

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 45
5588308

BETWEEN VINOD KUNDU
Applicant

AND WARREN SMITH a Labour
Inspector of the Ministry of
Business, Innovation and
Employment
Respondent

Member of Authority: M B Loftus

Representatives: No appearance for Applicant
Aaron McIlroy, Counsel for the Respondent

Investigation Meeting: 11 April 2016 at Wellington

Submissions Received: At the investigation meeting

Determination: 11 April 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Vinod Kundu, objects to an Improvement Notice¹ served upon a company of which he is the sole director and shareholder, Hutt City Veterinary Care Limited (HCVC). The respondent's position is the application is out of time and the Improvement Notice is warranted given HCVC's failings.

Non-appearance of the Applicant

[2] Mr Kundu was neither present nor represented at the investigation meeting. That raised the question of whether or not I proceed in his absence.

¹ Section 223D of the Employment Relations Act 2000 (the Act)

[3] There can be no doubt Mr Kundu is aware of the investigation meeting. He participated in a telephone conference during which it was scheduled and the Notice of Investigation Meeting was properly served. Furthermore there have been issues with Mr Kundu's willingness to comply with the Authority's requirements regarding the filing of evidence in both this and other matters in which he is involved. He and I discussed his failure to file briefs for this matter when he attended at another investigation meeting on 30 March 2016.

[4] The Notice of Investigation Meeting includes advice that should an applicant not attend the claim may be dismissed.

[5] I am satisfied Mr Kundu is, or at least should be, aware of the investigation meeting and the consequences of non-attendance. In the circumstances, and given neither advice of nor an explanation for the absence, I consider it appropriate to continue.

Background

[6] On 16 September 2015 Mr Smith prepared an Improvement Notice addressing HCVC's failure to pay both the minimum wage and annual holiday pay to six employees. It was served the following day.

[7] On 19 October 2015 Mr Kundu lodged his objection with the Authority.² His grounds for doing so are:

- a. The alleged failure to pay the minimum wage can be addressed by:
 - i. the existence of agreements each of the employees Mr Smith represents were initially engaged on an unpaid trial;
 - ii. the existence of agreements with five of the affected staff that they shall for an initial period after commencement (which varies from employee to employee) be paid a training rate of 50% of the agreed wage; and
 - iii. the existence of an agreement with the sixth employee that should she leave within one year of commencement she

² Section 223E of the Act

reimburse the cost of her training at the rate of \$99 for each hour of training received.

- b. The failure to pay holidays is attributable to a dispute about what hours each employee actually worked.

Determination

[8] The application shall be dismissed for the following reasons.

[9] First there is a question about whether or not the application is valid. It names Mr Kundu as the applicant yet he was not the employer and not the entity upon which the Improvement Notice was served.

[10] More important, however, is the fact the application was not filed within the time allowed by section 223E(1) of the Employment Relations Act 2000 (the Act). The section requires this be done within 28 days of the notices' issue. Mr Kundu's application was filed 32 days after the notice was issued.

[11] That raises the question of whether or not this time requirement should be extended.³ The answer is no as there is no application I extend the time and no evidence or argument as to why I should do so.

[12] Even if I were not of a view to dismiss the objection for the above reasons I conclude an application of Section 223E(2) of the Act to this Improvement Notice would have led to a decision to confirm it.

[13] The purported agreement each employee was initially engaged on an unpaid trial was not produced. In any event I note the evidence of those Mr Smith represents that they were performing revenue producing tasks which means the agreements are likely to be found to be invalid.⁴ Furthermore, and conducting the requisite enquiry, it is doubtful whether or not these employees, being persons intending to work, could be considered volunteer's in the true sense.⁵

[14] The purported agreement five of the affected staff be paid a training rate of 50% faces three impediments. First, it is not mentioned in the applicable individual

³ Section 221(c) of the Act

⁴ *Salad Bowl Ltd v Howe Thornley* [2013] ERNZ 326

⁵ *Brook v MacOwn* [2014] ERNZ 639

employment agreements which do, however, contain completeness clauses. This raises questions about their validity even if they were agreed. Second, there is no applicable industry training order which might validate a training wage. Third, these agreements would still be unlawful as they would take the wage well below anything that might be permissible even if a training wage could be legitimately paid.⁶

[15] The requirement the sixth employee reimburse the cost of her training at the rate of \$99 an hour should she leave within a year faces two problems. First it would reduce the employee's earnings below those required by the Minimum Wage Act 1983. Second, and to be enforceable, such a forfeiture provision must be a genuine assessment of damage.⁷ There is no evidence it is.

[16] The claim for holiday pay is based on HCVC's own records. In such circumstances it is difficult to see how there can be a dispute, especially in the absence of any evidence from HCVC.

Conclusion and costs

[17] For the above reasons Mr Kundu's objection to the Improvement Notice is dismissed.

[18] This means the notice remains valid but compliance is yet to occur. Hutt City Veterinary Care Limited is therefore ordered to comply with the requirements of the Improvement Notice dated 16 September 2015 no later than Friday 29 April 2016.

[19] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority

⁶ Section 6 of the applicable Minimum Wage Order

⁷ *G L Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120