

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 3962/20
Applicant: Faisal Sarheed
Respondent: C1 Formwork Group Pty Ltd
Date of Determination: 15 September 2020
Citation: [2020] NSWCC 326

The Commission determines:

1. I find that the applicant's pre-injury average weekly earnings as at 17 January 2020 were \$1,009.31.
2. I make no order.

A statement is attached setting out the Commission's reasons for the determination.

Catherine McDonald
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Faisal Sarheed was employed by C1 Formwork Group Pty Limited (C1) when he suffered an injury on 17 January 2020. There is no dispute that C1 is liable to pay compensation and Mr Sarheed is receiving weekly payments.
2. The dispute concerns the calculation of pre-injury average weekly earnings (PIAWE).
3. Mr Sarheed is receiving compensation based on PIAWE of \$1,009.31 as adjusted. He argues that he should be receiving compensation based on PIAWE of \$2,475. The determination of that issue rests on the terms of his oral contract with C1, including whether he was employed as a formworker or a formwork labourer.

PROCEDURE BEFORE THE COMMISSION

4. The matter was listed for conciliation conference and arbitration hearing by video conference on 2 September 2020 when Mr Adhikary of counsel appeared for Mr Sarheed and Ms Goodman of counsel appeared for C1.
5. At the telephone conference on 14 August 2020, I was told that both parties sought to cross examine witnesses though that application was not pursued at the hearing.
6. C1's solicitors served a Notice of Production dated 5 August 2020. The schedule sought:

"All financial records including reports and books of account, bank statements, profit and loss statement and tax returns relating to any business undertaken by you either in partnership or on your own account tending to show your income and savings from any source from 1 January 2020 to date."
7. Mr Sarheed produced one page of his bank records from 1 January 2020 to 21 January 2020, which was admitted in the proceedings.
8. I declined to grant an adjournment to enforce production because the schedule was ambiguous. The lack of commas contributed to that ambiguity. It could be read as seeking all documents showing Mr Sarheed's income for the period or it could be read as seeking those documents only in respect of any business run by him.
9. Mr Ibrahim of C1 attended the conciliation conference and arbitration hearing. Some of the documents in the file refer to him as Mohammed Ibrahim Dafaala and others as Mohammed Ibrahim. He said that he was happy to be described as Mr Ibrahim.
10. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:

- (a) Application to Resolve a Dispute (ARD) and supporting documents;
 - (b) Reply;
 - (c) Mr Sarheed's application to Admit Late Documents dated 26 August 2020;
 - (d) A further statement from Mr Ibrahim dated 31 August 2020, and
 - (e) Mr Sarheed's bank statement for the period 1 to 21 January 2020.
12. There was no oral evidence.
 13. Mr Sarheed provided a statement with the help of an Arabic interpreter. He said that he communicates in Arabic and does not speak much English. He said that he had lived in Sydney since mid-2012.
 14. On 7 January 2020, he was unemployed. He was contacted by his friend Salam who told him that a number of companies were looking for form workers on construction sites in the ACT and paying high hourly rates. Salam told him that a person named Mohammed who had his own construction company was looking for workers. Salam was working for that company which was paying for his accommodation and he invited Mr Sarheed to that accommodation. Mr Sarheed drove to the ACT.
 15. Mr Sarheed said he received a telephone call from Mohammed that evening. He said that Mohammed said that he had formwork positions available and needed someone to start urgently. He said that the position required full time commitment six days per week with 10 hours work Monday to Friday and five hours on Saturday, being 55 hours per week. The hourly rate was \$50 and Mohammed said that he would pay the rent on shared accommodation with other workers. He would be paid weekly and Mohammed said he would take care of superannuation. Mr Sarheed said he would take the job and Mohammed told him he could start the following day after an induction.
 16. Mr Sarheed went to the work site and began work on 8 January 2020. On 9 January, he had a telephone conversation and asked to be paid early because he needed to purchase items "as I had relocated from Sydney to the ACT for this job." Mohammed arranged for him to collect \$200 from a Commonwealth Bank ATM.
 17. Mr Sarheed said that he had a meeting with Mohammed on 11 January 2020 and that Mohammed said that he was unable to pay \$50 per hour but would pay \$45 per hour for the same hours. Mr Sarheed protested then agreed. Mohammed told him that he would be paid \$2,475 per week on a Wednesday for work performed on Monday to Saturday the previous week.
 18. On 13 January 2020, Mr Sarheed asked Mohammed for a "further early partial payment of my weekly pay as I required the money." Mohammed sent him a text message to collect \$300 from a CBA ATM. On 15 January Mr Sarheed received \$1,000 in his bank account and that the three amounts received "was my pay for the first week of my employment." He said he had worked a total of 32.5 hours and that the payment of \$45 per hour equated to an hourly rate of \$6.15.
 19. In the week commencing 13 January, Mr Sarheed said that he worked 41 hours before his injury at 10.30am and that he should have been paid \$2,362.50 plus superannuation. He said that a payslip provided by C1 stating that he worked 37.5 hours was "incorrect, false and misleading."

20. A series of screenshots from Mr Sarheed's mobile phone confirms the payments made and Mr Ibrahim confirmed that they were sent from his phone. Some of the content of the text messages is in Arabic. On Thursday 9 January 2020, Mr Sarheed was given \$200 and on Monday 13 January he was given \$300. A screenshot dated 15 January 2020 shows that he was paid a "work payment" of \$1000.
21. Mr Sarheed provided a timesheet for the period 8 to 11 January 2020 headed Xmplar Building Solutions, showing that he had worked 7.00 am to 5.00 pm on 8 and 9 January, 7.00 am to 3.30 pm on Friday 10 January and 7.00 am to 11 am on Saturday 11 January. The timesheet was approved by a supervisor.
22. Mr Sarheed signed a further statement on 26 August 2020. He said that he commenced working as a form worker in late 2012 and "I would among other things erect columns, place formwork sheeting for the ceiling, do the formwork required for concrete slabs and walls."
23. Much of his statement consists of denials of Mr Ibrahim's statement. He said that he was employed on a full time, permanent basis and that he would have continued working if not for the injury. He denied that he had finished working. He said that he was driven back to Sydney by a friend rather than driving himself and that he was paid for the first week of work only and that he has still not been paid for the second week of employment. He denied that he had been paid \$1,009.13.

C1's evidence

24. Mr Ibrahim's first statement is dated 6 July 2020 and was obtained by an investigator. He said that he is the sole director of C1 and that the company had six to nine employees depending on the volume of work. He contracted to other formworking companies or direct to a builder.
25. Mr Ibrahim said that Mr Sarheed contacted him at the beginning of the year looking for work. He told him about a project at Dickson/Lyneham for which he needed labourers for form workers and asked if Mr Sarheed was prepared to work for two weeks to clean up after the formworkers had finished. He said that Mr Sarheed and three other labourers agreed to work for two weeks and he provided them with accommodation.
26. Mr Ibrahim said that Mr Sarheed and the other labourers started on 7 January 2020 and reported to the Xmplar site supervisor, Jo. Mr Sarheed was employed to work for two weeks. The other labourers had worked for Mr Ibrahim before and continued to work for him at the date of his statement. During the first week, Mr Sarheed asked to be paid cash and Mr Ibrahim "advanced him" \$300 because he said he did not have any money.
27. On 16 January 2020, Mr Ibrahim received a phone call from Jo who told him that Mr Sarheed and the other labourers were not performing. When Mr Ibrahim said that they were finishing the next day, Jo was happy for them to remain for that day.
28. The injury occurred on the Friday. Mr Ibrahim went to the hospital and interpreted for Mr Sarheed. The doctor said that Mr Sarheed was fit for light duties the following week. Mr Ibrahim drove Mr Sarheed to the job site where his car was parked and Mr Sarheed drove back to Sydney. Before he left Mr Ibrahim offered him light duties on the following Monday because he "felt bad" but Mr Sarheed did not attend. He described the circumstances of the injury – that Mr Sarheed was supposed to be cleaning the concrete at ceiling level and that it was his responsibility to ensure that the area was clear of debris before putting the ladder in place. A photograph referred to in the statement was not in the Reply and Mr Adhikary opposed it being admitted at the arbitration hearing.

29. Mr Ibrahim prepared a further statement with the assistance of C1's lawyers. He said that Mr Sarheed was hired for 14 days to perform site cleaning work. Mr Sarheed did not provide his tax file number when he commenced. He said that there was no employment contract between C1 and Mr Sarheed, by which I understand he meant there was no written contract. Mr Sarheed was paid for 37.5 hours work at \$26.91 per hour which was the award rate for his level of expertise, resulting in a weekly total of \$1,009.13.
30. Mr Ibrahim's letter dated 16 January 2020 to Mr Sarheed appears in the Reply and confirmed a conversation earlier that day informing him that his services were no longer required "due to skill level and experience required for satisfactory performance."
31. Mr Ibrahim responded to Mr Sarheed's statement to dispute that he was employed for 55 hours per week or at \$50 or \$45 per hour. He said that he provided \$200 cash as a goodwill gesture when Mr Sarheed said that he did not have money for groceries.
32. A payslip dated 29 January 2020 for the period 13 to 18 January notes Mr Sarheed's job title as carpenter and employment status as casual. He had worked 37.5 hours and the ordinary hourly rate was \$26.91 in respect of CW1(a), resulting in a gross payment of \$1,009.13 and a net payment of \$823.13. Contributions to CBUS superannuation and NSW Long Service Leave were paid in addition.
33. A series of medical certificates show that Mr Sarheed had been certified as having no current work capacity from 20 January 2020. His occupation on those certificates is "form worker." His condition was described as "Cervical Spine Radiculopathy, Lumbar Spine and Acute Stress Disorder."
34. On 28 April 2020, icare wrote to Mr Sarheed in response to a request for review by his solicitor. Icare sought clarification from C1 which it had not received. Icare determined that the payslip dated 18 January 2020 was the only documented evidence of earnings and that his PIAWE was \$1,009.31. Once indexation under s 82A of the *Workers Compensation Act 1987* (the 1987 Act) was applied, the current PIAWE was \$1,020 and icare resolved to pay \$969 being 95% of that amount.
35. Mr Sarheed's payments were reviewed again on 3 July and he was paid \$832 per week from 1 April 2020.

SUBMISSIONS

36. Mr Adhikary said that there were credit issues because the evidence of Mr Sarheed and Mr Ibrahim was diametrically opposed evidence.
37. Mr Adhikary summarised Mr Sarheed's statements. He said that Mr Sarheed asked for an advance payment of \$200 to purchase items because he left Sydney to go to work for C1 in the ACT. On 13 January Mr Sarheed requested further payment. On 15 January he received a transfer of \$1,000. The total of those payments was \$1,500 which represented a payment of \$46 per hour for the 32.5 hours worked that week.
38. Mr Adhikary stressed that Mr Sarheed said that he would have continued working but for his injury and that he was never paid for the second week he worked. This was relevant, he said, to Mr Ibrahim's credit.
39. Mr Adhikary said that I would not accept Mr Ibrahim's evidence because he said there was no employment contract and because he repeatedly stated that Mr Sarheed was not employed as a form worker. However the payslip described Mr Sarheed as a carpenter which was related to being a form worker rather than a labourer.

