

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 188  
5550831

BETWEEN DOUGLAS HIXON, LABOUR  
INSPECTOR  
Applicant

AND NEAL ALAN SUMMERS  
Respondent

Member of Authority: Christine Hickey

Representatives: Emma Light, Counsel for Applicant  
Respondent in person

Investigation meeting: 24 September 2015 in Blenheim.  
Submissions received at the investigation meeting.

Determination: 2 December 2015

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**DETERMINATION OF THE AUTHORITY**

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**A. Within 28 days of the date of this determination Neal Summers is to pay a penalty of \$2,550 to the Employment Relations Authority for transfer into a Crown Bank account.**

**B. Within 28 days of the date of this determination Neal Summers is to pay Douglas Hixon, Labour Inspector, \$971.56 as a contribution towards Mr Hixon's legal costs.**

**Employment relationship problem**

[1] This is a claim against Neal Alan Summers who runs Seumus' Irish Bar (the Bar) in Picton for penalties for failures to:

- provide employees with written employment agreements (s 65 Employment Relations Act 2000 (the Act));
- keep wages and time records (s 130 of the Act);

- keep holiday and leave records (s 81 Holidays Act 2003);
- pay final holiday pay to employees (s 23 Holidays Act 2003); and
- for making unauthorised deductions from employee's wages without written consent (s 5 Wages Protection Act 1983).

[2] The claim for a penalty under s 5 of the Wages Protection Act 1983 was withdrawn at the investigation meeting. It was clarified that the amount of holiday pay being claimed had been paid and there was no outstanding claim for Mr Walsh's final week's pay.

[3] I heard affirmed evidence from Mr Hixon, Neal Summers and Toni-Jayne Stills, the former manager of the Bar. I questioned all three witnesses. Ms Light cross-examined Mr Summers. Mr Summers was given the opportunity to cross-examine Mr Hixon and Ms Stills.

[4] On 4 April 2014 Stephen Walsh, a former employee of Mr Summers at Seumus' Irish Bar, telephoned MBIE with a complaint that he had not been paid his final week's wages and holiday pay and that he had not been given a written employment agreement. He told MBIE that other employees were similarly affected.

[5] Mr Hixon had previously resolved a complaint, about another employee not receiving his final holiday pay, directly with Mr Summers.

[6] On 10 April 2014 Mr Hixon rang Mr Walsh to discuss his complaint. Mr Walsh told Mr Hixon that he was employed from early January and left work about 12-15 March 2014. He said for the most part he had been paid in cash, around \$5,000, and received only one payment in his bank account of \$1,500. He believed no tax had been paid to the IRD on his earnings.

[7] On 10 April 2014 Mr Hixon rang Mr Summers about Mr Walsh's complaint and Mr Summers said he would send Mr Hixon some records the following week.

[8] On 15 April 2014 Mr Hixon sent Mr Summers a notice under s 229(1)(c) of the Employment Relations Act 2000 (the Act) to produce Mr Walsh's employment agreement and wages and time records within 14 days.

[9] On 29 April Mr Summers phoned Mr Hixon and asked if he was obliged to pay an employee who had not returned an IRD tax declaration. Mr Hixon advised Mr Summers that he was obliged to pay such an employee and to deduct and pay PAYE at the non-declared rate.

[10] On 30 April Mr Summers faxed Mr Hixon a handwritten one page document that identified two payments to Mr Walsh on 2 March and 9 March 2014. It also said:

*That is all we have for Steve. He refused to provide us with an IRD# when we asked.*

[11] In May 2014 Bonnie Szabo, also a former employee of Mr Summers, rang MBIE and complained about her final holiday pay not being paid and unauthorised deductions from her wages.

[12] On 8 May 2014 Mr Hixon went to Seumus' Irish Bar and met Mr Summers. Mr Summers told him Mr Walsh worked from early February to 9 March 2014 and that his holiday pay had been paid by cash or cheques. He said Mr Walsh's payments were based on Mr Walsh's timesheet hours and that he had already provided that information in the fax.

[13] Mr Hixon asked Mr Summers if he had any information about holiday pay paid for Mr Walsh and he replied *it's in the records*. Mr Summers provided Mr Hixon with rosters and he noted that Mr Walsh's name first appeared on a roster dated 27 January 2014. The other named employees included Ms Stills and Ms Szabo.

[14] Mr Summers provided employment agreements for three former employees but admitted that he did not have any for most of his employees. He showed Mr Hixon two payslips for Mr Walsh. Mr Hixon noted having seen them and noted they were the only two payslips for Mr Walsh.

[15] Mr Hixon also saw the Bar's IRD Employer Monthly Return which did not show any tax payments for Mr Walsh. However, the two payslips showed that PAYE had been deducted from Mr Walsh's pay.

[16] On 11 July 2014 Mr Hixon spoke to Ms Stills by telephone. She confirmed that when she began work at the Bar only a few employees had written employment agreements. Ms Stills also told Mr Hixon that a number of employees were being

paid in cash and that Mr Summers was not paying PAYE to the IRD. She also said employees were not paid time and a half when working on public holidays and confirmed that Mr Walsh was not paid holiday pay when he left.

[17] Mr Hixon completed an investigation report and sent a copy of that to Mr Summers.

[18] Mr Hixon had arranged to meet Mr Summers again in October 2014 but unfortunately that meeting did not go ahead as Mr Hixon had to travel to the US where his mother and his aunt were ill in hospital.

### **Procedural background**

[19] Mr Hixon's application was lodged with the Authority on 2 April 2015. On 23 April 2015 Mr Summers lodged his statement in reply which said that he was shocked to receive the proceedings. He wrote that after he had deposited money into Stephen Walsh and Bonnie Szabo's accounts he was not aware of any ongoing issues and believed the matter was closed.

[20] On 29 May 2015 I held a teleconference with Mr Hixon, Angela Graham, who was then Mr Hixon's counsel, and Mr Summers.

[21] Mr Summers was directed to provide proof of payment to Mr Walsh by 12 June 2015. Mr Summers was also directed to provide the year's worth of timesheets he said he had already provided to Mr Hixon, which Mr Hixon said he had not received, by 28 July 2015 along with any written witness statements he wished to provide.

[22] A date of 11 August 2015 was set for the investigation meeting at the teleconference, although it had to be adjourned for Mr Summers' travel back to the US because of a family death.

[23] A further notice of direction was issued on 7 July 2015 noting that Mr Summers had not yet provided proof of payment to Mr Walsh and reminding him that he needed to provide the copies of a year's worth of timesheets he said he had and setting another date for Mr Summers to provide a written witness statement.

[24] After Mr Summers contacted the Authority a change in the start time for the investigation meeting was made to suit his business hours. The Authority received no documents from Mr Summers before the meeting. Mr Hixon did not receive any further documents either.

[25] Mr Summers attended the investigation meeting and brought with him the ACE payroll records for all former employees including Mr Walsh as well as some employment agreements, but not one for Mr Walsh or a number of other former employees.

[26] I adjourned the investigation meeting to allow Mr Hixon and Ms Light to examine Mr Summer's records which had not previously been produced to Mr Hixon or to the Authority. I reconvened the meeting later that morning.

### **Determination**

*Did Mr Summers breach provisions of the Employment Relations Act and the Holidays Act?*

[27] Mr Summers' evidence was that all his employees had been given written employment agreements and until Ms Stills left his employment they had been in the filing cabinet. However, he says that Ms Stills removed most of them and took them away.

[28] Ms Stills categorically denies having taken any documents from the Bar and said that when she began employment a number of employees did not have written employment agreements.

[29] Mr Summers' evidence was that at the date of the investigation meeting he did not have any employees. However, he said that in early October he would be employing a new staff member and would ensure that person and any other staff had written employment agreements and that he kept adequate wages and time records.

[30] **Non-provision of written employment agreements** – I have considered Mr Summers' explanation of providing Mr Walsh with a written employment agreement only once Mr Walsh provided an IRD number and his explanation that Ms Stills must have taken Mr Walsh's employment agreement along with a number of others when she left.

[31] I consider the explanation to be wholly implausible. Ms Stills' evidence is that she acted under Mr Summers' instructions and she was only instructed to supply written employment agreements for some staff. She says that other staff 'worked under the table' and did not have written employment agreements. That explanation is consistent with Mr Summers' telling Mr Hixon that he did not supply Mr Walsh with a written employment agreement until Mr Walsh supplied him with an IRD number. However, I find that Mr Summers never supplied Mr Walsh with a written employment agreement. Mr Summers' understanding seemed to be he was not bound to provide an employment agreement, or even to pay an employee, unless an employee gave him an IRD number. That also stacks up with his query to Mr Hixon about whether he should have paid PAYE for Mr Walsh before Mr Walsh gave him an IRD number.

[32] Mr Summers has breached his obligation to supply copies of written employment agreements to all his staff under s 65 of the Act and having failed to comply with the section is liable in an action brought by a Labour Inspector to a penalty imposed by the Authority. An individual can be liable for a penalty of up to \$10,000.

[33] **Failure to keep wages and time records** – until the date of the investigation meeting no wages and time records had been produced despite Mr Hixon's notice requiring those of Mr Walsh to be produced. At the investigation meeting copies of printouts from an ACE payroll system were produced, but not for Mr Walsh's complete period of employment.

[34] The ACE payroll system may be capable of being used to adequately meet the standards set out in s 130 of the which are to keep a record showing:

- The name of the employee.
- The employee's age, if under 20 years of age.
- The employee's postal address.
- The kind of work on which the employee is usually employed.
- Whether the employee is employed under an individual employment agreement.
- In the case of an employee employed under a collective agreement, the title and expiry date of the agreement and the employee's classification under it.
- When necessary for the purpose of calculating the employee's pay, the hours between which the employee is employed on each day, and the days of the employee's employment during each pay period.

- The wages paid to the employee each pay period and the method of calculation.
- Details of any employment relations education leave taken under Part 7.
- Such other particulars as may be prescribed.

[35] However that is dependent on accurate information being regularly input. Mr Summers has failed to keep an adequate wages and time record in relation to Mr Walsh and has breached s 130 of the Act.

[36] Section 130(4) of the Act provides that any employer who fails to comply with s 130 is liable to a penalty imposed by the Authority.

[37] Section 135(1) of the Act provides that an action for recovery of a penalty may be brought:

*(b) in the case of a breach of this Act, at the suit of any person in respect of whom the breach is alleged to have taken place; or  
(c) if permitted in the particular penalty provision, by a Labour Inspector.*

[38] The Notice sent to Mr Summers by Mr Hixon requiring copies of the wages and time records was issued under Mr Hixon's power under s 229(1)(c) being:

*the power to require the production of, and to inspect and take copies from, -  
(i) And wages and time record or any holiday record  
whether kept under this Act or any other Act:*

[39] Section 229(3) of the Act provides:

*Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subsection (1)(c) or subsection (1)(d) is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.*

[40] The application for a penalty for a breach of s 130, being a failure to keep employment records, is not a penalty action that a Labour Inspector can bring on their own behalf. Instead such an action must be brought by an employee, or their

representative.<sup>1</sup> That is because s 130 of the Act does not expressly permit a penalty action to be brought by a Labour Inspector.

[41] Mr Hixon could have brought an action for recovery of a penalty as a representative of Mr Walsh, but he did not. He brought the action in his capacity as a Labour Inspector. Alternatively, he could have brought an action under s 229(3) of the Act for Mr Summers' failure to produce the wages and time records he requested under s 229(1)(c)(i) of the Act.

[42] However, his claim for a penalty for the breaches of s 130 must be dismissed.

[43] **Failure to keep a holiday and leave record as required under s 81 of the Holidays Act 2003** - no holiday and leave records were produced. The ACE payroll system may be capable of keeping a sufficient holiday and leave record as well as a sufficient wages and time record but only if properly used with all relevant data input on a regular basis.

