

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 161
5609480

BETWEEN EDWARD GATES
 Applicant

AND EVERLAST DESIGN LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Mr Gates, the Applicant
 Dillon Lewis, representative for the Respondent

Investigation meeting: 28 June 2016
Submissions: Further evidence and submissions received 5 and 6 July
 2016.

Determination: 20 September 2016

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of this determination, Everlast Design Limited must pay Edward Gates \$1,903.94 gross being the total of final pay and holiday pay.**
- B. Within 28 days of this determination, Everlast Design Limited must pay Edward Gates \$121.56 net being the total for associated costs.**
- C. Within 28 days of this determination, Edward Gates must pay Everlast Design Limited \$327.75 gross.**
- D. It is up to the parties if they wish to offset one amount against the other. I make no such order.**

Employment relationship problem

[1] Edward Gates was dismissed from his role as a draftsman under a valid 90-day trial period provision in his employment agreement. He has not been paid his final pay or holiday pay. He claims unpaid wages and holiday pay of \$1,903.94¹ and the filing fee of \$71.56.

[2] Mr Gates also claims petrol costs of \$50.00 to attend two prearranged mediations which Mr Lewis, Everlast Design Limited's director, had agreed to attend. Mr Gates attended both mediation appointments and drove from Ashburton to Christchurch to do so. However, Mr Lewis did not attend either appointment.

[3] Everlast Design Limited (Everlast) counter-claims from Mr Gates. It says that it had to re-create work that he had done while in its employment. It also says it had to discount its fee to a client because of delay caused in re-creating the work. The initial amount Everlast claimed Mr Gates' actions cost was more than the amount it withheld from Mr Gates. He offered to write off that amount on the basis that he pay Mr Gates' only for a public holiday, which fell in Mr Gates', final fortnight.

[4] In Mr Lewis' final submissions, he claimed that costs to his business were \$2,704.00. He stated that Everlast was not willing to write off any costs it claims Mr Gates caused. Therefore, Everlast asserts it does not owe Mr Gates any money.

[5] Mr Gates acknowledges that he deleted details from two projects (15031 and 15037). He says he did so because Everlast did not have the right to that material as it had originally come out of his own personal 'library' of designs.

[6] Both parties attended an Investigation Meeting in Christchurch on 28 June 2016. Mr Lewis did not bring documentation to support Everlast's claims, although he gave oral evidence. I decided that there may be some merit in Everlast's claims and that it should have one week to provide the supporting documentation that Mr Lewis says he has.

¹ Which is the amount Mr Lewis acknowledges has not been paid to Mr Gates.

[7] I received some documents from Mr Gates at the Investigation Meeting that he had not previously supplied.

[8] I told the parties that I did not consider that Everlast had legal grounds for withholding Mr Gates' pay and that I did not consider Mr Gates had been justified in deleting the material that he had deleted.

[9] During the Investigation Meeting, the parties agreed to undergo a process of facilitated negotiation conducted by another Member of the Authority but ultimately they were unable to reach their own settlement of matters. Therefore, I resumed the meeting.

[10] After the meeting, I issued an email direction that Everlast would have until 5 July 2016 to provide evidence to support its claims and Mr Gates would have until 12 July 2016 to provide a written response. Mr Gates' response was received on 6 July 2016.

Issues

[11] I need to determine whether:

- a. Everlast was entitled to withhold Mr Gates' final pay and holiday pay;
- b. Everlast has a valid claim for the \$500.00 discount it gave its client;
- c. Everlast has a valid claim for work it says Mr Gates did not supply or timesheets it says he falsified;
- d. Mr Gates breached his contract of employment with Everlast when he deleted the "foundation, drain/foundation details, roof cladding/weathering details and wet area details" from the two projects. If so, what damages did Everlast suffer from the breach?
- e. Everlast can recover the cost of Mr Lewis' time in collecting its property from Mr Gates;
- f. Mr Gates is entitled to the costs he has claimed.

Was Everlast entitled to withhold Mr Gates' pay?

[12] The Wages Protection Act 1983 provides that no deductions can be made from an employee's pay without their written consent. Everlast did not have Mr Gates' written consent to withhold his final pay and holiday pay.

[13] Mr Lewis has raised concerns about whether Mr Gates actually worked the hours he has claimed on his timesheets. These concerns do not empower Everlast to ignore the legislation and refuse to pay Mr Gates. Nor are any of the other matters raised by Everlast, legal reasons to withhold Mr Gates' statutory entitlement to his final pay and holiday pay.

[14] Everlast must pay Mr Gates the \$1,903.94 gross that it owes him.

Does Everlast have a valid claim for the \$500.00 discount it gave its client?

[15] Mr Lewis says that he discounted the cost of Job 15037 by \$500.00:

...due to continually pushing back the timeline for submission of their building consent. Although there was no written contract between myself & this client I could tell that there was beginning to be some frustration with me pushing completion out for their job.

[16] It is not a cost that Mr Gates should bear. There is insufficient evidence that Mr Gate's deletion of the design work he had done was the only factor in Everlast "continually pushing back the timeline".

[17] The decision to give a discount was a voluntary one by Mr Lewis in the interests of his business. This aspect of the counter-claim is dismissed.

Does Everlast have a valid claim to claw-back \$759.00 wages it paid Mr Gates?

[18] This is one aspect of what amounts to a "double claim" by Everlast. In this claim, Mr Lewis says that Everlast paid Mr Gates for approximately 33 hours of work the value or product of which he did not supply to Everlast even though he claimed to have done it, and/or that he took too long to do. Everlast values that work at the

\$23.00 per hour Mr Gates was paid and wishes to deduct \$759.00 from what it owes him.

[19] Everlast also claims damages from Mr Gates for what it cost to repeat work that he had done, been paid for and deleted. I deal with this claim at paragraphs [24] to [31], below.

[20] Mr Lewis's gave written evidence of the reason he decided to terminate Mr Gates' employment:

I found the turnaround times to be very large for the amount of work completed. Edward also found it difficult to follow simple & direct instructions in relation to work he was asked to complete.

[21] These are issues of performance. Mr Lewis' dissatisfaction with Mr Gates' performance was solved by terminating his employment under the 90-day trial period provision. There is simply no legal basis for Everlast to also require Mr Gates to effectively repay it for wages earned while he was employed. This aspect of the claim is dismissed.

[22] Everlast also claims either \$150.00 (4 x \$37.50) or \$380.00 (\$95 hourly charge out rate x 4) for Mr Lewis spending two hours on each of Jobs 15031 and 15037 completing weather tightness and H1 calculations that Mr Gates had put down on his timesheets but had not completed.

[23] There is insufficient evidence to prove that this work needed to be completely re-done by Mr Lewis. Even if it did, I consider it was a matter of poor performance by Mr Gates in taking too long to complete tasks Everlast considered should have been completed more quickly. I dismiss this claim.

Did Mr Gates breach his contractual obligations when he deliberately deleted design work from Jobs 15031 and 15037?

[24] Clause 11.2 of Mr Gates' individual employment agreement provides:

All work produced for the Employer by the Employee under this agreement or otherwise and the right to the copyright and all other

intellectual property in all such work is to be the sole property of the Employer.

[25] In the last few days of his employment Mr Gates deleted work that he had already completed from Jobs 15031 and 15037 and did not pass on the value of that completed work to Everlast.

[26] It was his view that since he had supplied or copied the design details from his own personal library of designs Everlast was not entitled to that design work. He wrote in an email to Mr Lewis:

They were provided to speed up both projects for you, and for your clients benefit, unfortunately given your reluctance to consider the value of such a move, I have withdrawn them.

