

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 89
5377829

BETWEEN COLIN NATHAN TOKA DE
THIERRY
Applicant

AND PETER HAERewa T/A
HAERewa TRANSPORT
Respondent

Member of Authority: P R Stapp
Representatives: Colin de Thierry in person
No appearance the respondent
Investigation Meeting: 31 July 2012 at Palmerston North
Determination: 9 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application lodged by Mr de Thierry for an order for the payment of holiday pay, and a penalty for failing to provide a wage time and leave record to a Labour Inspector.

Issues

[2] The Authority has been requested to make an order for holiday pay and a penalty against Peter Haerewa.

The facts

[3] Colin de Thierry worked as a truck driver for Peter Haerewa trading as Haerewa Transport. Mr de Thierry was employed by Mr Haerewa from 9 April 2009 until July 2010. In that time Mr de Thierry had two weeks holiday for which he was

paid. He left that job to take up another job, but was not paid by Mr Haerewa all his final holiday pay.

[4] Mr de Thierry says he went to the Department of Labour (now the Department of Business, Innovation and Employment) for assistance to recover the holiday pay. The department requested wage time and leave records from Peter Haerewa (prior to 25 August 2011). The department's request for the wage time and leave records was not complied with by Mr Haerewa. The department decided not to pursue the claim because Mr Haerewa's business no longer operated and it was not likely he would employ anyone again. Instead Mr de Thierry contacted the Community Law Centre (CLC) for assistance and to continue the claim in the Authority. In the absence of any wage time and leave records the CLC calculated 8% of his total gross earnings as \$4,121.16 using an online calculation tool. There is no indication from the papers I have that the CLC actually asked Mr Haerewa for wage time and leave records, but instead seems to have made its own calculations because Mr Haerewa had failed to produce the records requested by the department.

[5] Also the Community Law Centre calculated that he had been paid \$1,898.70 gross for the leave that he took during his employment.

[6] Mr de Thierry says he is thus owed \$2,222.46 gross for his unpaid holiday pay. Despite requests no payment has been made. Also, Mr de Thierry says that Mr Haerewa apparently agreed to pay, but has not honoured the commitment.

[7] I accept that Mr Haerewa did not produce wage and time and leave records as requested by the Labour Inspector. Although there was no direct evidence from the Labour Inspector my conclusion that the record was not provided is supported by the following:

- a. Mr de Thierry's evidence on oath;
- b. The Labour Inspector's letter dated 25 August 2011 that there was no response to the request for wage time and leave records; and
- c. The Community Law Centre's attempt to reconstruct the calculations for holiday pay in gross figures.

[8] Also Mr Haerewa failed to comply with a direction from the Authority to produce wage time and holiday records prior to the investigation meeting.

[9] In this matter Mr Haerewa has failed to appear at the Authority's investigation meeting. A process server was required to serve the documents and notice of the investigation meeting on Mr Haerewa.

[10] I was satisfied that service was completed. This has been supported by an affidavit from the process server.

[11] I decided to proceed fully in the matter as if Mr Haerewa had attended or been represented under clause 12 Schedule 2 of the Employment Relations Act. The matters I took into account were:

- a) That Mr Haerewa had been properly served with the documents and notice of investigation meeting.
- b) That attempts were made by a support officer to contact Mr Haerewa prior to the start of the investigation meeting. This was unsuccessful.
- c) That Mr Haerewa failed to lodge a statement in reply.
- d) That the start of the investigation meeting was delayed to enable Mr Haerewa more time to get to the hearing.
- e) That there has been no good cause for Mr Haerewa failing to appear at the investigation meeting.

Determination

[12] I am satisfied Mr de Thierry was employed as a truck driver by Peter Haerewa. This is supported by an employment agreement, payments and bank statements and IRD information.

[13] I am satisfied that Mr de Thierry's calculations amount to the holiday pay he says he is owed. This is supported by:

- (a) The summary of earnings based upon IRD and bank records and calculated by the Manawatu Community Law Centre;

- (b) The IRD Summary records;
- (c) The bank records;
- (d) The Labour Inspector's correspondence.
- (e) The statement of problem.

[14] Section 132 of the Act applies. I accept the claims for the holiday pay made by Mr de Thierry are proved.

[15] Peter Haerewa must pay Mr Colin de Thierry \$2,222.46 gross holiday pay.

Penalty for failing to produce the holiday and leave records

[16] The Labour Inspector has not commenced proceedings under the Holidays Act. Section 83 of the Holidays Act allows for evidence to be produced that the employer failed to comply with the request for the leave record under s 82 and s 83 of the Holidays Act. Section 74 of the Holidays Act enables an employee to commence proceedings for enforcement, but under s 76 only a Labour Inspector can recover a penalty in regard to a breach of s 83.

[17] Also, under s 130 (2) of the Employment Relations Act (the Act) a request for wages and time records (incorporating the leave record) must be made by an employee or by an authorised representative under s 236 of the Act. In this case the request was made by a Labour Inspector acting on a complaint from Mr de Thierry, and I am not satisfied that the Labour Inspector was acting as Mr de Thierry's representative under s 236 of the Act. Indeed the Labour Inspectors have their own powers under the Act to act and to commence proceedings. Mr de Thierry and/or an authorised representative did not request the wage time and leave records. A claim has not been commenced by a Labour Inspector for a penalty (under the Labour Inspector's powers:-s 229 (1) (c) (i) and s 229 (1) (d) and s 229 (3) of the Employment Relations Act).

[18] The records would have been of immeasurable assistance if they had been provided. Mr Haerewa's failure to reply and respond in the matter leaves the impression that either he has no such records and never kept them or they support Mr de Thierry's claim. Mr Haerewa was on notice of the attempts made by the

department and the Community Law Centre to re-construct the amount owing. I can only conclude that Mr Haerewa has accepted the calculations without replying.

[19] I conclude Mr Haerewa's failure to provide the leave records as requested has been deliberate and he has put Mr de Thierry to the time, expense and effort to do his best to calculate the amount owing, albeit with assistance.

[20] I am not able to apply a penalty because Mr de Thierry personally did not request Mr Haerewa to produce the records, there is no evidence that the CLC requested the records, and the Labour Inspector has not brought a claim.

Failure to assist the Authority

[21] Mr Haerewa failed to assist the Authority by:

- (a) Failing to provide a statement in reply despite being put on notice of the requirement to do so;
- (b) Failing to provide wage time and holiday records when requested to do so by the Authority;
- (c) Failing to attend the Authority's investigation meeting held in Palmerston North.

Summary

[22] Peter Haerewa is required to pay Colin de Thierry the sum of \$2,222.46 gross holiday pay and \$71.56 filing fee. There is no other issue in regard to costs.