

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 8
5517127

BETWEEN EVA BELLEY
(LABOUR INSPECTOR)
Applicant

AND AKKARANEE MAHAMAI
Respondent

Member of Authority: M B Loftus

Representatives: Greg La-Hood, Counsel for Applicant
No appearance for the Respondent

Investigation Meeting: 28 January 2015 at Christchurch

Submissions Received: At the investigation meeting

Determination: 28 January 2015

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The applicant, Eva Belley, seeks orders the respondent, Akkaranee Mahamai:
- a. Comply with an Improvement Notice issued in accordance with section 223D of the Employment Relations Act 2000 on 29 April 2014 and amended on 21 May 2014 in that she:
 - i. pay wages owing to an ex-employee, Narphassorn Sahrunchatcharakul; and
 - ii. pay holiday pay owing to Ms Sahrunchatcharakul;
 - b. Pay interest on the above sums;
 - c. Be penalised for failing to comply with the Improvement Notice; and



d. Pay costs.

[2] Ms Mahamai's position is largely unknown given the lack of a Statement in Reply and her failure to participate meaningfully in the Authority's process. I say largely as there is correspondence from Ms Mahamai which claims she is now unemployed and incapable of complying with the demands made of her.

Non-appearance of the Respondent

[3] Ms Mahamai was neither present nor represented at the investigation meeting. That raised the question of whether or not I proceed in her absence.

[4] The Authority has been sending its correspondence to an address supplied by Ms Belley. Copies have also been sent to an e-mail address through which Ms Belley previously corresponded with Ms Mahamai. That these are addresses through which Ms Mahamai can be contacted has been confirmed by responses she sent to the Authority.

[5] The notice of investigation meeting was sent to both addresses with Ms Mahamai acknowledging receipt of the couriered hardcopy at 10.27am on 19 December 2014. The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant. I am therefore satisfied Ms Mahamai is, or at least should be, aware of the investigation meeting and the consequences of non-attendance.

[6] In the circumstances, and given the lack of an explanation for the absence, I consider it appropriate to continue. Both Ms Belley and Ms Sahrunchatcharakul are entitled to have their claims resolved.

Determination

[7] Ms Mahamai operated a shop in The Palms, Christchurch. Between 26 January 2014 and 8 February 2014 she employed Ms Sahrunchatcharakul.

[8] On 3 February Ms Sahrunchatcharakul approached the Labour Inspectorate about various concerns including her rate of pay which appeared to be less than that required under the Minimum Wages Act 1983. The rate was said to be a training one but the circumstances of Ms Sahrunchatcharakul's employment would preclude that.

[9] On 10 February Ms Belley wrote to Ms Mahamai about these concerns though by that time the employment had ceased. That led to a further issue. While an initial, albeit deficient, wage payment had been made for Ms Sahrunchatcharakul's work up till 1 February the balance was never paid and nor was holiday pay.

[10] Ms Belley's subsequent investigation led to the issuing of an Improvement Notice on 29 April 2014. It sought compliance with various provisions of the Employment Relations Act 2000, the Minimum Wages Act 1983 and the Holidays Act 2003. In particular Ms Belley took issue with the failure to pay appropriate wages.

[11] Further correspondence followed with Ms Mahamai advising she was no longer operating her franchise business in Christchurch and was incapable of complying with the Improvement Notice. As a result, and given further information about Ms Mahamai's financial state, Ms Belley issued the amended Improvement Notice which allowed payment via weekly instalments of \$50 commencing 26 May 2014.

[12] There has been no compliance which led to this application.

[13] As already said Ms Belley seeks an order Ms Mahamai pay outstanding wages, holiday pay, interest thereon and receive a penalty for her failure to comply with the Improvement Notice. She calculates Ms Sahrunchatcharakul is owed, and seeks payment of:

- a. \$921.25 unpaid wages;
- b. \$128.70 for holiday pay due upon cessation; and
- c. \$103.13 for an alternate public holiday.

[14] There can be no doubt the monies sought are payable. Ms Mahamai has not objected to the Improvement Notice (s.223E of the Employment Relations Act 2000) and her correspondence acknowledges a debt.

[15] The full amount is now payable as compliance with the amended Improvement Notice would have seen that occur by now. Payment shall be ordered accordingly.

[16] Turning to the claim for a penalty. I am satisfied the Improvement Notices were properly served. Ms Belley's evidence, along with the email traffic between herself and Ms Mahamai, satisfies me there has been no compliance. Section 223F of the Employment Relations Act 2000 provides for the imposition of a penalty in such circumstances.

[17] The evidence shows little, indeed no, real attempt by Ms Mahamai to comply with her obligations as an employer and there are also issues of deterrence. The situation in this respect is not dissimilar to that considered by the Court in *Xu v Naenae Auto Service Station Ltd and McIntosh*¹ and which strongly suggests a penalty is appropriate. The question is how much.

[18] Ms Belley accepts there is evidence Ms Mahamai is of limited means and suggests an amount of between \$500 and \$1,000. Having considered *Xu* and Ms Mahamai's failure to appear and further explain her situation I conclude Ms Belley's approach is fair and reasonable. I consider \$750 to be appropriate and order payment accordingly. Payment shall be made to the Crown via the Ministry of Business, Innovation and Employment.

[19] Ms Belley also seeks interest. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Ms Mahamai has, by failing to make payments properly due, continued to have use of money rightfully belonging to Ms Sahruphatcharakul. This is, I conclude, a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[20] The rate to be applied is prescribed in the Judicature (Prescribed Rate of Interest) Order 2011 (2011/177). It is currently 5%. The monies were payable upon cessation (8 February 2014). As of the date of this determination the amount payable on the wage and holiday arrears is \$56.07.

[21] The costs claim is minimal and limited to reimbursement of the Authority's filing fee. The cost was incurred and the claim has been totally successful.

[22] In order to avoid additional effort or expense and given a costs award can be reviewed, I choose to dispose of the issue. The respondents will pay a further \$71.56 as reimbursement of costs.

¹ ([2004] WC 13A/04, Colgan CJ, 18 November 2004

Conclusion and Orders

[23] For the above reasons I make the following orders.

[24] The respondent, Akkaranee Mahamai, is to make the following payments no later than 4.00pm Thursday 12 February 2015:

- a. \$1,153.08 (one thousand, one hundred and fifty three and eight cents) gross for unpaid wages and holiday pay. Payment is to be made to Eva Belley, Labour Inspector, for disbursement to Ms Sahrunchatcharakul; and
- b. A further \$56.07 (fifty six dollars and seven cents) being interest owing as of the date of this determination. This will increase by \$0.15 (fifteen cents) with each calendar day that passes between 29 January 2015 and the date of payment; and
- c. a further \$750.00 (seven hundred and fifty dollars), being a penalty payable to the Crown pursuant to section 135 of the Employment Relations Act 2000. Payment is to be made to the Ministry of Business, Innovation and Employment (MBIE); and
- d. a further \$71.56 (seventy one dollars and fifty six cents) as a contribution towards MBIE's costs. Payment is to be made to the Ministry of Business, Innovation and Employment (MBIE).



M B Loftus
Member of the Employment Relations Authority



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