

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 101  
5466422

BETWEEN JOSAINE INGHAM,  
(LABOUR INSPECTOR)  
Applicant

A N D MATTHEW SWAN t/a  
MENSWORKS  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person  
Respondent in person

Investigation Meeting: 25 March 2015 at Auckland

Date of Determination: 31 March 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Within 28 days of the date of this determination, the respondent Mr Matthew Swan, trading as Mensworks must:**
- (i) Comply with the requirements of the enforceable undertaking entered into under s.223B of the Employment Relations Act 2000 (“the Act”)<sup>1</sup> and pay to the applicant, Ms Josaine Ingham, the Labour Inspector (the Inspector) for the use of Ms Louella Huang (Mr Swan’s former employee) the sum of \$2,550.43 gross;**
  - (ii) Pay to the Authority a penalty of \$2,000 for failing to comply with the terms of the enforceable undertaking<sup>2</sup> (\$1,000 of that amount is to be paid by the Authority to the**

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<sup>1</sup> Under s.137(1)(a)(iii) of the Act

<sup>2</sup> Pursuant to s.223C and s.135(f) of the Act

**Inspector for transfer to Ms Huang) and the balance of \$1,000 to be transferred by the Authority to the Crown).**

**B. Mr Swan must also pay the sum of \$71.56 to the Inspector in reimbursement of the fees paid to lodge this application in the Authority.**

### **The application**

[1] By statement of problem lodged in the Authority on 23 June 2014, Labour Inspector, Ms Josaine Ingham (the Inspector) alleged that Mr Swan was in breach of the Minimum Wage Act 1983 and the Holidays Act 2003. Specifically, the Inspector alleged Mr Swan had failed to pay his former employee, Ms Huang minimum wages and annual holiday pay arrears. The Inspector sought orders from the Authority that Mr Swan pay outstanding minimum wages and holiday pay to Ms Huang, together with interest.

[2] The Inspector also sought penalties for these alleged breaches by Mr Swan of the Minimum Wage Act 1983 and the Holidays Act 2003 and penalties for allegedly failing to provide Ms Huang with a written employment agreement and failing to provide wages and time records and holiday and leave records to the Inspector.

[3] Following the filing of the statement of problem, in August 2014, the Inspector and Mr Swan entered into an enforceable undertaking under s.223B of the Act.

### **The enforceable undertaking**

[4] The enforceable undertaking sets out acknowledgements by Mr Swan of breaches by him of the Minimum Wage Act 1983 and the Holidays Act 2003 and his commitment to rectify such breaches.

[5] Clause 3 of the enforceable undertaking states:

#### **3. *Undertakings***

**3.1 *The Employer will rectify its breaches by taking the action below, which is one that the Labour Inspector determines is appropriate having regard to the nature of the breaches listed in this undertaking:***

1. *The employer will pay the remaining \$3,750.43 gross to the Ministry of Business, Innovation & Employment, for the use of Louella Mengru Huang, in the following instalments:*

[6] The clause specified weekly amounts to be paid by Mr Swan, the final payment of which was to be made on 20 March 2015.

[7] Clause 4 of the enforceable undertaking stated that the Employer acknowledges:

4.1 *That the Labour Inspector has provided information about the nature of the breaches, the full effect of not complying with the undertaking, and assistance as to how these breaches can be remedied.*

4.2 *In the event this undertaking is not fully met, the Labour Inspector ... can seek a compliance order under section 137 of the Employment Relations Act 2000.*

[8] There was further provision in the enforceable undertaking, for the Inspector to seek interest on any unpaid monies and penalties under the Act for breach.

[9] Mr Swan failed to comply with the enforceable undertaking. An amended statement of problem and a second amended statement of problem were filed by the Inspector seeking orders from the Authority that Mr Swan comply with the enforceable undertaking, interest on unpaid monies, penalties for breach of the enforceable undertaking and penalties for breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and the Act.

### **The Authority's investigation**

[10] Mr Swan failed to file statements in reply to the statements of problem filed by the Inspector.

[11] At the investigation meeting Mr Swan sought, and was granted, leave to respond to the Inspector's applications. Mr Swan acknowledged his failure to fully comply with the enforceable undertaking citing financial difficulties. Mr Swan informed the Authority that he had voluntarily been adjudicated bankrupt. Mr Swan explained he had subsequently been discharged from bankruptcy.

[12] This information was new to both the Inspector and to the Authority. Following the Investigation Meeting, Mr Swan provided the Inspector and the

Authority with a Certificate of Discharge from the Official Assignee. The date of discharge was 10 February 2015.

[13] Mr Swan told the Authority he had taken no steps such as approaching a Bank for a loan to allow him to repay money he acknowledged was owing to Ms Huang.

[14] As at the date of the Investigation Meeting, Mr Swan had paid 10 out of the 31 payments required under the enforceable undertaking which left the sum of \$2550.43 gross outstanding.

