

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 286
3230819

BETWEEN	ANDREI BORODIN Applicant
AND	ABEC CONSTRUCTION LIMITED First Respondent
AND	GLEN HOLT Second Respondent
AND	SIMON YORK Third Respondent

Member of Authority:	Nicola Craig
Representatives:	Simon Greening and Erin Drew, counsel for the applicant No appearance for the respondents
Investigation Meeting:	31 January 2024 in Auckland
Submissions (and other information) received:	At the investigation meeting and 21 February 2024 for the applicant Nothing provided for the respondents
Determination:	14 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] From May 2022 Andrei Borodin worked as a Site Foreman and Team Leader for Diamond Building Group Limited (DBG) (currently in liquidation). Glen Holt and Simon York were the only directors and shareholders of DBG.

[2] On 11 November 2022 DBG went into liquidation but Mr Borodin was not told of that. His work continued as usual although his bank statements showed a pay reference to ABEC. Mr Holt and Mr York are also the only directors and shareholders of ABEC Construction Limited (ABEC).

[3] On 18 February 2023 Mr Borodin fractured his finger in a work accident and was unable to work for almost three months. Mr Borodin contacted Mr Holt and Mr Young requesting pay information be sent to ACC but, despite promises, nothing was provided. Around this time he found out DBG was in liquidation.

[4] On 4 April 2023 Mr Borodin was notified by the Accident Compensation Corporation (ACC) that he was not entitled to weekly compensation due to not being able to provide earnings evidence for the four weeks prior to the accident.

[5] As a result, Mr Borodin was unable to obtain ACC weekly compensation payments for an extended period.

[6] Mr Borodin seeks a determination that he was disadvantaged by unjustified actions of ABEC in failing to be communicative about his requests. Little is known of the position of ABEC and its directors given their lack of involvement in this proceeding.

Authority's investigation

[7] I am satisfied that ABEC, Mr Holt and Mr York were properly served with Mr Borodin's statement of problem but none of the three provided a statement in reply.

[8] In addition to his grievance claim, Mr Borodin initially argued that Mr Holt and Mr York should be penalised for aiding and abetting ABEC's breach of an implied term of good faith in the employment agreement.

[9] The investigation meeting was held on 31 January 2024. There was no appearance on behalf of ABEC, Mr Holt or Mr York. I was satisfied that ABEC and Mr Holt had been properly served with the notice of investigation meeting but not Mr York. In any event, Mr Borodin was willing to proceed at that meeting solely regarding the claims with ABEC. The claims with Mr Holt and Mr York were not being pursued, including the penalties.

[10] Mr Borodin provided a written witness statement and gave evidence under oath.

[11] At the investigation meeting it was agreed that costs could be determined along with the other ABEC issues, with Mr Borodin being given the chance to file additional documents regarding costs. An email for the applicant and legal aid tax invoice were received.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

Issues

[13] The issues to be determined are whether Mr Borodin was employed by ABEC, has a personal grievance against it and if so, what remedies (if any) he should receive.

Mr Borodin starts with DBG

[14] Mr Borodin is a very experienced builder, having owned his own company in Russia.

[15] On 14 May 2022 Mr Borodin began working for DBG with his work visa being linked to DBG. The employment agreement identified DBG as his employer. Mr Borodin's wage payments were recorded on his bank statements as being from "Diamond Build" with a reference "Diamondbuild Contract".

[16] Mr Borodin oversaw the construction of residential buildings. Apart from the directors, the others who spent time on site were contractors as far as Mr Borodin knew.

Work continues after liquidation

[17] Companies Office records show that DBG went into liquidation on 11 November 2022. Mr Borodin was however not informed of this, formally or informally, around this time. From his perspective things simply continued as before. He was working on the same construction site, dealing with the same people. Mr Holt and Mr York still appeared on site, driving their utes with "Diamond Building Group" signage on them. Friday afternoon social time continued as normal. A Christmas party was held in December 2022.

[18] What did change somewhat was the recording of his wage payments. The first payment after liquidation shows “Diamond Holdi” with the reference “Labour”. After that payments from “Diamond Holdi” with the reference “ABEC” or just “Diamond Holdi” were interspersed.

[19] Mr Borodin asked Mr Holt about the ABEC reference. He wondered if he might need to change his visa details and contract.

[20] Mr Holt said it was their old company and that company’s account was putting Mr Borodin’s wages into his account. Mr Holt said Mr Borodin worked for the same guys, they were still running the business. Mr Borodin asked if there were any changes. Mr Holt replied no, it is a temporary thing and will get back to normal after some time. There was no mention of the liquidation.

The accident and communications

[21] On 18 February 2023 Mr Borodin fractured his finger at work, meaning he was unable to work. When in hospital he talked to Mr Holt about needing sick leave or some payment.

[22] Mr Borodin applied for ACC. He needed to provide payslips or other proof of work to ACC but had not been receiving payslips. ACC told him bank statements were not sufficient as they did not show the number of hours worked.

[23] Over several days in March 2023 Mr Borodin sought his pay information be provided to him or ACC. Mr Holt messaged that Mr York was preparing the paper work and would send it to ACC the next Monday. When it was not supplied Mr Borodin followed up and was asked by Mr Holt to message Mr York. Mr Borodin tried to phone plus message Mr York asking for the paperwork to be sent but did not get an answer so asked Mr Holt to remind Mr York.

