

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2015] NZERA Auckland 314  
5450533**

BETWEEN                      FREDERICK PRETORIUS  
Applicant

AND                              MARRA CONSTRUCTION  
(2004) LIMITED  
Respondent

Member of Authority:        Eleanor Robinson

Representatives:             Danny Jacobson, Counsel for Applicant  
Ken Patterson, Counsel for Respondent

Investigation Meeting:      22 September 2015 at Tauranga and 5 October 2015 (by  
telephone)

Submissions received:      22 September 2015 from Applicant and from Respondent

Determination:                8 October 2015

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Frederick Pretorius claims that he was unjustifiably dismissed by the Respondent, Marra Construction (2004) Limited (Marra)

[2]     Mr Pretorius further claims that Marra breached an oral agreement made in 2007 to pay him an increased salary rate and a bonus.

[3]     Mr Pretorius also claims that Marra (i) exhibited misleading and deceptive conduct by denying its promise to remunerate him for a greatly increased workload during the period 2007 -2010; (ii) failed to protect him from physical and mental harm in the workplace resulting from a high workload; and (iii) breached its duty of good faith.

[4]     Marra denies that it unjustifiably dismissed Mr Pretorius

[5]     Marra further denies that it,(i) breached an oral agreement made in 2007 to pay him increased salary and bonus; (ii) exhibited or displayed any misleading conduct; (iii) failed to

protect him from harm in the workplace; (iv) placed him in a position where he had an unusually high workload, or (v) breached its duty of good faith.

[6] This determination addresses the preliminary issue of whether or not the remuneration arrears claims brought by Mr Pretorius are outside the six year limitation time period set out in s 142 of the Employment Relations Act 2000 (the Act) and thus statute barred from proceeding in the Authority.

### **Issues**

[7] The issue for determination is whether or not the claims for wage arrears made by Mr Pretorius fall within the six year period pursuant to s. 142 of the Act.

### **Brief Background Facts**

[8] Marra is a commercial and residential construction company operating from Tauranga.

[9] Mr Pretorius was employed as a Quantity Surveyor by Marra on or about June 2004. There was no written employment agreement entered into by the parties at that date; however Mr Pretorius stated it was agreed at the commencement of his employment with Mr Phil Marra, currently Chairman of Marra, that he would receive an annual salary of \$55,000.00 per year.

[10] Mr Pretorius also stated that he worked a 40 hour week, and provided a pay slip for the period ended 27 June 2005 confirming the annual salary and hours.

[11] During 2007 Marra and Dominion Constructors Limited (Dominion) entered into a joint venture arrangement (the Project) to construct a multilevel apartment building in Tauranga (Number 11).

[12] The negotiations for the Project took place during 2007, and an Unincorporated Joint Venture Deed (the Joint Venture Deed) was executed between Marra and Dominion just prior to the commencement of work on the Project site in December 2007.

[13] Mr Pretorius claims that at the Project negotiation stage he was told by Mr Rob Bailey, at that time a director of Marra, that he would be working on site at the Project, and that he would receive the same terms and conditions of employment as those which applied to Dominion employees. He claims that the terms and conditions of employment applicable to

the Dominion employees included an enhanced level of remuneration to that of the Marra employees and a bonus.

[14] Mr Pretorius commenced working on site at Number 11 during the week ending 24 December 2007. His role was that of Quantity Surveyor for the Project reporting to Mr Graeme Harvey, Project Manager for Dominion.

[15] Mr Pretorius' evidence was that the Project negotiation stage was completed two or three weeks prior to the Project commencement.

[16] Mr Pretorius said his work on the Project finished by 30 May 2010, apart from some minor finishing tasks.

[17] Mr Pretorius said his understanding was that he would be paid both the increased salary payments due and the bonus upon completion of the Project.

[18] On 11 January 2011 Mr Pretorius emailed Mr Marra stating:

*.... I have been requesting for a number of years now for an increase in salary bringing it to close the market rate. In compensation for an increase I was given my company vehicle on 11 Maunganui Road and was told that as I had been contracted out of Marra and into Dominion Joint Venture and that I would receive the same benefits as those paid to Dominion employees. With negotiating salaries this overall package was agreed with Dominion's salary rates being agreed, based on 54 hr week to cover the overtime costs expected on a Contract of its size, a company vehicle and a 10% bonus.*

*... Can you please ley me know if you and Bev are prepared to increase my salary and a company car (already being a tax benefit to Marra) ? and to what?*

[19] Mr Marra responded on 12 January 2011: "*Fred Not sure where you are coming from*".

[20] There is no written documentation confirming the terms Mr Pretorius claims were offered to him verbally by Mr Bailey.

[21] Mr Pretorius is claiming:

- A payment in the amount of approximately \$125,000.00 in respect of the increased salary and bonus; or in the alternative:
- a payment on a *quantum meruit* basis for all the hours he worked in excess of 40 per week during the Project'; or in the alternative:
- a payment in respect of the statutory minimum wage rate for the hours worked in excess of 40 per week during the Project.

[22] Marra denies the claim and asserts that Mr Pretorius was at all times paid the correct salary, and that there are no monies owing to him in respect of any work he undertook at Number 11.

[23] Marra also claims that in any event, any claim Mr Pretorius may have is barred by s. 142 of the Act as being outside of the limitation period of six years.

## **Determination**

### **The Law**

[24] Mr Pretorius is claiming arrears of salary and a bonus payment pursuant to s.131(1) of the Act which states:

#### ***131 Arrears***

*(1) Where—*

*(a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or*

*(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,— the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.*

#### *Limitation Date*

[25] A personal grievance has to be raised within the Authority no more than three years after the date on which the personal grievance arose<sup>1</sup>, however in *Law v Board of Trustees of Woodford House*<sup>2</sup> the Chief Judge held that an arrears of wages claim falls under s.142 of the

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<sup>1</sup> S.114(6) Employment Relations Act 2000

<sup>2</sup> [2014] NZEmpC 25

Act. The Chief Judge further held that it is s 142 of the Act rather than the Limitation Act 2010 which applies to a wages claim.

[26] Section 142 states:

***142 Limitation period for actions other than personal grievances***

*No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.*

[27] Accordingly I find that Mr Pretorius' claims are limited to the six year period before they were filed with the Authority. The Statement of Problem was received by the Authority on 3 March 2014 and I determine that the limitation date is therefore 3 March 2008. I note that there is no dispute between the parties that this is the relevant date for the limitation date purposes.

*Contractual/Quantum Meruit Entitlement*

[28] Mr Pretorius is claiming payment based upon a contractual or quantum meruit entitlement basis. I note that this determination is concerned only with whether or not Mr Pretorius is able to raise a claim on this basis; I make no determination at this stage on the merits of such claims. If I determine Mr Pretorius is within the limitation date period to be able to raise his claims on a contractual or quantum meruit basis, it will be for him to establish his claims at a substantive hearing.

[29] Mr Pretorius claims that he was lead to believe by Mr Bailey that he would receive an increased salary and a bonus payment in return for working long hours on the Project. From the date of his commencement on the Project during week ending 24 December 2007, Mr Pretorius claims that he worked hours in excess of 40 per week on the basis that he believed he would be remunerated in the form of an increased salary payment and a bonus payment.

[30] In the Employment Court case *Haig v Edgewater Developers Ltd*<sup>3</sup> the Chief Judge considered the issue of whether or not a knowledge/imputed knowledge test applied to limitation issues. He concluded on this issue:

*[17] I conclude, therefore, that irrespective of the knowledge or imputed knowledge of the claimants, the causes of action for all claims*

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<sup>3</sup> [2012] NZEMPC 189

*in this proceeding accrued when the elements necessary for prosecuting them came into existence. They then had the period of six years to issue those proceedings in the Employment Relations Authority.*

[31] In order to bring a claim it is therefore necessary to establish when Mr Pretorius was in possession of all the elements necessary for him to prosecute the cause of action.