40. He said that Mr Sarheed would not have left Sydney to go to the ACT to work for the lower wages Mr Ibrahim said were appropriate for a period of only two weeks. Mr Adhikary said that there were numerous gaps in Mr Ibrahim's evidence in that he did not discuss the conditions of employment. Again this would be expected when Mr Sarheed was moving to the ACT to commence work.
41. A further inconsistency was the reference to \$300 being advanced then later being described as a payment by way of goodwill. Mr Sarheed asked for an advance payment of his wages to get by. Mr Adhikary said that it did not make sense that someone would make a payment out of goodwill and there was no evidence to support that contention. This was particularly so when the payments corresponded to the hourly rate agreed for the hours worked in that week, recorded on the timesheet. The payment of \$1,000 did not reflect the hours worked. Mr Adhikary said that Mr Sarheed was employed on an ongoing basis.
42. He also said that there was objective evidence in the certificates of capacity that Mr Sarheed was employed as a form worker. The first time that there was an issue about the job title was in Mr Ibrahim's statement in July 2020.
43. In response to my question as to whether the alleged PIAWE was unusually high for a form worker, Mr Adhikary said that may be so but that was the agreement between the parties.
44. Ms Goodman said that the alleged earnings were more than the statutory maximum compensation amount in s 34 of the 1987 Act and very high for a formworker so that I would not accept that was the agreement made. She noted that Mr Sarheed prepared his statement with the assistance of his solicitor and an interpreter so that I should be careful about relying on the words used and would place no weight on the reference to Mr Ibrahim having offered a "position in formwork."
45. Ms Goodman said it was important to note that Mr Ibrahim agreed that Mr Sarheed should stay in shared accommodation with the other workers.
46. She said that submissions about ongoing employment were irrelevant to the issue of PIAWE.
47. Ms Goodman took me to Mr Ibrahim's statement to confirm that Mr Ibrahim had offered a job cleaning up after the formworkers had finished. The pay slip showed that he was paid under an award by reference to an award category. He commenced on 8 January which is reflected in the timesheet and was paid in accordance with it.
48. In the first week, Mr Sarheed asked for some money. He was given \$200 then an additional \$300. He was paid \$1,000 for that week which was just a few dollars less than the award rate for the hours worked. The payslip for the later work is dated 29 January 2020.
49. Ms Goodman noted Mr Adhikary's repeated submission that Mr Sarheed would not have left Sydney for the ACT if he was not to be paid appropriately. She said that the evidence shows that he was not asked to come but that he was already in the ACT at the suggestion of a friend. He spoke to Mr Ibrahim when he was already at the accommodation where the other workers were staying.
50. Mr Ibrahim said that Mr Sarheed asked to be paid in cash. Mr Ibrahim refused but advanced \$300. Ms Goodman said that evidence was important because Mr Sarheed's bank statement showed he was in receipt of Centrelink payments, paid on 5, 7 and 21 January 2020. Ms Goodman said that I would not accept the applicant's evidence and that he wanted to be paid in cash so that he could retain his Centrelink benefits.

51. Ms Goodman took me to the evidence which confirmed that Mr Sarheed was employed as a form work labourer and Mr Ibrahim's explanation of the calculation of earnings. Mr Sarheed could have called more evidence to prove his case – he could have relied on more entries in his bank statements to prove his case about earnings. The only evidence is that he was paid \$1,000 and then in accordance with the pay slip. He could also have obtained a statement from his friend Salam to prove the terms of his employment but did not and Ms Goodman said I should draw an inference that his evidence would not have assisted. In addition, Mr Sarheed left the ACT to Sydney which indicated that he considered that his employment had finished. There is no statement from the friend who drove him back to Sydney and the same inference could be drawn. Mr Sarheed's bank statement showed that he continued to pay rent in Sydney which was also consistent with a short term arrangement.
52. In response to my question as to whether the provision of accommodation was relevant to the question of whether Mr Sarheed's wages were as high as submitted, Mr Adhikary said it was irrelevant.
53. Mr Adhikary said that I should not draw an inference that Salam's evidence would not have assisted Mr Sarheed because the evidence was unclear as to whether he was present during the conversations between Mr Sarheed and Mr Ibrahim or whether he was employed on the same basis.

FINDINGS AND REASONS

54. In *Nguyen v Cosmopolitan Homes*¹, McDougall J said:

“A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist.”

55. The determination of this case depends solely on whether I accept Mr Sarheed's evidence or that of Mr Ibrahim. Mr Sarheed carries the onus of proving that his version of the terms of his oral contract of employment was correct. In order to find in his favour, I must feel an actual persuasion that the facts as presented on his behalf existed.

