

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Brian Kenton (Applicant)  
**AND** Labour Inspector (Jon Henning) (Respondent)  
**REPRESENTATIVES** Louise Burrows, Counsel for the Applicant  
Jon Henning in person  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** Timaru, 7 November 2006  
**DATE OF DETERMINATION** 20 November 2006

**DETERMINATION OF THE AUTHORITY**

***Employment relationship problem***

[1] By demand notice dated 3 August 2006, the respondent Labour Inspector (Mr Henning) made demand on the applicant (Mr Kenton) for the sum of \$2709 pursuant to section 224 of the Employment Relations Act 2000.

[2] By notice dated 11 August 2006, Mr Kenton lodged an objection to the demand notice pursuant to section 225 of the Act.

[3] I am satisfied that the demand notice was properly served on Mr Kenton and that the Labour Inspector met all of his obligations under the statute, and I am equally satisfied that Mr Kenton's objection to the demand notice was lodged within time and otherwise complied with the requirements of the Act.

[4] This determination deals with the Authority's obligation to decide on the objection pursuant to section 226 of the Act. The Authority is required to determine whether or not the whole or part of the moneys specified in the demand notice is due to the employee by the employer.

***The grounds of the objection***

[5] Ms Burrows identified a number of grounds of objection and each of these was dealt with in turn. The demand notice effectively comprised three elements, viz. an amount of holiday pay due and owing in the sum of \$660 gross, pay for alternative holidays and penal payments relating to work performed on public holidays.

[6] It was accepted that Mr Kenton had already agreed that holiday pay of \$660 gross was due and owing and so that amount ceased to be in dispute between the parties.

[7] As to the other elements of the demand notice, the situation was less straightforward. Ms Burrows quite properly conceded that the employer had a difficulty because Mr Kenton had not kept proper records. There was no written employment agreement; nor was there a proper time record kept.

[8] Mr Kenton said that the diaries which were maintained by the employee, and in which he noted principally operational matters that required attention together with some detail of hours worked, were in fact a timesheet system. Mr Kenton said that he had purchased the diaries and that he regarded them as a time record as well as an operational diary.

[9] In my view, the diaries were primarily operational in nature and certainly, insofar as they sought to record time worked were inadequate for the purpose as they did not deal with time keeping with sufficient particularity.

[10] A particular area of difficulty was the record of work performed on public holidays. Mr Kenton denied that the employee ever worked public holidays; the diary record suggested he did.

[11] Ms Burrows, using the diaries as the base document produced a schedule which showed a different calculation from the one arrived at by Mr Henning. Ms Burrows helpfully provided the Authority with a set of working papers which supported the calculations that she had made and I have carefully reviewed them.

[12] It is not necessary for me to provide a detailed critique of Ms Burrows' calculations. Suffice it to say that, having reviewed her material, I am satisfied that Mr Henning's calculation of the amount owed is both more robust and more consistent with the principles that ought to apply.

[13] The paucity of the records makes it difficult to be certain how many statutory holidays the worker actually worked, but I accept Mr Henning's calculation which he indicates is based on a proper construction of whatever records he had available to him including the operational diaries.

[14] I have reflected carefully on Mr Kenton's claim that the diaries are to some extent manufactured evidence; that is that some of the material in the diaries has been completed after the event to facilitate the employee's claim. There was no evidence produced to support this contention and while I acknowledge there is a possibility of this unsavoury event happening, I am satisfied with the careful work done by Mr Henning in trying to get as robust an analysis as the circumstances allowed.

### ***The employer's position***

[15] I have some sympathy for Mr Kenton's position. He indicated to me he felt that he had been badly served by the employee, that the process the employee embarked upon to obtain redress for the money the employee claimed to be owed had itself been a bruising one and he felt that the system was stacked against small employers.

[16] I told Mr Kenton during the investigation meeting, and I reiterate the point now, that it is difficult for any employer to successfully defend a worker's claim for unpaid wages in circumstances where they have failed to comply with the basic legal rules around employment. Specifically, I indicated the requirement that an employer provide an employment agreement which was a comprehensive document dealing with the employment relationship, and that the employer keep proper wage and time records such that claims of this kind could be dealt with on the basis of the factual position rather than on the basis of what is, with the best will in the world, something of a speculative exercise.

[17] I commend to Mr Kenton the notion that he prepare employment agreements for employees still in his employ and that he keep proper and adequate wage records to avoid the confusion that the present matter has obviously created.

***Determination***

[18] I am satisfied that Mr Henning's calculation of the amount owed to the employee is as robust as can be achieved with the paucity of records available and accordingly I direct that Mr Kenton is to pay to Mr Henning for the use of the worker concerned the sum of \$2709 being the whole of the moneys specified in the demand notice earlier served on Mr Kenton by Mr Henning.

***Costs***

[19] Costs are to lie where they fall.

James Crichton  
Member of Employment Relations Authority