

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 308
3055492

BETWEEN JASON WON
Applicant

AND BUILDERLAB & CO LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Namlee Kim, son of Sole Director of Respondent

Investigation Meeting: 24 May 2019 at Auckland

Date of Determination: 24 May 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Byeongjin Kim is the sole director and shareholder of Builderlab & Co Limited (Builderlab). Mr Namlee Kim is Mr Byeongjin's son and he (the son) was the person who had most of the dealings with Mr Won regarding his employment with Builderlab.

[2] Mr Won told the Authority that Mr Namlee Kim is also known as James Kim and Daniel Kim and Joshua Kim.

[3] Mr Won is claiming six months wage arrears for wages he was not paid over the period 9 August 2018 until 8 February 2019. Builderlab does not dispute that it has not paid Mr Won his contractual wages, or that it has a legal obligation to fix that problem.

[4] Mr Won was employed by Builderlab & Co Limited (Builderlab) as a Project Manager in May 2018 on a salary of \$180,000 gross per annum. The parties signed an individual employment agreement dated 9 August 2018.

[5] Mr Won's employment agreement stated that he was to be paid his gross annual salary in monthly instalments by cheque, although Builderlab employer could change that by giving him notice of the change in writing. That did not occur.

[6] Mr Won wage rate was based on him working 40 hours per week between the hours of 9:00 am and 5:00 pm Mondays to Fridays. Mr Won was to be paid \$15,000 per month gross with his first wages payment being due on 9 September 2018, and then on the 9th of every month following.

[7] However, instead of receiving his normal wages Mr Won received vastly reduced amounts, some in cash and some by way of a bank transfer. There is no dispute between the parties that the only wages Mr Won was paid were the following amounts:

- (a) \$1,600 cash deposit on 16 August 2018;
- (b) \$1,600 cash deposit on 3 September 2018;
- (c) \$50 bank transfer on 14 September 2018;
- (d) \$100 bank transfer on 8 October 2018;
- (e) \$1,900 bank transfer on 16 October 2018.

[8] The parties therefore agree that the total amount of wages paid to Mr Won for the duration of his employment with Builderlab was \$5,250 gross.

[9] Mr Won says he should have been paid total wages of \$90,000 gross (being 6 x \$15,000 gross per month) for the six months he was employed by Builderlab.

[10] Mr Won is claiming wage arrears of \$84,750 being \$90,000 gross wages less the \$5,250 he actually received.

[11] It was very clear from the documents Mr Won produced to the Authority, and from the evidence he gave the Authority, that:

- (a) Mr Won has continually asked Namlee Kim to pay his wage arrears; and
- (b) Mr Kim has been stringing Mr Won along by either telling Mr Won he was about to be paid or had actually been paid, so the fact Mr Won had not received any payment was down to some error by a third party;

- (c) The wide range of excuses Mr Won was given for not having received the money which he was told had supposedly already been paid by Builderlab appear to be untrue.

[12] Builderlab has put forward the following reasons for not paying Mr Won his wage arrears:

- (a) A big project it expected to get did not eventuate;
- (b) Mr Won did not have the skill or experience for the job;
- (c) Mr Won was a part owner of the Builderlab business.

[13] None of these excuses are valid, specifically:

- (a) Mr Won's employment agreement included a redundancy clause that Builderlab could have invoked if its financial situation had changed to the extent that Mr Won's position was surplus to requirements. That did not occur;
- (b) Builderlab knew what Mr Won's skills and experience were when it employed him. The Authority notes that was an excuse for its non-payment that Builderlab raised for the first time in the investigation meeting today. Having employed Mr Won, Builderlab was required to pay him his contractual wages;
- (c) Mr Won disputed he was a part owner of Builderlab. The company office records establish that Mr Kim was the sole director and shareholder. Even if Mr Won did have a financial interest in the business (and there was no credible evidence that he did) he was also employed as an employee, meaning he was entitled to be paid his contractual wages regardless of Builderlab's ownership structure.

[14] Mr Won also pointed out to the Authority that Builderlab had not remitted to Inland Revenue Department (IRD) any PAYE for the \$5,250 wages it had paid him.

[15] That is a serious matter that the Commissioner of Inland Revenue may wish to investigate to ensure that the individuals associated with Builderlab are meeting their taxation responsibilities because it is unclear what if any information about Mr Won's monthly wages Builderlab was including on its Employer Monthly Schedules that an employer is required to send to IRD each month.

[16] Mr Won told the Authority that based on \$90,000 gross wages for six months, he should have been paid \$63,693.84 net wages and PAYE should have been remitted to IRD of \$26,306.16.

[17] The Authority records its finding that not only must Builderlab pay Mr Won his contractual wages but it must also deduct PAYE from his gross wages and remit that PAYE to IRD on Mr Won's behalf.

[18] Mr Won has satisfied the Authority on the balance of probabilities that:

- (a) He was employed by Builderlab;
- (b) He was not paid his contractual wages during the period he was employed;
- (c) Builderlab owes him wage arrears of \$84,750;
- (d) Builderlab has not paid any PAYE to IRD for the period Mr Won was employed.

[19] Builderlab is ordered, within 28 days of the date of this determination, to:

- (a) Pay Mr Won wage arrears of \$84,750 gross;
- (b) Deduct and remit to IRD the appropriate PAYE on the wage arrears it has been ordered to pay Mr Won in paragraph [19](a) above;
- (c) Pay Mr Won \$71.56 to reimburse his filing fee.

[20] Interest at the rate specified using the Ministry of Justice online calculator established by the Interest on Money Claims Act 2016 shall apply to any of the \$84,750 that remains outstanding from 22 June 2019 onwards.

[21] Builderlab's failure to pay Mr Won the amount he is owed may result in Mr Won applying to the Authority for a compliance order.

Rachel Larmer
Member of the Employment Relations Authority