

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 399  
5440523**

BETWEEN                      NZ STAFF LIMITED  
   Applicant  
  
AND                              DARREN CARR, LABOUR  
   INSPECTOR  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Bruce Murray, Counsel for Applicant  
   Marija Urlich,/Counsel for Respondent  
  
Investigation Meeting:        2 & 3 September 2014 at Auckland  
  
Submissions received:        from Applicant  
   from Respondent  
  
Determination:                02 October 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem: Objection to an Improvement Notice**

[1]     This is an objection from NZ Staff Limited (NZ Staff) to an Improvement Notice issued on 24 October 2013 by Mr Darren Carr, a Labour Inspector.

[2]     In its Statement of Problem dated 21 November 2013 NZ Staff sought resolution of its objection by:

(a)     Withdrawal or rescission of the Improvement Notice;

Or, in the alternative,

(b)     More time to meet the Respondent's requirements;

(c)     Written advice from the Respondent as to whether the new form temporary employment agreement is compliant with New Zealand legislation;

(d)     Written advice as to whether accrual of holiday pay or a pay-as-you-go system is compliant with New Zealand legislation;

- (e) Verbal or written advice of other steps the Applicant could take to comply with New Zealand employment legislation.

[3] The Labour Inspector claims that NZ Staff has been provided with all the alternative remedies sought, and as such the Improvement Notice should be confirmed and not be varied or rescinded.

## **Issues**

[4] The issues for determination are:

- whether the Labour Inspector believed on reasonable grounds that NZ Staff is failing or has failed to respond to the provisions of the legislation specified in the notice
- The nature and extent of NZ Staff's failure to comply
- The nature and extent of any loss suffered by any employee as a result of the failure to comply by NZ Staff
- Whether to confirm, vary or rescind the Improvement Notice.

## **Background Facts**

### *NZ Staff Operation*

[5] NZ Staff is an Australian based company. It is a labour hire business. In New Zealand it has major clients including Progressive Enterprises, Fulton Hogan and Action Traffic Control (the client companies). It supplies temporary employees for specific projects as and when advised by the client companies. The office administration and other employees, known as consultants, who work for NZ Staff in New Zealand are based in Auckland and are permanent employees.

[6] NZ Staff advises for potential employees to register for work with it. The work provided is primarily warehouse employees (pickers/packers, store persons, forklift operators, labourers, contact unloaders), civil construction (drivers, machine operators, road maintenance), manufacturing (assemblers, process workers) and distribution. NZ Staff supplies employees to the client companies when advised of a specific short-term requirement.

[7] A prospective employee will respond to an advertisement placed by NZ Staff, and will undergo a verbal interview by telephone and subsequently face-to-face to establish what skills they have. If the prospective employee has skills which NZ Staff thinks it can use and the person is otherwise suitable, the person is registered as a prospective employee.

[8] In the initial interview, the consultant tells the prospective employee that:

- (a) he or she could be employed as, and where, and when, a job opening arises;
- (b) the exact duties, and where and what times the job is to be performed, cannot be specified in advance until the job opening actually arises;
- (c) the job opening could be a project of days or weeks, and the time period is uncertain;
- (d) that NZ Staff will contact them when a job comes up.

[9] The prospective employee is provided with an employment agreement which is usually signed by the prospective employee, and then the prospective employee awaits a call from NZ Staff when it has a client engagement for which they might be suitable. NZ Staff does not consider the prospective employee is formally an employee until they have both signed an employment agreement and accepted a job opening when one arises.

[10] When a job is lodged with NZ Staff an NZ Staff consultant contacts a suitable prospective employee, and informs them of the project details: tasks, time they need to report, and the location. Usually the client company keeps a time record for the employee and provides time records to NZ Staff for the purposes of payment of wages. An employee is paid weekly according to the time record received.

