

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 30
5519830

BETWEEN DAVID O'SHEA
 (LABOUR INSPECTOR)
 Applicant

A N D RADLEY HAULAGE LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Ella Tait, Counsel for the Applicant
 Michael Radley, Advocate for the Respondent

Investigation Meeting: 25 February 2015 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 2 March 2015

DETERMINATION OF THE AUTHORITY

- A. Radley Haulage Limited is to pay to David O'Shea for the use of Lindsay Dunn the sum of \$4,399.26 gross being his annual holiday entitlement.**
- B. Radley Haulage Limited is to pay to David O'Shea for the use of Lindsay Dunn the sum of \$1000.17 gross being his public holiday entitlements.**
- C. Radley Haulage Limited is ordered to pay interest on the sum of \$5,399.43 at 5% per annum from 20 April 2014 until the date of payment.**
- D. Radley Haulage Limited is ordered to pay a penalty to the Crown in the sum of \$800.**

E. Radley Haulage Limited is ordered to reimburse the filing fee incurred by the Labour Inspector in the sum of \$71.56.

Employment relationship problem

[1] The Labour Inspector, David O'Shea, wants the Authority to resolve payments are due to a previous employee of Radley Haulage Limited (Radley Haulage), Lindsay Dunn, for holiday and public holiday entitlements. He also seeks a penalty for breaches of s 229(3) of the Employment Relations Act 2000 (the Act) for failing to comply with a request for wage, time and holiday records and a breach of s 65(4) of the Act for the failure to provide Mr Dunn with an employment agreement. Interest on the entitlements is sought together with reimbursement of the filing fee.

[2] The sole director of Radley Haulage was prepared to make payments to Mr Dunn once the Authority had confirmed what was owed. Mr O'Shea wanted the issue of penalty determined Mr Radley did not agree that Mr Dunn was required to work on public holidays and said that he should not have been doing so. He said Mr Dunn did not state that he worked public holidays on his time sheets. He also said that two additional days should have been taken into account in assessing annual leave entitlement. Mr Radley said that the reasons he did not comply earlier with Mr O'Shea's request for wage and time records is that he was a truck driver and away from home for up to a fortnight. He says that an employment agreement was left for Mr Dunn on a bench in a company property in Invercargill but was never picked up.

The Issues

[3] The Authority needs to resolve the following issues:

- (i) Is there an outstanding entitlement due to Mr Dunn for annual holiday pay?
- (ii) Did Mr Dunn work four public holidays and is he entitled therefore to payment at time and a half and an alternative day's holiday?
- (iii) Should there be an award of interest on any awards made for annual and public holiday entitlements?

- (iv) Should a penalty be awarded for failure to provide wage, time and holiday records and failing to have a written individual employment agreement within the time requested by Mr O'Shea?
- (v) Should there be reimbursement of the filing fee?

Is there an outstanding entitlement due to Mr Dunn for annual holiday pay?

[4] Mr Dunn was employed by Radley Haulage from on or about 29 October 2012 as a truck driver. He resigned from his employment on 17 April 2014 at which time he was being paid \$1,168.21 gross per week by Radley Haulage.

[5] Mr O'Shea had calculated that Mr Dunn was owed \$5,567.47 for holiday pay for the period of his employment taking into account one week annual leave he had taken. He took into account the wage and time record prepared by Mr Radley and Mr Dunn's view on leave. Mr O'Shea said that he was in receipt of the wage and time record between 19 September and 3 October 2014 although there was a dispute as to whether Mr Radley provided a copy of the wage and time record to Mr O'Shea or whether he received that through a third party. The evidence satisfies me that it is likely Mr O'Shea and Mr Radley discussed the spreadsheet.

[6] The wage and time records show that there was one week's extra pay for 14 December 2013. A discussion with Mr Dunn by telephone confirmed that he requested an extra week's pay from his leave entitlement around the Christmas period.

[7] On that basis, there was agreement that one further week's pay should be deducted from the amount claimed of \$5,567.47.

[8] There was then one remaining issue. On the spreadsheet provided by Mr Radley, it shows that Mr Dunn has taken two annual leave days for the last week that Mr Dunn worked. Mr Dunn could not recall whether he worked on the Thursday or not but did recall that he did not work on the Friday but was paid for that day. He could not recall agreeing to that day or both days as annual holidays.

