

Application for Reopening of Investigation

[1] An oral determination in this matter was given on 26 August 2016 with the Written Record of Determination issued on the same day (the first determination)¹. The first determination included a compliance order requiring the Respondent, Lotus Body Clinic Limited (Lotus), to comply with an improvement notice issued by the Labour Inspector, Thomas Liang, on 10 February 2016.

[2] The Labour Inspector subsequently sought to reopen the investigation under clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act). This application is made on the limited basis of seeking to obtain a determination of a date for compliance.

[3] The Authority proposed to the parties that it would consider the application to reopen, and if the application was successful, any further information and/or submissions, on the papers. The Applicant indicated his agreement with the proposal. No response or objection was received from the Respondent.

[4] Submissions were then received from the Applicant. Submissions were sought from the Respondent but none were received by the deadline of 21 November 2016.

[5] The earlier involvement of Ashley Palmer in this proceeding on behalf of Lotus was outlined in the first determination. On 22 November 2016 the Authority received an email from Mr Palmer stating that he would be tied up in the High Court this week, and that “Perhaps 10 days and I will be in a position to reply”. The Applicant did not object to an extension being granted and the Authority extended the deadline for the Respondent’s submissions until 2 December 2016. Nothing was received from Lotus by 2 December 2016.

[6] On 6 December 2016 Mr Palmer emailed the Applicant’s representative, who forwarded the email to the Authority. In the email Mr Palmer states that he was in Middlemore [Hospital] with heart and lung problems. Further “Cannot assist in this matter. Maybe end of January if I survive surgery.” Attached to the email was a letter from a doctor at Counties Manukau Health dated 5 December which says that Mr Graham Palmer is a patient at Middlemore Hospital having been admitted on 4

¹ [2016] NZERA Auckland 292

December 2016. It continues that he "... is likely to remain an inpatient ...until 8 December 2016".

[7] The Authority, having noted that the letter referred to a Graham (rather than Ashley) Palmer, informed Mr Palmer on 8 December 2016 that if he wished to seek a further extension of time to file submissions, he must obtain a medical certificate, and that if no such information was received, the Authority would proceed to determine the file on the material which it currently had.

[8] Nothing further was heard from Mr Palmer, or anyone else on behalf of Lotus, by the date on which this determination was issued.

Reopening

[9] Clause 4 of Schedule 2 of the Act states:

4. Reopening of investigation

- (1) The Authority may order an investigation to be reopened on such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.
- (2) The reopened investigation need not be carried out by the same member of the Authority.

[10] This is a discretionary power which the Authority must not use arbitrarily. The principal consideration should be the justice of the case.²

[11] The Applicant refers to s 137(3) of the Act. Section 137 sets out the powers of the Authority to order compliance. Under subs (3) the Authority is to specify a time within which the order is to be complied with. Although that provision may not always be honoured in practice, I am satisfied that the Applicant is entitled to have the determination reopened on the basis of that provision and the first determination not specifying a time.

² *Heritage Expeditions Ltd v Fraser* [2010] NZEmpC 35 at [21]

Determination

[12] The first determination ordered that Lotus comply with the requirements of the Improvement Notice dated 10 February 2016 issued by the Labour Inspector Thomas Liang.

[13] The Applicant seeks to have a time requirement specified for the compliance order. No particular period of time was sought, either in relation to the first determination, or in the submissions regarding the re-opening.

[14] Under s 137(3) of the Act a time shall be specified for compliance.

[15] I order that Lotus Body Clinic Limited complies by 10 March 2017 with the Improvement Notice issued to it by Thomas Liang, Labour Inspector, on 10 February 2016.

Costs

[16] No costs were sought in relation to the application to re-open the investigation.

Nicola Craig
Member of the Employment Relations Authority