#### *Labour Inspector Investigation*

[11] On 18 June 2013 a complaint was received by the Labour Inspector, Mr Darren Carr, from Mr Todd Jones who claimed that he was an ex-manager of NZ Staff. His complaint was in relation to non-payment of holiday pay which Mr Todd claimed was a systemic problem within NZ Staff.

[12] During the week prior to 24 June 2013 Mr Carr said that he had arrived unannounced at NZ Staff premises. As the Auckland Manager was not there, he had left his contact details with an employee and these were then passed to Mr Scott Farrow, Chief Operations Officer of Staff Australia, who was based in Australia.

[13] Mr Farrow said as soon as he was advised of Mr Carr's visit, he had made a telephone call from Australia to Mr Carr who told him about the complaint by Mr Jones. Mr Carr requested staff records relevant to that issue and said that he wanted to meet with NZ Staff. Mr Carr said that in response to his request for a meeting, one was immediately arranged at the NZ Staff premises in Auckland.

*First Meeting held on 24 June 2013*

[14] On 24 June 2013 Mr Carr met with Mr Scott Farrow, Chief Operations Officer of Staff Australia, Mr Michael Champion, Chief Executive Officer of Staff Australia, and Ms Louise McKean, Accountants Manager NZ Staff.

[15] During the meeting Mr Carr said he provided information regarding the nature of Mr Jones' complaint, along with information about the role of the Labour Inspector, and an employer's legal requirements. He also outlined the different tools the Labour Inspector might use to ensure compliance with those legal requirements, including enforceable undertakings, demand notices, improvement notices and applications to the Authority for arrears and penalties.

[16] During that meeting with Mr Carr, NZ Staff advised that they were conducting their own investigation regarding Mr Jones' claim. Mr Farrow said he was concerned about the possible misuse of documents by Mr Jones which related to his claim that he had worked on public holidays and was owed holiday pay.

[17] As NZ Staff was undertaking its own investigation, Mr Carr advised that the Labour Inspectorate was willing to work with it, allowing it to identify and correct any issues with compliance, but that the Labour Inspectorate would also be conducting an investigation into both matters, focusing on the records and documents provided to the employer.

[18] During the meeting Mr Carr provided a letter for the directors of NZ Staff identifying the reason and nature of the visit by a Labour Inspector in relation to the obligation of an employer to comply with the requirements of the Employment Relations Act 2000 (the Act), the Minimum Wage Act 1983 and the Holidays Act 2003.

[19] Mr Carr said that in relation to Mr Jones' claim, he also advised NZ Staff that it is a legal requirement that holiday entitlements and wages are paid in full and on time without deductions under ss.4 and 5 of the Wages Protection Act 1983, and that NZ Staff needed to provide clear evidence that it had any entitlement to withhold any payment or part thereof.

[20] Mr Carr said he also advised NZ Staff that reasonable timeframes would be provided to allow time for it to provide that information.

[21] Mr Farrow said that Mr Carr had explained his position and powers as a Labour Inspector and that one of his roles was to assist a company in its compliance with any employer obligations. Mr Carr had asked for wage, time and holiday records for three employees who had worked for NZ Staff for more than 12 months.

[22] He said Mr Carr had been helpful at the first meeting and the message NZ Staff had received was that Mr Carr was willing to help it with Mr Jones's issue and any other issues that arose.

[23] Mr Farrow said he had advised Mr Carr that NZ Staff was immediately willing to cooperate and that its intention was to comply with the legal requirements for employees.

[24] Mr Farrow said his understanding from what Mr Carr had told it at this first meeting was that NZ Staff would be able to review its systems and practices in light of what Mr Carr had said and make changes to those systems and that as a result Mr Carr would be satisfied that it was meeting the statutory requirements.

*(i) Steps taken between 24 June and 9 July 2013*

[25] Following the meeting on 24 June 2014, Mr Carr emailed NZ Staff a summary of the meeting. In response he received an email from Mr Farrow advising that there was a difference of opinion on the contents of the meeting, but nonetheless agreeing to meet the requirements as directed.

