

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2015] NZERA Auckland 26  
5521129**

BETWEEN ERIN SPENCE,  
LABOUR INSPECTOR  
Applicant

AND BAY ENTERPRISES LTD  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Erin Spence for Applicant  
Jas Singh, representing the Respondent

Investigation Meeting: On the papers

Submissions received: 28 January 2015 from Applicant  
27 January 2015 from Respondent

Determination: 28 January 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] On 16 May 2014 the Labour Inspector, Ms Erin Spence, served on the Respondent, Bay Enterprises Limited, (Bay Enterprises), an Improvement Notice issued under s 223D of the Employment Relations Act 2000 (the Act).

[2] The Improvement Notice advised that Ms Spence reasonably believed that Bay Enterprises had failed to comply with:

- **Section 65 Employment Relations Act 2000 – failing to provide all employees with a written Individual Employment Agreement**

[3] The Improvement Notice required Bay Enterprises to take action to ensure compliance with the provisions detailed above by 20 June 2014. Following an audit of Bay Enterprises on 16 July 2014 Ms Spence concluded that it had failed to comply with s 65 of the Act.

[4] Bay Enterprises claims that it has complied with the Improvement Notice by providing employees with written employment agreements.

#### **Note**

[5] This matter was scheduled for an investigation meeting on 7 January 2015 but Mr Jas Singh, Representative of Bay Enterprises, was unable to attend due to an injury and related sickness absence. The parties therefore agreed to have the matter dealt with 'on the papers'.

[6] I have accordingly proceeded on the basis of the statement of problem, statement in reply, and submissions and documentary evidence from the parties.

#### **Background Facts**

[7] Bay Enterprises is a limited liability company providing contract workers to the kiwifruit industry.

[8] On 13 May 2014 the Labour Inspectorate audited Bay Enterprises for compliance with minimum employment standards and advised it that written individual employment agreements should be made available to employees in the field.

[9] On 16 May 2014 Ms Spence conducted a further audit of Bay Enterprises for compliance with minimum employment standards, and identified an employee without an available written individual employment agreement.

[10] Ms Spence served Bay Enterprises with an improvement notice and provided Bay Enterprises with oral and written information regarding its relevant legal obligations.

[11] On 16 July 2014 Ms Spence visited Bay Enterprises and conducted an audit, interviewing three employees who advised her that they had commenced work without having received written individual employment agreements, and that they had been shown a generic written employment agreement.

[12] Ms Spence stated that Mr Singh had told her that these three employees had not signed or been provided with written individual employment agreements because they did not want them.

[13] Ms Spence stated that she had advised Mr Singh that Bay Enterprises appeared to be in breach of its s.65(1) obligation to have written individual employment agreements, that a similar breach had been the subject of the 16 May 2014 improvement notice, and she had

reiterated the obligation under s 65(1) of the Act to provide employees with written individual employment agreements.

[14] Ms Spence stated that since that date the Labour Inspectorate had received five additional complaints from Bay Enterprises employees regarding the non-provision of written individual employment agreements.

[15] Mr Singh claimed in the statement in reply that employees were provided with written individual employment agreements at the commencement of their employment, and attached unsworn employee statements which alleged that the employees in question had commenced work with Bay Enterprises without receiving written individual employment agreements because that had been their wish.

[16] Mr Singh subsequently provided written individual employment agreements from two employees, Mr Johannes Bottinger and Ms Paula Caroline. Both had been signed and dated 19 August 2014, although two of the dates appear to have been altered from 29 August 2014.

[17] Ms Spence stated that once she had received the copies of the written individual employment agreements of Mr Bottinger and Ms Caroline, she emailed Mr Bottinger attaching the written individual employment agreements provided by Bay Enterprises and stating:

*Hi Johannes and Paula,*

*I have received these agreements from Bay Enterprises. Can you please confirm that these are the ones you signed.*

[18] In response she received an email from Mr Bottinger stating:

*No I don't think so.*

*In the ones we Signed we were writing an additional Part that if we didn't reach the Minimum that he would Pay it anyway. And I Always Write my Surname with an oe, but on top of that One Page it says Bottinger*

*And the Handwrite of my girlfriend Looks different Aswell. And the Company we Signed it for was another One. We didn't Even Know the Name of the Company. This ones are 100% not the ones we Signed! He didn't Even give us the Real Company Name. They are Fake ones, and it Looks like somebody else filled Them out.*

*Regards Johannes*

[19] Both emails have been provided to the Authority.

[20] Ms Spence submits that the agreements provided and purported to be signed by Mr Bottinger and Ms Caroline are not legitimate. Even if the legitimacy was not in question, Ms Spence submits that the issue of back dating would remain.

[21] Ms Spence further submits that Bay Enterprises is trying to circumvent the requirement to provide written individual employment agreements and is also seeking to provide fraudulent documentation to the Labour Inspectorate.

### **Determination**

[22] I am satisfied that Bay Enterprises has not complied with the Improvement Notice issued by the Labour Inspector on 16 May 2014 by failing to provide written individual employment agreements to its employees at the commencement of their employment pursuant to s 65 of the Act.

### **Penalty**

[23] In circumstances in which there has been non-compliance with an improvement notice issued under s 223D of the Act, a penalty may be imposed by the Authority pursuant to s 223F of the Act.

[24] Bay Enterprises is required to provide its employees with written individual employment agreements in accordance with the legislative requirements. It had been served with an improvement notice and provided with oral and written information regarding its relevant legal obligations. It had been given a reasonable amount of time to ensure the correct procedures were put in place.

[25] It failed to provide its employees with written individual employment agreements as required. Further it compounded the situation by the submission to the Authority and the Labour Inspectorate of fraudulent written individual employment agreements purported to have been provided to, and signed by, two of its employees. I have taken this fraudulent behaviour into consideration when setting the level of the penalty

[26] I consider that public policy considerations require employers to act responsibly in adhering to statutory imperatives. Bay Enterprises has failed to do so.

[27] Bay Enterprises is ordered to pay a penalty of \$5,000.00 to the Crown. The cheque should be made out to the “Employment Relations Authority” and forwarded to the Auckland office.

**Filing Fee**

[28] I further order that Ms Spence, the Labour Inspector, be reimbursed for the Authority’s filing fee in the sum of \$71.56.

**Costs**

[29] Ms Spence is seeking costs. This matter was heard ‘on the papers’, accordingly a minimal amount is appropriate in recognition of the costs incurred by the Labour Inspector.

[30] Bay Enterprises is ordered to pay a sum in the amount of \$250.00 as costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[31] The penalty amount, filing fee and costs are to be paid within 28 days of the date of this determination.

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