

[4] The day prior to that scheduled for the investigation meeting (26 July 2010) Ms Patterson, a Director of the respondent company and their representative in this matter, sent an e-mail to one of the Authority's support staff. It reads:

"How are you... further to my calling you this morning , i would like to say that i am unable to go to queenstown tomorrow as i have other comitments sorry" (verbatim, including typographical errors).

[5] This is not the first example of Ms Patterson's uncooperative attitude toward the Authority. The statement in reply, if you could stretch your imagination to consider it as such, was furnished well beyond the due date and Ms Patterson failed to participate in the telephone conference called to timetable the investigation and discuss its conduct.

[6] I considered it appropriate to continue with the investigation and determine the matter given:

- The content of the e-mail clearly confirms that respondents awareness of the hearing;
- That there was no attempt to explain the absence, beyond a bland reference to "*other commitments*"; and
- The respondent's poor history of dealing with the Authority (see 5 above) and acknowledged obligations to its staff (as shall later be explained).

Background and Facts

[7] This matter has its genesis in the second quarter of last year (2009). At that time Mr Henning took interest in claims that the respondent had failed to pay wages owing and/or holiday pay to six of its staff.

[8] By December 2009 only two of the claims remained unresolved - those of Ms Haldezos and Ms Telfer, though I note correspondence which suggests the respondent remained tardy in meeting its obligations to others, even when Court orders were involved.

[9] The respondent's reluctance to resolve Ms Telfer's claim appears to emanate from the fact she received part, perhaps the majority, of her earnings in kind. There

was uncertainty as to how this should be recognised when calculating the residue owing and there were, accepting Ms Telfer's evidence, issues that subsequently arose with Inland Revenue.

[10] Ms Haldezos does not appear to have warranted a mention in Ms Patterson's responses at that time. Other correspondence suggests that this was due to the fact that the respondent had levelled allegations of impropriety against Ms Haldezos. They relate to possible theft, or a similar accusation. I surmise, given the lack of evidence from the respondent, that it was awaiting the outcome of any proceedings.

[11] Mr Henning was hamstrung by the absence of complete and accurate time and wage records but he had, by December 2009, concluded that the Respondent owed something in the order of \$1245.24 to Ms Telfer and \$6,164.00 to Ms Haldezos.

[12] On 3 May 2010, and by which time the claim had been filed, the Authority received a letter from Ms Patterson advising that the respondent accepted it owed Ms Telfer the amount claimed and that would be paid. The letter indicates the respondent was of the view it owed nothing to Ms Haldezos and advised that in respect to her, it had forwarded "*everything*" (meaning, I assume, every record) to Mr Henning. It went on to note an inability to meet with Ms Haldezos due to her pending prosecution for "*embesslement*" (sic).

[13] That same day, 3 May 2010, Mr Henning also received a letter from Ms Patterson. This letter also advised acceptance of Ms Telfer's claim. Appended were three, contradictory, documents that purported to be time and wage records for Ms Haldezos. I say 'purported' as they do not come close to recording the full range of information required under either the Wages Protection Act 1993 or the Employment Relations Act 2000. They were little more than a record of each week's gross payment due, PAYE and the net payment made. I say 'contradictory', as they are inconsistent.

[14] After analysing those records, Mr Henning concluded that one indicated Ms Haldezos was owed some \$3,539.76 in outstanding holiday pay. Another indicated \$4,163.20 to be outstanding, while the third suggested the amount might be as low as \$1978.00. Unpaid wages, thought to be \$1,334, remained additional.

[15] Mr Henning responded by letter dated 24 May 2010. He noted the concession in respect to Ms Telfer, before going on to record a view that he considered the records for Ms Haldezos inconsistent and unclear. The letter also noted comments about the upcoming prosecution and that he understood the matter to have been, by that time, resolved. Here I note the matter involved a small amount (\$223), that it has already been dealt with in the appropriate forum and that there was no conviction.

