

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 43  
5445545

BETWEEN DOUGLAS KARL HIXON,  
LABOUR INSPECTOR  
Applicant

AND PAPANI TUPOU AND  
OFA FOTU-MOALA  
Respondents

Member of Authority: M B Loftus

Representatives: Douglas Hixon, on his own behalf  
No appearance for the Respondent

Investigation Meeting: 11 March 2014 at Blenheim

Submissions Received: At the investigation meeting

Determination: 24 March 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Hixon, seeks orders the respondents, Papani Tupou and Ofa Fotu-Moala:

- (a) pay wages and holiday pay seven employees did not receive for their services;
- (b) be penalised for failing to comply with an Improvement Notice issued in accordance with Section 223D of the Employment Relations Act 2000; and
- (c) comply with requirements of the Improvement Notice which will remain an issue once the arrears are paid.

[2] The respondents' position is unknown given the lack of a Statement in Reply and their failure to participate in the Authority's process.

### **Non-appearance of the Respondents**

[3] The respondents were neither present nor represented at the investigation meeting. That raised the question of whether or not I proceed in their absence.

[4] The respondents' failure to participate in the process which led to a hearing being scheduled, along with Mr Hixon's advice (tendered during a telephone conference) he knew their whereabouts, led to an instruction he serve the notice of investigation meeting.

[5] Mr Hixon attests to having personally handed the notice to Mr Tupou. He says they then discussed the process and its possible implications. I accept his evidence.

[6] The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant(s).

[7] I am therefore satisfied the respondents were aware of the investigation meeting and the consequences of non-attendance.

[8] In the circumstances, and given the lack of an explanation for the absence, I consider it appropriate to continue. Those Mr Hixon represents are entitled to have their claims resolved.

### **Background**

[9] The respondents operate as viticulture contractors trading under the name Sovereignty of Knowledge Contracting. In doing so they have employed an unknown number of people to perform work in vineyards.

[10] In June 2013 the respondents approached a group of seven visitors staying at Blenheim Backpackers. They offered a short period of casual employment which the prospective employees accepted. The work was performed but no payment received. The employees raised the issue with the Central Amalgamated Workers Union which passed the claim to Mr Hixon.

[11] Discussions subsequently ensued but despite Mr Hixon's statement the respondents were cooperative and offered to assist in resolving the complaint, there was no action.

[12] The respondents' failure to act led to the issue of an Improvement Notice requiring compliance with:

- (a) S.6 of the Minimum Wages Act 1983 (payment of the minimum wage);
- (b) S.23 of the Holidays Act 2003 which relates to payment of holiday pay;
- (c) S.130 of the Employment Relations Act 2000 which deals with employment records; and
- (d) S.65 of the Employment Relations Act (provision of employment agreements).

[13] The alleged arrears ((a) and (b) above) total \$790.40 with \$98.80 gross payable to each of six workers and a further \$197.60 gross to the seventh.

[14] The original Notice, dated 16 August, incorrectly identified Sovereignty of Knowledge as the employer.

[15] On realising the error Mr Hixon served a second notice on 22 November 2013 and it correctly identified Papani Tupou and Ofa Fotu-Moala as the employers. It was handed to Mr Tupou on 22 November 2013 and required compliance by 28 November.

[16] There has been no compliance.

### **Determination**

[17] As already said Mr Hixon seeks an order the respondents pay outstanding wages; receive a penalty and comply with residual, yet still relevant, requirements of the Improvement Notice issued on 22 November 2013.

[18] Section 132 of the Employment Relations Act 2000 provides where there is a failure to keep or produce wage records I may accept the claim unless the

respondent(s) can prove it is incorrect. Here, there are no time and wage records and no evidence the claim lacks validity. To the contrary, there is Mr Hixon's evidence the respondents acknowledged the debt and agreed to pay but then failed to do so. There is also supporting documentary evidence from those Mr Hixon represents.

[19] I accept the evidence and conclude the amount claimed (\$790.40) remains owing. Accordingly payment will be ordered and is to be made to Mr Hixon in his capacity as a Labour Inspector. Mr Hixon will then arrange to have appropriate amounts forwarded to each of the seven employees upon whose behalf he is acting.

[20] Turning to the claim for a penalty. I am satisfied the Improvement Notice, or at least the second version, was properly served. Mr Hixon's evidence also satisfies me there has been no compliance. Section 223F of the Employment Relations Act 2000 provides for the imposition of a penalty in such circumstances.

[21] Having heard Mr Hixon and assessed his evidence I am satisfied this is a situation in which a penalty is appropriate. I do, however, note his view the respondents are of limited means and his request a message be sent but the amount not be crippling.

[22] Having considered Mr Hixon's views and penalties recently imposed by my colleagues for similar breaches, I consider \$1,500 to be appropriate. The respondents are jointly liable for payment which shall be made to the Crown via the Ministry of Business, Innovation and Employment.

[23] There are then the residual requirements of the Improvement Notice. Along with the request known arrears be paid, the Notice required the respondents:

(a) *Audit employee files and where minimum wage has not been paid calculate and use best endeavours to contact and pay minimum wage to those employees and provide the results to the Labour Inspector for examination;*  
and

(b) *Prepare employment agreements which meet the requirements of section 65 of the Employment Relations Act 2000 and offer these to all intended employees.*

[24] Mr Hixon has convinced me these requirements remain. The audit is required given the respondents failure to provide wage records and resulting uncertainty as to

how many employees they have retained yet failed to pay correctly. The ongoing need for an employment agreement which complies with statutory requirements emanates from Mr Tupoa's advice to Mr Hixon the respondents intend to continue employing.

[25] The compliance sought shall therefore be ordered.

### **Costs**

[26] The costs claim is minimal and limited to reimbursement of the Authority's filing fee. The cost was incurred and the claim has been totally successful.

[27] In order to avoid additional effort or expense and given a costs award can be reviewed, I choose to dispose of the issue. The respondents will pay a further \$71.56 as reimbursement of costs.

### **Conclusion and Orders**

[28] For the above reasons I make the following order.

[29] The respondents, Papani Tupou and Ofa Fotu-Moala, are to make the following payments:

- (a) \$790.40 (seven hundred and ninety dollars and forty cents) gross for unpaid wages and holiday pay. Payment is to be made to Mr Doug Hixon, Labour Inspector, no later than 4.00pm Monday 7 April 2014. Mr Hixon will then distribute appropriate amounts to the seven workers he represents; and
- (b) a further \$1,500.00 (one thousand, five hundred dollars), being a penalty payable to the Crown pursuant to section 135 of the Employment Relations Act 2000. Payment is to be made to the Ministry of Business, Innovation and Employment (MBIE) no later than 4.00pm Monday 7 April 2014; and
- (c) a further \$71.56 (seventy one dollars and fifty six cents) as a contribution towards MBIE's costs. Again payment is to be made no later than 4.00pm Monday 7 April 2014.

[30] Furthermore the respondents, Papani Tupou and Ofa Fotu-Moala, are to:

- (a) Audit employee files and where the minimum wage has not been paid, calculate and use best endeavours to contact and pay minimum wage to those employees and provide the results to the Labour Inspector for examination no later than 4.00pm Wednesday 16 March 2014; and
- (b) Ensure employment agreements offered to any future employees meet the requirements of section 65 of the Employment Relations Act 2000.

M B Loftus  
Member of the Employment Relations Authority