

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 140  
5400317

BETWEEN	KERRI MAREE AHOMIRO (LABOUR INSPECTOR) Applicant
A N D	SHILOH SILVERCULTURE LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in person Malcolm Wano for Respondent
Investigation Meeting:	On the papers
Date of Determination:	23 April 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant Labour Inspector (the Labour Inspector) alleges that the respondent (Shiloh) has failed to fulfil an enforceable undertaking under s.223B of the Employment Relations Act 2000 (the Act).

[2] The Labour Inspector received a complaint from Mr Jason Wano who is Mr Malcolm Wano's nephew. The complaint alleged that Mr Jason Wano had been underpaid annual leave, sick leave and public holiday entitlements and was owed \$5,666.56.

[3] The Labour Inspector says that Shiloh was given an opportunity to voluntarily correct the matter but failed to do so and accordingly on 10 July 2012, the Labour Inspector and Shiloh entered into a voluntarily Enforceable Undertaking.

[4] The effect of that Enforceable Undertaking was to require Shiloh to:

- (a) review holiday payments to past and present employees and make corrective payments;
- (b) prepare employment agreements complying with the requirements of s.65 of the Act;
- (c) make remedial payments to Mr Jason Wano.

[5] Those matters were to be attended to by 12 September 2012. Shiloh asked for an extension and was granted one but on 4 October 2012, having failed to attend to the matters in the Undertaking as required, the Labour Inspector provided a final 14 days for the matter to be attended to by Shiloh and it was not.

[6] Compliance is now sought together with a penalty and reimbursements of the Authority's filing fee.

[7] By agreement between the parties, the matter is dealt with on the papers. Mr Malcolm Wano did suggest to the Authority that it arrange a telephone conference between himself and Mr Jason Wano. The Authority demurred on the basis that Mr Jason Wano was not a party to the employment relationship problem before the Authority.

[8] Mr Malcolm Wano has taken the opportunity to file submissions and those submissions appear to the Authority to disclose that, with one exception that the Authority will come to shortly, the only outstanding matter from the Undertaking entered into between the parties is the failure to pay the monies owed to Mr Jason Wano who now lives overseas. That failure needs to be set off against Mr Malcolm Wano's claim (which the Authority accepts at face value) that he has made numerous attempts to contact Mr Jason Wano and the latter will not take his calls.

[9] The only other matter which it seems, on Mr Malcolm Wano's submission anyway, is still outstanding is the requirement that he audit past employee files and ensure that their leave entitlements were correctly attended to. In that regard, Mr Malcolm Wano says that there appear to be no other complaints from former staff about their wage and holiday treatment, and he clearly doubts the practicality of tracking down people who have long since left his employ.

[10] Dealing now with the payments owed to Mr Jason Wano, the Authority has already noted it accepts that Mr Malcolm Wano has tried to contact his nephew without success. It seems to the Authority axiomatic that if Mr Jason Wano will not speak with Mr Malcolm Wano then it is difficult to hold Mr Malcolm Wano to account for failing to complete the Undertaking if it is not physically possible for him to do that.

[11] While Mr Malcolm Wano clearly has some views about the appropriateness of the holiday pay regime mandated by the Holidays Act 2003, those views are neither here nor there. The Holidays Act 2003 is the law and the Authority's obligation is to enforce the law. If Mr Malcolm Wano wishes to have his company Shiloh pay people on a different basis from that mandated by the Parliament of New Zealand, then he must take the consequences which include regular attentions by the Labour Inspector and regular complaints from former employees.

[12] Shiloh would be well advised to ensure that its continuing practices comply with the law, if it intends to continue offering employment rather than contractual roles to people it engages.

[13] As to the particular circumstances of this application, a practical outcome would be that Shiloh paid to Mr Jason Wano the monies owed to him. The Authority is satisfied that Shiloh has tried to contact Mr Jason Wano without success. The Authority is not persuaded that in those circumstances, and given the apparent completion of all but one of the other matters of the Undertaking, that it is appropriate to grant the relief sought by the Labour Inspector.

### **Determination**

[14] The Authority thinks the appropriate course of action is for the Labour Inspector to contact Mr Malcolm Wano and arrange a basis on which payment can be made either in whole or in part from Shiloh to Mr Jason Wano.

[15] On the footing that that arrangement can be practically achieved within four weeks of the date of this determination, the Authority will reserve leave for either party to revert to the Authority for further orders, dependant on the outcome of the Labour Inspector's contact with Mr Jason Wano and Shiloh's engagement in the payment of the monies owed to Mr Jason Wano by Shiloh.

[16] On that basis, the application is deferred pending further advices from either party.

James Crichton  
Member of the Employment Relations Authority