[32] Mr Pretorius commenced working on the Project during the week ending 24 December 2007, and said it was at the Joint Venture negotiation stage on or about early December 2007 that Mr Bailey told him he would be on comparable terms and conditions to the Dominion employees working on the Project. Mr Pretorius set out his understanding of what had been agreed by Mr Bailey in the email to Mr Marra dated which stated that he had: “*... been contracted out of Marra and into Dominion Joint Venture and that I would receive the same benefits as those paid to Dominion employees.*”

[33] Mr Pretorius’ understanding was that he would receive the enhanced salary and a bonus at the completion of the Project. His work and involvement on the Project ceased in May 2010, although I note that Practical completion of the Project did not take place until April 2012. Mr Pretorius’ last pay period on the Project was 30 May 2010.

[34] Mr Marra and Mr Brett Russell, a director of Dominion, gave evidence that Marra and Dominion were each responsible for their own employee costs during the Project, this was in accordance with clause 4.19 of the Joint Venture Deed which stated:

*All persons engaged on the Construction Contract including key personnel and the Project Manager shall be employees of the respective Participants and subject to the control of the Participant in every respect including the terms and conditions of their employment..*

[35] Mr Jacobson submits that this clause is subject to clause 6.1 of the Joint Venture Deed which states:

*For the purposes of determining the costs to the parties of the Joint Venture the cost of construction shall consist of, but not be limited to, the cost of all subcontract, salaries and wages ...*

[36] Mr Russell said that all personnel costs were subject to the decision of the Management Committee established in accordance with clause 4.2 of the Joint Venture Deed, and that clause 6.1 was subject to the Management Committee decisions..

(i) *Salary*

[37] Mr Pretorius provided an email dated 20 August 2008 which he claims establishes the rate at which he would be remunerated during the Project. The email from Mr Harvey is addressed to Mr Marra and Mr Russell and states:

*Gents*

*We are trying to agree and get some similarities in the invoicing from Dominion and Marra for Site Staff and labour.*

*The following are what Fred and I propose (Fred and my rates to be agreed between Phil and Brett):*

*Monthly fixed costs:*

*Based on (50 hrs/wk or 216 hrs/month)*

<i>Graeme</i>	<i>Dominion</i>	<i>\$17,300.00</i>
<i>Fred</i>	<i>Marra</i>	<i>\$12,500.00</i>
<i>Aaron</i>	<i>Marra</i>	<i>\$12,500.00</i>
<i>Jeremy</i>	<i>Dominion</i>	<i>\$10,000.00</i>
<i>Joe</i>	<i>Marra</i>	<i>\$ 7,000.00</i>

*This rate includes wage, vehicles, computers, mobile phone, ACC etc.*

*....*

*Please can we have your comments so we can input thses costs and reconcile staff and labour for both companies from the start.*

[38] Mr Russell could not recall the salary level which was paid to Mr Harvey during the Project, but confirmed that the rate set out in the email would have taken into account all the costs associated with Mr Harvey's time on the Project, including accommodation costs for Mr Harvey who lived in Auckland, and his family in Tauranga during the Project.

[39] Mr Aaron McCormick, a Marra employee who worked on the Project said that he was not remunerated at a salary level of \$12,500.00 as set out in the email dated 20 August 2008, but at the salary rate paid by Marra at that time, which was a lower rate. Mr McCormick commented that that would have been the rate cited in the email would be that which was to be used for client invoicing purposes by Marra and Dominion.

[40] I do not find that the email dated 20 August 2008 establishes the salary level at which Mr Pretorius would be remunerated during the Project in that:

- it refers to invoicing not actual costs;
- includes all costs associated with that individual, including ACC, computers and vehicle costs;
- Is subject to comments by Mr Marra and Mr Russell prior to finalisation.

[41] I further observe that any enhanced salary costs to employees during the Project would have been subject to approval by the Management Committee if they were to be charged to the Project and the responsibility of Marra or Dominion respectively.

[42] I therefore conclude that the operative date for a salary increase would be the date when Mr Bailey allegedly advised Mr Pretorius he would be receiving a salary increase during the Project, i.e. in early December 2007. In the email to Mr Marra dated 11 January 2011 Mr Pretorius stated his understanding to have been that he: *“had been contracted out of Marra and into Dominion Joint Venture and that I would receive the same benefits as those paid to Dominion employees.”*

[43] Mr Pretorius is claiming that the enhanced salary payment was agreed to be paid at the conclusion of the Project. I consider it would be most unusual for an increased salary rate to not take effect until some three years after the relevant work had been completed.

[44] On that basis I find that when the alleged commitment was made in early December 2007 Mr Pretorius would have been in possession of all the elements necessary for prosecuting his cause of action as soon as he failed to receive a salary increase in his first pay slip after the Project commenced i.e. at the end of December 2007. Subsequent non-payment of the enhancement did not give rise to new causes of action.

[45] Accordingly I find that Mr Pretorius is not able to establish, on the balance of probabilities, that his expectation that the aggregate enhancements to his salary would not be paid until the conclusion of the Project in May 2010

[46] I determine that he is time barred from bringing a claim for monies in respect of a salary increase being outside the six year limitation period.

(ii) *Bonus*

[47] Mr Russell confirmed that Dominion employees received bonus payments. These were discretionary in nature and based on Dominion's performance overall rather than project or job based. Payment of the bonuses to employees usually took place at the end of May or September.

[48] I accept that a bonus payment may not crystallise until the conclusion of a project. On that basis, providing he can establish the details of his claim, I find that Mr Pretorius would have six years from May 2010 to prosecute a claim for non-payment of the bonus.

[49] Mr Pretorius said that Mr Bailey offered him the same terms and conditions of employment as the Dominion employees. I note that Mr Russell said that Dominion employees were paid discretionary bonuses based upon company rather than a specific project performance. Moreover such bonuses were usually paid at two stages in the year, May and September.

[50] However, even if I find that Mr Pretorius would have been in possession of all the elements necessary for prosecuting his cause of action as soon as he failed to receive a bonus payment in May 2008, he would still be within the six year limitation period to raise his claim.

[51] I determine that Mr Pretorius is not time barred from bringing a claim for monies in respect of an unpaid bonus.

*Minimum Wage Act claim*

[52] Employees may be lawfully required to work hours above their normal hours for which they receive no additional remuneration above their annualised salary. That proviso is however subject to the employers responsibilities under the Minimum Wage Act 1983.

[53] In the case of *Law v Board of Trustees of Woodford House*<sup>4</sup> the Chief Judge examined the issue of coverage and concluded:

*[71] I conclude that an employee in receipt of a salary (or of remuneration so expressed) is not thereby excluded from coverage and*

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<sup>4</sup> [2014] NZEmpC 25

*falls under the category of “in all other cases” in the rates specified in the statutory Minimum Wage Orders as discussed at [48] earlier in this judgment. That is because such employees cannot be described as being “paid by the hour” or by piece work or “paid by the day”. Salaried employees are not excluded from coverage by the MW Act because of the description of their remuneration as being on an annual basis.*

[54] Section 11 B (2) of the Minimum Wage Act 1983 sets out:

*(2) The maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week may be fixed at a number greater than 40 if the parties to the agreement agree.*

[55] In *Idea Services Ltd v Dickson*<sup>5</sup>, the full Employment Court found that the Minimum Wages Act 1983 does apply to salaried employees where appropriate circumstances exist.

[56] I determine that Mr Pretorius is not time barred from pursuing a claim for unpaid wages in excess of 40 per week where these have arisen after 3 March 2008.

#### **Costs**

[57] Costs are reserved pending the final determination of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>5</sup> [2011] 2 NZLR 522