[26] On 25 June 2013 Mr Carr said he received a further email from Mr Farrow requesting further information in relation to Mr Jones's claim and advising that he would be acting as the agent for NZ Staff in the matter.

[27] Mr Carr said he had emailed Mr Farrow on 26 June providing the sections of the legislation relevant to the Labour Inspector's investigation which was focused on two matters, the first being Mr Jones's claim, and the second being the usual practices and systems being used by NZ Staff.

[28] In particular he specified NZ Staff's obligations regarding public holidays, and requested relevant information including a full list and contact details of all employees employed by NZ Staff for more than a year, full wage, time and holiday records for Mr Jones, Mr Jones's employment agreement, a copy of employment agreements for casual and permanent employees, and any other relevant documents.

[29] On 28 June 2013 Mr Farrow emailed a response which provided some of the records Mr Carr had requested, including:

- documents entitled Internal Employment Agreement;
- the casual employment agreement;
- the temporary employment agreement;
- Mr Jones' employment agreement and pay and leave records; and
- a staff list of 35 employees with more than 12 months of ongoing employment with NZ Staff.

Mr Farrow advised that full records for Mr Jones were not available because there was a delay from a third party administering the payroll.

[30] The casual employment agreement and staff details provided included the details of the specific assignment position, duties, the hours of work, wages and location of each assignment to be written down as part of the employment records. The casual employment agreement also called for this detail of the specific assignment, known as the temporary assignment confirmation (TAC).

[31] Mr Carr said the temporary employment agreement provided to him did not provide for the written recording of terms and conditions for each assignment and the details provided orally to the employee by NZ Staff's consultants.

[32] On 31 July 2013 Mr Carr emailed Mr Farrow requesting further information, chasing up records and confirming the next meeting.

[33] On 1 July 2013 Mr Carr received an email from Mr Farrow providing details of payroll providers and advising they would be forwarding the rest of the records.

[34] On 2 July 2013 Mr Carr emailed Mr Farrow requesting further information.

*Second meeting: 9 July 2013*

[35] A further meeting between Mr Carr and Mr Farrow and Mr Campion was held on 9 July 2013. In a summary sent by Mr Carr to Mr Farrow by email on 17 July 2013 he summarised the points discussed at the meeting as annual holiday entitlements, treatment of public holidays, and finished with a "to do" list which included:

- NZ Staff to provide a new employment agreement taking into consideration the actual nature of employment for casual employees stating that: "*a copy of this draft is to be provided to this office for reviewing*".

- NZ Staff to recover records in relation to Mr Jones and provide a report as to its position on whether payments outstanding to Mr Jones, letter and statements and documentation supporting the statements to be provided to Mr Carr.
- NZ Staff to review records of all employees to determine who had been disadvantaged by the current practices.
- The Labour Inspector to prepare an enforceable undertaking under s.223B of the Act between the Ministry of Business, Innovation and Employment, and NZ Staff.

[36] Mr Carr explained in the email that the enforceable undertaking under s.223B of the Act would be reviewed at the next meeting and was to be signed within seven days of the undertaking being provided.

[37] Mr Farrow said that his understanding from the meeting was that Mr Carr had been prepared to work with NZ Staff and assist it to achieve compliance as required and that NZ Staff was going to be able to satisfy all of Mr Carr's compliance requirements.

[38] However, when NZ Staff had asked Mr Carr for his specific directions about changes to make to its documentation or systems and practices, his response was to say that it was not his role to tell NZ Staff how the legislation was to be interpreted, but rather for NZ Staff to read the legislation, come to its own conclusions, and make changes based on those conclusions.

[39] In relation to Mr Carr's "to do" list as set out in the email dated 17 July 2013, Mr Farrow said that he and Mr Champion had undertaken to make the changes they thought appropriate to the employment agreement, decided they would not be able to obtain further records about Mr Jones' statutory holiday claims, and looked at the other employee records.

[40] NZ Staff subsequently reviewed the standard form of employment agreement with casual or temporary employees during July 2013 and produced a new standard form, named "Temporary Employment Agreement" instead of "Casual Employment Agreement".

*Third Meeting: 1 August 2013*

[41] At the third meeting held on 1 August 2013, Mr Carr and Mr Farrow discussed NZ Staff's non-compliance and the need for NZ Staff to take further steps to progress the matter.

[42] Mr Farrow provided Mr Carr with the new form of temporary employment agreement, requesting his comments.

[43] The new form of temporary employment agreement differed from the previous casual employment agreement in the following ways:

- (a) The nature of the agreement and hours of work sections were restated.
- (b) The holiday and leave entitlements were changed from '*pay-as-you-go*' to conventional accrual.

[44] Mr Farrow said he told Mr Carr that NZ Staff would be introducing the revised form of agreement, and changing its entire systems and processes about holidays as from 1 September 2013 as it understood those changes would be as required by Mr Carr.

[45] Mr Farrow explained that the company's expectation had been that Mr Carr would recognise that in the new temporary employment agreement NZ Staff had gone beyond minimum standards and requirements. Mr Farrow said that he had asked Mr Carr if he thought the changes made were acceptable.

[46] He said Mr Carr's response had been that it was not his role to interpret the legislation, which was the responsibility of NZ Staff. Further that he could not give any guidelines about how they could change their employment agreement or their systems and practices.

[47] Mr Farrow said that during the meeting Mr Carr had said he was considering making NZ Staff "*build back*" holiday accruals for employees even though they had already been paid for annual leave on a '*pay-as-you-go*' basis.

[48] Mr Farrow said his understanding had been that Mr Carr was advising that NZ Staff would have in effective pay the temporary employees twice for annual leave, in that the employee was to retain the '*pay-as-you-go*' element, but NZ Staff would also have to make provision for annual leave entitlement accrual in respect of the period for which the temporary employee had received the '*pay-as-you-go*' payment, and that this requirement also applied to employees over a three year period, even if they were no longer employed by NZ Staff.

[49] He had understood from the meeting that in the ensuing two weeks Mr Carr would be making a determination about NSZ staff's practices and procedures.

[50] Mr Farrow said he told Mr Carr that accruing annual leave in addition to having paid the '*pay-as-you-go*' element would cause extreme hardship to NZ Staff. He also told Mr Carr

that NZ Staff had reviewed its systems and could not see that any employee had been disadvantaged by the way it had operated to that point.

[51] Mr Carr emailed Mr Farrow on 8 August 2013 with a notice requiring NZ Staff to produce a full set of wage, time, holiday and leave records, employment agreements and other documentation regarding the remuneration for six named employees, requiring that information by 22 August 2013.

[52] On 9 August 2013, Mr Carr received an email from Mr Farrow confirming that further records would be provided and that NZ Staff would pay Mr Jones and provide confirmation to Mr Carr of the payment. On 13 August 2013, Mr Carr received confirmation that Mr Jones had been paid.

[53] On 14 August 2013, Mr Carr emailed Mr Farrow confirming that the payment to Mr Jones had been received and that the Labour Inspector was closing the focus of the investigation in relation to Mr Jones.

[54] On 22 August 2013, Mr Farrow said he emailed Mr Carr with:

- (a) The employment agreements for the six employees;
- (b) Full pay information for the six employees;
- (c) Certain time records for those who had worked as Progressive Enterprises employees from April 2013 onwards, with an explanation about the other pre-April time records; and
- (d) A statement that time records for non-Progressive Enterprises employees were physically available at the NZ offices for Mr Carr to view.

[55] Mr Carr did not come to the NZ Staff offices to view the non-Progressive employees time records.

