

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 349
5443029

BETWEEN VINCENT TAYLOR
 Applicant

A N D DBUILT CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in Person
 Dion Henare, Respondent Director

Investigation Meeting: 13 August 2014 at Hamilton

Submissions Received: Oral submissions 13 August 2014 from the Applicant
 Oral submissions 13 August 2014 from the Respondent

Date of Determination: 26 August 2014

DETERMINATION OF THE AUTHORITY

- A. The application for wage arrears is dismissed.**
- B. As both parties were self-represented, there shall be no order as to costs.**

Employment relationship problem

[1] Vincent Taylor seeks payment of net wage arrears of \$2,651.26 including holiday pay. D Built Construction Limited (the company) disputes any wages are owed. In particular it disputes the applicant's time sheets and hours claimed for refurbishment work on the Tirau Information Centre.

The facts leading to the dispute

[2] Mr Taylor was employed as a project manager by the company on or about 24 April 2013. There was no written employment agreement.

[3] Mr Taylor received daily instructions from Dion Henare, the company's director. He kept a record of his daily tasks in his personal diary. Mr Taylor would subsequently email Mr Henare the hours he had completed each week. No breakdown of the hours in terms of jobs or activities was provided.

[4] Between 24 April and 21 May, the applicant's hours worked were 25 to 27 hours per week.

[5] On 23 May 2013, Mr Taylor emailed Mr Henare about his hours of work and payment of a retention fee of equivalent to a minimum of 24 hours per week for being placed 'on standby'. He sought 'clarity' about these arrangements.

[6] Between 22 May and 18 June 2013 the applicant's hours were reduced to 16 hours.

[7] On 18 June 2013, Mr Taylor emailed his hours stating:

Vince 16 should be minimum retention of 24 hr.

[8] On 21 June 2013 Mr Henare replied by email disputing payment of a 24 hour per week retention fee:

... I should pay 24 hour minimum retention you say? What are your thoughts that support this bud? So does that also mean that when you work over 24 hours per week, like you should have been I should've only paid for 24?

[9] By 2 July 2013 the applicant's hours had reduced to 2 hours per week. Mr Henare emailed Mr Taylor the same day stating:

Sorry I've not seen you. You'll be paid 24 hours again as per last week.

[10] On 3 July 2013 the applicant started work on the Tirau Information Centre Refurbishment project (Tirau Project). Another employee, Enos Vanderputten, also started work on the Tirau Project and keep a daily work log of all employee's including the applicant's work hours.

[11] On or about 11 July 2013 a stopwork notice was issued for the Tirau Project. The company gave an instruction not to stay on the job if the employee was not

working. At the time the only persons allowed to be on site were the subcontracting plumbers.

[12] Between 11 and 23 July 2013 the applicant continued going to work on the Tirau Project.

[13] On 23 July 2013 the company issued a further instruction to the applicant to stop work. Between 24 to 30 July no work was offered.

[14] On 30 July 2013, the applicant emailed advising his hours had reduced to nil. Mr Henare replied saying:

I'm paying you 24 for last and 24 for this week. I will get it back when the job finally takes off. I've had no end of stress over it. Come see me tomorrow if you can out Arapuni. Say 10am and I give you a small project to carry on with. By your email you obviously understand what is happening now, so that's great.

[15] On 31 July and 1 August 2013 the applicant was given work totalling 9 hours at most. No work was given between 2 to 6 August 2013.

[16] On 6 August 2013, the applicant emailed Mr Henare stating:

Also we have a shortfall of 25 hours to balance out.

[17] Mr Henare replied on 7 August 2013 stating:

No prob we get money sorted.

[18] Between 7 and 15 August 2013 no work was given. The applicant emailed Mr Henare stating his hours had reduced to nil.

[19] On or about 16 August 2013 work resumed on the Tirau Project.

[20] On 20 August 2013, Mr Taylor emailed Mr Henare stating:

16 hours Tirau Info Centre.

[21] On 27 August 2013 Mr Henare emailed the applicant seeking time sheets setting out the jobs and hours done by Mr Taylor. Mr Taylor's emails about his hours for the weeks ending 27 August 2013 became more detailed, recording the job, hours worked and activities.

[22] On 16 September 2013, Mr Henare was unhappy with the time sheets sent in by Mr Taylor recording his hours stating:

That's not a daily time/job sheet? I sent them to you guys remember. I want to know exactly where he was and what he was doing for the hours claimed. He was meant to be recording daily and this has never happened.

[23] On 16 September 2013 Mr Taylor's wife completed job sheets based upon his personal diary for the period of his employment.

[24] From 17 September 2013 onwards, the company did not offer Mr Taylor any further work.

[25] The matter did not resolve at mediation and is now before me for determination.

Issues

[26] There is one issue before the Authority namely, what if any wage arrears are owed to Mr Taylor from his employment from 24 April to 24 September 2013?

[27] Mr Taylor produced his personal diary showing the hours worked, job sheets summarising that information and a table showing the hours worked, gross pay, PAYE, net amount to be paid and net amount actually paid. The company produced emails between the parties and the daily work log kept by Enos Vanderputten for the refurbishment of the Tirau Information Centre. It is Mr Taylor's hours pertaining to the refurbishment of the Tirau Information Centre (Tirau Project) that are at issue, especially where they vary from Mr Vanderputten's daily work log.

[28] No wage and time record have been produced for hearing. There was no written employment agreement or job description. In order to determine the wages owed (if any) requires firstly a determination about Mr Taylor's terms and conditions of employment.

The Employment Agreement

[29] The employment agreement between the parties was concluded orally on or about 24 April 2013. Mr Taylor's Diary note dated 24 April 2013 set out his understanding of the contract:

... Project Manager DBuilt Constr (sic)
Employment contract will be in tomorrow
Stated worksheets don't apply to me as Im part of admin N.B put on
contract tomorrow
I don't want you on the tools \$27 pw

[30] At hearing Mr Taylor raised for the first time a dispute about his gross hourly wage. He alleged he had been employed at the rate of \$27 per hour as per his Diary note. The company submitted he had been employed at \$26.50 per hour and this was the rate he had been paid throughout the contract. It was also the amount Mr Taylor used to calculate his wage arrears claims. It is possible Mr Taylor recorded the wrong hourly rate in his Diary. There are other matters within his Diary which were incorrectly recorded referred to below. The late raising of the hourly rate at hearing does not assist his case. I determine the agreed hourly rate was \$26.50.

[31] There is a dispute about his hours of work. The applicant says he was a permanent employee and was offered two weeks of 24 hours per week, increasing to 40 hours per week. His above Diary note does not refer to his hours of work at all.

[32] Mr Taylor was employed for a little over a 5 ½ months. Both parties were aware at the time of his employment work was dependent upon the securing of future work such as the Tirau Project.

[33] Mr Taylor received daily instructions from Mr Henare setting out his tasks and kept a note of his hours worked in his diary. He then emailed Mr Henare his hours of work each week. Those hours varied from week to week indicating there was no certainty about the amount of work available. There were periods of days and weeks where he was offered no work at all. On those occasions he sent an email noting his hours worked were nil. Mr Taylor was also looking for other employment.¹

[34] It appears Mr Taylor later raised the possibility of payment of a retainer of 24 hours per week by email dated 23 May 2013. At the time his hours were in excess of 24 but well below 40 per week. The email appears prompted by his anticipation his hours may drop below 24 hours at some stage, which they subsequently did in June. Emails from Mr Henare dated 2 and 30 July appear to agree to payment of 24 hours

¹ Diary note 11 July 2013

for the weeks ended 2, 23 and 30 July but no payment was made. This may have been due to concerns about Mr Taylor's work at the Tirau Project following the issue of a stop work notice on 11 July 2013. Mr Taylor took no issue about non-payment at the time. There does not appear to have been any concluded agreement about a minimum retention fee.

[35] The above evidence indicates Mr Taylor may have been a casual employee with no set hours of work. The question of whether or not a person has been employed as a casual employee depends on the mutuality of the intention at the outset of the employment and the nature of the work including its regularity, its hours and the obligations imposed on the employee.²

[36] There is no statutory definition of a casual employee. The Authority can assess whether employment is casual against the following characteristics:³

- a) engagement for short periods of time for specific purposes;
- b) a lack of regular work pattern or expectation of ongoing employment;
- c) employment is dependent on the availability of work demands;
- d) no guarantee of work from one week to the next;
- e) employment as and when needed;
- f) the lack of an obligation on the employer to offer employment, or on the employee to accept any other engagement; and
- g) employees are only engaged for the specific term of each period of employment.

[37] The evidence shows Mr Taylor was engaged for a short period of time. There was no regular work pattern and his employment was dependent upon work demand without any guarantee of work from week to week. There also appeared to be a lack of obligation on the company to offer work. Mr Taylor was at times considering alternative employment to the work offered by the company. I determine Mr Taylor was a casual employee.

² See above at [44]

³ *Lee v Minor Developments Ltd t/a Before Six Childcare Centre* EmpC Auckland AC52/08, 23 December 2008 at [43]

What wage arrears (if any) is Mr Taylor owed wages for work on the Tirau Project?

[38] The refurbishment of the Tirau Information Centre (Tirau Project) started in 8 July 2013. On 11 July 2013 a stop work notice was issued by the local Council. Work did not resume on the Tirau Project until 16 August 2013. Mr Taylor's wage arrears claim for the Tirau Project between 10 and 23 July 2013 totals 69 hours. The company disputes 60 hours of his claims because it pertains to work done after the issue of the stopwork notice.

[39] There is a dispute about what Mr Taylor was instructed to do on the Tirau Project. He says his job included overseeing sub-contractors, taking care of inspections and health and safety issues. The company disputes this was his work at the Tirau Project. The majority of Mr Taylor's work between 11 and 23 July 2013 involved overseeing contractors and doing work requested by the contractors.

[40] Mr Taylor must have been aware the stopwork notice was issued on 11 July 2013. The stopwork notice required all work on the site to cease. Mr Henare said he obtained permission for the subcontracting plumbers to complete work they had started.

[41] There was no direct instruction from Mr Henare for Mr Taylor to remain on site overseeing the subcontracting plumbers. Mr Taylor relied upon a general instruction to remain on site. This was at odds with another direct instruction he had received from Mr Henare during this period of "*don't stay if you're not working*". It is likely he was given this direction following the stopwork notice.

[42] Mr Vanderputten's Tirau daily work log (Daily log) has no record of Mr Taylor's time spent at the site on 11 July, although the company accepts he was there. Mr Vanderputten and another worker record 1/2 hour each to cleanup and secure the site. No further work on the Tirau Project occurred until the stopwork notice had been lifted on 16 August 2013.

[43] Mr Taylor's Diary and jobsheet for 11 July recorded 9 hour's work including "*clean up*" at 8.00 am to 10 am, "*concrete cutting*" at 10 to 11 am, "*me clean walls*" at 11am to 12 pm. There is no record of what he did between 12 pm and 4.30 pm.

[44] The concrete cutting should not have occurred given the stop work notice. If Mr Taylor was doing concrete cutting work for the sub-contractors, this is not work

directed by the company. More particularly he was not supposed to be “*on the tools*” according to his above Diary note of 24 April 2013. The necessity to clean the walls is questionable. It again appears to be work for the sub-contractors. There is no record of what he did between 12 pm and 4.30 pm despite the detailed record of what he did earlier in the day. There seems little reason to spend 4 ½ hours overseeing sub-contractors. This was not part of his job recorded in his above Diary note. He was “*admin*” not the site foreperson for the Tirau Project. At best there are two hours on cleanup and securing the site which is attributable to work for the company, despite this being work “*on the tools*”. The remaining time does not appear to be for or directed by the company at all.

[45] Mr Taylor’s Diary and job sheet records him assisting the plumber for 9 hours on 12 July 2013. Similarly for 15 to 22 July 2013, all of the recorded work appears to be for the subcontracting plumbers not the company. There was no written instruction for him to assist the plumber from the company.

[46] When examined about the work he did during this period, Mr Taylor confirmed the work he did was at the request of the subcontractors. This was not how he received his daily work instructions. He was not working for subcontractors. He worked for the company.