[9] When annual holidays are to be taken is a matter under the Holidays Act 2003 for agreement between the employee and the employer. I could not be satisfied that there was an agreement that in the last week of employment two days were to be

annual leave days. I am not prepared to deduct those two days for the annual holiday pay entitlement.

[10] I find that there is an amount due and owing to the Labour Inspector for Mr Dunn for his annual holiday entitlement in the sum of \$4399.26 gross.

[11] I order Radley Haulage Limited to pay to the Labour Inspector for the use of Mr Dunn his annual holiday pay entitlement in the sum of \$4399.26 gross.

Public holiday entitlement

[12] Mr O'Shea was satisfied that the wage record provided by Mr Radley shows that on some public holidays Mr Dunn received a paid day's holiday. Mr Radley said that Mr Dunn should not have been working on public holidays and that he was not instructed to drive his truck on those days.

[13] Mr O'Shea says that Mr Dunn told him that he worked on the following days:

- Easter Friday (29 March 2013) for 5 hours
- Ester Monday (1 April 2013) for 10.5 hours
- Queen's Birthday (3 June 2013) for 10.5 hours
- Southland Anniversary Day, (17 January 2014) for 13 hours

[14] In accordance with s 50 of the Holidays Act 2003, the Labour Inspector seeks a public holiday entitlement be paid calculated at 0.5 of Mr Dunn's relevant daily pay for the total 39 hours worked. Four alternative days' leave are also sought.

[15] Unfortunately Mr Dunn could only locate one of his logbooks. The only public holiday of the four above that was in the log book was 17 January 2014. I am quite satisfied that Mr Dunn worked on that day. It is less clear, however, that Mr Dunn worked on the other days as the Authority does not have the benefit of the driver log records.

[16] Mr Dunn did though have a clear recollection of the activity that he undertook on Easter Friday and Easter Monday. That satisfies me that, in all likelihood, he worked those days. I could not be satisfied in the same way about 3 June 2013 notwithstanding that that week on the wage and time records does not show a public holiday taken. Mr Dunn had recorded in his written note to the Labour Inspector that

4 June was the public holiday when it should have been 3 June. Secondly and more importantly given that there was no log book available for the Authority to consider, Mr Dunn did not have a recollection of what work he undertook on that public holiday.

[17] In those circumstances, I find it fair to only take three public holidays into account and not 3 June 2013. The hours worked on 29 March 2013, 1 April 2013 and 17 January 2014 total 28.5 hours. 28.5 hours at \$21 per hour multiplied by 0.5 is \$299.25 gross.

[18] Mr Dunn is also entitled to payment for three alternative days at his relevant daily rate of \$233.64 which is the total sum of \$700.92.

[19] I order Radley Haulage Limited to pay to the Labour Inspector for the use of Mr Dunn his public holiday entitlements in the sum of \$1000.17 gross.

Should there be an award of interest on the any awards made for annual and public holiday entitlements?

[20] I find that there should be an award of interest on the outstanding entitlements for annual and public holiday payments which total \$5399.43 gross. Payment of holiday pay/public holiday entitlements should be made in the pay that relates to the final period of the employee's employment. I find that in this case interest should be payable from the Monday after Mr Dunn's final day which is 20 April 2014 until the date of payment at 5% per annum under clause 11 of the schedule two of the Act. That is a daily rate of interest of 0.74 per day and there has been 317 days from 20 April 2014 as at the date of this determination.

Penalties

[21] The Labour Inspector seeks penalties under s 229(1)(d) and s 65 (4) of the Act for failing to comply with the requirement to provide wage, time and holiday records and failing to have a written individual employment agreement for Mr Dunn.

[22] Ms Tait recognised in her submissions that the Authority has discretion to either award a penalty claimed or dismiss the action under s 135 (4) of the Act. Ms Tait referred the Authority to the Employment Court judgment in *Tan v. Yang &*

*Zhang*¹ in which Judge Inglis noted at para.[32] a non-exhaustive list of factors that may usefully be considered when considering whether it is an appropriate case to award a penalty and if so the quantum of the penalty. These factors are as below:

- The seriousness of the breach;
- Whether the breach is one-off or repeated;
- The impact, if any, on the employee/respective employees;
- The vulnerability of the employee/respective employees;
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

Seriousness

[23] Ms Tait properly accepted that the breaches by Radley Haulage are not at the most serious end of the scale but that detailed and verifiable records are important for determining if minimum entitlements have been received by employees, both past and current.

