

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 182
5602742

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS, INNOVATION
 AND EMPLOYMENT
 Applicant

AND TAMEHANA
 HORTICULTURE SERVICE
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Erin Spence for Applicant
 Brenda Sandhu for Respondent

Investigation Meeting: 2 June 2016

Determination: 9 June 2016

DETERMINATION OF THE AUTHORITY

- A. Tamehana Horticulture Service Limited is ordered to comply with the Authority's determination dated 29 September 2015 within seven (7) days of the date of this determination.**
- B. Leave is reserved for the Labour Inspector to return to the Authority to pursue the claim for minimum wages and holiday pay.**
- C. Tamehana Horticulture Service Limited is ordered to reimburse the Labour Inspector the filing fee of \$71.56 within 28 days of the date of this determination.**

Employment relationship problem

[1] The Labour Inspector claims Tamehana Horticulture Service Limited (Tamehana) has failed to comply with orders made by the Employment Relations Authority in a determination issued on 29 September 2015 and seeks compliance orders.

[2] The Labour Inspector also claims Tamehana has failed to pay minimum wages and holiday pay to three Tamehana employees and seeks payment of the outstanding amounts and penalties for the failure to pay. The claim for penalties was withdrawn at the investigation meeting.

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

Investigation meeting

[4] The statement of problem was served on Tamehana on 12 February 2016 at 7.53am. The document was signed for by Brenda Ranui. During the course of this proceeding Ms Brenda Sandhu (a director and shareholder of Tamehana) has been involved on behalf of Tamehana. Ms Ranui and Ms Sandhu is one and the same person.

[5] Ms Sandhu attended a case management call on Friday 1 April 2016. During the case management call Ms Sandhu agreed to lodge a statement in reply together with an application for leave pursuant to Regulation 8 of the Employment Relations Authority Regulations 2000 within 10 days of receiving a copy of Form 3 from the Authority. Ms Sandhu was directed to include in the application for leave an explanation about the reasons why the statement in reply was not lodged within the statutory 14 day period.

[6] A blank Form 3 was emailed to Ms Sandhu on 5 April 2016 and a hard copy was served on Tamehana and signed for by Ms Sandhu on 6 April 2016 at 12.53pm. The statement in reply was due to be lodged in the Authority by no later than Monday, 16 April 2016. No statement in reply was lodged.

[7] During the case management call on 1 April 2016 Ms Sandhu agreed that the investigation meeting into the Labour Inspector's claims would be held on 2 June 2016. The Notice of Investigation Meeting was served on Tamehana and signed for by Ms Sandhu on 6 April 2016 at 12.53pm confirming the date and time of the investigation meeting.

[8] Ms Sandhu did not attend the investigation meeting at the appointed time. On my instructions the investigation meeting was delayed to allow telephone contact to be made with Ms Sandhu who told the Authority Officer that she had not put the fact of the investigation meeting in her diary but she intended to attend and would be there as soon as she could. In order to allow Ms Sandhu the opportunity to attend the investigation meeting I delayed the meeting for a further 45 minutes.

[9] Ms Sandhu attended the investigation meeting and made an oral application for leave to respond to the matter. As it is always preferable that an application be dealt with on its merits and because I did not perceive any prejudice to the Labour Inspector in granting leave, Tamehana was granted leave to respond.

Background

[10] Tamehana is a small employer who employed staff for approximately 6 weeks in the kiwifruit industry. The company was established in October 2013 and has ceased trading. The Companies Register states that the company is about to be removed from the register for a failure to file annual returns.

[11] The Authority held an investigation meeting on 29 September 2015 at Tauranga investigating an application by a Labour Inspector in which the Labour Inspector was seeking a compliance order with an Improvement Notice issued on 16 March 2015. Tamehana failed to attend or be represented at the investigation meeting and the Member determined Tamehana had shown no good cause for its failure to attend and proceeded with the investigation pursuant to clause 12 of Schedule 2 of the Act.

[12] On 29 September 2015 the Authority issued a determination¹ ordering Tamehana to comply with the Improvement Notice by providing the Labour Inspector with:

- a) individual employment agreements;
- b) wages and time records; and
- c) holiday leave records

for all employees employed by Tamehana during a six year period leading up to the date of the Improvement Notice. Tamehana was ordered to comply within 14 days of the date of the determination; that is by 13 October 2015.

[13] The Authority imposed a penalty of \$6,000 of which \$1,500 was to be paid to a former employee, Ms Engle, with the remaining \$4,500 to be paid to the Crown. In addition to the penalty the Authority ordered Tamehana to pay a contribution of costs to the Labour Inspector of \$371.56. The penalties and costs were to be paid within 28 days of the date of the determination; that is by 27 October 2015.

[14] Tamehana has failed to comply with the orders of the Authority.

[15] Subsequent to the determination of the Authority the Labour Inspector received information from Ms Engle that allowed the Labour Inspector to calculate wage arrears owing to three of Tamehana's previous employees despite its failure to provide wages and time records.

[16] On 4 December 2015 the Labour Inspector wrote to Tamehana setting out the claim for arrears of wages and requesting a response by 14 December 2015. No response was received from Tamehana.

[17] The Labour Inspector has calculated minimum wages payable in the amount of \$749.85 gross and holiday pay in the amount of \$162.68 gross for each of the following employees:

- a) Neco Treibert;

¹ *Erin Spence, Labour Inspector v Tamehana Horticulture Service Ltd* [2015] NZERA Auckland 302.

- b) Marius Braun; and
- c) Elia Keerzman.

Issues

[18] The issues for determination are whether:

- a) Tamehana has complied with the Authority's determination and if not, whether a compliance order should be issued;
- b) Tamehana has failed to pay minimum wages and holiday pay to three of its employees;

Compliance

[19] The Authority's determination was an order for compliance with the Labour Inspector's Improvement Notice which was issued on 16 March 2015 under section 223D of the Act.

[20] I am satisfied that Tamehana has not complied with the terms of the Authority's determination. Tamehana Horticulture Service Limited is ordered to comply with the Authority's determination dated 29 September 2015 within seven (7) days of the date of this determination. To be clear Tamehana is ordered to:

- a) provide the Labour Inspector with:
 - i. individual employment agreements;
 - ii. wages and time records; and
 - iii. holiday leave records
- b) pay the penalty of \$6,000 (\$1,500 to Ms Engle and \$4,500 to the Crown);
- c) pay costs to the Labour Inspector of \$371.56.

[21] At the investigation meeting Ms Sandhu acknowledged that she would be unable to comply with the order to provide employment agreements as she did not provide employment agreements to the employees.

Further non-compliance

[22] Tamehana is cautioned that the Authority's orders may be the subject of a further application for compliance in the Employment Court which is empowered to impose penalties for continuing non-compliance which include imprisonment, fines and the sequestration of property.

Minimum Wages and Holiday Pay

[23] The Labour Inspector claims three German tourists all travelling and working under valid travel work visas carried out work for Tamehana and have not received at least the minimum wage of \$14.25 for each hour they worked. In her statement of problem the Labour Inspector claimed minimum wages in the amount of \$749.85 gross for each employee and holiday pay in the amount of \$162.68 making a total of \$2,737.59.

[24] There is no dispute that the workers were all employed and paid on piece rates depending on the type of work they were undertaking. The rate for flowers was \$6.25 per kg and the rate for pruning trees was \$6.00 per bay.

[25] At the investigation meeting Ms Sandhu disputed the hours the Labour Inspector says the employees worked. The Labour Inspector claims each of the employees worked various hours generally commencing at or about 7.00am each day. Ms Sandhu told me that no employees would have started work before 8.30am or at the earliest 8.00am on any day because of the dew. Ms Sandhu told me that the employees were mainly employed on picking the flower buds and if they were wet with dew when they were picked they were of no use. This means that picking of flower buds could not happen until all the dew had dried.

[26] The Labour Inspector accepted that employees would not have commenced work before 8.00am and agreed to accept a start time of 8.15am.

[27] Ms Sandhu also disputed the finish times of some days set out in the Labour Inspector's claim. Ms Sandhu told me that employees would not have worked beyond 5.00pm because the flower buds had to be weighed and in the mill before 4.30pm as that is when the mill closes. Both parties accepted that the employees may have had to wait to have their flower buds weighed and that employees may have finished at or about 5.00pm on some days.

[28] On the basis of the concessions discussed during the investigation meeting the Labour Inspector recalculated the minimum wage and holiday pay entitlements for the three employees. The recalculation indicated that it was likely the minimum wages and holiday pay entitlements have been met.

[29] Ms Sandhu acknowledged that she had kept some records in notebooks which may support her evidence as to the start and finish times for each of the three employees and that these were stored in her garage in a box. It was agreed that the Labour Inspector would visit Ms Sandhu and inspect all of the company records.

[30] If the Labour Inspector is satisfied that the records support Ms Sandhu's evidence as to start and finish times the claim for minimum wages and holiday pay will be withdrawn. In the event that the records do not support Ms Sandhu's evidence or Ms Sandhu fails to provide access for the Labour Inspector to inspect the records leave is granted to allow the Labour Inspector to return to the Authority to continue to pursue the payment of minimum wages and holiday pay as claimed in the statement of problem.

Costs

[31] The Labour Inspector is entitled to reimbursement by Tamehana of the filing fee of \$71.56 paid by the Ministry of Business, Innovation and Employment to lodge this application in the Authority. Payment of this amount is to be made within 28 days of the date of this determination.

Vicki Campbell

Member of the Employment Relations Authority