[47] Despite the stopwork notice, the applicant’s hours increased. The week prior to the stopwork notice his work hours were 20 hours for the week. Immediately following the stopwork notice being issued, his hours increased to 45 hours, 27 hours being undertaken after the stopwork notice had issued on 11 July.

[48] It seems unusual for Mr Taylor to be paid to remain on site overseeing subcontracting work for 9 hours per day. The pattern of his work set out in his Diary suggests he did not do this previously. There was no instruction from the company to remain on site to oversee the sub-contractors. This appears to have occurred at Mr Taylor’s own initiative.

[49] I do not accept there was a need for the applicant to work at the Tirau Project after the stopwork notice was issued on 11 July 2013. His claims for work during this period total 60 hours.⁴ Two hours for the work cleaning up and securing the site on

⁴

11 July is appropriate but there is insufficient evidence to prove the company's liability for the additional 58 hours claimed.

[50] Mr Taylor also claimed payment for lunch breaks of 30 minutes each day when he worked a six hour or longer day in Tirau. He accepted he took a lunch break because he lived nearby. Only his last jobsheet for the Tirau Project for the week ended 17 September 2013 deducted a 30 minute lunch break from his hours claimed. From my perusal of his jobsheets and Diary, there are 17 days where no lunch break was deducted resulting in an additional 8.5 hours claimed.⁵

[51] There was some divergence between the hours recorded in Mr Taylor's job sheet and the hours recorded in his diary. Mr Taylor also conceded at hearing he started at 8 am checking emails not 7.30 am as recorded in his Diary on 2 May 2013. Given that period of time was not the subject of this dispute, I decline to make further deductions.

[52] Mr Taylor accepted on 10 July 2013 his diary records he worked 8 hours worked but his jobsheet claims 9 hours. Mr Taylor conceded the diary was correct. One hour is to be deducted from the amounts owed.

[53] His last timesheet for the week ended 17 September 2013 incorrectly calculates 7 hours worked on 11 September. It is in fact 6 hours. A further 1 hour deduction is required.

[54] Mr Taylor gave evidence he spent 1 to 1 ½ hours checking his emails in the morning. The emails produced did not seem to warrant this amount of time. Mr Taylor explained he did other jobs during that period including phoning suppliers, contractors etc about jobs. Given the lack of evidence supporting his claims the hours sought appear excessive for the Tirau Project. From the jobsheets it appears Mr Vanderputten took over as Site Foreman from Mr Taylor on 28 August 2013. This should have stopped the necessity for Mr Taylor to undertake any business administration during this period. It appears more likely 30 minutes business administration per day was required. It is difficult to quantify the amount of time claimed in excess for the Tirau Project. From his evidence it appears more likely he

⁴ Jobsheet for week ended 16 July 2013 claiming 36 hours for the period 11 to 16 July and jobsheet for week ended 23 July 2013 claiming 24 hours.

⁵ See jobsheets for period 8-10 July, 16, 20, 21-23, 26-27, 28-30 August, 2-5 September where the applicant has worked 17 days of 6 hours or more in Tirau and has not accounted for a 30 minute lunch break.

spent 1 hour upon business administration during the Tirau Project on the full days claimed then the partial days claimed. There were 17 full days claimed on the Tirau Project. Accordingly a reduction of 8.5 hours is appropriate.

[55] The applicant claims to have worked 477 hours. I have determined this should be reduced by 77 hours. This leaves a wages claim of 400 hours. His gross wages payable would have been \$10,600.00 and PAYE \$2,905.76. This equates to a net wage of \$7,694.24.

[56] Holiday pay shall be calculated at 8% of \$10,600.00 totalling \$848.00. The total amount of wages he should have received at the end of his employment were \$8,542.24. Mr Taylor accepts he received wages of \$8,706.95.

[57] Given he has received money in excess of the amounts of wages owed, there are no orders to be made requiring payment of wage arrears. In the circumstances the application is dismissed.

[58] As both parties were self-represented, there shall be no order as to costs.

T G Tetitaha
Member of the Employment Relations Authority