviour is inconsistent with his repeated claims and evidence that he was in financial difficulty.

Public holidays

[52] It is accepted Mr May was not paid time-and-a-half and/or alternative days for public holidays worked. Mr Robertson made it clear to Mr May and his counsel that he intended to pay any outstanding holiday pay to Mr May once the amount had been agreed. When agreement could not be reached as to the amounts due, Solidbuilt placed the sum of \$7500 into its solicitors trust account on 19 September 2018 to ensure funds were available for payment, if required.

[53] In light of the disagreement between the parties as to the number of hours worked by Mr May, I accept Solidbuilt's calculation that on average Mr May worked 8.21 hours a day.

[54] Mr May is owed the following amounts; \$1,108.35 net for Christmas, Boxing Day and New Year's Day. In addition, Mr May is owed the sum of \$497.25 net as he was not paid time-and-a-half on Labour Day, the day after New Year's Day, Anniversary Day or Waitangi Day. In respect of these days on which it is accepted Mr May worked, he is also owed alternative days amounting to \$985.20 net.

[55] These amounts total \$2,590.80 net. I order Solidbuilt to pay Mr May the sum of \$2,590.80 for underpayments in respect of public holiday pay as above within 28 days of the date of this determination.

Annual holiday pay

[56] Mr May's net income amounted to \$28,147.11, according to records provided to the Authority.

[57] Total earnings including the above sums for public holidays amount to \$30,737.91. Holiday pay at 8% of that net total amounts to \$2,459.03. I order Solidbuilt to pay outstanding annual holiday pay owed to Mr May in the sum of \$2,459.03 within 28 days of the date of this determination.

[58] Pursuant to s.87(3) of the Judicature Act 1908, Solidbuilt is to pay interest at the rate of 5% per annum on the amounts of holiday pay owing to Mr May under paras [55] and [57] totalling \$5,049.83, from 20 February 2018 to the date of payment to Mr May.

Penalties

[59] Mr May is seeking penalties for what he claims to be breaches of the Act and the Holidays Act 2003. Mr May alleges breaches by Solidbuilt as follows:

Employment Relations Act breaches

- Failure to provide an employment agreement - 1;
- Failure to keep and produce wages and time records - 2;
- Misleading and deceiving the applicant in relation to PAYE and KiwiSaver -3;

Solidbuilt is liable for a maximum penalty of \$20,000 for each of the 3 alleged breaches. A total of \$60,000 in penalties.

Holidays Act breaches

- Failure to keep a holiday and leave record - 4;
- Failure to provide information in a holiday and leave record - 5;

- Failure to pay annual holiday pay - 6;
- Failure to pay annual holiday when employment ended - 7;
- Failure to pay for public holidays not worked which were ordinarily a working day - 8;
- Failure to pay time and a half for each hour worked on a public holiday - 9;
- Failure to provide an alternative holiday - 10;
- Failure to provide an employment agreement with a provision confirming the employee's right to be paid penal rates when working on public holidays - 11.

[60] Solidbuilt is liable for a maximum penalty of \$20,000 for each of the 8 alleged breaches of the Holidays Act. A total of \$160,000.

Four step approach to penalties

[61] The Employment Court in *Borsboom v Preet PVT Ltd*² applies a four step process for determining the quantum of penalties.

Step one

[62] The first step is to identify the nature and number of statutory breaches. Solidbuilt accepts there have been breaches of both the Act and the Holidays Act. It does not accept that Mr May was deceived in respect of the deduction of PAYE and Kiwisaver. I do not accept that Mr May was deceived or that Solidbuilt did not act in good faith, in breach of the Act. Mr Robertson informed Mr May that he would be paid what was owed to him, and that Solidbuilt's accountant was attending to these compliance issues. Funds were paid into the trust account of Solidbuilt's lawyers while the parties resolved their differences.

[63] The breaches of Act and the Holidays Act in relation to the keeping of records are similar are similar in my view and should be treated globally. These are numbered 2, 4 and 5. These 3 breaches will be treated as 1 breach.

² [2016] NZEmpC 143

[64] The breaches of the Holidays Act that relate to non-payment for public holidays not worked, non-payment of time and a half for public holidays, or for alternative days for working on public holidays. These breaches are numbered 8, 9 and 10 and in my view are similar and should be considered globally.

[65] The failure to pay annual leave and the failure to pay annual leave upon termination of employment are breaches 6 and 7 and are similar and to be considered globally.

[66] The failure to provide an employment agreement, the failure to provide an employment agreement containing Holidays Act information, breaches 1 and 11 are similar and are to be considered globally. Finally, the alleged breach of misleading and deceiving Mr May in relation to PAYE and KiwiSaver, number 3 is distinct and attracts a separate penalty. I do not accept there was a breach by Solidbuilt.

[67] Taking this global approach, Solidbuilt is theoretically liable in respect of 4 breaches of minimum employment legislation, as above. Therefore maximum penalties total \$80,000.

Step two

[68] The next step is to look at the severity of the breaches. With regard to the keeping and production of records, breaches 2, 4 and 5. Solidbuilt was established solely for the purpose of renovating Mr Robertson's own home. At the time of its establishment, Mr Callagher was sorting out PAYE issues with the IRD and other employment related matters for Solidbuilt. Mr May was employed to undertake renovations on Mr Robertson's home. He was the only employee.

[69] Mr May and Mr Robertson agreed that Mr May would determine his own working hours and text them to Mr Robertson who would arrange payment accordingly. There was no dispute that Mr May sought payment of his wages, 2 or 3 times a week and sometimes daily, as he was in financial difficulty. Solidbuilt paid Mr May when he requested payment. Solidbuilt failed to keep records which were compliant with the Act.

[70] Having compliant time and wages records would have lessened the likelihood of the dispute that arose between Mr May and Mr Robertson as to hours of work and wages owed. This failure was not deliberate. Mr Robertson and his accountant were

working out the processes to be implemented to ensure Solidbuilt complied with its legal obligations to Mr May. Mr May was kept informed.

[71] Failure to pay holiday pay and public holidays, breaches 6, 7, 8, 9 and 10. Mr Robertson indicated his intention to pay Mr May any monies that should be paid to him, once they agreed on quantum. While waiting to agree, he paid \$7,500 in to his solicitors Trust account.

[72] There is no dispute that Mr May was not provided with an employment agreement, breaches 1 and 11. Mr Robertson says he relied on Mr May's offer to provide him with an employment agreement that his former employer and friend, Mr Plowright had used before. Mr May did not do so. Mr Robertson accepts he should have followed Mr May up, but did not do so. The impact on Mr May of this breach was not overly significant. Mr May was a very experienced builder and was aware of his employment rights.

[73] Solidbuilt employed one member of staff, namely Mr May. Solidbuilt no longer employs staff and accepted early responsibility for its breaches of minimum employment standards legislation.

[74] Taking into account aggravating and ameliorating factors and proportionality of the outcome, together with relevant case law, I find a penalty of \$3000 for each breach to be appropriate in the circumstances. The penalties are to be paid to Mr May. Solidbuilt is ordered to pay penalties of \$12,000 to Mr May within 28 days of the date of this determination.

Costs

[75] Costs are reserved. The parties are encouraged to agree costs. If agreement cannot be reached, Mr May has 14 days within which to file a memorandum as to costs. Solidbuilt has 14 days upon receipt to file a memorandum as to costs in response.

Anna Fitzgibbon
Member of the Employment Relations Authority