

BETWEEN

**DE
APPLICANT**

AND

**WV LIMITED
RESPONDENT**

Date of Order:

4 September 2015

Referee:

Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that WV Limited is to pay the sum of \$1,465.10 directly to DE on or before 25 September 2015.

Facts

[1] DE was engaged by WV Limited as a contract builder and signed a written contract on 29 June 2014. In fact the contract is referred to by WV Ltd in its cover letter as an employment agreement, but the term 'employee' has been crossed out in places and replaced with the word 'contractor'. DE appears to accept that he was a contractor, has invoiced for his work and as he is the applicant to this claim, I do not intend to address the unusual combination of contractual and employment terms in the contract any further.

[2] DE worked on a couple of jobs for WV Ltd, invoiced and was paid without issue until the job that is the subject of this claim. WV Ltd says it allocated 96 hours for that job, which it extended to 116 hours following a variation to the work and has already paid DE for 122 hours.

[3] DE's claim is for 74 additional hours worked for which he has not been paid, this amounting to \$2,978.50.

Issues

[4] Had the parties agreed to a fixed number of hours for each job?

[5] Were there changes to the scope of the work?

[6] What are reasonable hours for the work done and are deductions for travel between sites reasonable?

Had the parties agreed to a fixed number of hours for each job?

[7] I find that the hours written on the jobsheet as "estimated time on site" are covered by the written contract at clause 5.5 which reads:

"The Contractor must provide the Employer with invoices on a per project basis that accurately record the time spent in order for the Employer to invoice the Contractor's time accurately. These hours are to reflect the assigned project worksheet hours allocated to the Contractor. Project worksheet act as the contract assigned to the

Contractor builder if a variance of project occurs the hours nominated for the project will be modified to reflect as mutually agreed by both parties”.

[8] The hours invoiced therefore had to ‘reflect’ the hours allocated on the worksheet, 96 hours originally, before the change to the stairs. The wording ‘estimated time on site’ combined with the word ‘reflect’ in the contract mean that DE was essentially working on an ‘estimate’ basis, rather than a ‘fixed price’ basis.

[9] DE has said that there were some issues which proved trickier than expected such as the balustrade wiring as well as additional work (which will be addressed below). WV’s client, AA, appeared as a witness for DE saying that he was an excellent worker, punctual and on task and that she was very happy with the quality of his workmanship.

[10] There is no evidence of any inaccuracies on any of DE’s completed time records and given that and the witness evidence I accept them as accurate, but BB for WV Ltd says that the job should not have taken him as long as it did. DE acknowledged that he was not keeping track of the hours spent on the job; he was simply doing the work required and invoicing his time.

[11] I am of the view that this was at least in part due to the ambiguous nature of the contract, which uses both contractual and employment terminology, which in turn reflects fairly accurately the ambiguous nature of the relationship where WV was providing the work and setting the hours and DE was turning up and doing the work.

[12] Nevertheless, DE has signed the contract and, by doing so, he agreed to invoice time that reflects the assigned hours. In accordance with standard industry practice for estimates, I allow a 15% margin above the original allocated hours towards the actual time DE spent on the job – this means he is entitled to charge and be paid for 110.4 hours for the original scope of work.

Were there changes to the scope of the work?

[13] I find that there were issues that arose during the course of the job that could not have been predicted and allowed for in allocating the hours originally. These include the need to move the footings and rebate boards again following Council inspections, and the substantial change to the stairs at the client’s request. None of these additions was a result of poor workmanship on the part of DE.

[14] BB disputes that the first two items were substantial changes and adds that there was no handrail built so that should have saved some time. DE also contends that the wire on the balustrading was fiddly and time-consuming, both working out how it could be done and doing the task. The reasonable hours for these additional matters will be discussed below.

What are reasonable hours for the work done and are deductions for travel between sites reasonable?

[15] I accept DE's account of the hours spent additionally on the footings, 3 hours, and the board rebating, 5 hours, as these are actual hours and do not seem excessive. I find that these 8 hours are variations to the original scope of the job.

[16] There should be no deductions for time charged for travel between sites as it is standard for contractors to charge time to travel to site. It is only employees who cannot count their time travelling to work as work time (although it is work time if they are travelling between sites during the working day).

[17] I do not allow time as an 'extra' for the unexpected time spent on the balustrade wiring, rather I set it off against any saving of time for not having to build a handrail, because both these items were part of the original scope of the job.

[18] With respect to the change to the stairs, DE says that BB asked him how long the new plan for the stairs would take him (as per the requirement in the contract that additional hours be mutually agreed) and he replied 'over a week'. BB rejected that and allocated an additional 20 hours.

[19] However BB also gave evidence that as he regarded the change to the stairs as a change by the client (and I accept that looking at the original plans), he attempted to negotiate an additional \$2,000.00 on the contract price with the client, AA. She would not accept that and they settled on an additional \$700.00. This represents 20 hours of DE's time at \$35 per hour (before GST). WV Ltd was also paying a labourer at \$18 per hour so the total labour time for 20 hours each would have been \$1,060 + GST.

[20] The fact that BB wanted to charge the client an additional \$2,000.00 suggests that the labour component should reasonably be closer to what DE had estimated, even allowing for GST and materials (BB was presumably not looking to recover 100% of his costs as a dispute had arisen). In addition, WV Ltd, by unilaterally allocating additional hours, has not

complied with the contractual term that requires the allocation of hours for additional work to be mutually agreed. I therefore allow 40 additional hours for the changes to the stairs.

[21] The total time payable for the job is therefore 158.4 hours (being 110.4 hours, 8 hours and 40 hours). WV Ltd has already paid DE for 122 hours and; therefore owes an additional 36.4 hours at \$35.00 plus GST. The total awarded on the claim is \$1,465.10