[56] Mr Carr said he had analysed the records provided by Mr Farrow on 22 August 2013 and identified that some of the employees had TAC attached to their employment agreements and some did not:

- (a) Employment record dated 29 November 2011 for Acushla Maree Potaka required the terms and conditions of the assignment to be kept in writing as part of the employment agreement records. No terms and conditions of assignments had been provided for Ms Potaka;

- (b) Employment agreement dated 6 June 2012 for Avaganofoa Inu required the terms and conditions of the assignment to be kept in writing as part of the employment agreement records. No terms and conditions of assignments had been provided;
- (c) Employment agreement dated 2 March 2012 for Gerald Watson required the terms and conditions of the assignment to be kept in writing as part of the employment agreement records. No terms and conditions of assignments had been provided;
- (d) Employment agreement dated 1 August 2013 for June Mason required that the terms and conditions of the assignment be provided to the employee verbally;
- (e) Employment agreement dated 17 January 2011 for June Mason required the terms and conditions of the assignment to be provided to the employee verbally;
- (f) Employment agreement dated 30 November 2011 for Takai Terekia required the terms and conditions of the assignment to be kept in writing as part of the employment agreement records. No terms and conditions had been provided;
- (g) Employment agreement dated 24 November 2011 for Ted Pickering required the terms and conditions of the assignment to be kept in writing as part of the employment agreement records. No terms and conditions had been provided;
- (h) The time records for Ms Potaka, Mr Inu and Mr Watson of the six employees named in the notice to produce.

[57] Mr Carr emailed Mr Farrow on 29 August 2013, identifying issues still not answered as requested in his email dated 25 July 2013, specifically in relation to the correct dates recorded on the provided time records.

[58] Despite not having heard from Mr Carr about the proposed new form of the temporary employment agreement, Mr Farrow said that with effect from 1 September 2013, NZ Staff had introduced the new employment agreement as it had wanted to be seen to be meeting the Labour Inspector's expectations.

[59] All prospective and new employees were given the new form of temporary employment agreement with effect from 1 September 2013. It was also rolled out progressively to all existing employees. In addition, the roll out of the new temporary

employment agreement was provided at meetings held onsite at various NZ Staff client companies.

[60] Mr Farrow explained that NZ Staff consultants gathered together the NZ Staff employees and explained to them that NZ Staff was intending to put in place a new form of employment agreement to comply with legal requirements. The employees were told that the principal change was to remove the ‘pay-as-you-go’ holiday payment element. Mr Farrow said that this had resulted in some discontent from the employees because this resulted in a lower weekly take home pay.

#### *Enforceable Undertaking*

[61] Mr Farrow said that he and Mr Carr had a lengthy telephone conversation on 9 September 2013. On 11 September 2013, Mr Carr had emailed Mr Farrow outlining the issues to be included in an enforceable undertaking, specifically related to the employment agreements, recordkeeping, and entitlements provided under legislation.

[62] In response and with reference to the matters discussed in their telephone conversation, Mr Farrow emailed a reply to Mr Carr, annotating a response on a copy email of that sent to him by Mr Carr.

[63] In his response, Mr Farrow pointed out that NZ Staff had been “*happy to work with the Ministry to adjust our systems and practices moving forwards*”. In response to complaints about the temporary employment agreement, Mr Farrow commented that he did not believe NZ Staff had failed to comply in its original employment agreement, however, having engaged with:

*... and in consultation with the Ministry we have decided to adjust our employment agreement and nature of employee engagement to better reflect a clear understanding of the employment arrangement for all parties.*

*This has already been acted upon as at September 1 and we have advised you as such and provided a copy of this new agreement whereby we no longer provide a ‘pay as you go’ arrangement. As at September 1 we accrue leave for all employees no matter of their length of employment with us.*

*As per the spirit of the Act and the role of the Inspector as one of support, assistance and advice we would welcome advice and comment on our new employment agreement.*

[64] In response to the recordkeeping situation, Mr Farrow had noted that whilst NZ Staff’s methods for the collection, recording and maintenance of records may not have been ideal, it did not agree that any employee had ever been disadvantaged by it. Further, that NZ

