

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 65/10  
5277668

BETWEEN                      LABOUR INSPECTOR KIM  
BALDWIN  
Applicant

A N D                              BULK                      SUBSTANCES  
LIMITED  
Respondent

Member of Authority:      James Crichton  
  
Representatives:              Applicant in person  
Peter Ashworth, for Respondent  
  
Investigation Meeting:      26 February 2010 at Christchurch  
  
Determination:                12 March 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant Labour Inspector (Ms Baldwin or the Labour Inspector), alleges that the respondent (Bulk Substances) has failed to pay minimum wage entitlements and/or pay arrears of wages in respect of a former employee, Terry Brown. In essence, it is alleged that Mr Brown did not receive holiday pay or statutory holiday pay at the end of his employment. The Labour Inspector contends that Bulk Substances has provided partial records only in respect of Mr Brown's time wage and holiday records, specifically for the last two years. The explanation for this failure is said to be a change in the ownership of the company.

[2]     The Labour Inspector told Bulk Substances that in the absence of records for the preceding four years, the Labour Inspector would make a determination of the amount owed to Mr Brown using any other reliable source of information. In practice, the information the Labour Inspector relied upon was IRD personal tax

summaries provided by the employee together with dates taken from the employee's personal diary. A claim of \$11,600.57 gross is made by the Labour Inspector against Bulk Substances.

[3] Ms Baldwin asks the Authority to levy penalties in respect of the various breaches of the Holidays Act 2003 and the Employment Relations Act 2000, seeks reimbursement of the Authority's filing fee, and an order for Bulk Substances to pay the amount claimed by the Labour Inspector.

[4] Mr Ashworth for Bulk Substances denied that the company owed Mr Brown any unpaid wages and contended that if Mr Brown would supply the employer copy of his logbook entries, Bulk Substances would be prepared to reconsider its position. Mr Brown told me in the Authority's investigation meeting that he no longer had that information as he was only required to keep it by law for a total of 12 months and the matters in dispute predated that period.

[5] Mr Brown had worked for Bulk Substances for a number of years as a tanker driver. This is a specialist kind of truck driving and typically tanker drivers are fastidious and exceptionally careful because of the dangerous cargoes that they carry. Mr Brown, it is acknowledged, was no exception.

[6] The employment relationship was of long standing. Bulk Substances is based in Christchurch but at the point at which the employment relationship ended, Mr Brown was employed out of New Plymouth. The evidence before the Authority was that Mr Brown was Bulk Substances' only North Island driver. It was common ground that Mr Brown was supposed to have forwarded on a periodical basis to the head office in Christchurch copies of his logbook sheets. This information is required to be kept by the Land Transport Agency. However, Bulk Substances sought to have this information provided to it because it would effectively confirm the days and times that Mr Brown was working and thus provide an alternative source material for the missing wage and time records. Mr Brown's evidence before the Authority was that he had provided this information directly to Mr Ashworth; Mr Ashworth denied having ever received it.

[7] The relationship between Mr Ashworth and Mr Brown was fractured. They had been friends. Mr Brown was a groomsman at Mr Ashworth's wedding and a godfather of one of Mr Ashworth's children. Mr Brown says that the relationship

started to deteriorate when his position was disestablished and he felt that his final pay did not accurately record his entitlements.

[8] Mr Ashworth, conversely, denies that Bulk Substances underpaid or short changed Mr Brown in any way and provided me with a number of examples of generosity from the employer which he said were based on the personal relationship between himself and Mr Brown. These included examples of financial assistance to Mr Brown and his family when Mr Brown was taking holidays. But that aside, Mr Ashworth's fundamental position was that Mr Brown had been paid everything that he was entitled to, save for any evidence that might present itself as a consequence of Mr Brown's provision of the log sheets which Mr Ashworth said he had never received. Mr Ashworth also made the point to me in his evidence that if Mr Brown felt he was being short changed during the employment, he never raised the issue and that suggested that he was somehow manufacturing things now.

### **Discussion**

[9] It is particularly sad when the collapse of an employment relationship also brings down a personal friendship. This is such a case. Both men impressed me as honest and straightforward, but it was clear from the evidence of both of them that the personal relationship between them had irretrievably broken down in the same way the employment relationship had. Clearly, neither trusted the other, so much so that the Labour Inspector made the judgment (quite correctly in my view) that mediation or any personal contact between the principal protagonists would be pointless.

[10] A particular aspect of this case which is unusual is that Mr Ashworth for Bulk Substances was never evasive or difficult in the Authority's process and despite the apparent reservations of the Labour Inspector in progressing this claim with the employer, I must say that I found Mr Ashworth straightforward and sensible to deal with. I was particularly impressed with the fact that throughout the Authority's proceedings, he was always prepared to engage in the process and never evasive or difficult. Sadly, this is a comparatively unusual situation in a claim of this type.

[11] Fundamentally, the Labour Inspector seeks two forms of order. The first is an order directing a payment of unpaid holiday and statutory holiday leave and the second order levies penalties against Bulk Substances in respect of the various errors it has allegedly made in this transaction.

[12] As to the issue of penalties, I accept without reservation that Bulk Substances has failed to keep proper records for the period up until two years ago and that, as a consequence of that failure, the Labour Inspector has been put to trouble and expense in reaching appropriate conclusions in this matter.

[13] However, I am not persuaded that it would be a proper exercise of my discretion to penalise Bulk Substances for that failure or indeed for the other failures of process in dealing with this particular claim. As I have made clear, I was impressed with the honesty and integrity of both the principal protagonists and for present purposes especially Mr Ashworth himself and I do not think it appropriate to penalise Bulk Substances now for failures which are partly failures of previous owners and partly are failures derived from the collapse of a personal relationship. I think the evidence strongly suggests that had there not been a strong personal relationship between these two men to start with, the difficulties that they both had in sorting out this issue would simply not have existed. In those particular circumstances, I decline to award any penalties.

[14] However, the other claim is different. Mr Ashworth relies on the alleged failure of Mr Brown to supply copies of his log sheets to, as it were, counteract Bulk Substances' presumption that it had paid everything that Mr Brown is entitled to. But that of course is not the legal position at all. The legal presumption is that employers will keep proper records which enable them and/or a Labour Inspector to verify that appropriate payments have been made. Despite my refusal to award penalties, I cannot be blind to the fact that Bulk Substances has failed to keep proper records and so is unable to demonstrate the accuracy of its claim that Mr Brown has been paid everything he is entitled to.

[15] Indeed, on the face of it, the evidence available to the Authority suggests the reverse. While the much talked about log sheets are not available, Mr Brown's own operational diaries are. From those diaries, the Labour Inspector was able to derive her own assessment of what Mr Brown was owed. Those diaries have been made available to the Authority and I have reviewed random sample entries. First, I have to say that I am absolutely satisfied from the way that the diaries were kept that they are a contemporaneous written record. There is no evidence whatever that the diaries have been produced after the fact and they appear to me to be genuine *operational* diaries recording precisely what Mr Brown was or was not doing, where, and for how

long. Further, days on annual leave, statutory holidays worked and the like were all the subject of entries on the appropriate days.

[16] I explored with Mr Ashworth at the investigation meeting whether he could accept that Mr Brown's diaries offered an alternative record to the missing records from Bulk Substances itself. Mr Ashworth was unable to accept that premise but I have to be clear that, for my purposes, I am satisfied that it is appropriate to place the reliance that the Labour Inspector does on this material. It is for that reason that I am prepared to make the order sought in that regard.

[17] Mr Ashworth submitted records of his client (Hooker Pacific) as to the days worked by Mr Brown. I assume these were not available to the Labour Inspector. In any event, I am satisfied the source material used by the Labour (principally Mr Brown's diaries) is the best evidence of the fact in dispute, in the absence of the employer's own evidence which, of course, the employer has a legal obligation to maintain.

### **Determination**

[18] Bulk Substances is to pay to the Labour Inspector for the use of Mr Brown the sum of \$11,600.57 gross being unpaid arrears of annual and statutory holiday pay.

[19] Bulk Substances is also to pay to the Labour Inspector the sum of \$70 being the Authority's filing fee.

[20] For reasons which I have earlier advanced, I decline to order any penalties against Bulk Substances.

[21] In all the circumstances of this case, I am satisfied that payment of the outstanding wages by Bulk Substances to the Labour Inspector for the use of Mr Brown is sufficient to do justice between the parties. I decline to award interest on the sum outstanding.

### **Costs**

[22] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority