

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2017] NZERA Wellington 47  
5617059

BETWEEN            TONY BRAD VICKERS  
                                 Applicant  
  
AND                    BURGESS CROWLEY CIVIL  
                                 LIMITED  
                                 Respondent

Member of Authority:    M. B. Loftus  
  
Representatives:        Tony Vickers on own behalf  
                                 Troy Wano, Counsel for Respondent  
  
Investigation Meeting:    9 March 2017 at New Plymouth  
  
Submissions Received:    At the investigation meeting  
  
Determination:            7 June 2017

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Tony Vickers, claims he was unjustifiably dismissed by the respondent, Burgess Crowley Civil Limited (BCCL), on or about 6 January 2016. Mr Vickers also claims he was underpaid by \$2 an hour for the entire period of his employment.

[2]     The respondent, BCCL, denies Mr Vickers was dismissed. It says he chose not to return after a prolonged absence on accident compensation. BCCL also denies Mr Vickers was underpaid.

**Identity of respondent**

[3] The application, as initially lodged, identified the respondent as Owen Burgess/Burgess Crowley Civil Limited. This was discussed during a telephone conference and the parties agreed the respondent was Burgess Crowley Civil Limited. That agreement was confirmed at the investigation meeting and the citation changed accordingly.

**Background**

[4] Mr Vickers was employed by BCCL as a drain layer. He commenced employment on 22 September 2014 having already signed a written individual employment agreement on 16 September 2014. The agreement states Mr Vickers shall be paid an hourly rate of \$20 with this being recorded in a one page schedule to the agreement.

[5] Mr Vickers takes issue with this. He says he was promised \$22 an hour during his interview and when he signed the agreement the hourly rate had not been entered.

[6] In his written statement Mr Vickers says some six weeks passed before he received his first pay slip and it was then he noticed he was being paid \$20 an hour. He says he phoned Owen Burgess, a director and co-owner of BCCL, that night and was told Mr Burgess *would look into it*. Mr Vickers says he again raised the issue about a fortnight later and was then told Mr Burgess had been busy and yet to address the issue. Mr Vickers says the two again discussed the issue a week or so later and it was then he was told \$20 was correct as he was not a qualified drain layer.

[7] BCCL says \$20 per hour is the starting rate for all unqualified drain layers and there was no deviation from that practice here. Mr Burgess is adamant that is what he offered though accepts he also advised the rate was subject to review after a period of employment and an increase to \$22 an hour was possible.

[8] Mr Burgess also accepts the hourly rate was not filled in when Mr Vickers signed the agreement. He says he gave Mr Vickers a copy of BCCL's standard agreement to consider but the schedule was not completed. Aside from the hourly rate, the *place of work* and start date entries were not completed though Mr Burgess says these items were all discussed during the interview.

[9] Notwithstanding the omissions Mr Vickers signed the document and returned it. It was only then Mrs Burgess, who performs an administrative function at BCCL, noticed the omissions. It was she who entered the rate having checked with Mr Burgess.

[10] Mr Burgess denies Mr Vickers raised the hourly rate with him and says he was unaware Mr Vickers was dissatisfied with it before January 2016.

[11] On 10 May 2015 Mr Vickers suffered a non-work related injury that would see him absent from work for a considerable time. Indeed, it would not be until Christmas 2015 that he claims he obtained a clearance to return to work. Mr Vickers complains that over the intervening months he made various attempts to contact Mr Burgess about a return but his approaches went unanswered. He complains approaches from his ACC manager also went unanswered and supports that claim with a short memo from ACC which refers to two specific approaches.

[12] Mr Burgess denies being approached by Mr Vickers and contrary to ACC's memo says he had three discussions with them and was well aware Mr Vickers would be absent for an extended period. He also says he conversed with an occupational therapist toward the end of Mr Vickers absence. Irrespective of which is correct the issue need not be determined as it is clear Mr Vickers did not have a clearance to return to work prior to 23 December 2015. That was the day upon which he contacted BCCL to advise he had received the clearance though it now appears that is incorrect.

[13] Mr Vickers advised BCCL of the clearance to return via a text sent to Mr Burgess. By that time BCCL had closed for its Christmas shutdown and the text shows Mr Vickers was aware of that having spoken to a work colleague the previous day. The shutdown was due to end on 5 January 2016.