Staff did not agree that it had not met the criteria under s.130 of the Act as a general rule in its business. Mr Farrow stated:

*As in all of our dealings with the Ministry. We have taken all advice and looked at how we have operated. Again, we have already made adjustments as at September 1 in the way NZ Staff maintains its records.*

*We note that we have also engaged an employee at expense to the company to audit our entire time and wages records from our business as a proactive measure to ensure we are able to satisfy any requests the Ministry may make.*

*This is problematic when determining entitlements required under legislation.*

[65] In the email to NZ Staff dated 11 September 2013, Mr Carr had advised an enforceable undertaking would be provided to NZ Staff by the Labour Inspectorate, outlining the non-compliance, legislative entitlements to be reconciled, the action required to be taken to comply, within in an agreed timeframe, for NZ Staff to consider and for signing.

[66] In response, Mr Farrow had commented that NZ Staff would like to make the following points:

1. *NZ Staff has never taken a position of being non-compliant with any legislation.*
2. *NZ Staff has never taken a position of disadvantaging an employee for its own favour.*
3. *NZ Staff has always addressed any of the very few employee concerns regarding entitlements in a timely and positive manner.*
4. *NZ Staff is an employer who legitimately operates to provide gainful employment to hundreds of people and has always sought to ensure all entitlements are met.*
5. *NZ Staff has always been a willing and cooperative participant in the Ministry's audit of its business.*
6. *NZ Staff has in conjunction with the Ministry's advice made proactive adjustments to its business and without hesitation.*
7. *NZ Staff is enduring significant cost voluntarily to work with the Ministry.*

#### ***Improvement notice***

[67] In late September 2013, Mr Carr compiled an investigation report based on the records and information provided by NZ Staff to date and the requirements of the legislation.

On 24 October 2013, Mr Carr served an Improvement Notice under s.223D of the Employment Relations Act 2000 on the registered office of NZ Staff.

[68] On 21 November 2013, NZ Staff filed an objection to the Improvement Notice.

[69] On 3 February 2014, Mr Carr said a bundle of records was provided to him by NZ Staff. These were time records only and not fully compliant with the requirements of s.130 (1)(g) of the Act. The records could not be used to, where necessary, calculate employees' pay, the hours an employee was employed on each day or the days an employee was employed during each pay period.

[70] Mr Carr said that this was fundamental to determining the pattern of work, one of the factors for an otherwise working day as required under s.12 of the Holidays Act 2003.

[71] On 4 February 2014, Mr Carr said that MBIE's legal service wrote to NZ Staff lawyers requesting sample temporary employment agreement and wage, time and holiday records. On 7 February 2014, the copy of the temporary employment agreement and holiday leave records were provided.

[72] On 11 February 2014, a Statement in Reply in response to the Objection filed by NZ Staff to the Improvement Notice was filed on behalf of the Labour Inspectorate.

[73] The parties subsequently attended mediation but this did not resolve the issue.

[74] Since the Improvement Notice was served, NZ Staff has implemented a text messaging system and provided a screenshot at the Investigation Meeting as further evidence that it is seeking to comply with the legislative requirements as it perceives them to be. However the Labour Inspector's view is that this is unlikely to be sufficient to meet the requirements of the Improvement Notice.

## **Determination**

### **The Law**

#### **223A *Functions of Labour Inspector***

*The functions of a Labour Inspector include –*

*(a) Determining whether the provisions of the relevant Acts are being complied with; and*

*(b) Taking all reasonable steps to ensure that the relevant Acts are complied with; and*

- (c) *Supporting employers, employees, and other persons in complying with the relevant Acts by providing information and education; and*
- (d) *Preventing non-compliance with the relevant Acts by assisting employers to implement systems and practices that comply with the provisions of the relevant Acts; and*
- (e) *Providing any other services that assist employers and employees to resolve, promptly and effectively, employment relationship problems arising under the relevant Acts.*