### **Compliance order**

[15] I am satisfied from the Inspector's evidence that Mr Swan failed to meet his statutory obligation to comply with the enforceable undertaking and that she is entitled to have the terms of the enforceable undertaking enforced by way of a compliance order issued by the Authority. Mr Swan has been discharged from bankruptcy and provided the Authority with no other information to suggest he could not comply with the enforceable undertaking.

[16] The compliance order is that within 28 days of the date of this determination, Mr Swan must comply with the requirements of the enforceable undertaking and pay to the Inspector for the use of Ms Huang the sum of \$2,550.43 gross. In the circumstances I am not making an order that interest be payable on this amount.

### **Penalties**

[17] The Inspector seeks penalties for the following breaches:

- Non-compliance with an Enforceable undertaking (s.223C(2) of the Act);
- Failing to pay minimum wages (s.10 of the Minimum Wage Act 1983);
- Failing to pay outstanding annual holiday pay (s.75(2)(a) of the Holidays Act 2003);
- Failing to offer an employment agreement to an employee (s.65(4) of the Act);
- Failing to provide a wages and time record to a Labour Inspector (s.229(3) of the Act); and

- Failing to keep or provide a holiday and leave record to a Labour Inspector (s.75(2)(a) of the Holidays Act 2003).

[18] The Inspector initially sought minimum wages and arrears of holiday pay on behalf of Ms Huang together with penalties for breaches of the relevant legislation. After filing a Statement of Problem, the Inspector and Mr Swan entered into an enforceable undertaking. The Inspector filed an amended statement of problem when Mr Swan failed to comply with the enforceable undertaking. The Inspector sought an order from the Authority order that Mr Swan comply with the terms of the enforceable undertaking.

[19] Section 223B of the Act makes provision in respect of enforceable undertakings. Section 223B states:

**223B Enforceable undertakings**

- (1) *A Labour Inspector and an employer may agree in writing that the employer will undertake by a specified date (an **enforceable undertaking**) to –*
  - (a) *rectify the breach of any provision of the relevant Acts; or*
  - (b) *pay money owed to an employee under a provision of the relevant Acts; or*
  - (c) *take any other action that the Labour Inspector determines is appropriate having regard to the nature of the breach of the provision of the relevant Act.*

[20] Section 223C of the Act states:

**223C Enforcement of undertakings**

- (1) *An enforceable undertaking may be enforced by the Authority making a compliance order under section 137.*
- (2) *An employer who fails to comply with an enforceable undertaking that remains in force is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*
- (3) *If the enforceable undertaking relates to a monetary settlement, the Enforceable undertaking may be enforced by using, as if the undertaking were an order enforceable under section 141, the procedure applicable under section 141.*

[21] Section 141 allows a compliance order made by the Authority to be filed in a District Court and be enforceable in the same manner as an order made or judgment given by the District Court.

[22] The enforceable undertaking entered into between the Inspector and Mr Swan required payment by Mr Swan of a monetary amount owing to his former employee, Ms Huang. Mr Swan only partially complied with the enforceable undertaking and the Inspector brought an action for compliance in the Authority.

[23] It is my view that the Inspector is able to seek payment of a penalty by Mr Swan for his failure to comply with the enforceable undertaking. The Authority is not able to make separate orders for penalties in respect of breaches of legislation such as the Minimum Wage Act as the enforceable undertaking was entered into by the parties in order to rectify the alleged breaches of such legislation by Mr Swan.

[24] I am satisfied that Mr Swan's failure to comply with the enforceable undertaking entered into by him voluntarily to rectify acknowledged breaches by him to Ms Huang in respect of minimum wage and holiday pay legislation justifies the imposition of a penalty.

[25] Ms Huang was a young and vulnerable employee. Mr Swan's ongoing breach of the enforceable undertaking was serious and ongoing.

[26] In normal circumstances, a penalty of \$3,500 would be appropriate. It is an amount which reflects the seriousness of such a failure to comply with an enforceable undertaking voluntarily entered into, and signals that such behaviour is not acceptable. However, I take into account the fact that Mr Swan did partially comply with the enforceable undertaking. I also take into account that Mr Swan has only recently been discharged from bankruptcy which has impacted on his ability to pay. In the circumstances, I order a penalty of \$2000.

[27] Under s.136 of the Act Mr Swan must pay the entire penalty to the Authority. The Authority is to transfer 50% of the penalty received to a Crown bank account and the remaining 50% of the penalty to the Inspector for the use of Ms Huang. Payment by Mr Swan is to be made within 28 days of the date of this determination.

## **Costs**

[28] The Inspector is also entitled to reimbursement by Mr Swan of the fee of \$71.56 paid by MBIE to lodge her successful application in the Authority. Payment of this amount is to be made within 28 days of the date of this determination.

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