[16] On 8 June 2010 the respondent sent further wage records for Ms Haldezos. Mr Henning recommends these be used for ascertaining the amount owing, if only because they are, whilst still well short of statutory requirements, the most comprehensive available. According to these documents the outstanding holiday pay is in the order of \$4,875.92. Unpaid wages, in the now amended sum of \$1328.25, remain additional. The total of \$6,204.17 is not dissimilar to the amount calculated in December 2009 (see 11 above).

[17] Attached to Ms Pattersons's 26 July e-mail to the Authority was a letter from her accountant, Ms Horrell. She asks that I take its content into account.

[18] The letter contains a number of facts and figures that can be used to calculate the holiday pay owing, but does not advise a specific amount. It concludes "*The amount owing is less than \$4,000 after this [unperformed] calculation is completed*". The wage component of the claim is not mentioned.

[19] The letter goes on to suggest I offset the amount owing against other debts it contends Ms Haldezos owes the respondent. It reads:

"I am aware the Reid Patterson Limited have evidence that Sandra Haldezos has taken money from the company via the company visa card she had to use for the shop. I have seen records of the purchases on that visa card and paid for by the company that DO NOT relate to the business of the company ... The directors of the company are holding these documents and will make them available to you. They add to more than \$6,000. At present Sandra Haldezos owes the company more for private and personal goods charged to the business credit card than the company owes her for holiday pay. There are still

other issues not mentioned here needing full disclosure”, (emphasis is Ms Horrell’s).

Determination

The arrears

[20] A decision in respect to Ms Telfer is simple. The respondent concedes the calculated amount as owing. It should, therefore, be paid and an order will be made accordingly.

[21] Ms Haldezos is not so simple given the multiple calculations. With respect to the calculation, I discount Ms Horrell’s letter. The content is unhelpful as it fails to specify an amount owing and requires various assumptions be made. I find myself agreeing with Mr Henning’s proposal that the records of 8 June be used. They appear the most comprehensive (though that is a relative term) and there is close proximity to the amount originally calculated in December 2009. Acceptance of Mr Henning’s uncontested proposal leads to a conclusion that Ms Haldezos is owed \$6,204.17.

[22] That leaves the offset argument. I can not, by law and irrespective of the circumstances, offset against, or deduct from, wages without the permission of the payee. Even if I could, I would not be remotely tempted by what I have before me, which is nothing more than unsubstantiated allegations.

Interest

[23] Mr Henning seeks interest on any amounts found to be owing. Interest is to reimburse someone for use, by others, of money that is theirs. In this instance there is no doubt that Reid Patterson has continued to use money that rightfully belonged to others, even after having acknowledged the debt, as occurred with Ms Telfer. I have also heard evidence that the respondent has previously acknowledged arrears in respect to Ms Haldezos, before then applying the worthless offset argument. This is a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[24] When ordering interest the Authority may consider an amount up to the current 90 day bank rate plus 2%. The 90 day rate is currently 3.28% which makes 5.28% the total possible. I consider that to be an appropriate amount given the circumstance of this failure and the lack of an argument to the contrary.

[25] The evidence would indicate that the obligation to pay occurred prior to Mr Henning originally approaching the respondent on 7 June 2009. That is the date from which the interest shall be payable given an earlier date can not be accurately identified on the evidence before me.

[26] There shall therefore be an order that the respondent pay each of the affected ex-employees interest on arrears owing at the rate of 5.28% per annum from 7 June 2009. The amounts payable are \$375.15 to Ms Haldezos and \$75.30 to Ms Telfer.

The penalty claim

[27] There are multiple transgressions. The respondent accepts, in correspondence to Mr Henning, that it has failed to enter into written employment agreements as required by the Employment Relations Act 2000. The documents I have seen illustrate a failure to maintain time and wage records as the Act requires. Finally it is clear that the respondent failed to meet its obligation to pay monies due under statute.

[28] That the respondents conduct is culpable is, in my mind, confirmed by the fact that even when it accepted a transgression, there is evidence of a reluctance to rectify the failure. That evidence resides in its actions in respect to both Ms Telfer and, according to the correspondence that flowed between the respondent and Mr Henning last year, other ex-employees including Ms Haldezos.

[29] There is also the respondent's behaviour in respect of Ms Haldezos. Aside from continuing to proffer unsubstantiated allegations through the offices of Ms Horrell, I must question the appropriateness of withholding thousands of dollars to offset a claim which, on the evidence before me, amounted to no more than \$223 and has, in any event, been resolved. When combined with the failure to pay debts accepted as owing, I find it ironic that the respondent continues to accuse others of theft in such an inappropriate way. If there is evidence of further wrongdoing, I

advise the respondent to return to the appropriate authorities but do not raise it here. It is, as was explained in 23 above, irrelevant to the determination of this claim.

[30] Mr Henning has, in my view, been generous. Rather than seek multiple penalties, he contends that I simply impose a single comprehensive one. Having considered the multiplicity of breaches, the respondent's tardiness (even in the face of accepted wrongdoing) and Mr Henning's views, I consider a penalty of \$1,500 to be appropriate. That conclusion leads, given the circumstances and evidence heard, to a discussion as to the most appropriate recipient of the penalty.

[31] Aside from my own negative views about the treatment of Ms Haldezos' (see 29 above), I heard evidence (and not from Ms Haldezos) that Ms Patterson had been making vindictive observations about Ms Haldezos in the local community. Those comments appear to be partly attributable to the allegations of theft and partly attributable to the pursuit of this claim. While this evidence is uncontested, I have no reason to doubt it and accept it as accurate.

[32] When I consider the conduct outlined in 31 above, the withholding of arrears amounting to thousands of dollars as offset against an already resolved claim that amounted to only \$223 and the attempt to use further unsubstantiated claims to offset any award of monies found owing to Ms Haldezos, I conclude that it is proper to consider giving her the benefit of any penalty awarded for wrongs she suffered.

[33] Accordingly half of the penalty (\$750) shall be payable to Ms Haldezos and half (a further \$750) to the Crown. This later amount is payable through the Department of Labour.

Costs

[34] The costs claim is minimal. It is limited to the reimbursement of the \$70 fee incurred for filing this claim in the Authority. The cost was incurred and the claim has been totally successful. In such circumstances I consider it appropriate the claimed reimbursement occur. An order will be made accordingly.

Orders

- [35] For the reasons given, the following orders are made:
- (i) The respondent is to pay to Ms Sandra Haldezos wage and holiday arrears in the sum of \$6,204.17 (Six thousand, two hundred and four dollars and seventeen cents); and
 - (ii) The respondent is to pay to Ms Sandra Haldezos interest at the rate of 5.31% per annum from 7 June 2009. As at the date of this decision, the sum owing amounts to \$375.15 (three hundred and seventy five dollars and fifteen cents); and
 - (iii) The respondent is to pay to Ms Michelle Telfer wage and holiday arrears in the sum of \$1245.24 (Twelve hundred and forty five dollars and twenty four cents); and
 - (iv) The respondent is to pay to Ms Michelle Telfer interest at the rate of 5.31% per annum from 7 June 2009. As at the date of this decision, the sum owing amounts to \$75.30 (Seventy five dollars and thirty cents); and
 - (v) The respondent is to pay a penalty in the sum of \$1,500.00 (fifteen hundred dollars). Half (\$750.00 (seven hundred and fifty dollars)) is payable to Ms Sandra Haldezos and half (\$750.00) to the Crown; and
 - (vi) The respondent is to pay to the Department of Labour a reimbursement of costs incurred in the sum \$70.00 (seventy dollars); and
 - (vii) Given the respondent's previous failure to honour debts already acknowledged, an order is made that the above sums are to be paid no later than Friday 20 August 2010; and
 - (viii) All payments are to be made to the Department of Labour, who will distribute the funds accordingly.

Mike Loftus
Member of the Employment Relations Authority