**223D Labour Inspector may issue Improvement Notice**

1. *A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an Improvement Notice that requires the employer to comply with the provision.*
2. *An Improvement Notice issued under sub-section 1 must state –*
  - (a) *The provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and*
  - (b) *The Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and*
  - (c) *The nature and extent of the employer's failure to comply with the provision; and*
  - (d) *The steps that the employer could take to comply with the provision; and*
  - (e) *The date before which the employer must comply with the provision.*
3. *An Improvement Notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).*

**223E Objection to Improvement Notice**

1. *An employer may, within 28 days after the Improvement Notice is issued to the employer, lodge with the Authority an objection to the Notice.*
2. *The function of the Authority in respect of an objection is to determine –*

- (a) *Whether the employer is failing, or has failed, to comply with the specified provision of the relevant Acts; and*
  - (b) *The nature and extent of the employer's failure to comply with the provision; and*
  - (c) *The nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).*
3. *The Authority may confirm, vary or rescind the Improvement Notice as the Authority thinks fit.*

### **The Nature and Extent of that failure**

[75] The Improvement Notice set out the reasonable grounds on which the Labour Inspector believed that NZ Staff was failing to comply with the listed statutory provisions, namely:

#### ***Eddie Pickering***

- Failing to provide a written employment agreement which contained a written description of work performed, where the work is to be performed or times of work; s.65(2);
- Failing to maintain and produce on request compliant wage, time and holiday records despite being requested by Notice dated 8 August 2013: s.130;
- Unlawfully paying 'pay-as-you-go' holiday pay where the employment does not meet the s.66 requirements: s.28 Holidays Act 2003 (plus Avaganofoa Inu, Takai Terekai, Joel Clive Watson, Acushla Potaka and June Mason);
- Failing to pay holiday pay correctly for public holidays not worked; s.49 Holidays Act 2003;
- Making unlawful deductions from wages for PPE without workers' consent; s.4 Wages Protection Act 1983.

#### ***Amusia Faiane***

- Failure to provide a paid alternative holiday when public holidays worked: ss.12(3)(a), 56 and 60 Holidays Act.

[76] In broad terms the reasonable grounds on which the Labour Inspector issued the Improvement Notice are based on the applicant's failure to provide complete and compliant

wage, time and holiday records in accordance with the 8 August 2013 notice (requiring NZ Staff to produce a full set of wage, time, holiday and leave records, employment agreements and other documentation regarding the remuneration for six named employees), and the Labour Inspector's assessment of NZ Standard Form Employment Agreement.

[77] Section 223E(2) of the Act states that the function of the Authority in respect of an objection to an Improvement Notice is to determine:

- (a) Whether the applicant is failing or has failed to respond to the provisions of the legislation specified in the notice; and
- (b) The nature and extent of its failure to comply; and
- (c) The nature and extent of any loss suffered by any employee as a result of that failure (if applicable).

[78] Under subsection (3) of s.223E of the Act, the notice may be confirmed, varied or rescinded.

**Did the Labour Inspector believe on reasonable grounds that NZ Staff is failing or that it has failed to respond to the provisions of the legislation specified in the Improvement Notice?**

[79] During the first meeting held on 24 June 2013, Mr Carr had advised that he was, as a result of Mr Jones's complaint, investigating systemic non-compliance with statutory minima and additionally that he had tools which could be used to ensure compliance.

[80] Mr Farrow had understood from that meeting that the Labour Inspector would be able to assist NZ Staff with complying with its employer obligations.

[81] Following that initial meeting Mr Carr requested a number of documents. NZ Staff responded by supplying some but not all, of the documents by 28 June 2013.

[82] On 2 July 2013 Mr Carr requested further information and the subsequent meeting held between him and NZ Staff on 9 July 2013 produced a "to do" list as set out in the email dated 17 July 2013 and the advice that he would be providing a enforceable undertaking which could be reviewed at the next meeting.

