

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 46
5526442

BETWEEN LABOUR INSPECTOR CHERYL
PUT
Applicant

AND AMTEC ENGINEERING
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Angela Graham, Counsel for Applicant
No appearance by or for Respondent

Investigation Meeting: 28 January 2015 at New Plymouth

Determination: 1 May 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Labour Inspector Cheryl Put seeks a compliance order under s.137 of the Employment Relations Act 2000 (the Act) requiring the respondent to comply with an improvement notice dated 14 July 2014 which she asserts was served on the respondent on 15 July 2014. The Labour Inspector also seeks a penalty against the respondent, Amtec Engineering Limited (Amtec) for failure to comply with the improvement notice.

[2] Amtec did not file a response or participate in the investigation meeting.

The Authority's investigation

[3] The Labour Inspector filed a Statement of Problem in the Authority on 30 October 2014. A copy of the Statement of Problem was sent by signature-required

Courier Post to the respondent at its physical address, which is also the registered office of the company. The letter accompanying the Statement of Problem was addressed for the attention of "the director". The item was delivered by courier on 31 October 2014 and signed for by somebody identifying herself as "Kay" at Amtec. The letter accompanying the Statement of Problem informed Amtec that it was required by Regulation 8 of the Employment Relations Authority Regulations 2000 to file with the Authority two copies of a Statement in Reply within 14 days after the date of receipt of the letter.

[4] Amtec did not file a Statement in Reply by the due date. The Authority officer dealing with the matter telephoned Alan McGregor, sole director of Amtec, on three occasions between 18 and 25 November 2014, on each occasion leaving a voicemail message for Mr McGregor to contact her about the overdue Statement in Reply. No response was received to those voicemail messages.

[5] On 18 December 2014, I issued a direction to Amtec to file a Statement in Reply by 5pm on Friday, 9 January 2014. I required Amtec to provide the reasons for not filing a Statement in Reply within 14 days. I also directed the matter be set down for an investigation meeting on 28 January 2015.

[6] Despite the erroneous reference to 2014 in the date for a Statement in Reply, instead of 2015, I am satisfied it would have been clear to the respondent from the context that the Statement in Reply was due by 9 January 2015. My direction also provided that any witnesses the respondent intended to call should file witness statements by 15 January 2015.

[7] The Minute containing those directions and a Notice of Investigation Meeting was sent by Courier Post to the respondent's physical and registered address for service on 22 December 2014. Courier Post subsequently confirmed the item had been signed for on 23 December 2014 by a person at Amtec identifying himself as "Mark".

[8] Amtec did not respond to the Authority's directions and did not attend the investigation meeting. I was satisfied all reasonable attempts had been made to make the respondent aware of the investigation meeting. After waiting several minutes, I invoked the Authority's power, under clause 12 of Schedule 2 to the Act, to proceed where a party fails to attend or be represented, with no good cause shown.

Evidence of the Labour Inspector

[9] Ms Put gave evidence of receiving an anonymous complaint on 12 May 2014 alleging, firstly, the respondent was not paying its employees time and a half for working on public holidays and, secondly, that payment for alternate holidays was not calculated correctly. She says the complainant named Toby Lecher as the contact person for Amtec.

[10] Labour Inspector Put said she telephoned Mr Lecher on 14 May 2014, identifying herself as a Labour Inspector and informing him of the complaint she had received against Amtec. She said Mr Lecher advised that employees working on a rig were paid a daily rate inclusive of public holiday payments. She said he also advised her he would rectify that matter.

[11] The Labour Inspector said Mr Lecher told her he would discuss with payroll the calculation for payment of alternative holidays to ensure it was done correctly. Ms Put told the Authority she advised Mr Lecher of the Holidays Act 2003 requirements with regard to public holidays and informed him the practice of paying public holiday pay with an employee's regular pay was not in accordance with the legislation.

[12] Ms Put provided evidence of her subsequent email to Mr Lecher on 14 May 2014 confirming their telephone discussion, setting out the requirements of the Holidays Act, asking Amtec to review its systems and practices and take the necessary steps to achieve compliance with employment legislation. She asked Amtec to conduct an audit of public holiday entitlements for employees who had worked on the rigs for the last six years and make payment of any resulting arrears to those employees. She also requested Amtec to inform her of the details of how this matter was resolved.

[13] The Labour Inspector said that, when she did not receive a reply to her email after some weeks, she emailed Mr Lecher again on 11 June 2014 regarding his lack of response. She said Mr Lecher telephoned her the same day and advised her he would send an email shortly regarding progress on the matter. Ms Put said he did not email her as promised and she has had no further communication from him. He did not respond to her email of 30 June 2014 in which she advised of possible enforcement and penalty action if she had not heard from him by Friday, 4 July 2014.

[14] Labour Inspector Put said she spoke by telephone with an employee in the payroll department of Amtec on 8 July 2014. The employee advised Ms Put that she knew Amtec was including public holiday wages with employees' regular wages and she also knew this practice was incorrect and out of line with current legislation. Ms Put said the payroll employee stated she would be involved in any audit of public holidays that Amtec conducted and that no audit had been conducted to her knowledge.

[15] By the Labour Inspector's evidence, her subsequent attempts to communicate with Mr Lecher by telephone were unsuccessful. Ms Put emailed Mr Lecher and Mr McGregor on 9 July 2014 advising them of her intention to issue an improvement notice pursuant to s.223D of the Act if she did not receive the details of their public holiday audit by 11 July 2014. She did not receive a reply.

[16] Ms Put said she reasonably believed that Amtec Engineering Limited had failed, and was failing, to comply with ss.50 and 51 of the Holidays Act. This was based on information she had received regarding how Amtec pays its employees who work on rigs for work they perform on public holidays. She said she also believed, based on the lack of evidence provided by Amtec regarding payment of alternative holidays, that Amtec had failed, and was failing, to comply with s.60 of the Holidays Act.

[17] Accordingly, on 14 July 2014 Ms Put issued an improvement notice for non-compliance with ss.50, 51 and 60 of the Holidays Act and arranged for service of the notice at the registered office the following day. Labour Inspector Monique Williams gave evidence of having served the improvement notice by hand on 15 July 2014.

[18] Labour Inspector Williams told the Authority the notice was received by Mr Lecher who opened and read it in her presence. She said Mr Lecher then told her he was not employed by Amtec but would pass on the improvement notice to Mr McGregor. He declined to sign for receipt of the notice.

[19] Labour Inspector Put provided evidence of having emailed and posted letters of confirmation of the improvement notice to both Mr McGregor and Mr Lecher on 30 July 2014. She included a copy of the improvement notice with the letters. She says she received no reply or evidence of compliance with the improvement notice.

[20] The Labour Inspector said she emailed Messrs McGregor and Lecher on 19 August 2014 providing them with a final opportunity to comply with the improvement notice and advising her intention of applying to the Authority for a compliance order and penalties for non-compliance. As previously stated, Ms Put's evidence was that she had no further communication from the respondent.

Improvement notice

[21] The person with whom the labour inspectorate has had most contact over Amtec is Mr Lecher. He engaged in telephone discussions with Labour Inspector Put and it was largely on the basis of information he provided, as well as the confirmation of that advice by an employee in payroll, that the improvement was issued. It was also Mr Lecher who accepted the improvement notice for the purpose of passing it on to Mr McGregor, while making it clear he was not an employee of Amtec.

[22] The question arises whether the improvement notice was issued in accordance with the requirements of the Act. Section 223D(4) of the Act deals with the issuing of an improvement notice and provides that:

An improvement notice may be issued -

- (a) by giving it to the employer concerned; or
- (b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.

[23] The employer in this instance is a limited liability company and not a natural person. As such the service or issuing of the improvement notice must be able to be effected by means other than physically handing it to a person. The Authority has previously accepted that service effected in accordance with the provisions of s.388 of the Companies Act 1993 satisfies the requirements of s. 223D(4)¹. Such service includes service:

- by delivery to a person named as a director of the company on the New Zealand register; or
- by delivery to an employee of the company at the company's head office or principal place of business; or
- by leaving it at the company's registered office or address for service; or

¹ Eg, *Labour Inspector (Laurence Norton) v TP Manu Limited* [2014] NZERA Christchurch 32

- in accordance with an agreement made with the company; or
- by posting it to the company's registered office or address for service or delivering it to a box at a document exchange which the company is using at the time.

[24] It is questionable whether giving the improvement notice to Mr Lecher met the statutory requirement for issuing the notice. However, I am satisfied that the Labour Inspector's subsequent posting of the notice to Mr McGregor at the company's registered office did meet that requirement.

[25] Amtec had ample opportunity to respond to the improvement notice, or to object to it as provided for by s. 223E of the Act. It did neither.

[26] I am satisfied from the Labour Inspector's evidence that Amtec has failed to meet its statutory obligation to comply with the improvement notice. Labour Inspector Put is entitled to have the requirements of that notice enforced by way of a compliance order issued by the Authority in accordance with s. 137 of the Act.

[27] The Act provides that, where the Authority makes a compliance order, it may then adjourn the matter to enable compliance without imposing a penalty or making a final determination to enable the order to be complied with while the matter is adjourned.²

[28] I do not consider it would be useful to adjourn this matter in light of the non-responsiveness of Amtec to the improvement notice and to the notification of the Authority's investigation.

Penalty

[29] The Labour Inspector seeks a penalty against Amtec under s. 233F of the Act for failure to comply with the improvement notice. I am satisfied that she has made out grounds for the imposition of a penalty. Failure to comply with the provisions of the Holidays Act is a serious matter that can result in employees losing valuable statutory entitlements. Improvement notices are one of the useful and relatively low level methods by which the Labour Inspectorate can ensure compliance with the legislation.

² Section 138(5) of the Act

Orders

[30] Under s. 137 of the Act I order Amtec Engineering Limited to comply with the requirements of the improvement notice issued on 15 July 2014, and posted to its registered address on 30 July 2014, by no later than 14 days from the date of this determination.

[31] I further order Amtec Engineering Limited, under s. 223F of the Act, to pay to the Crown a penalty of \$5,000 for failing to comply with the Improvement Notice.

Costs

[32] The Labour Inspector seeks reimbursement of the Authority' filing fee. I order Amtec Engineering Limited to pay costs to the applicant in the sum of \$71.56.

Trish MacKinnon
Member of the Employment Relations Authority