

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 176
5306294

BETWEEN RYAN HYLAS JOHNSON
PEMBERTON
Applicant

AND TE HAUMI LOGGING
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: R Pemberton, in person
S Hooper, advocate for respondent

Investigation meeting: 3 March 2011 at Rotorua

Determination: 29 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ryan Pemberton says his former employer, Te Haumi Logging Limited (THL) owes him unpaid wages.

Preliminary matter

[2] No statement in reply was filed in this matter, despite prompting from the Authority and the granting of a series of extensions. The matter was also the subject of two directions to mediation. On the first occasion the matter was referred further to the Department of Labour's labour inspectors, who were hampered by difficulties in obtaining copies of records. The second direction to mediation was then made. In the absence of progress following that direction the matter was set down for an investigation meeting.

[3] Shane Hooper, who is the husband or partner of the company's director and majority shareholder and oversaw the business, attended the investigation meeting. The failure to file a statement in reply meant THL was entitled to reply only with the leave of the Authority. I heard from Mr Hooper on the content of the claim for payment.

[4] Mr Hooper also alleged at the meeting that the parties were not in an employment relationship, rather their relationship was one of principal and independent contractor.

[5] In the absence of a statement in reply and of any other material capable of suggesting suitable arrangements should be made to pursue the allegation, it was not investigated. To the extent that Mr Hooper sought to further discuss the matter notwithstanding this ruling, nothing in what was said caused me to change this view or to take the view that THL should be granted any more indulgences than it has received.

[6] For the further information of THL not only should a statement in reply have been filed but the allegation regarding the contractual nature of the parties' relationship and an outline of the basis for it should have been set out in the statement. Had that been done, the path this matter has followed could have been very different.

Background

[7] Mr Pemberton was employed as a 'logging consultant' by THL. He was engaged initially in Gisborne, but in or about January 2010 he moved to Warkworth to work in a THL operation there. The parties' relationship ended on 7 March 2010.

[8] Mr Pemberton says:

- (a) he was not paid for logs not cut, decked and painted and trees felled but not processed as at 7 March, so as a result is owed \$2,500;
- (b) payment in respect of a period which included a two-day absence was calculated incorrectly, leaving a shortfall of \$792.30; and

- (c) he should receive payment in respect of a deduction of \$225.69 which should not have been made from an outstanding payment in respect of work done in Gisborne.

1. Payment for logs not cut

[9] As he put it, Mr Pemberton walked off the job late on the morning of 7 March. He said his claim for payment covered the last two weeks in February and the first week in March. The trees and logs which were the subject of the claim were stacked in plain view on 7 March. He asserted he was not paid for that wood. His quantification of what he is owed was based on photographs he took of the stacked wood early the next morning, together with an estimated count. His count was: 950 logs cut, decked and painted; and 200 trees felled but uncut, undecked and unpainted. That estimate led him in turn to estimate he was owed \$2,500.

[10] Mr Pemberton's pay was calculated according to tonnage carted from the block being worked, plus allowances per tonne. Tonnage records were kept. When I asked Mr Pemberton whether his estimate of \$2,500 reflected an estimated tonnage based on his observations and photographs he said it did not. He could not explain the basis of the estimate any further. If the estimate were based on tonnage the claim would concern some 1,000 tonne. However it appeared that there was no basis at all for the estimate other than the estimated count.

[11] According to Mr Pemberton's payslip for 13 – 26 February he was paid for 1304 tonne at \$2.50 per tonne (including allowances), less the deduction which has given rise to the second of his claims for payment. According to the final payslip for the period 1 – 8 March, payment was made for 475.26 tonne at \$2.50 per tonne (including allowances). The tonnage records, which verified these figures, were provided subsequently. THL says Mr Pemberton was paid for work done to the date of his departure and nothing is owed.

[12] When Mr Pemberton was asked why he believed the payments he received did not relate to the wood he photographed, he was unable to answer. With some reason he said he could not verify at the time that he received his full entitlement or quantify his claim in terms of tonnage because he did not have the necessary records, but nor

was he able to suggest what the final payment in particular was for if not the wood he photographed.

[13] Secondly, when the tonnage records were provided Mr Pemberton's response was to rely on what was said to be an admission of liability from Mr Hooper in a covertly made sound recording which was forwarded to the Authority. I have not taken that recording into account, and consider it unfortunate and unhelpful that its inappropriate forwarding escalated the tendency of both parties to air their wider arguments before the Authority rather than focussing on the matters with which this determination is concerned.

[14] Since payment was made on a regular and systematic basis, lack of access to records did not provide an explanation of the basis of the claim. Both Mr Pemberton's allegation that he was underpaid, and his estimate of what he is owed, are based on assertion only. I do not accept that Mr Pemberton received no payment at all for the wood he photographed. Despite the unsatisfactory nature of THL's participation in this matter I do not accept there is any basis for making the order Mr Pemberton seeks.

2. Incorrect calculation of wages in February 2010

[15] Mr Pemberton was absent from work on 27 and 28 January 2010 while he attended a concert in Auckland.

[16] As noted, payment for the period 13 – 26 February was based on production of 1304 tonne. By averaging production over the period of Mr Pemberton's absence Mr Hooper assessed the tonnes of production affected by the January absence at 352, so subtracted that figure from 1304 and calculated payment based on 952 tonne. Mr Pemberton disputed the averaging calculation but in any event said the adjustment should have been made with reference to the work actually done during his absence, not with reference to an average. He said there was $(11.98 + 23.1)$ 35.08 tonne of production on the two days in question, and that figure should have been used for the adjustment.

[17] Accordingly Mr Pemberton calculated the amount owed as follows:

35.8 tonne x \$2.50/tonne (inclusive of allowances) = \$87.70

\$880 (the amount deducted) - \$87.70 = \$792.30

[18] Mr Hooper said he made the deduction, in what was a subsequent pay period, after the colleagues who worked during Mr Pemberton's absence complained it was unfair that Mr Pemberton had been paid when he had not worked.

[19] The terms of the parties' agreement did not give Mr Hooper an entitlement to act in that way.

[20] THL is therefore ordered to pay Mr Pemberton the sum of \$792.30.

3. Deduction from 'final' Gisborne payment

[21] In April 2010 Mr Pemberton received a further payment for 'final' tonnage in respect of work done in Gisborne. The sum of \$225.69 was deducted from the payments to each of Mr Pemberton and his two colleagues to reflect their share of the cost of the return of a load of wood from Warkworth on the ground that it was unsatisfactory.

[22] I accept that amount reflected the cost of the returned load, but nothing in the parties' agreement permitted such a deduction.

[23] THL is therefore ordered to pay Mr Pemberton the sum of \$225.69.

Summary of orders

[24] THL is ordered to pay to Mr Pemberton the sums of :

- a. \$792.30 in respect of a deduction made from his payment for the period 14 – 26 February; and
- b. \$225.69 in respect of a deduction made from the 'final' tonnage from Gisborne.

Costs

[25] THL is further ordered to reimburse Mr Pemberton for the filing fee of \$70.

R A Monaghan

Member of the Employment Relations Authority