Credit

56. C1 raised the issue of Mr Sarheed's credit. Neither he nor Mr Ibrahim was cross examined. That is not an impediment to making a finding as to credit. The Commission may accept or reject evidence which is not tested by cross examination.² In *JB Metropolitan Distributors Pty Ltd v Kitanoski*³ Roche DP said⁴:

“Subject to the relevant issues having been fully and fairly ventilated in the documentary evidence, and the parties having had a reasonable opportunity to make appropriate submissions on those issues, it is open to an Arbitrator to form a view about the credit of a witness or a party even if that witness or party has not given oral evidence or been cross-examined (*New South Wales Police Force v Winter* [2011] NSWCA 330 from [81]).”

¹ [2008] NSWCA 246

² *Baines v Hany* [2018] NSWCCPD 1 at [234]; *Calvary Home Care Services Ltd v Vernon* [2020] NSWCCPD 54.

³ [2016] NSWCCPD 17

⁴ At [121].

57. The single bank statement provided by Mr Sarheed suggests that he was in receipt of payments from Centrelink at the same time as he performed work for C1. That page was produced despite his objection to answering the notice to produce. It would have been a simple matter to produce more pages but he did not. He did not seek to explain his apparent receipt of Centrelink benefits whilst working for C1. The question was raised on the basis of what appears on the face of the document. Even though the bank statement was only provided on the day of the conciliation conference, Mr Adhikary did not seek to lead evidence to explain the receipt of Centrelink payments while Mr Sarheed was working.
58. Mr Ibrahim said that Mr Sarheed asked to be paid in cash. Mr Sarheed did not answer that paragraph of Mr Ibrahim's statement. A request to be paid in cash could indicate that Mr Sarheed did not intend to disclose his earnings to Centrelink.
59. Mr Sarheed said that he had still not been paid for the second week of work. Mr Ibrahim's evidence was that he had been paid. If he had not been paid, it would have been a simple matter for Mr Sarheed to produce bank records for the following period but he did not.
60. Because of the controversy between the parties, it might be expected that Mr Sarheed would have supported his evidence by a statement from his friend, Salam but he did not. Mr Sarheed's evidence is that Salam told him about the opportunity, that he was working for C1 and staying in accommodation paid for by C1. Mr Sarheed went to the ACT and stayed in that accommodation. After the injury, he said he was driven home by a friend. Mr Ibrahim referred to a small group of workers. Those circumstances suggest that those other workers may have been retained on a similar basis and would have given knowledge of the rates of pay and hours worked.
61. In the absence of a statement from Salam, I consider it is appropriate to draw an inference that evidence from Salam would not have assisted Mr Sarheed's case.⁵
62. Because of those concerns about Mr Sarheed's credit, and because some of the evidence is improbable, as discussed below, I prefer the evidence of Mr Ibrahim where that differs from the evidence of Mr Sarheed.

Contract terms

63. The PIAWE for which Mr Sarheed contends is very high. The original Workers Compensation Commission and the Compensation Court were recognised as having knowledge and experience of the value of work in the labour market.⁶ In *Woolworths Ltd v Salam*, Snell DP said:
- "These principles similarly apply in the Commission, which is a specialist tribunal, taken to possess such specialist knowledge: *Goktas v Goodyear Australia Pty Limited* [2007] NSWCCPD 1 at [32], *Forests NSW v Hancock No.2* [2007] NSWCCPD 191 at [76], *Perkins v Ceva Materials Handling Pty Ltd (previously TNT Materials Handling Pty Ltd)* [2011] NSWCCPD 32 at [75].
64. In that context, I can say that it would be a very rare case that the PIAWE of a building worker would exceed the maximum weekly payment under s 34 of the 1987 Act. The circumstances of the formation of the contract reinforce my view that it is unlikely such a high PIAWE was agreed.

⁵ *Jones v Dunkel* [1959] HCA 8, (1959) 101 CLR 298; *Kuhl v Zurich Finance Australia* [2011] HCA 11.