[44] Section 83 of the Holidays Act allows the Authority to make a finding that an employer has failed to comply with his obligations under s 81 of the Holidays Act. I find that Mr Summers has failed to keep holiday and leave records as required under s 81.

[45] Section 75 of the Holidays Act provides that an employer who fails to comply with his obligations under s 83 is liable to a penalty of up to \$10,000 when the employer is an individual.

[46] **Failing to pay final holiday pay** - s 23 of the Holidays Act provides that if an employee's employment comes to an end within 12 months the employer must pay the employee 8% of their gross earnings.

[47] Mr Summers failed to pay Mr Walsh's final holiday pay.

[48] Failure to do so renders an employer who is an individual, such as Mr Summers, liable to a penalty of up to \$10,000 under s 75 of the Holidays Act.

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<sup>1</sup> Under s 236 of the Act.

*Should a penalty be imposed and, if so, in what amount?*

[49] The Authority's power to order a penalty is discretionary. In *Xu v McIntosh*<sup>2</sup> the Employment Court provided guidance to the Authority when considering imposing penalties. It made the following observations:

*A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*

*The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*<sup>3</sup>

[50] The following non-exhaustive list of factors is useful to consider in exercising the Authority's discretion about whether or not to impose a penalty and if it is to be imposed, what amount should be ordered to be paid. I will look at:

- the seriousness of the breach,
- whether the breach is one-off or repeated,
- the impact if any on the employees, including considering the vulnerability of the employees,
- the need for deterrence,
- remorse shown by the party in breach, and
- the range of penalties imposed in other comparable cases.<sup>4</sup>

[51] Section 135(2) allows a claim for two or more penalties against the same person to be joined in the same action. I propose to deal with each of the claims that render Mr Summers liable for a penalty together and impose one global penalty.

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<sup>2</sup> [2004] 2 ERNZ 448

<sup>3</sup> Ibid, Paragraphs [47] and [48]

<sup>4</sup> *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

[52] Ms Light provided helpful submissions which I have considered. Mr Summers did not make specific submissions in relation to penalties except to say that he would ensure that his obligations were met in the future.

[53] Every breach of a minimum standard is a serious one, if not an inadvertent breach. I consider none of the breaches - the failure to provide written employment agreements, failure to pay final holiday pay and the failure to keep a holiday and leave record – were inadvertent and are moderately serious although not at the extreme end of the spectrum.

[54] The failure to pay final holiday pay is a repeated breach. The breach was not only in relation to Mr Walsh but also Ms Szabo and an earlier employee. The breach of failure to keep a holiday and leave record is a repeated one. The failure to provide written employment agreements is also a repeated breach. All breaches were sustained over a reasonable period of time.

[55] The impact on the employees was significant and two breaches, those of the lack of holiday and leave records and of wages and time records, made proving the quantum owed by way of final holiday pay more difficult.

[56] Mr Walsh was a vulnerable employee in that he was in New Zealand on a working holiday visa and was dependent on Mr Summers to comply with New Zealand's minimum employment code. The lack of a written employment agreement made being able to ensure his rights were upheld more difficult.

[57] One of the purposes of imposing a penalty is to deter this particular employer, and to deter others. In addition, employers who do not comply with their obligations can gain a business advantage over the majority of employers who do comply with their employment obligations.

[58] There is a need for deterrence in this case. There was no remorse shown by Mr Summers who continued to blame a previous employee for his failure to provide and keep copies of employment agreements. I recognise that Mr Summers paid Mr Walsh and Ms Szabo their final holiday pays before the investigation meeting but it took Mr Hixon's intervention to make that happen.

[59] I consider a penalty of \$2,550 to be reasonable in this case and order Mr Summers to pay that to the Authority within 28 days for transfer to a Crown Bank Account.

**Costs**

[60] Ms Light seeks reimbursement of the filing fee of \$71.56 and claims costs of \$3,000 per day on a pro rata basis. The investigation meeting took less than two hours.

[61] Mr Summers should reimburse MBIE \$900 for the costs of Ms Light's representation and should also reimburse it the \$71.56 filing fee.

Christine Hickey  
Member of the Employment Relations Authority