IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 232/10
5312443

	BETWEEN	LABOUR INSPECTOR (Miss Jo-Ann Duff) Applicant
	AND	QUEENSTOWN MANAGEMENT SERVICES LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Ms Jo-Ann Duff, On own behalf No appearance for the Respondent
Investigation Meeting:	14 December 2010 at Dunedin
Submissions received:	At the Investigation Meeting
Determination:	15 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an action brought by a Labour Inspector, Miss Duff, on behalf of Ms Evelin Tenorio, an employee of the respondent, Queenstown Management Services Ltd.

[2] Ms Tenorio believes that she has not been paid her wages in full and is yet to receive holiday pay. The quantum, if any, can not be calculated until the respondent provides time, wage and holiday records and that is yet to occur despite multiple requests. It is the failure to produce those records that is addressed in this determination with Miss Duff seeking:

(i) An order that the respondent comply with the requirements of sections 229(1)(d) of the Employment Relations Act 2000 and 82 of the Holidays Act 2003; and

(ii) A penalty for the respondents failure to comply with the requirements of section 229(1)(d) of the Employment Relations Act 2000; and

(iii) A penalty for the respondents failure to answer a request under section 82 of the Holidays Act 2003; and

(iv) An order that the respondent pay the filing fee incurred in pursuing this application in the Authority.

Non appearance on behalf of the Respondent

[3] Queenstown Management Services Ltd was not represented at the investigation meeting. That raised the question of whether or not it was appropriate to proceed in its absence.

[4] The application was filed on 15 July 2010 and a copy was, in accordance with the Authority's normal processes, forwarded to the respondent along with advice that any statement in reply had to be lodged within 14 days. A statement in reply has never been received.

[5] It is normal that the next step taken by the Authority is to schedule a telephone conference at which the parties discuss the forthcoming investigation meeting, its timetabling and conduct. Attempts to telephone the respondent to arrange this were unsuccessful with all calls being forwarded to an answering machine. Therefore the conference was arbitrarily scheduled for 14 October and the respondent advised of this by letter dated 28 September. That notice incorrectly identified the parties and while it is now known it was received by the respondent, the error was not queried at the time. Indeed, there was no response from the respondent and it failed to participate in the call.

[6] As a result, and again in accordance with normal processes, the Authority set a date for an investigation meeting, 14 December. The respondent was advised via a notice dated 18 October.

[7] That notice brought a response, with a Director and shareholder of the respondent, Ms Deborah Lee, telephoning the Authority on 19 November and speaking to a Support Officer. She advised that she did not live in Queenstown (as is indicated in the records of the New Zealand Companies Office both before and after the change of registered office) and contrary to contemporaneous advice to the Labour Inspector – see 18 below) and that she was totally unaware of the issue given she did not know of the employee identified as the applicant in the Authority's notice of 28 September. The error was explained and Ms Lee was advised to contact Miss Duff which, I now understand, she did (also 18 below).

[8] The call raises two issues – the incorrect identification of the parties in the 28 September notice and the fact that the Authority's correspondence was sent to the respondent's PO Box in Queenstown. At the time the matter was filed the address for service was at an Auckland address though this changed to a Queenstown address on 20 September. Both issues are, in my view, inconsequential.

[9] Even if the parties had been correctly identified in the 28 September notice the respondent would not have been any wiser. Miss Duff would have been identified as the applicant and not an employee known to Ms Lee. In any event, it is now apparent that Ms Lee received the notice and chose not to query it at the time.

[10] Likewise I conclude that the respondent has not been disadvantaged as a result of correspondence being sent to its Queenstown address. Ms Lee's call of 19 November confirms that two of the three notices sent by the Authority found their way to her, a representative of the respondent, and this includes the notice of investigation meeting.

[11] In the circumstances I considered it appropriate to continue with the investigation and determine the matter given:

- Ms Lee's call of 19 November confirms that she received the notice of 18 October and was aware of the scheduled investigation meeting; and
- Notwithstanding that, the respondent has failed to appear; and
- The respondent has made no attempt to explain that absence; and

- The respondent's history of attempting to ignore this matter as illustrated by its previous failure to reply to either the Authority or the Labour Inspector (evidenced by documents appended to the statement of Problem).

