



**The respondent's failure to take part in the process**

[4] The application to the Employment Relations Authority was sent to the last known address of Mr Collins by the Authority under cover of a letter dated 13 September 2013. The track and trace records of Courier Post record that the letter and application were delivered to the address on Monday, 16 September 2013 and signed for by a third party.

[5] On 7 October 2013, the Authority's support officer emailed Mr Collins at the last known email address advising him that he had not filed his statement in reply and asking him to reply so that the Authority was aware of his views of the matter.

[6] A case management conference by telephone was arranged and the date and time advised to Mr Collins by way of a letter from the Authority which was both emailed and posted. The case management conference by telephone took place on 22 October 2013 but Mr Collins did not participate as he did not answer his telephone when called to join him to the teleconference.

[7] The Authority then arranged delivery of a notice of direction advising Mr Collins that the matter would be determined on the papers and giving him a further seven days from the date of service to provide any information he wished the Authority to consider when making its determination. Service of the documents was arranged through Baycorp which confirmed by way of an affidavit of service signed by an agent of Baycorp that the documents were personally served on Mr Collins on 23 October 2013.

[8] As at the date of this determination, no communication has been received by the Authority from Mr Collins and the Authority has therefore decided to proceed without the benefit of his comments on the basis that he has had ample opportunity to take part.

**Background**

[9] Mr Collins traded as *SMC Security Limited*, an entity which has not been registered with the Companies Office. I am therefore satisfied that Mr Collins personally is the correct respondent in this matter.

[10] The following account is derived from information provided by the Labour Inspector. In the absence of any evidence to the contrary from Mr Collins, I accept the Labour Inspector's account of events.

[11] In March 2013, the Labour Inspector received a complaint from Mr Bowen, a former employee of Mr Collins, advising that he had not received holiday pay at the termination of his employment and that, at no time during his employment, did he receive an employment agreement.

[12] On 26 April 2013, Mr Collins telephoned the Labour Inspector and admitted that he had not put employment agreements in place initially but that he had done so at some stage but was now unable to locate copies. He also stated that his employees were told when they started employment that holiday pay was being included in their wages.

[13] In the absence of further information from Mr Collins, the Labour Inspector completed an investigation report which concluded that there was no evidence that an agreement had been reached that holiday pay was to be paid with wages and, even if there was such an agreement, there was a clear breach of s.28 of the Holidays Act 2003 because Mr Bowen had not worked intermittently or irregularly and had not been employed on a fixed term agreement. Accordingly, Mr Bowen was owed holiday pay at the rate of 8% of gross earnings in accordance with s.23 of the Holidays Act.

[14] Mr Collins also did not have written employment agreements in place for current employees and the Labour Inspector considered that there had been an established breach of s.65 of the Act. In addition, s.63A of the Act had not been complied with.

[15] In the absence of a response from Mr Collins to the investigation report, on 14 June 2012 the Labour Inspector sent Mr Collins a letter requesting that he make payment to Mr Bowen for holiday pay in accordance with the Holidays Act. Mr Collins was warned that an Improvement Notice would be served if the matter was not resolved by 25 June 2012.

[16] In July 2012 the Labour Inspector received a substantially similar complaint from Mr Martin, another former employee of Mr Collins. As well as not having been given a copy of an employment agreement, and not having been paid holiday pay at

the end of his employment, Mr Martin also complained that he had worked public holidays which were otherwise working days for him but had not been provided alternative days' holidays in breach of s.56 of the Holidays Act. This complaint was set out in writing by the Labour Inspector to Mr Collins on 2 August 2012 and on 16 August 2012, Mr Collins got in touch saying that he was going to *fix the outstanding issues*.

[17] On 24 August 2012, Mr Collins advised the Labour Inspector that he had paid Mr Bowen holiday pay of \$1,922.56 and acknowledged that he agreed with the Labour Inspector's findings.

[18] On 30 August 2012, the Labour Inspector advised Mr Collins that the holiday pay paid to Mr Bowen was incorrect and requested a full breakdown of Mr Bowen's gross earnings. She also set out the details of Mr Martin's complaint and requested copies of employment agreements for current employees.

[19] In the absence of a response, the Labour Inspector reminded Mr Collins of the Labour Inspector's compliance options.

[20] On 1 November 2012 the Labour Inspector received a telephone call from a third party advising that Mr Collins had suffered a *meltdown* and that copies were currently unavailable but that a copy of a current employment agreement would be provided.

[21] On 30 January 2013, the Labour Inspector wrote to Mr Collins advising him that the information requested had not been received and that she intended to complete the investigation of Mr Martin's claim and then enforce matters through an Improvement Notice.

[22] On 28 March 2013, the Labour Inspector sent Mr Collins an investigation report regarding Mr Martin's claim. In the absence of a response from Mr Collins, the Labour Inspector completed her findings that Mr Martin had never been provided with an employment agreement, had not agreed the terms and conditions in accordance with s.63A of the Act, had worked on public holidays but not received alternative days' holidays under s.56 of the Holidays Act and had not been paid for the alternative days in accordance with s.60 of the Holidays Act. Furthermore, Mr Martin was owed holiday pay at the rate of 8% of gross earnings in accordance with s.23 of the Holidays Act.

[23] The Labour Inspector also considers that, in breach of s.130 of the Act, Mr Collins does not have time and wage records for employees and, in breach of s.83 of the Holidays Act, has not provided holidays and leave records.

[24] On 26 May 2013, the Labour Inspector served Mr Collins with an Improvement Notice stating that she reasonably believed that he was failing or had failed to comply with the provisions of ss.63A, 65 and 130 of the Act and ss.23, 28, 56, 60 and 83 of the Holidays Act.

[25] The Improvement Notice gave Mr Collins until 29 July 2013 to carry out the steps set out in it. The Labour Inspector informs the Authority that Mr Collins has failed to comply with the Improvement Notice. No objection to the Improvement Notice has been lodged it appears.

### **Statutory requirements of an Improvement Notice**

[26] Section 223D(2) of the Act requires that an Improvement Notice state, among other things:

- (a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and*
- (b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and*
- (c) the nature and extent of the employer's failure to comply with the provision; and*
- (d) the steps that the employer could take to comply with the provision; and*
- (e) the date before which the employer must comply with the provision.*

[27] The Improvement Notice served by the Labour Inspector upon Mr Collins complies with these requirements.

### **Compliance order**

[28] The Improvement Notice has not been complied with, and so an order for compliance is warranted.

[29] Section 138(4A) of the Act states:

*If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.*

[30] The order sought by the Labour Inspector includes the payment of \$731 (gross) in respect of Mr Bowen's holiday pay and the sum of \$1,096.32 (gross) in respect of Mr Martin's holiday pay. No communications have been received from Mr Collins advising that his financial position requires the Authority to order payment to the employees by instalments and therefore I decline to do so.

[31] It is also appropriate for Mr Collins to comply with paragraph 4 of the Improvement Notice (on page 6) and the second and third bullet points on page 7 headed *information the employer is required to provide the Inspector as evidence of the steps taken to comply*.

[32] It is not clear whether Mr Collins continues to operate a business and to employ staff. Insofar that he does continue to employ staff, I also order that he complies with numbered paragraphs 1, 2 and 3 on page 5 of the Improvement Notice, numbered paragraphs 5, 7 and 8 on page 6 of the Improvement Notice and the first and fourth bullet points on page 7 headed *information the employer is required to provide the Inspector as evidence of the steps taken to comply*.

[33] Mr Collins is therefore ordered to comply with the Improvement Notice by making a payment to the Ministry of Business, Innovation and Employment in the sum of \$1,827.32, together with interest stipulated in paragraph [40] of this determination.

[34] Section 138(5) of the Act permits the Authority to adjourn a matter when it makes an order for compliance, without imposing a penalty or making a final determination, to enable the order to be complied with during the adjournment. However, given the failure of Mr Collins to communicate in any way with the Authority, I do not consider that a further adjournment would serve any purpose and therefore I proceed under s.137(3) to specify a time within which the compliance order is to be obeyed. I therefore order that payment is to be made under the order by 4pm, 14 days from the date of this determination. I further order that, he complies with paragraph 4 of the Improvement Notice (on page 6) and the second and third bullet points on page 7 headed *information the employer is required to provide the Inspector as evidence of the steps taken to comply* by 4pm, 14 days from the date of this determination.

[35] Finally, insofar that Mr Collins continues to employ employees, he is to comply with the other requirements set out in the Improvement Notice by 4pm, 28 days from the date of this determination.

### **Penalty**

[36] Section 223F of the Act provides as follows:

#### ***223F Penalty***

*(1) An employer who fails to comply with an improvement notice issued under section 223D is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*

*(2) If subsection (1) applies, a Labour Inspector may not also bring an action seeking a penalty in respect of the same matter under any of the relevant Acts*

[37] No reason for the failure to comply with the Improvement Notice has been provided by Mr Collins. Many of the failures set out in the Improvement Notice are serious matters, and especially the failure to make payments under the Holidays Act. Accordingly, I believe it is appropriate to reflect the seriousness of the circumstances and to reinforce the role and importance of Improvement Notices by ordering the payment of a penalty.

[38] Mr Collins is ordered to pay to the Authority a penalty in the sum of \$750, which will then be paid into a Crown Bank Account pursuant to s. 136 of the Act.

### **Summary of orders**

[39] Mr Collins is ordered to comply with the Improvement Notice by:

- (a) making a payment to the Ministry of Business, Innovation and Employment in the sum of \$1,827.32 by no later than 4pm, 14 days from the date of this determination;
- (b) complying with paragraph 4 of the Improvement Notice (on page 6) and the second and third bullet points on page 7 headed *information the employer is required to provide the Inspector as evidence of the steps taken to comply* by no later than 4pm, 14 days from the date of this determination;

- (c) insofar as Mr Collins continues to employ employees, complying with numbered paragraphs 1, 2 and 3 on page 5 of the Improvement Notice, numbered paragraphs 5, 7 and 8 on page 6 of the Improvement Notice and the first and fourth bullet points on page 7 of the Improvement Notice headed *information the employer is required to provide the Inspector as evidence of the steps taken to comply* by no later than 4pm, 28 days from the date of this determination.

[40] In addition, interest is to be paid by Mr Collins on the sum of \$1,827.32 (or on any balance remaining after any part payment) calculated at 5% per annum from 29 July 2013 until the date of payment of the sum of \$1,827.32 in full.

[41] Mr Collins is ordered to pay a penalty in the sum of \$750 for his failure to comply with the Improvement Notice.

#### **Costs**

[42] I further order that the Labour Inspector be reimbursed for the Authority's lodgement fee in the sum of \$71.56

David Appleton  
Member of the Employment Relations Authority