

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 21/08
5104471

BETWEEN STACEY BERNARD TIMMO

AND OLD PANELROK LTD
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mr Timmo in person
 Jeanette Wilcox for respondent

Investigation Meeting: 23 January 2008

Determination: 23 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] For just two weeks in late August and September 2007 Mr Timmo was employed as a production worker in a small factory in Silverdale. On or shortly before 10 September 2007 the person who had engaged him, Mr David Throwgood, passed away. Mr Timmo was advised by business associates of Mr Throwgood that there was no longer a job for him and ceased work immediately. Mr Timmo received payment for the two weeks he worked but now comes to the Authority seeking recovery of a further two weeks pay in lieu of notice.

[2] As explained in my Minute of 13 December 2007 (attached) the sole issue for determination here is the identity of Mr Timmo's employer. I have heard evidence on this issue from Mr Timmo as well as from Mr Throwgood's associate Tania Hayden and from Jeanette Wilcox, who is the administration manager of a company called *Metpresco Engineering Ltd* of which Mr Watts (director and shareholder of the respondent) is also shareholder and director.

[3] Mr Timmo told me that he heard about the job in Silverdale through “Work and Income” who gave him Mr Throwgood’s name and the address of the factory and sent him off for an interview. Two weeks after that Mr Throwgood rang and offered Mr Timmo the job.

[4] Mr Timmo accepted and started work with two others in the small factory. It was operated by a company called *Betta Walls and Panels Ltd* whose shareholders and directors were Mr Throwgood and Mr Watts. Mr Watts and Mr Throwgood had developed the factory’s product themselves and although they had not patented their process they were co-owners of the trademark “*Panelrok*” which described the factory’s product. I heard from Ms Wilcox that Mr Watts had put capital in to the business but (unlike Mr Throwgood) did not work in it. She also said that Mr Throwgood had no involvement in Mr Watts’s other business interests (such as *Metpresco Engineering Ltd.*)

[5] By August 2007 the two men were considering severing their business association. Mr Throwgood had discussed with Ms Hayden (who had skills in the marketing area) a plan whereby she would become his new business partner, taking an equity share in a new company which would produce and market “*Panelrok*” after Mr Watts had been bought out. However he, Ms Hayden and Mr Watts had not been able to reach any agreement on this proposal by the time of Mr Throwgood’s sudden death. Ms Hayden never held any kind of interest in the business.

[6] Meanwhile, Ms Wilcox told me, Mr Watts wanted to retain the option of taking over the business himself and sought to protect his own rights to the use of the name “*Panelrok*” by incorporating a new company, in August 2007, called “*Panelrok NZ Ltd.*” He was sole director and shareholder of that company (which has never traded.) The Companies’ Register confirms this information.

[7] After Mr Throwgood’s death Mr Watts decided that the business was not viable in its present form. The assets of *Betta Walls and Panels Ltd* (including plant and equipment in the factory and the use of the name *Panelrok*) were sold and it was put into liquidation. Mr Watts changed the name of *Panelrok NZ Ltd* to “*Old Panelrok NZ Ltd*” and the purchasers (who have no prior involvement in this history at all) set up a brand new company called *Panelrok NZ Ltd* to run their business.

[8] Ms Wilcox was responsible for the administration of *Betta Walls and Panels Ltd* as well as *Metpresco Engineering Ltd*. Her duties included paying the two workers at the Silverdale factory (one being an employee and the other a contractor.) She told me that in early August Mr Throwgood told her that he was going to take on another worker at the Silverdale factory. She offered him the relevant tax forms but he replied that he was not planning for the new person to be employed by *Betta Walls and Panels Ltd*. She asked who would pay the person concerned (whom she now understands to have been Mr Timmo) and Mr Throwgood told her that he and Ms Hayden would sort it out. Ms Wilcox was never involved in any payment to Mr Timmo. She said as far as she knew, Mr Timmo was employed by Mr Throwgood personally.

[9] Ms Hayden told me that this was consistent with her understanding which was that Mr Throwgood had employed Mr Timmo in anticipation of the new business arrangement, and that his intention was that Mr Timmo would eventually work for the new company that had been proposed.

[10] Mr Timmo received one week's wages before Mr Throwgood's death. The associated payslip was made out and signed by Ms Hayden who told me that Mr Throwgood borrowed money from her to pay those wages. The payslip was on letterhead bearing the "*Panelrok*" trademark which Ms Hayden told me was developed in contemplation of the new business venture. She said she gave Mr Timmo the payslip on Mr Throwgood's authority. After Mr Throwgood's death Ms Hayden paid Mr Timmo's final week's wages and holiday pay. In a letter to Mr Timmo dated September 19 2007 she told him:

"As promised, I have personally paid your wages and holiday pay in honour of David."

