

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 177
3011911

BETWEEN	LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	COUNTRY HOSPITALITY MANAGEMENT (NZ) LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Claire English for Applicant Eric Neal for Respondent
Investigation Meeting:	17 October 2017
Submissions Received:	17 October 2017 from Applicant 16 and 17 October 2017 from Respondent
Oral Determination:	17 October 2017
Record of Oral Determination:	17 October 2017

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Country Hospitality Management (NZ) Ltd is ordered to comply with the Improvement Notice issued on 16 September 2016 by no later than 18 December 2017.**
- B. The application for the imposition of a penalty is declined.**
- C. Costs are reserved.**

Employment relationship problem

[1] The Equestrian Hotel in Christchurch is owned and operated by Country Hospitality Management (NZ) Limited. The Labour Inspector carried out an audit of seven employees employed by Country Hospitality. The audit identified issues arising out of the application of the Holidays Act 2003 and the payment of all types of leave including annual holidays, sick leave, alternative holidays and unworked public holidays.

[2] Country Hospitality disagreed with the Labour Inspector's findings and advised that he would engage his payroll provider to assist in sorting out the issues identified by the Labour Inspector.

[3] The Labour Inspector issued an improvement notice on 16 September 2016 requiring Country Hospitality to rectify the breaches of the Holidays Act with respect to the payment of annual leave, sick leave, bereavement leave, public holidays and alternative holidays.

[4] Following a number of communications between the parties the compliance date was ultimately extended to 24 March 2017. The Labour Inspector remained of the view that Country Hospitality had failed to comply with the Improvement Notice and lodged these proceedings seeking an order for compliance and the imposition of a penalty.

Issue

[5] In order to resolve this problem I must consider the following:

- a) Should Country Hospitality be ordered to comply with the Improvement Notice?
- b) Should a penalty be imposed?

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the Labour Inspector and Country Hospitality but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Compliance order

[7] The Improvement Notice dated 16 September identified the following failures on the part of Country Hospitality to comply with the Holidays Act.

[8] The Improvement Notice required Country Hospitality to take the following steps to comply with the provisions of the Holidays Act:

- a) Make any changes necessary to ensure each employee receives payment for annual holidays in accordance with ss 20 or 22 of the Holidays Act. Where an employee has become entitled to an annual holiday, payment must be at the greater of the employee's ordinary weekly pay or average weekly earnings at the time the annual leave was taken.

For the purpose of meeting the employee's entitlement to annual holidays an employer and employee need to consider what genuinely constitutes a working week for the employee.

- b) Recalculate annual leave entitlements for past and current employees for the past six years from the date of the Notice and pay or credit arrears where necessary. Ensure each annual leave payment is not less than the greater of the employee's ordinary weekly pay and average weekly earnings.
- c) Make any changes necessary to ensure employees who are entitled to payment for unworked public holidays receive payment at not less than the employee's relevant daily pay or average daily pay.
- d) Conduct a review of public holidays for past and current employees for the past six years from the date of the Notice and pay or credit arrears where necessary. Ensure payment for each holiday is not less than the employee's relevant daily pay or average daily pay.
- e) Make any changes necessary to ensure employees who are entitled to payment for alternate holidays taken have received payment at not less than the employee's relevant daily pay or average daily pay.

- f) Recalculate entitlements for past and current employees for the past six years from the date of the Notice and pay or credit arrears where necessary. Ensure payment for each holiday is not less than the employee's relevant daily pay or average daily pay.

- g) Make any changes necessary to ensure employees who are entitled to payment for sick and bereavement leave receive payment at not less than the employee's relevant daily pay or average daily pay.

- h) Recalculate entitlements for past and current employees for the past six years from the date of the Notice and pay or credit arrears where necessary. Ensure payment for each day taken as sick or bereavement leave is not less than the employee's relevant daily pay or average daily pay.

[9] During the investigation meeting (convened by way of telephone conference) the Labour Inspector acknowledged Country Hospitality was compliant with the Holidays Act with respect to the calculation of annual holidays, sick leave, bereavement leave, unworked public holidays and alternate holidays.

[10] Despite this there are still aspects of the Improvement Notice which are yet to be fully complied with. This has been as a result of a number of factors, not least of which has been the significant attempts by Mr Neal to demonstrate that holidays were being calculated in accordance with the Holidays Act and a lack of clarity from the Labour Inspector about why he had formed a view the calculations provided by Mr Neal were not acceptable.

[11] The acknowledgement today has come about principally due to the Authority's investigation process. During the process of investigation the Authority has required the parties to exchange witness statements. The witness statements (in particular the statement from the Labour Inspector) have provided clarity in a number of areas which had previously been in dispute. This has been of assistance to Mr Neal who has used the information provided by the Labour Inspector to rectify any

concerns with the calculations and to ensure Country Hospitality complies with the requirements of the Holidays Act.

[12] Now that Mr Neal's calculations have been accepted by the Labour Inspector, Country Hospitality is in a position to comply fully with the Improvement Notice. Mr Neal told me there are potentially 195 employees affected and it will take him approximately seven weeks to complete the outstanding calculations. On the basis of that information I made an oral order of compliance which I now confirm.

[13] Country Hospitality Management (NZ) Ltd is ordered to comply with the Improvement Notice issued on 16 September 2016. Compliance is required to be completed by no later than 18 December 2017.

Penalties

[14] Country Hospitality has not yet complied with the Improvement Notice. The Labour Inspector has applied to the Authority for the imposition of a penalty for this failure.

[15] In deciding whether to impose a penalty I have taken into account that Country Hospitality acted very quickly to instruct Mr Neal to remedy any mistakes in the calculation of holiday pay.

[16] I am satisfied that this is not an appropriate case for the imposition of a penalty. The correspondence between Mr Neal and the Labour Inspectorate confirms that he worked diligently to rectify any issues with respect to calculation and payments of holiday pay in accordance with the Holidays Act.

Costs

[17] Costs are reserved. The parties are invited to resolve the matter. Given that both parties have had a measure of success I am inclined to let costs lie where they fall.

[18] If the parties seek costs they will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[19] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards. Any determination on costs will take into account that the investigation meeting lasted for less than an hour and was conducted by telephone conference.

Vicki Campbell
Member of the Employment Relations Authority