

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 26/09
5124528

BETWEEN LABOUR INSPECTOR
 HENNING
 Applicant

AND VIZUAL PHOTOMEDIA
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Jon Henning, Labour Inspector
 No appearance for Respondent

Investigation Meeting: On the papers

Determination: 9 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In my earlier determination between these parties dated 19 November 2008, I catalogued the process by which the applicant Labour Inspector (Mr Henning) had brought his claim against the respondent company (Vizual Photomedia Limited). I reached the conclusion that I was unable to grant the relief sought by Mr Henning because he had simply made an assessment of the moneys owed by Vizual Photomedia Limited to the former employee.

[2] I was satisfied that the Authority had no inherent power to enforce an assessment by a Labour Inspector in those circumstances.

[3] The present application then, filed by Mr Henning on 28 November 2008, attempts to deal appropriately with that deficiency although it does not proceed on the basis of a demand notice because the application Mr Henning brings to the Authority seeks compliance with an assessment made partly under the Holidays Act 2003 and partly under the Wages Protection Act 1983.

[4] The reason that Mr Henning proceeds by way of a compliance order rather than by way of a demand notice is that, of the two statutes that he seeks enforcement in respect of, only the Holidays Act allows a Labour Inspector to proceed by way of a demand notice.

[5] Section 224 of the Employment Relations Act 2000 confers on the Labour Inspectorate power to generate demand notices, on certain terms and conditions, in respect of enforcement of the Holidays Act on the one hand and the Minimum Wage Act on the other, but critically for our purposes, not the Wages Protection Act.

[6] It will be convenient, then, to deal separately with each of Mr Henning's heads of claim.

The Wages Protection Act claim

[7] Mr Henning seeks a compliance order against Vizual Photomedia Limited in the sum of \$996.92 being wages due and money owing to a former employee Mark Samsone.

[8] Section 11 of the Wages Protection Act 1983 provides that a worker may recover wages due and owing under this Act by application to the Employment Relations Authority and s.13 of the Wages Protection Act confers power on a Labour Inspector to seek a penalty for any breach of the Wages Protection Act, again from the Employment Relations Authority.

[9] I am satisfied that Mr Henning has made out his claim for the payment of \$996.92.

[10] I am also satisfied that, pursuant to s.13 of the Wages Protection Act 1983, this is an appropriate case where a penalty should apply. The employer in the instant matter has had ample opportunity to make payment or to reach an appropriate arrangement with Mr Henning and notwithstanding several opportunities to do so has failed absolutely to reach any proper arrangement.

Recovery of holiday pay

[11] Pursuant to s.228(1) of the Employment Relations Act 2000, Mr Henning also brings a claim against Vizual Photomedia Limited for the payment of outstanding amounts of public holiday pay and annual holiday pay.

[12] I am satisfied that both these claims are made out. These particular claims relate to the question whether holiday pay was subsumed within the hourly rate or not.

[13] The evidence is clear that there was no proper basis for that subsuming and there was no consent from the employee in any event.

[14] Accordingly it follows that Vizual Photomedia Limited must pay to Mr Henning for the use of the employee, Mr Mark Sansone, the sums of \$148.33 in respect of public holiday pay and \$1,286.82 in respect of annual holiday pay.

[15] Again, Mr Henning seeks penalties for the breaches respectively of s.23 of the Holidays Act 2003 and s.49 of the Holidays Act 2003. The former section relates to the payment of annual holiday pay when the employment ends within 12 months, and the subsequent section relates to the payment for public holidays when a worker does not work on such a day but would normally work that day if it were not a public holiday.

[16] In the circumstances of the present case and having regard to the inordinate delay in dealing with the matter appropriately and the various indulgences the Authority has given to the employer to try to get compliance, I think penalties are appropriate in relation to these breaches as well.

Determination

[17] Vizual Photomedia Limited is to pay to Mr Henning for the use of Mark Sansone the following amounts:

- (a) The sum of \$996.92 in terms of s.4 of the Wages Protection Act 1983;
- (b) The sum of \$148.33 in terms of s.49 of the Holidays Act 2003;
- (c) The sum of \$1,286.82 in terms of s.23 of the Holidays Act 2003;
- (d) A penalty in the sum of \$2,000 in respect of the breach of the Wages Protection Act;
- (e) Penalties totalling \$1,000 in respect of the two breaches of the Holidays Act 2003;

- (f) All those penalties to be paid to Mr Henning for the use of Mr Sansone.

Costs

[18] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority