

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

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[2014] NZERA Christchurch 52

BETWEEN DOUGLAS HIXON, LABOUR
INSPECTOR, Applicant

AND AKBABAS LIMITED,
Respondent

Member of Authority: Christine Hickey

Date: 2 April 2014

DETERMINATION OF THE AUTHORITY (No.1)

- A. The application for leave to lodge an objection to the improvement notice out of time is denied.**
- B. The investigation meeting will proceed on 27 and 28 May 2014 to consider the Labour Inspector's application for orders for compliance and a penalty.**

Issue for resolution

[1] Graeme Downing, counsel for Akbabas Limited (Akbabas), has applied for leave to file an objection to an improvement notice out of time. Alex Leulu, solicitor for the Ministry of Business, Innovation and Employment, made submissions on the Labour Inspector's behalf and objects to such leave being given.

[2] I have considered written submissions from Mr Downing and Mr Leulu, who have consented to this issue being resolved on the papers.

Background facts

[3] On 25 November 2013 Mr Hixon issued an improvement notice to Akbabas seeking that it take the following steps by 5 pm on 20 December 2013:

- Keep employment records in compliance with s.130 Employment Relations Act 2000;

- Comply with the Minimum Wages Act 1983, the Wages Protection Act 1983 and the Holidays Act 2003; and
- Pay wages arrears and holiday pay totalling \$25,930.22 to Serkan Akyurt.

[4] Akbabas was also required to provide evidence to Mr Hixon that it had taken steps to:

- Keep a record of hours employees work;
- Provide employees an opportunity to sign wage records as correct;
- Keep a record of employee entitlements to annual holidays, public holidays and alternate holidays;
- Provide all employees with a copy of the intended employment agreement that is translated into their native language if necessary; and
- Advise employees of their right to seek advice before signing an employment agreement.

[5] The improvement notice also contained notification to Akbabas of its right to object to the notice under s.223E of the Employment Relations Act 2000 (the Act).

Section 223E provides:

An employer may, within 28 days after the improvement notice is issued to the employer, lodge with the Authority an objection to the notice.

(2) The function of the Authority in respect of an objection is to determine—

(a) whether the employer is failing, or has failed, to comply with the specified provision of the relevant Acts; and

(b) the nature and extent of the employer's failure to comply with the provision; and

(c) the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

(3) The Authority may confirm, vary, or rescind the improvement notice as the Authority thinks fit.

[6] Akbabas did not comply with the improvement notice. Instead on 2 December 2013 Mr Akbabas sent a letter to Mr Hixon and on 20 December 2013 an objection to the improvement notice was sent to Mr Hixon, who did not receive it until 6 January 2014.

[7] On 6 January 2014 Mr Hixon notified Mr McFadden (of Mr Downing's firm) that the objection to the improvement notice should have been lodged directly with the Authority. The objection to the improvement notice has not been lodged with the Authority.

[8] On 4 February 2014 Mr Hixon made an application to the Authority to make a compliance order, under s.137 of the Act, ordering Akbabas to comply with the improvement notice and to consider awarding a penalty against Akbabas¹ for its failure to comply with the improvement notice.

[9] On 24 February 2014 Akbabas' statement in reply was filed with the Authority seeking leave to extend time for the lodgement of the objection to the improvement notice. By way of the statement in reply Akbabas denies that it owes Mr Akyurt any arrears and denies that it failed to comply with the Minimum Wage Act, the Wages Protection Act and the Holidays Act.

[10] To extend the time for lodging the objection notice Akbabas relies on the Authority's discretionary power to make an order extending the time in which anything required to be done under the Act can be done.²

Mr Leulu's submissions

[11] Mr Leulu submits that Akbabas had every opportunity to lodge an objection notice within the required 28 days and, having failed to do so, can no longer ask the Authority to assess the considerations set out in s.223E(2)(a)-(c) of the Act. In other words Mr Leulu says in investigating whether to make compliance orders the Authority can no longer consider:

- whether Akbabas failed or is failing to comply with the Minimum Wage Act, the Wages Protection Act and the Holidays Act;
- the nature and extent of Akbabas' failure to comply with the provisions; and
- the nature and extent of any loss suffered by Mr Akyurt as a result of Akbabas' failure to comply with the Minimum Wage Act, the Wages Protection Act and the Holidays Act.

[12] Mr Leulu submits that allowing Akbabas to argue those matters would undermine the purpose of the 28 day period set out in s.223E(1) of the Act and:

essentially allow an employer two opportunities to argue the detail of any given case. To do so would undermine the purpose of the provision and amount to an abuse of process, effectively negating section 223D to a nullity.

Instead, the focus of an employer's opposition to a compliance order should focus on the reasons why the requirements of the notice have not been met on time.

¹ Under s.223F(1) of the Act

² Section 219 of the Act

Determination of the application to grant leave to lodge an objection out of time

[13] When determining an objection to an improvement notice, s.223E(3) of the Act gives the Authority the discretionary power to vary, rescind or confirm the improvement notice. What I am now asked to do is order compliance with the improvement notice, which is a different exercise.

[14] Sections 137 and 138 of the Act set out the Authority's powers to order compliance with a number of provisions including an improvement notice (at s.137(1)(a)(iiib) and s.223D(6) of the Act).

[15] Sub-sections 137(2) and 137(3) of the Act provide:

(2) *Where this section applies, the Authority **may**, in addition to any other power it may exercise, **by order require**, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, **that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.***

(3) *The Authority must specify a time within which the order is to be obeyed.*

[Emphasis added]

[16] The Authority's power to order compliance is a discretionary one. Likewise, the Authority's power to award penalties under s.135 of the Act is discretionary.

[17] Section 157 of the Act sets out the role of the Authority:

(1) *The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and **making a determination according to the substantial merits of the case**, without regard to technicalities.*

(2) *The Authority must, in carrying out its role,—*

(a) ***comply with the principles of natural justice;** and*

(b) *aim to promote good faith behaviour; and*

(c) *support successful employment relationships; and*

(d) *generally further the object of this Act.*

(2A) [Repealed]

(3) *The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with—*

(a) *this Act; or*

(b) *any regulations made under this Act; or*

(c) *the relevant employment agreement.*

[Emphasis added]

[18] In investigating whether or not to make compliance orders and award a penalty against Akbabas, the Authority needs to comply with the principles of natural justice as mandated in s.157(2)(a) of the Act.

[19] Compliance with natural justice is also necessary for the Authority to make a determination in accordance with the substantial merits of the case. In order to do so

the Authority needs to allow Akbabas to give evidence and make submissions on whether or not the Authority should order compliance with the improvement notice. That is so whether or not Akbabas will argue the same points as it may have argued had it lodged an objection to the improvement notice within time.

[20] In order to investigate and determine the application for compliance and to do so observing natural justice there is no need to grant Akbabas leave to file an objection to the improvement notice out of time. Akbabas has filed a statement in reply to the application for compliance orders and a penalty or penalties. The Authority will proceed to investigate whether to make compliance orders and whether or not to award a penalty or penalties at the meeting already scheduled.

[21] Akbabas denies that it owes Mr Akyurt any further money. However, I note that Akbabas has not provided any record of Mr Akyurt's hours of work as requested by Mr Hixon and I draw Akbabas and its counsel's attention to section 132 of the Act:

Failure to keep or produce records

(1) Where any claim is brought before the Authority under [section 131](#) to recover wages or other money payable to an employee, the employee may call evidence to show that—

- (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and*
- (b) that failure prejudiced the employee's ability to bring an accurate claim under [section 131](#).*

(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—

- (a) the wages actually paid to the employee;*
- (b) the hours, days, and time worked by the employee.*

(3) A defendant may not use as evidence any wages and time record that would be inadmissible under [section 232\(3\)](#).

[22] Mr Leulu's submission that the employer should focus on *reasons why the requirements of the notice have not been met* is correct, to an extent. The Authority's focus in determining whether to make compliance orders and, if so, what they should be will be first to focus on whether or not Akbabas has complied with the requirements set out in the improvement notice. As part of the investigation into whether or not to make compliance orders the Authority will also assess whether it was practical (and lawfully required) for Akbabas to comply with the requirements set out in the improvement notice.

[23] Secondly, in order to assess whether or not it to impose a penalty and, if imposing a penalty, what quantum to impose, the Authority will need to consider

submissions from Akbabas on why it has not complied with the requirements set out in the improvement notice.

Determination

[24] Leave to lodge an objection to the improvement notice out of time is denied. The matter remains before the Authority in respect of compliance with the improvement notice and consideration of a penalty. The Authority will proceed to determine the Labour Inspector's application on 27 and 28 May 2014.

Christine Hickey
Member of the Employment Relations Authority