[14] The text went on to say

acc are paying me up to next week and have informed that I eligible for holiday pay, if you or Viv could contact me asap as I would like to have two weeks holiday payed out to cover the 2 weeks till I receive my first full pay. Looking forward to being back at work. Cheers,  
Tony

[15] Mr Vickers claims Mr Burgess responded by phone and advised Mr Vickers no longer had a job as he had been replaced. Mr Burgess denies saying that. He claims he advised he had earlier said there could be no guarantees. He would have to

get the clearance and find out what was available by checking with his supervisors. That is reflected in a text he sent later that day. Also noted in a series of texts which flowed that day is the fact Mr Vickers had already sought legal advice. When asked about this in the investigation he confirmed he had done so due to *rumours* he had heard. He did not say what the rumours were or where they came from though his evidence indicates he was questioning if he could be dismissed while on ACC.

[16] As already said there was a flow of texts that day with the bulk coming from Mr Vickers. Mr Burgess attributes this to a wish he avoid inflaming the situation given increasingly belligerent texts from Mr Vickers.

[17] On the morning of 6 January Mr Vickers sent Mr Burgess a text reading

We can have a meeting to talk about my pay you owe me my holiday pay the fact ya fired me if you wood like but I will be recording the meeting

[18] Mr Crowley responded he was happy to have a meeting later that day and suggested any time after 1pm. More texts followed during which a venue (BCCL's office) was agreed and Mr Vickers sought and was promised his wage records.

[19] About the meeting Mr Burgess Crowley says:

At this meeting Mr Vickers raised his concern that he should have been paid at the rate of \$22 an hour. That was I believe the first time he had ever raised an issue with [me] about the pay rate. He had been paid throughout the period from September 2014 and May 2015 and never once questioned the \$20 an hour pay rate. I tried to explain to him that I had never agreed to that \$22 rate and would not be paying that rate when he returned to work. It soon became clear to me however at this meeting that he was simply not going to listen to anything I had to say.

I also made it clear to Mr Vickers at this meeting that he was welcome to return to work. There was definitely work for him at that time. However, he did not appear interested at all in returning to work and said he was too upset because I would not agree to the \$22 per hour rate. Before he walked out of that meeting I again made it clear to him his job was there for him if he still wanted to return.

[20] Mr Crowley followed the meeting with a text advising Mr Vickers the offer he return to work on his existing rate remained open.

[21] Mr Vickers' response was *no thanks*. He advised he was going to a lawyer and intended pursuing a claim of *unlawful* dismissal and would be seeking arrears of \$2 an hour for all hours worked. There was also the issue of holiday pay. Mr Vickers

sent a further ten texts over the next 24-or-so hours but Mr Crowley chose not to respond.

[22] Mr Vickers has not returned since and the issues have not been resolved. Indeed there are accusations Mr Vickers has made abusive phone calls to Mr Burgess' daughter and there is a text he sent to another of BCCL's employees. It includes:

Owen try's to give my job back and I trun it down coss I'm taken him to court as he owes my 8g but I'm going to get 20g + he gona b paying for his lawyer and mine lol

### **Issues**

[23] There are three issues to be determined. They are:

- a. Should Mr Vickers have been paid at \$22 an hour as opposed to the \$20 he received;
- b. Was Mr Vickers unjustifiably dismissed; and
- c. Is Mr Vickers owed holiday pay?

### **Determination**

[24] The first issue, at least chronologically, is that of Mr Vickers hourly rate. He says he was promised \$22 an hour during the interview while Mr Burgess says the offer was \$20 an hour.

[25] On this I prefer Mr Burgess' evidence. I do so for four reasons.

[26] First Mr Vickers answers during the investigation were often contradictory and went so far as to undermine assertions central to his claim. One example is the assertion he was cleared to return to work on 23 December while another relates to his reaction to the hourly rate.

[27] Indeed some of his answers raise serious questions about his credibility with the prime example being his assertion he had a clearance to return to work on 23 December. This is especially so as it is that, and Mr Burgess' alleged response, which underpin his prime claim of unjustified dismissal.

[28] Mr Vickers was unable to produce evidence of the clearance. Not only that there is an ACC certificate dated 14 December 2015 which certified Mr Vickers

remained unfit for work until 31 January 2016. BCCL was not aware of the certificates existence until after the grievance was raised but it appears to provide confirmation Mr Vickers was incapable of returning. As Mr Burgess said the certificate would have raised concerns had BCCL known of it and perhaps the events of early January would not have occurred had Mr Vickers been honest about it at the time.

[29] Here I also note the certificate renders nugatory the complaints Mr Vickers voiced at the investigation about Mr Burgess' failure to respond to alleged requests he be allowed to return at an earlier date.