[83] NZ Staff responded by reviewing the "to do" list and taking a number of actions including reviewing and amending the employment agreement.

[84] Mr Carr did not find the documents supplied compliant and requested further information on 31 July 2013. NZ Staff responded by supplying details of payroll providers and advising that it would supply the rest of the requested information.

[85] The amended version of the employment agreement had been provided to Mr Carr at the meeting held on 1 August 2013 for comment; however none was received on the basis that Mr Carr advised that it was not his role to interpret the legislation or to provide NZ Staff with guidelines.

[86] Mr Carr's subsequently requested NZ Staff on 8 August 2013 to produce a full set of wage, time, holiday and leave records, employment agreements and other documentation for six named employees.

[87] NZ Staff responded by supplying the majority of the requested records by the due date of 22 August 2013 with an invitation for Mr Carr to view the non-Progressive Enterprises employee information at its offices, however he did not do so.

[88] Following a full analysis of the records supplied, Mr Carr emailed NZ Staff on 29 August 2013 identifying the unresolved issues, followed by an email dated 11 September 2013 outlining the issues to be resolved in an enforceable undertaking.

[89] In response NZ Staff took issue in an email dated 18 September 2013 with the comments made in Mr Carr's email and responded on the basis that NZ Staff had made adjustments to its business and was seeking to work with the Labour Inspector.

[90] The Improvement Notice was then issued on 24 October 2013.

[91] I find that the evidence establishes that NZ Staff failed to supply complete wage, time and holiday records, and had supplied non-compliant records, such that it was reasonable for the Labour Inspector to reach the view that NZ Staff was failing or that it has failed to respond to the provisions of the legislation specified in the Improvement Notice.

**What is the nature and extent of any loss suffered by any employee as a result of that failure?**

[92] In light of the difficulty in the Labour Inspector obtaining complete records from NZ Staff, and indeed of NZ Staff providing records for a significant number of previous employees, there is insufficient evidence to establish whether there has, or has not been, loss suffered by NZ Staff employees, present or past employees.

[93] However until such time as the Labour Inspector is presented with compliant records, there remains concern that loss has been suffered, and this situation needs to be addressed.

**Should the Improvement Notice be confirmed, varied or rescinded?**

[94] I appreciate that the Labour Inspector in this case has taken a considerable amount of time analysing the data which has been supplied to him, a large amount of which has significantly not been in an easily assimilated form, by NZ Staff.

[95] I accept that he has reasonable grounds for his belief that NZ Staff had not complied with the requirements of legislation.

[96] However this is not a case in which the employer has been non-responsive. NZ Staff has taken steps to meet the requirements of the legislation as raised with it by the Labour Inspector. It also sought assistance with understanding what was required of it, in particular it revised and amended its temporary employment agreement and submitted it for comment by the Labour Inspector, and has responded within reasonable times to the information requests made to it.

[97] Since the Improvement Notice was served, further steps have been taken to comply with the legislative requirements, notably that of the introduction of a text messaging service.

[98] Whilst it may not be the role of a Labour Inspector to advise on how the legislation should be interpreted, I find that it is part of the functions of a Labour Inspector pursuant to s 223A of the Act to support employers in complying with the relevant Acts by supplying information and advice, and to assisting with the implementation of systems and practices.

[99] I determine that in light of the willingness of NZ Staff to meet the statutory requirements, the Improvement Notice be varied in respect of the date by which such improvements are to be made to meet compliance with the legislative requirements. In the course of so doing, I anticipate that Mr Carr will be invaluable as a source of advice and assistance.

[100] I determine that the Improvement Notice is varied only to the extent that NZ Staff is required to complete the improvements (including providing the Inspector with evidence) and ensure compliance before 4 p.m. on 9 January 2015.

## **Costs**

[101] Costs are reserved. It may be considered appropriate by the parties that costs lie where they fall in this case. However if the parties are unable to agree on costs, are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**