

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 165  
5445955

BETWEEN                      LABOUR INSPECTOR (KATE  
FEENEY)  
Applicant

A N D                              DANUJA INTERNATIONAL  
(PVT) LIMITED  
Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:            Kate Feeney in person  
No appearance for Respondent

Investigation Meeting:     01 May 2014 at Auckland

Date of Determination:     02 May 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.    Under s.137 of the Employment Relations Act 2000 (the Act) Danuja International (PVT) Limited (Danjuja) must comply with the requirements of the Improvement Notice issued to it on 31 October 2013 under s.223D of the Act by no later than 14 days from the date of this determination.**
- B.    Under ss.135 and 223F of the Act, Danuja must pay a penalty of \$5,000 for failing to comply with the Improvement Notice within 21 days of the date of this determination.**

- C. Under s136 of the Act, the penalty is to be paid to the Authority for transfer to a Crown Bank Account within 21 days of the date of this determination.**
- D. Danuja must pay the Labour Inspector the sum of \$71.56 in reimbursement of the amount paid by the Ministry of Business, Innovation and Employment, on the Inspector's behalf to lodge her application in the Authority.**

### **Non-appearance of respondent**

[1] Danuja filed a statement in reply on 10 February 2014 stating that it would be able to *“solve the problem, as soon as possible”*. Danuja also stated there was a dispute with the franchisor. The issue has not been resolved and the fact that there is a dispute with the franchisor is not a matter for the Authority to deal with.

[2] Danuja was served with a notice of investigation meeting on 14 February setting out the date and venue for the meeting. At the investigation meeting, the Labour Inspector informed the Authority that she had undertaken some enquiries and was aware that Danuja's director, Mr Presanna Thilakarathna had departed New Zealand on 11 April 2014. On 29 April, two days before the meeting was due to proceed an email was received by the Authority from Mr Thilakarathna stating that he was in Sri Lanka and unable to attend. No reasons were provided. I find Mr Thilakarathna had ample time before the investigation meeting to apply for an adjournment of the meeting and give reasons for doing so, but he failed to do so. I am not convinced that there were any grounds for the failure by Danuja to attend the investigation meeting and so I proceeded to investigate the matter in the absence of Danuja.

### **Employment Relationship Problem**

[3] The Improvement Notice stated that the Labour Inspector, Ms Feeney (the Inspector) reasonably believed that Danuja had failed to comply with:

- Section 27 of the Holidays Act 2003 – employer must pay annual holiday upon termination of employment;

- Section 60 of the Holidays Act 2003 – employer to pay unused alternative holidays upon termination of employment;
- Sections 65 and 71 of the Holidays Act 2003 – entitlement to and payment of sick leave.

[4] The Improvement Notice required Danuja to take action to ensure compliance with the provisions detailed above by 5pm on Friday 29 November 2013. However, the Inspector said that despite having repeatedly drawn this to the attention of the Director of Danuja, there was no evidence of required remediation furnished to her.

[5] The Inspector is seeking an order under s.137(1)(a)(iii)(b) of the Act for compliance.

[6] The Inspector also seeks a penalty of up to \$20,000 under s.223F(1) of the Act.

### **Background facts**

[7] In response to a complaint made by two of Danuja's former employees, the Inspector investigated the complaints that holiday pay had not been paid upon the termination of their employment, nor had public and alternative holidays been paid, and in the case of one former employee sick leave she was entitled to had not been paid.

[8] The Inspector made contact with Mr Thilakarathna who accepted that some of the monies being sought by the former employees was owing but disputed that money was owed for public holidays. Mr Thilakarathna confirmed to the Inspector that the financial position of Danuja was not good. Despite promises to contact the Inspector, Mr Thilakarathna failed to do so and so the Inspector decided to enforce measures, initially in the form of an Improvement Notice.

[9] The Improvement Notice had been signed by the Inspector and was dated 31 October 2013.

[10] Section 223D of the Act requires that such a Notice, state, among other things:

- The provision which the Inspector believes the employer had not complied with;

- The Inspector's reasons for that belief;
- The nature and extent of the failure to comply;
- The steps that could be taken in order to comply; and
- The date by which the employer must comply.

[11] Accordingly, the Improvement Notice cited the failure to comply with ss.27, 60, 65 and 71 of the Holidays Act and outlined the steps required to achieve compliance.

[12] As the Inspector did not receive a satisfactory response from Danuja, she made an application for a compliance order to the Authority.

[13] Danuja was served with a statement of problem and filed a statement in reply that he Mr Thilakarathna had been overseas but *could solve this problem with the mediator*. The matter was not solved.

[14] I was satisfied from the Inspector's evidence that Danuja had failed to meet its statutory obligations to comply with the Improvement Notice and she was entitled to have the requirements of that Notice enforced by way of a compliance order issues by the Authority. The compliance order is made on the terms as set out at head of this determination.

### **The penalty**

[15] I was also satisfied that the Inspector had made out the grounds for a penalty to be imposed on Danuja for its failure to comply with the Improvement Notice.

[16] The failure to comply with the provisions of the Holidays Act is a serious matter. A failure to respond properly to an Improvement Notice, which has the purpose of correcting matters without resort to legal proceedings, makes matters worse.<sup>1</sup> In the present case the Inspector's evidence and the apparent lack of any real effort by Danuja to engage and explain its position support a conclusion that its actions (or rather, omissions) are deliberate and not inadvertent.<sup>2</sup> Further, this was not the first time the Inspector had cause to deal with Danuja. The Inspector said that Mr

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<sup>1</sup> *Erin Spence, Labour Inspector v. Oakridge Masonry Ltd* [2002] NZERA Auckland 414 at [23]

<sup>2</sup> *Zu v. McIntosh* [2004] 2 ERNZ 448

Thilakarathna and Danuja have been investigated for similar matters some 4 times previously. I find that Mr Thilakarathna was aware of his and Danuja's obligations when served with an Improvement Notice, and simply failed to satisfactorily resolve matters. The harm caused is that at least two of Danuja's former employees have been left short of their statutory entitlements.

[17] A penalty under s.223F is appropriate. The only question is the appropriate level of such a penalty and the range, since April 2011, may go up to \$20,000 for a company.<sup>3</sup>

[18] On that scale I consider that a penalty of \$5,000 is appropriate. Danuja, despite assurances by its director that it would solve matters, has not complied with the Improvement Notice. Danuja and its director have been investigated with regard to similar issues on a number of previous occasions. Such behaviour is not acceptable and the penalty imposed is to deter it from continuing to act in a similar manner and also to deter other employers from acting in a similar manner.

[19] Under ss.135 and 223F of the Act, I order Danuja to pay a penalty of \$5,000 for failing to comply with the Improvement Notice, within 21 days of the date of this determination.

[20] Under s136 of the Act, the penalty is to be paid by Danuja to the Authority for transfer to a Crown Bank Account within 21 days of the date of this determination.

### **Costs**

[21] The Inspector is also entitled to reimbursement by Danuja of the fee of \$71.56 paid by the Ministry of Business Innovation and Employment to lodge her successful application in the Authority. This fee is to be paid within 21 days of the date of this determination.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

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<sup>3</sup> Section 135(2) of the Act