[30] When questioned about the ACC certificate, and notwithstanding the fact it was he who provided it when preparing for this investigation, he continued to assert the Doctor had given a verbal clearance. When pushed he eventually said he wanted to return and had been trying for months before accepting he could not prove he had a clearance.

[31] Mr Vickers also displayed an unfortunate inability to understand what he was being told or asked at the investigation. He showed a propensity when there was the slightest possibility of ambiguity to interpret something in the way most beneficial to him and was then incapable of understanding any attempt to correct any misapprehension. Add to that an admission he likes to make a point or pursue a goal and is *willing to go all the way to do so*. It is very easy to conclude, having observed Mr Vickers and considered his answers, that he incorrectly interpreted advice of a possible review and future increase as an offer of same from the outset.

[32] Secondly there were his answers to questions about challenging the hourly rate as he originally claimed he did on at three occasions ([6] above). Various answers given in short succession contradicted both each other and his written assertions in this regard. When asked about the approaches he initially said his first approach was about a fortnight after receiving his first pay slip. That according to his written evidence was the second. He then said that he did nothing at the time as he didn't realise he could challenge his pay and did not do so until after he received legal advice at the end of the year. Indeed he said it was only when he went to a lawyer toward the end of the year about whether or not he could be dismissed while on ACC that he realised there might be a possibility he could challenge the hourly rate.

[33] He later repeated the answer he did nothing and said simply *took it on the chin*. A final answer was while he raised the issue three times all were after his *dismissal*.

[34] The bulk of Mr Vickers answers indicate he accepted the rate and did not challenge it (at least at the time).

[35] Third there is the fact Mr Burgess' evidence remained consistent. It was not marred by the inconsistencies of Mr Vickers' and supported by the evidence there was, at the time, only one starting rate for an unqualified drain layer which was \$20 an hour.

[36] Finally there is the agreement. While it is of little value as the hourly rate was filled in by Mrs Burgess after Mr Vickers signed at least the document is relatively contemporaneous. The entry was also made after a discussion between Mr and Mrs Burgess when the interview was fresh in Mr Burgess' mind.

[37] I conclude the originally agreed hourly rate was \$20 (and if not it became the accepted rate by virtue of the behaviour of the parties). Mr Vickers wage claim therefore fails.

[38] Turning to the alleged dismissal. A dismissal is a sending away initiated by the actions or words of the employer. Mr Vickers says he was told he was dismissed on 23 December. Mr Burgess says no – Mr Vickers was told that as there had been no guarantees about the return he would need the clearance and have to check what was available. If correct that falls well short of the express dismissal Mr Vickers alleges.

[39] Again I prefer Mr Burgess' evidence. First I have commented about Mr Vickers' credibility and his ability to correctly comprehend what he was being told. Second the text Mr Burgess sent on 23 December is consistent with his recollection there had been no guarantees and he would check what was available.

[40] To that I add Mr Vickers oral evidence the next contact after the texts of 23 December was a phone call from Mr Burgess saying he had checked, there was work and Mr Vickers was free to return. That action is again consistent with Mr Burgess' recollection of what was said during the phone call of 23 December and it was that approach which Mr Vickers says led to the meeting of 6 January 2016.

[41] There is then Mr Vickers admission Mr Burgess made it very clear during the meeting of 6 January there was work for Mr Vickers but he, Mr Vickers, replied he would not return unless Mr Burgess paid an additional \$2 an hour for each hour worked since commencement and wrote a new contract which prohibited any dismissal for the next six months. He says Mr Burgess rejected that and simply repeated its \$20 an hour – take it or leave it. Mr Burgess says he chose to leave it.

[42] My conclusion the parties originally agreed \$20 an hour means this was not a dismissal. It was an attempt to gain an advantage by Mr Vickers and a decision to depart when his attempts to do so were met with rejection.

[43] Finally Mr Vickers expresses a view in his texts of 7 January 2016 that advice of the dismissal was conveyed in Mr Burgess' text of 23 December. It says no such thing.

[44] For the above reasons I conclude Mr Vickers has failed to establish he was dismissed.

[45] Lastly there is the holiday pay issue. The bulk of Mr Vickers holidays were paid at the end of May 2015 after he had commenced ACC. It would appear a residual issues arose due to BCCL's failure to understand the entitlement continued to accrue while Mr Vickers was on ACC. The parties now advice that after continuing discussion this matter has been resolved. It need be considered no further.

[46] For these reasons Mr Vickers claims fail. They are dismissed and costs are reserved.

M B Loftus  
Member of the Employment Relations Authority