[24] Ms Tait also sets out the importance of the provision of written employment agreements to ensure that employees have certainty as to their terms and conditions and that failure to negotiate and provide a written employment agreement may have been a contributing factor to issues regarding Mr Dunn's remuneration. Ms Tait also submits that the failure to provide the records sought forthwith hampered the Labour Inspector's ability to effectively carry out his functions.

[25] When Mr O'Shea became involved Mr Radley entered into discussions directly with Mr Dunn rather than supplying the records within the required 7 working day time frame to Mr O'Shea. I accept that he was aware of the importance of complying with the timeframe and the risk in not doing so. No extension was requested and I could not be satisfied that Mr Radley was not in a situation to provide the records within the timeframe.

¹ [2014] NZEmpC 65

[26] It was Mr Radley's view that there had been overpayments made to Mr Dunn and that these should be offset against any annual leave entitlement. I accept Mr Radley wanted to go to mediation to discuss the matter but the Labour Inspector was concerned about the financial status of Radley Haulage and Mr Radley's suggestion that it may be put into liquidation or struck off the companies register and proceedings were lodged in the Authority.

[27] The seriousness of the breach in failing to provide records is reduced in this case because by whatever means the Labour Inspector was in receipt of wage, time and holiday records within three weeks from the end of the 7 day period. I do agree that there is an issue as to the form of those records and their accuracy. Mr Radley says that Mr Dunn's timesheets were inaccurate and the entries were made on the basis of the timesheets. I do accept that because of the nature of the employment Mr Radley rarely saw Mr Dunn.

One-off breach

[28] There was no suggestion that there had been other breaches.

Impact on the employee

[29] If there had been a written employment agreement that may have dealt with the issue of alleged overpayment and ability to withhold entitlements. In this case there was a discussed and agreed change to payments to be made to Mr Dunn. Mr Dunn could have had his entitlement resolved and paid earlier.

Vulnerability of the employee

[30] Ms Tait accepted that Mr Dunn was not particularly vulnerable.

The need for deterrence

[31] Ms Tait confirmed that the purpose of a penalty was recognised in *Tan* to punish and deter others from engaging in such conduct. I accept that there needs to be a clear signal that the requests of Labour Inspectors must be complied with and that an employee should have a written employment agreement.

Remorse shown

[32] Mr Radley did take some responsibility for his actions. He told the Authority that he has now changed the way he operates and is fully compliant with his employees. Having heard from him there was remorse and what I took was a genuine desire to make payment to Mr Dunn for his entitlements and move forward. Initially Mr Radley was very focussed on what he said were his overpayments. Mr Radley said that given the financial position of the company he would make those payments to Mr Dunn himself.

Penalties in other comparable cases

[33] Ms Tait provided the Authority with a number of other Authority determinations to indicate the range of penalties imposed in other comparable cases. Each case turns significantly on its own facts. However, my assessment of the cases that Ms Tait provided was that frequently there was no appearance by the respondent at the investigation meetings and no wage or time records ever provided. That is important because in those cases the Authority member does not get to hear from the respondent about the breach and assess the factors Ms Tait has set out. In this case, Mr Dunn more or less accepted the authenticity of the records as far as they went. They had been provided to Mr Dunn or to the union directly earlier than to the Labour Inspector and then to the Labour Inspector between 19 September and 3 October 2014. The Labour Inspector requested the records be provided by 12 September 2014.

Conclusion

[34] There were two breaches in this case. They were not at the serious end of breaches seen by the Authority but it has to be recognised that employees must be provided with a written employment agreement to be the subject of discussion, negotiation and agreement. There should also be compliance with a Labour Inspector's requests. I am satisfied that there should be a penalty imposed, that it should be a global penalty and that it should reflect the circumstances of this case and the improvements Mr Radley has now said have been implemented with his employees.

[35] I assess that penalty taking both breaches into account in the sum of \$800.

[36] I order Radley Haulage Limited to pay a penalty in the sum of \$800 into the Authority and then to the Crown.

Costs

[37] I find that there should be reimbursement of the filing fee of \$71.56 to the Labour Inspector.

[38] I order Radley Haulage Limited to reimburse the Labour Inspector the sum of \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority