

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 213
5608038

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| BETWEEN | NOEL WYATT Applicant |
| AND | SUNDRA TRANSPORT LIMITED First Respondent |
| AND | HILLTECH LIMITED Second Respondent |

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Prem Gounder, Director of the First and Second Respondent

Investigation Meeting: 19 May 2016

Determination: 28 June 2016

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Hilltech Ltd is to pay Noel Wyatt:**
- (i) the sum of \$549.99 gross being, \$509.25 for hours worked and \$40.74 holiday pay; and**
 - (ii) \$71.56 being the filing fee for this proceeding.**

Employment relationship problem

[1] Noel Wyatt claims that he is owed for time worked for the First or Second Respondent as a linehaul truck driver.

[2] Mr Wyatt is an experienced truck driver and applied for a driving job in a Trade Me advertisement. He got in touch with Prem Gounder, director of the Respondent companies, who told him to call his brother Sivan Gounder, who is a senior driver for the business. Mr S Gounder came to Mr Wyatt's home to meet and discuss the job. As a result it was agreed that Mr Wyatt would undertake, at least, a drive for the Respondents. The parties disagree about whether this was a trial or the start of permanent employment.

[3] Mr Wyatt's claim is for the hours which he worked and the costs of recovery of that money. He does not make any claim regarding a dismissal or personal grievance. He saw the parting of the ways as a mutual agreement.

[4] An investigation meeting was held on 19 May 2016 and Mr Wyatt, Mr P Gounder and Mr S Gounder gave evidence. The Respondents wanted to seek out CCTV camera footage which they believed was relevant to Mr Wyatt's claim. It was uncertain whether that footage would still be retained by a third party organisation. There was no response from the Respondents in the time set by the Authority to provide information about the availability of any footage. Despite a reminder being emailed, no response was received and so I am proceeding to issue this determination.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

- [6] The issues for investigation and determination are:
- i. Is Mr Wyatt entitled to payment for the hours undertaken in October 2015?
 - ii. If so, is that money owed by Sundra Transport Limited (Sundra) or Hilltech Limited (Hilltech)?

Entitlement to payment

[7] The parties agree that the nature of the job (role, route and hours) was clear. The Trade Me ad referred to pay of up to \$60,000 per annum, plus other benefits. However, there was no verbal discussion about pay rate. Both Mr Wyatt and Mr S Gounder said nothing about money was discussed at their meeting at Mr Wyatt's home.

[8] There was a dispute between the two men as to some of what was said at that meeting. Mr Wyatt says that Mr S Gounder offered him the job, saying "*can you start work on Sunday?*" Mr Wyatt's evidence was that he was not told that there was a trial or that there was another part to the recruitment process. He saw Mr S Gounder's presence at the first drive as in the nature of an induction, to show Mr Wyatt the route and introduce him to people.

[9] Mr S Gounder's evidence was that he specified at the meeting at Mr Wyatt's home, that the drive starting on the following Sunday was a trial. He and his brother gave evidence that Mr P Gounder was in charge of the business. Mr S Gounder would check drivers, and if he approved them, Mr P Gounder would proceed with the rest of the recruitment process. This would include the provision of a written employment agreement. The brothers gave evidence of the companies' emphasis in recent times on a thorough trial to ensure that drivers were safe to drive on the actual route/s of the job they were applying for.

[10] There was evidence provided regarding the quality of Mr Wyatt's driving and the quality of the Respondents' truck, but I do not consider that either of those issues are ultimately relevant to my decision in this case.

[11] It is agreed that Mr Wyatt and Mr S Gounder completed the drive to Gisborne, Hastings and then back to Auckland. The trip started late in the evening of 11 October 2015 and was completed in the morning of 13 October 2015. Mr Wyatt undertook some of the driving and Mr S Gounder completed the remainder. A compulsory rest period was taken in Hastings, with Mr Wyatt sleeping in premises provided by Toll, the company the transport was being undertaken for. For most of the trip the truck was carrying goods.

[12] An induction session at Toll in Auckland was arranged for Mr Wyatt on 13 October 2015 returned, however, as the truck only arrived back in the early morning, Mr S Gounder changed the induction time.

[13] A second drive was arranged on the same route. This was at least partially on the recommendation of a local Toll manager to ensure that Mr Wyatt knew where the depots were etcetera. However, Mr S Gounder also gave evidence that he would do as many trips (as needed) until he was confident and sure that the driver was safe on the road. At an early stage of the second drive Mr S Gounder advised Mr Wyatt that Mr Wyatt was not going to complete that drive.