Determination

[11] I start by saying that I am satisfied that *Old Panelrok NZ Ltd* was not Mr Timmo's employer. Ms Wilcox has given uncontested evidence that *Old Panelrok NZ Ltd* never operated any kind of business let alone hired staff, evidence that is

consistent with the fact that it was registered only in August 2007. The claim against it is dismissed.

[12] The question then becomes: who did? Both Ms Hayden and Ms Wilcox asserted that Mr Throwgood personally employed Mr Timmo. Mr Timmo's own evidence that he was engaged and set to work by Mr Throwgood is consistent with this position. Although he worked in a factory operated by *Betta Walls and Panels Ltd*, Mr Timmo was not paid by that company. I am not convinced that *Betta Walls and Panels Ltd* was his employer. As for Ms Hayden, she did not engage him and had no authority to set him to work in the factory at all. There is insufficient evidence to satisfy me that she could have been Mr Timmo's employer.

[13] I accept that Mr Throwgood was Mr Timmo's employer. It will now be for Mr Timmo to decide whether he wishes to pursue a claim against Mr Throwgood's estate.

Yvonne Oldfield

Member of the Employment Relations Authority

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5104471

BETWEEN STACEY TIMMO
AND OLD PANELROK LTD

Member of Authority: Yvonne Oldfield
Representatives: Stacey Timmo in person
 Fred Watts, Director, for respondent
Date: 13 December 2007

MEMBER'S MINUTE

Issues regarding identity of employer

[1] When Mr Timmo first lodged this employment relationship problem in the Authority, he cited the respondent as "Fred Watts (Panelrok NZ Ltd)." He also noted in the statement of problem that he was employed from 28/8/07 until 14/9/07.

[2] The Authority Support Officer checked the Companies Register and discovered that the company now going by the name of Panelrok NZ Ltd (Company number 2021844) was incorporated on 29 October 2007. Clearly this could not have been Mr Timmo's employer. However there had been a company of the same name in existence at the time Mr Timmo said he was employed, Company number 1968428, which was incorporated on 16 August 2007 and changed its name to "Old Panelrok NZ Ltd" on 26 October 2007. Mr Watts was sole director and shareholder of this company.

[3] The intituling in the Authority was therefore changed to Old Panelrok NZ Ltd and papers served on that company at two locations, one being its registered office, the other the mailing address on Mr Timmo's original payslip. The second of these addresses was, it turned out, also the address for Metpresco Engineering

Ltd, another company of which Mr Watts is a director. In response to the statement of problem, the Authority received a letter from Ms Jeanette Wilcox, office manager at Metpresco Engineering Ltd. Ms Wilcox stated:

“David Throwgood (now deceased) and Tania Hayden were in the process of setting up a company called Panelrok Ltd when they employed Stacey on some kind of subsidised scheme through Work and Income. Tania Hayden paid him and must therefore have his details regarding tax etc.

Fred Watts is Managing Director of Metpresco Engineering and is my employer. Prior to Panelrok being set up, Fred and David had a business named Betta Panels & Walls Ltd, which is now in liquidation. Fred and I told Stacey several times after he was laid off, that he was to deal with Tania Hayden as he is not and had not been Metpresco’s employee. He was given Tania’s contact details at the time.”

[4] This letter was forwarded to Mr Timmo. He advised that he wished to continue against Old Panelrok Ltd. In due course the matter was set down for an investigation meeting on 21st January 2008.

Issues for Investigation Meeting 21 January 2008

[5] The first question for me to decide is who employed Mr Timmo. From what both parties have told me Ms Hayden may be able to shed some light on this issue. I have therefore instructed that she be summoned to appear as a witness at the Investigation Meeting on 21 January.

[6] Once the first issue has been established the second question will be what if anything that employer owes Mr Timmo. If I decide that Mr Watts or his company is the employer I will require him to answer questions about that issue as well, and will proceed to issue a written determination on that issue. If not, then Mr Timmo will need to decide whether he wishes to pursue a claim against any other person or entity. If he does, then a further meeting may be necessary to hear evidence from that person.

[7] In summary, I require Mr Watts, Ms Hayden and Mr Timmo to attend the meeting of 21 January. If any of these individuals has any further questions they should contact Support Officer Mr Barraclough immediately.

Yvonne Oldfield
Member of the Employment Relations Authority