[24] A few days later, on 23 March 2023, Mr Borodin messaged Mr Holt again saying Mr York had told ACC he would provide the information to it that day. After Mr Borodin messaged that he was finding it hard to pay his bills, a \$1,000 payment was made from his employer. That may have reflected paid sick leave for Mr Borodin’s first week’s absence from work after the accident, although this was not specified.

[25] ACC told Mr Borodin that staff had tried many times to speak to Mr Holt and Mr York but were unable to reach them.

[26] On 4 April 2023 ACC told Mr Borodin that it was unable to provide weekly compensation due to him appearing not to have earnings in the four weeks prior to the accident. After this Mr Borodin pleaded in a message to Mr Holt for a further payment as he had nothing to pay his rent.

[27] Mr Borodin discovered DBG was in liquidation. Making contact, he discovered the liquidators did not know DBG had any employees. He did eventually receive payment from the liquidators which may have been his holiday pay.

[28] Mr Borodin was unable to work until early May 2023 and did not wish to go back to work with Mr Holt and Mr York.

Mr Borodin employed by ABEC

[29] Mr Borodin did not argue that he was employed by the liquidators of DBG. He had no contact with them prior to his accident and they were unaware of the existence of any DBG employees until after he got in contact, some months after the liquidation commenced.

[30] Submissions for Mr Borodin suggested that ‘Diamond Building Group’ continued almost like a brand after DBG went into liquidation.

[31] DBG and ABEC had the same directors and shareholders – Mr Holt and Mr York. On the face of the bank statements and Mr Holt’s comments to Mr Borodin, ABEC was paying Mr Borodin for his work. In the absence of other evidence I conclude that Mr Borodin became employed by ABEC on the liquidation of DBG.

Mr Borodin disadvantaged by ABEC’s unjustified action

[32] Under s 4 of the Act ABEC owed Mr Borodin a duty of good faith – to be responsive and communicative. He had a reasonable expectation that ABEC would provide the necessary documents to ACC to enable him to get weekly compensation.

[33] ABEC through its directors, Mr Holt and Mr York, failed to respond to repeated requests from Mr Borodin that paperwork about his pay be provided to ACC, as well as to attempts by ACC to contact his employer. It was clear to the employer that Mr

Borodin was off work unpaid and very much needed the documents to be provided to improve his ACC situation. On the face of it, other than repeated promises of action, nothing was actually done. This was an unjustified action by ABEC.

[34] Mr Borodin was unable to promptly get ACC weekly compensation without the provision of pay documents. ABEC's failure to respond to Mr Borodin and ACC's requests for documents had a significant impact on his. He had gone from earning around \$2,000 net a fortnight to receiving nothing other than the \$1,000 eventually paid by his employer in late March 2023.

[35] The reason for ABEC's failure is not before the Authority. It may relate to the undisclosed liquidation but that is no defence.

[36] Mr Borodin was disadvantaged by ABEC's unjustified action in failing to provide ACC with documents about his pay.

Mr Borodin entitled to a remedy

[37] Initially Mr Borodin sought reimbursement from ABEC of the value of the income that he would have received but for ABEC's breach.

[38] By the time of the investigation meeting Mr Borodin had received assistance from an ACC lawyer and recently received payment for weekly compensation. This was only in about January 2023. He therefore no longer seeks reimbursement for weekly compensation from ABEC.

[39] No basis was established for ABEC being required to top up Mr Borodin's 80% weekly compensation to 100% of his usual earnings.

[40] Still sought is compensation under s 123(1)(c)(i) of the Act or humiliation, loss of dignity and injury to feelings.

[41] Mr Borodin suffered an injury at work. He describes his situation as really hard having been used to being in paid work and relying on it. He was within a category of recognised vulnerable employees – those tied to their employer through their work visa.

[42] Mr Borodin found his situation very traumatic, being without food at points, struggling with rent and suffered embarrassment from having to ask friends for money. He lost his car - a special ute he had been paying off for over three years.

[43] Mr Borodin did not pursue a constructive dismissal claim but I am satisfied that the failure of ABEC's directors to communicate properly and provide the information were the cause of his decision not to return to ABEC once he recovered. He had lost trust in them.

[44] Compensation of \$10,000 is to be paid by ABEC under s 123(1)(c)(i) of the Act. Mr Borodin did not contribute to the situation giving rise to his grievance.

Costs

[45] Mr Borodin is legally aided. He seeks costs of the amount which have been invoiced. A legal aid tax invoice has been provided showing \$2,156.43 was billed.

[46] The Authority's daily tariff for a one-day investigation meeting is \$4,500. The investigation meeting here lasted a little under half a day. The amount sought is reasonable and is to be paid by ABEC along with \$71.55 for the Authority's filing fee.

Orders

[47] Within 21 days of the date of this determination ABEC Construction Limited is to pay Andrei Borodin:

(a) \$10,000 as compensation for his personal grievance; and

(b) \$2,156.43 as costs and \$71.55 for the filing fee.

Nicola Craig

Member of the Employment Relations Authority