

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 60
5288996

BETWEEN LABOUR INSPECTOR
 LAURENCE NORTON
 Applicant

A N D BUN THUON LAM
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
 Respondent in Person

Investigation Meeting: 29 April 2011 at Nelson

Date of Determination: 3 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector (Mr Norton) brings a claim on behalf of five former employees of the respondent (Mr Lam). Those five former employees are respectively Mohamad Hanif Omar, Jati Prakoso, Hery Permana, Hanis Wantoko and Reza Anwar.

[2] Mr Lam employed the five workers to work in the horticultural industry in the Nelson region, knowing that each of those workers was legally unable to work in New Zealand at the time.

[3] It is alleged that Mr Lam failed to pay the workers wages that were due and owing, failed to pay the workers at the minimum rate applicable by New Zealand law, failed to keep proper records of a wage and time nature, failed to provide employment agreements and made deductions from workers' wages without their written authority. In addition, it is alleged that, contrary to what the workers were told by Mr Lam, no

PAYE payments were made to the Inland Revenue Department in respect of any of the employees.

[4] The Authority convened an investigation meeting at Nelson to deal with Mr Norton's claim and Mr Lam attended to respond to it. It became apparent to the Authority during the course of the investigation meeting that Mr Lam had no real defence to the Labour Inspector's claims, primarily because it seemed there were no proper records. When the Labour Inspector prepared his claim for the Authority, he relied on the partial records retained by Mr Lam together with the information provided to him by the complainants.

[5] Having heard Mr Lam in person, I am satisfied that his records in this matter were grossly inadequate and I told him so in no uncertain terms during the investigation meeting. This is a case where s.132 of the Employment Relations Act 2000 (the Act) must apply and I explained to Mr Lam the effect of this provision during the hearing. By subsection (2) of that section, the Authority may accept as proved claims made on behalf of the employee which the employer cannot prove were incorrect. This is just such a situation. Mr Lam attended the investigation meeting without any documentation at all and told me simply that he did not agree with the hours that the complainant workers said they worked. He made no other submission in respect of the accuracy of Mr Norton's calculations and I discount that submission, as I am entitled to do, by the effect of s.132(2) of the Act.

[6] Insofar as any issues of credibility remain to be factored into the equation, I need to be clear that I much preferred the evidence of the Labour Inspector to the evidence offered by Mr Lam. As I have already noted, Mr Lam made no attempt to quarrel with the calculations made by Mr Norton save to the extent of saying that he disagreed with the hours claimed to be worked by the employees, but he offered no evidence to support his view.

[7] Sadly, Mr Lam has come to the attention of the Labour Inspector previously for similar offences. He has previously been advised, on Mr Norton's evidence, about his obligations under New Zealand law and his obligation in particular to keep proper and accurate wage and time records. Mr Lam agreed at the investigation meeting that he had made a mistake in not keeping good records. Mr Lam has also failed absolutely to fulfil his obligation to ensure that income tax is accounted for to the Inland Revenue Department in respect of the taxable income of the complainant

workers. Mr Norton told me (and I accept) that none of those employees had any record with the Inland Revenue Department at all.

[8] I conclude then that if evidence is to be preferred, in general I preferred the evidence of Mr Norton to that offered (slight though it was) on behalf of Mr Lam.

Determination

[9] The Authority finds that the claims made against Mr Lam by the Labour Inspector are made out. Each of the complainant employees has claimed for unpaid wages, public holiday pay, and arrears in the payment of the minimum wage. In addition, there is a claim for penalties and a claim for the Authority filing fee. The only matter that requires further elaboration at this point is the arrears of wages claim. In the normal course of events, an arrears of wages claim simpliciter is not brought to the Authority by a Labour Inspector but by the affected employee. However, in the particular circumstances of this case, as the Labour Inspector rightly observed, it would be difficult to quantify the other entitlements of the employees without first quantifying the ordinary arrears of wages owing. I am satisfied that Mr Norton has the authority of the complainant workers to bring their claim under s.131 of the Act and I make findings about the ordinary arrears of wages in consequence.

[10] I direct the following payments are to be made by Mr Lam to the Labour Inspector in respect of the following schedule of complainant employees:

•	Reza Anwar	
	Unpaid wages	\$ 3,363.50
	Public holiday pay	136.50
	Minimum wage arrears	3,400.00

	Total	\$ 6,900.00
•	Jati Prakoso	
	Unpaid wages	\$ 3,375.26
	Public holiday pay	136.50
	Minimum wage arrears	3,400.00

	Total	\$ 6,911.76

• Mohamad Hanif Omar	
Unpaid wages	\$ 3,352.30
Public holiday pay	136.50
Minimum wage arrears	5,541.00
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Total	\$ 9,029.80
• Hanis Wantoko	
Unpaid wages	\$ 1,653.60
Public holiday pay	136.50
Minimum wage arrears	3,400.00
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Total	\$ 5,190.10
• Hery Permana	
Unpaid wages	\$ 2,000.00
Public holiday pay	136.50
Minimum wage arrears	3,400.00
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Total	\$ 5,536.50

[11] In addition, I direct that Mr Lam is to pay to the Labour Inspector the filing fee of \$71.56 and is to pay penalties of \$5,000 for breaches of s.130 of the Act and s.81 of the Holidays Act 2003 for failing to keep proper wage and time records and for breach of s.229(2) of the Act for failure to produce wage and time records when required to do so by a Labour Inspector.

[12] Penalties are also sought for breaches of s.27(2) of the Holidays Act 2003 for failure to pay holiday pay and for a breach of s.63A(2) of the Act for failure to provide individual employment agreements together with a penalty for a breach of s.5 of the Wages Protection Act 1983 in making deductions from pay without obtaining written authority from the employees. All these breaches are proved to the Authority's satisfaction and the total penalty sum of \$5,000 is levied against Mr Lam for those aggregate breaches. The penalty sum is to be divided equally by five and paid as to one fifth each to the complainant employees pursuant to s.76(6) of the Holidays Act 2003 and s.136(2) of the Act.

[13] It follows from the foregoing paragraphs that Mr Lam is to pay to Mr Norton for the use of the complainant employees the total sum of \$38,568.16.

James Crichton
Member of the Employment Relations Authority