[27] Mr Gates is completely incorrect in his reasoning. The work he had completed and been paid for was work that he had produced for Everlast, his employer, wherever he got the details from. Clause 11 of his employment agreement made that work the property of Everlast. He deliberately deleted that work. That was a vindictive reaction arising out of his unhappiness at having his employment terminated. He breached his contractual duty under clause 11 by acting as if he retained ownership of the work, when he did not.

[28] Everlast claims that there were monetary costs to it because of the loss of that work. Another employee of Everlast had to redraw and add the details removed by Mr Gates. For Job 15037 she spent 5 hours reproducing the work. For Job 15031 she spent 7 hours reproducing the work. That is a total of 12 hours.

[29] Mr Lewis has valued the cost of removal of the work in two different ways. The first is by the cost of what Everlast' employee was paid. She is paid \$19.50 per hour x 12 hours = \$234.00.

[30] The second way Mr Lewis has valued the loss is as a loss to the business of the hours the employee spent on reproducing the work that could not then be charged out to a client at \$65.00 per hour x 12 = \$780.00. However, there is no evidence that the business lost the opportunity to charge the employee out at \$65.00 per hour, when the employee was remedying Mr Gates' deletions.

[31] I consider the loss or damage proved to Everlast to re-do work on the two jobs is the \$234.00 which Everlast had to pay another employee to do despite having already paid Mr Gates to do it. Therefore, Mr Gates must pay Everlast \$234.00 gross.

Can Everlast recover the cost of Mr Lewis' time in collecting its property from Mr Gates?

[32] Mr Gates usually worked from home in Ashburton. Everlast is based in Christchurch. Mr Gates sent the following email to Mr Lewis the evening before his final day of work:

Finally, there is a considerable amount of material in both files, such as jpg images, aerials, plans etc that Dropbox will probably be unable to cope with as it was reaching its limit a couple of weeks ago. What do you intend doing with them because after today they will be deleted?

[33] Mr Gates says that he had transferred the remaining files onto a USB and had offered to courier that to Everlast in Christchurch. Mr Lewis denies that and says that he was so concerned to get back all the work that Mr Gates had completed that he drove to Ashburton on 15 February 2016 to ensure he recovered everything because of Mr Gates' threat to delete the complete files. He says this took him three hours and this was time he could not spend productively on other fee earning work for Everlast.

[34] The threat to delete entirely the two Everlast files was a contractual breach by Mr Gates. Mr Lewis was right to take the threat seriously because Mr Gates had already deleted some work. Every employee has a duty of fidelity to their employer to act in their employer's best interests. Mr Gates breached that duty by threatening to delete the files.

[35] In the light of Mr Gates' threat, it was a reasonable response for Mr Lewis to travel to Ashburton to uplift Everlast's property from Mr Gates. Mr Lewis claims three hours of his time at his hourly charge out rate of \$95.00. Everlast pays Mr Lewis \$37.50 per hour. The trip from Everlast's offices to Ashburton takes approximately an hour. I consider Everlast lost 2.5 otherwise productive hours of Mr Lewis' time for which it had to pay him \$93.75.

[36] Mr Gates must pay Everlast \$93.75 gross for time spent in reacting to his threat to delete Everlast's property. Therefore, Mr Gates must pay Everlast a total of \$327.75.

Costs

[37] Neither party was legally represented. However, Mr Gates' has claimed the cost of petrol for two unnecessary trips to Christchurch for mediation meetings Mr Lewis chose not to attend. I consider that Mr Gates travel costs would have been avoided if Mr Lewis had been truthful about his intention to attend mediation. Everlast must pay Mr Gates \$50.00 in travel expenses.

[38] Mr Gates paid a filing fee of \$71.56 to make his claim. Everlast has not paid any fee to make its counter-claim. Mr Gates was entirely successful in his claim for unpaid wages and holiday pay. Everlast must pay him \$71.56.

Christine Hickey
Member of the Employment Relations Authority