IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA7A /08
5094760

	BETWEEN	HAVENLEIGH GLOBAL SERVICES LIMITED Applicant
	AND	PRASIT TOEIKRATHOK, GRITTAPAT KHAORSRI, WANLOP NGAMPAK, CHARAN BOONSOM, PHIT KHANGSAMRONG, KHWANTA KHANGSAMRONG, ORASA KHAMBUT and SURACHET KANMIKA Respondents

Member of Authority:	James Crichton
Representatives:	Brian Fletcher, Counsel for Applicant No appearance for Respondents
Investigation Meeting:	Determination on the papers
Submissions received:	3 July 2008 from Applicant No submissions from Respondents
Determination:	24 September 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By substantive determination dated 23 January 2008, the Authority dealt with the original application concerning these parties but because of an oversight by the Authority, failed to address and determine one subsidiary issue raised in the statement of problem filed by the applicant (Havenleigh).

[2] The essence of Havenleigh's position is that by dint of a decision of a Labour Inspector at Nelson, Havenleigh was directed to make a payment of annual holiday

pay in respect to two of the respondents in circumstances where Havenleigh contends that that holiday pay had already been paid.

[3] An application to re-open the investigation was filed by Havenleigh on 14 February 2008 and granted by the Authority on 10 June 2008.

[4] In a telephone conference with the applicant party on 10 June 2008 (the respondents having indicated they would participate but then failed to engage) the Authority directed that the parties were to have the opportunity of making further written submissions on the outstanding issue and the applicant's submissions came to hand on 3 July 2008. No submissions were filed on behalf of the respondents notwithstanding, I am satisfied, that the respondents had every reasonable opportunity to do so.

[5] I accept that the respondents may be prepared to rest on the evidence already available to the Authority from the substantive hearing held over a number of days in September 2007.

[6] I am satisfied that the respondents have had every reasonable opportunity to participate in this process towards the re-opening of the investigation and, notwithstanding that the respondents have not been engaged at any time in the re-opening, I intend to proceed to determine the matter having satisfied myself that the respondents were aware of the application, had proper access to translation services so as to participate in telephone conferences and the like, had those services actually arranged for them by the Authority's Senior Support Officer, and yet still chose not to engage.

[7] The Labour Inspector directed that Havenleigh make the following payments: a payment of annual holiday pay to Prasit Toeikrathok in the sum of $2,660.85; and a payment of annual holiday pay to Wanlop Ngampak in the sum of $2,136.72.

[8] The evidence heard by the Authority in the original investigation meeting in September 2007 included this statement from Mr Andrew Forward, a Director of Havenleigh:

> *Payment as requested by the Labour Inspector (in relation to the two respondents noted) has been paid to the Labour Inspector. As it has been agreed that holiday pay was actually paid in addition to the hourly rate to these two employees then even though the employer has been required to pay the holiday pay again due to the technical*

> *nature of the Holidays Act the earlier payment amounts to an overpayment which the employer claims back from these two employees in this proceeding.*

[9] In the submission filed on behalf of Havenleigh at the end of the original investigation meeting, Mr Fletcher, counsel for Havenleigh, had this to say about the subject payments:

> *There appears to be no issue raised that annual holiday payments had been included in addition to the hourly rate and properly paid in terms of the Employment Relations Act. This is allowed in relation to workers who are either on a fixed term contract or will not be working for more than 12 months. ... (these workers) worked over 12 months. The Labour Inspector has taken the view they could not legally be paid holiday pay on a PAYE basis. Even though it is patently obvious that they had received the holiday pay because of the strictness of the law the Labour Inspector required this to be paid again. … as there is no disagreement that holiday pay has been paid twice to these two employees, the employer is entitled to recover those amounts by way of overpayment of wages and seeks orders from the Authority accordingly.*

[10] In effect, Havenleigh say that the Labour Inspector has required that the holiday pay be paid to these workers in accordance with the Holidays Act but that in fact that money has already been paid as part of the hourly rate and that there was no dispute about that and so the submission is that Havenleigh is entitled to recover the overpayment.

The Labour Inspector's inquiries

[11] The Labour Inspector at Nelson formed the view that the payment regime in relation to holiday pay for the two subject workers did not fully comply with s.28(1)(a) of the Holidays Act 2003. That section generally prescribes the basis on which annual holiday pay can be paid to a worker on a *pay as you go* basis.

[12] Section 28(1)(a) provides that where the worker agrees and where proper records are kept differentiating annual holiday from ordinary pay, the parties may agree to a *pay as you go* basis if the worker's work is so intermittent as to be impracticable to adopt the normal four weeks annual holiday leave situation or where the worker works on a fixed term for less than 12 months.

[13] The Labour Inspector identified that the two workers affected in fact worked steadily for more than 12 months and therefore he considered they were not able to receive their holiday pay on a "pay as you go" basis.

[14] The Labour Inspector then concluded that as a consequence of that decision about the effect of the statutory enactment, he must require the employer to pay holiday pay in accordance with the statute and accordingly, the Labour Inspector directed that the employer pay the appropriate calculation of holiday pay by cheque to him for the use of the workers concerned.

[15] In conformity with the Labour Inspector's decision, Havenleigh then forwarded the cheques as directed, with a denial of liability.

The company's wage records

[16] There is no suggestion that the company's record keeping in relation to the wage records of the two workers concerned is anything other than absolutely appropriate and in conformity with the requirements of the Holidays Act 2003.

[17] Nor is it contended that the company failed to obtain the consent of the workers to the payment of holiday pay on a *pay as you go* basis.

[18] Indeed, the only breach of the law which the Labour Inspector was able to identify was the fact that the two employees concerned had in fact worked for longer than 12 months and therefore he found they were not entitled to have holiday pay paid as part of the hourly rate.

[19] However, I am absolutely satisfied with the records that have been made available to me as part of the Authority's investigation into this matter that both of the workers concerned were in truth paid holiday pay as part of their hourly rate. It follows that, as a consequence of the implemented decision of the Labour Inspector at Nelson, these workers have in fact received holiday pay twice. The company's evidence was that the workers had been paid holiday pay as part of their hourly rate and that evidence was not contradicted by the workers' evidence. Further, and most importantly, the company's wage records show that holiday pay was paid to these workers as part of the hourly rate. Even the Labour Inspector accepted that that is the position, as a matter of fact.

[20] I am referred to Section 94A of the Judicature Act 1908. Also of relevance is a decision of my colleague Member Urlich in *Northshore City Council v. Sutto 30 May 2005 AA 201/05* and a judgment of Travis J in *Master Builders' Assn (Auckland) Inc v. Dow [1997] ERNZ 331.*

[21] Section 94A of the Judicature Act 1908 provides that recovery of monies which might be granted by a Court for a mistake of fact may also be granted if the mistake is one of law or partially law and partially fact. Then Section 94B goes on to provide that such a payment may not be recoverable if it was received in good faith and the recipient had altered their position in reliance on the payment.

[22] Section 162 of the Employment Relations Act confers power on the Authority when dealing with any employment agreement to make the kinds of orders available to the High Court in respect to any *"enactment or rule of law relating to contracts"*.

[23] Three questions now need to be addressed. First, is there an employment agreement before the Authority in the present matter? I hold that there is. The recipients of the holiday pay in issue were, at the time the matter was put before the Authority, in the employ of Havenleigh. The employment relationship continued at least to the date of the investigation meeting.

[24] Second, is there an *"enactment or rule of law relating to contracts"* involved in the matter before the Authority such that the Authority may have recourse to the kinds of orders available to the High Court by reason of S 94A of the Judicature Act 1908? I have reached the conclusion that, although that provision clearly contemplates a wider ambit than simply matters of contract, by dint of its very wording, it is clear it applies to contractural matters and to that extent, it can be relied on in the Authority.

[25] Third, having reached the conclusion that Section 94A is available to the Authority, the next question is whether there is a mistake of fact or law which could attract the relief sought. I am satisfied there has been such a mistake in the Labour Inspector's failure to take account of subsections (2) and (3) of Section 28 of the Holidays Act.

[26] It seems that the Labour Inspector has considered Section 28(1) in rejecting the arrangement the parties have made but has failed to consider the effect of subsections (2) and (3) of the same section either one of which must have applied to the employees concerned. If subsection (2) applied (because the employees were on a series of fixed term agreements each of less than twelve months) then the "pay as you go" arrangement remained lawful. If subsection (3) applied (because the employees had become permanent workers) then the employer was entitled to a "set off" of the holiday pay already rendered, in this case 100%.

[27] In *North Shore City Council v Sutton* supra, the Authority directed repayment of a sum of overpaid wages relying on the general jurisdiction conferred by Section 161 of the Employment relations Act. I agree with Member Urlich that section 161 does confer such authority, but my decision in the instant case relies on the provisions of the Judicature Act I have just referred and to the mistaken application of the Holidays Act by the Labour Inspector.

[28] In *Master Builders Assn (Auckland) Inc v. Doe* supra, the Employment Court reached the conclusion that it was unable to consider the relief applied for because the overpayment in that case post dated the employment relationship. This is not the position here. It follows the Court's judgment can be distinguished.

Determination

[29] I direct that Prasit Toeikrathok is to repay to Havenleigh the sum of $2660.85 and that Wanlop Ngampak is to repay to Havenleigh the sum of $2136.72 each, being overpaid holiday pay.

Costs

[30] Costs are to lie where they fall

James Crichton
Member of the Employment Relations Authority