⁶ *J & H Timbers Pty Ltd v Nelson* [1972] HCA 12; 126 CLR 625; *Akawa Australia Pty Ltd v Cassells* (1995) NSWCCR 385.

65. The employment contract was made by telephone on 7 January and Mr Sarheed was invited to start the next day, subject to an induction. Mr Ibrahim had not met him before making the offer of employment. If Mr Ibrahim needed a formwork labourer to clean up for a short period, it may well be the case that he would offer a position paid at the award rate to someone he had not met. It is improbable that a position as a formworker at a very high rate of pay on an ongoing basis would be offered as a result of a telephone discussion.
66. As Ms Goodman pointed out, the length of time for which Mr Sarheed expected to be employed was not strictly relevant to the determination of PIAWE. Mr Sarheed maintained that he was not employed on a short term basis. Mr Ibrahim said that he terminated Mr Sarheed's employment on 16 January at the request of the supervisor on site. Mr Sarheed denied the conversation but did not deal with the letter in his statements.
67. Mr Adhikary submitted, and repeated more than once, that Mr Sarheed would not have travelled to the ACT to perform work for a period of two weeks at the PIAWE for which C1 contends. The submission was not further developed. The first part of the submission is not supported by Mr Sarheed's own evidence. He said that he drove to the ACT because his friend Salam told him work was available. Mr Sarheed did not speak to Mr Ibrahim until he had arrived at the accommodation where Salam was staying. In any event, the drive from south western Sydney to Canberra is a drive of only roughly three hours.
68. The submission is unconvincing for another reason. Mr Sarheed's evidence is that he was unemployed when Salam told him about work available in the ACT. That is confirmed by the entries in his bank statement for Newstart. For a person in his position, wages of \$1,009.31 per week were significantly better than Centrelink benefits.
69. Mr Sarheed's evidence about tasks of formworker is not persuasive. He prepared his second statement with the assistance of his solicitor and an interpreter. With that assistance, he had the opportunity to explain his experience more thoroughly than he did. His description does not convey long experience in that role.
70. I do not accept Mr Adhikary's submission that the reference to Mr Sarheed's occupation as formworker in the medical certificates is objective evidence as to the role in which he was employed. There is no evidence as to how the doctor who completed those certificates was informed of Mr Sarheed's occupation. It is likely that Mr Sarheed provided that information.
71. Mr Ibrahim said that Mr Sarheed was cleaning concrete at the time of the injury. That is consistent with the role of a formwork labourer.
72. Taking all of those matters into account, I find that Mr Sarheed was employed as a formwork labourer, employed to clean up after the formwork had been completed, and not as a formworker.

PIAWE

73. Despite the lack of further explanation as to how it was calculated, the parties both made submissions on the basis that the payment of \$1,000 was remuneration for the 32.5 hours worked during the first week of work.
74. Mr Ibrahim said that two further cash payments were made as a gesture of goodwill to allow Mr Sarheed to purchase items he needed. He made the second payment of \$300 after he had refused Mr Sarheed's request to be paid in cash. Mr Sarheed has sought to explain those payments as being part of his remuneration. Mr Ibrahim did not agree.
75. The pay slip dated 29 January 2020 forms the basis of the calculation of PIAWE by reference to an undisclosed award. The hourly rate of \$26.91 appears to be an appropriate rate for a formwork labourer.

76. Mr Sarheed said that he was retained to work 55 hours per week and that his PIAWE should be calculated on that basis. He based his calculation on a week of 10 hour days with 5 hours on Saturday. He did not include any time for breaks in that calculation. His assessment of hours worked is improbable.
77. C1 said that he was paid on the basis of 37.5 hours per week. It would be unusual for a building worker to be retained on a basis that did not include a base rate and overtime.
78. For the reasons set out above, I accept the evidence of Mr Ibrahim where it conflicts with that of Mr Sarheed.
79. I find that Mr Sarheed was employed as a formwork labourer and that his pre-in jury average weekly earnings were \$1,009.31.
80. Because I have determined that the calculation made by the insurer was correct, the appropriate course is not to make any order.