[14] Mr Wyatt asked Mr S Gounder about payment for the hours he had done. Mr S Gounder said that he would refer that matter to his brother. Mr Wyatt was dropped at a petrol station and a lift back to the trip's start point was arranged for him. He thought that the person who picked him up was another Gounder brother. However, Mr S Gounder and Mr P Gounder say that the driver was a friend and not someone who worked for the Respondents. Mr Wyatt said that that person offered him \$50 for the driving work he had done for the Respondents, which he refused as inadequate. Mr P Gounder did not know why that money was offered, despite Mr S Gounder having been informed of the offer by way of Mr Wyatt's text the morning after the second drive.

[15] The work time was recorded in a driving log book which Mr Wyatt had. Although this was not the Respondents' official log book, Mr S Gounder effectively agreed with the hours recorded by Mr Wyatt.

[16] Mr Wyatt claimed for 24 hours and 15 minutes of work time, being 20 hours and 15 minutes for the first drive and four for the second. He claims at \$21 per hour gross, totalling \$509.25. He also claims 8% on that sum as holiday pay under the Holidays Act 2003. I will deal with his claim for the time involved in pursuing this matter, in the costs section below.

[17] Mr Wyatt gave evidence regarding his recent experience of the hourly pay rates for long distance drivers. The advertisement for the position here referred to up to \$60,000 per annum. Mr P Gounder gave evidence that less experienced drivers could be offered less than \$60,000. I am satisfied that the rate claimed by Mr Wyatt is

within the range which the Respondents paid their drivers, as well as within the industry norms.

[18] Mr Wyatt was partially paid in kind. In Hastings he and Mr S Gounder had a meal and a drink at a shop run by a member of the Gounders' extended family. Mr Wyatt received the food and drink free of charge. The evidence was that the Respondents' business undertook tasks for the shop and in return, the shop provided food for the business' drivers.

[19] Mr P Gounder's position was that as this was a trial period it was not paid. There was no evidence that Mr Wyatt was told that before he undertook the drives. Mr P Gounder said that since this claim by Mr Wyatt, the Respondents are looking at putting in place something in writing regarding non-payment for trial periods.

[20] In *Salad Bowl Ltd v Howe-Thornley*¹ Chief Judge Colgan identified a distinction between events which would not usually lead to an expectation of payment, such as attendance at an interview and observation of a workplace, and those where "work" may be engaged in and payment expected. In the latter situation the employer gains an economic, business or operational benefit from the employee's activities. Although the benefit may not have been optimal, work was being performed and contributing to the business.

[21] In the present case, there is a dispute as to whether a permanent employment relationship was agreed to. However, even on the basis of the Respondents' evidence that this was a trial, I am satisfied that an employment relationship was established. Mr Wyatt expected to be rewarded monetarily for the performance of the almost 25 hour work trial, and he did receive a non-monetary "reward" for the work performed, in terms of a free meal and drink during the trial. There was economic benefit to the Respondents in the sense that Mr Wyatt undertook driving work, and had involvement in steps for the unloading of freight.

[22] Therefore I find that Mr Wyatt is owed \$509.25 gross for the time worked, and \$40.74 being 8% of that figure for annual holiday pay.

¹ [2013] NZEmpC 152

Sundra or Hilltech?

[23] The next issue is whether the money was owed to Mr Wyatt by Sundra or Hilltech?

[24] Mr Wyatt was unable to specify who he thought he had been working for and it was apparent that he had not given it much thought until it was evident that payment was not going to be forthcoming and he was preparing for this case.

[25] Contrasting this, the director of both companies, Mr P Gounder's evidence was that all employees of the driving business are employed by Hilltech. He produced a sample draft employment agreement for another employee from a few months before Mr Wyatt's involvement with the business. That agreement specified Hilltech as the employer. A letter from the Inland Revenue Department in August 2015 confirmed receipt of a sum of tax from Hilltech.

[26] In addition, Mr S Gounder gave evidence that as the Senior HT Truck Driver, he was employed by Hilltech. He said that his employment agreement was with Hilltech and he was paid his salary by Hilltech.

[27] Having considered the evidence I conclude that Mr Wyatt was employed by Hilltech and that it is responsible for the money owing to Mr Wyatt.

Costs

[28] Mr Wyatt claimed for the time he had spent trying to obtain payment for his driving time. This included his time at mediation and his time at the Authority.

[29] I accept that Mr Wyatt put the Respondent companies on early notice that he was intending to seek payment for this time. However, in *Murphy and Routhan t/a Enzo's Pizza v van Beek*² the Employment Court set out the general rule that a party who is not represented by law practitioners cannot recover anything for that party's time and trouble in attending to litigation.

² [1998] 2 ERNZ 607

[30] In the event that Mr Wyatt had been able to establish that his time was generally being charged out, and he had lost that opportunity because of pursuing this case, then I may have awarded him some costs for his time. However, his evidence was that he was currently employed for wages. The investigation meeting was held after Mr Wyatt's work hours.

[31] I order that Hilltech pay Mr Wyatt \$71.56 being the filing fee for this proceeding.

Nicola Craig

Member of the Employment Relations Authority