Facts

[12] In March 2010 Ms Tenorio approached the Labour Inspectorate voicing concerns about unpaid wages and holiday pay. The Inspector then dealing with the matter, Mr Jon Henning, initially tried to contact the respondent by telephone to discuss the claim. He was, however, unsuccessful as, in a manner similar to the Authority's calls, his approaches were redirected to a answering machine. The respondent failed to reply to the messages he left on said machine.

[13] On 29 March Mr Henning wrote to the respondent, with copies sent to both its Queenstown address and the registered office in Auckland, requesting *"… copies of all your written employment agreements with this person, and a copy of its wages, time and holiday records for the same, for the full period(s) of her employment"*.

[14] The letter referred to both section 81 of the Holidays Act 2003 and section 229(1)(d) of the Employment Relations Act 2000 and asked that the respondent comply within ten days.

[15] Section 81 of the Holidays Act 2003 requires that an employer keep a compliant holiday and leave record. Section 229(1)(d) of the Employment Relations Act 2000 allows a Labour Inspector to demand copies of the holiday record, applicable employment agreements and the time and wage record that must be kept pursuant to section 130 of the Employment Relations Act.

[16] There was no reply and Mr Henning sent a reminder on 28 May. This contained additional advice that should compliance not occur within fourteen days legal action would follow and such action would include a request for penalties. Again the respondent failed to comply and that led to the application being filed in the Authority on 15 July.

[17] Correspondence from the Authority to the respondent followed as outlined in paragraphs 4 to 7 above. There was no further contact between the Labour Inspector and the respondent until Ms Lee telephoned Miss Duff at the Support Officers' suggestion (see 7 above).

[18] That call occurred on 29 November. Ms Lee advised that she had moved again and gave a new address which, interestingly, is one recorded with the Companies Office as at mid July 2010 (which, as an aside, raises doubts about the honesty of Ms Lee's comments to the Authority's support officer on 19 November). Ms Duff repeated the Department's request of 29 March and Ms Lee replied by stating that she would provide the documents. She stated that she thought she could do so within a week but if that proved to be an optimistic schedule she would "update" Ms Lee. There has been no further contact – the promised records were never received and nor was the "update" guaranteed as an alternate.

Determination

Compliance

[19] There can be no debate that the respondent is required, by law, to have and keep the documents sought first by Mr Henning and now by Miss Duff. Paragraph 15 above cites the authority for this statement in respect to the holiday and time records and written employment agreements are required by either s.54(1)(a) or s.65(1)(a) of the Employment Relations Act 2000.

[20] It is equally clear that a Labour Inspector is entitled to demand copies of those documents (s.229(1)(d) of the Employment Relations Act 2000). That a request pursuant to that section has been made is clear from the documents before the Authority. Even if, for some unexplained reason, the request was never received (and I doubt that was the case), I accept Miss Duff's evidence concerning the oral request of 29 November and her statement that the records have not been provided despite the respondent's promise of compliance.

[21] A legal obligation exists. Compliance has been requested repeatedly. Those requests have been ignored. In the circumstances I consider that this has now become

a situation where it is appropriate to grant the order sought by Miss Duff and order that the respondent comply with its obligations.

The penalty applications

[22] Miss Duff seeks two penalties – one in relation to the breach of s.229(1)(d) of the Employment Relations Act 2000 and the other for a breach of s.82 of the Holidays Act 2003.

[23] The provisions of s.229(1)(d) have been outlined in paragraph 15 above. Section 82 of the Holidays Act 2003 confers upon a Labour Inspector identical powers but only in respect to the holiday and leave record. I do not therefore consider it appropriate to consider two penalties. Both breaches relate to the same request and the same failure – namely the failure to provide the holiday and leave record initially sought on 29 March.

[24] Having discounted the possibility of multiple penalties, is it appropriate to consider one? The answer is, in my view, yes. I note the repeated requests and a continued failure to comply despite advice as to the consequences and a promise of delivery. In these circumstances, and given the lack of any evidence or argument to the contrary, I conclude the respondents' behaviour is deliberate and therefore culpable. I consider a penalty of $1,000 to be appropriate.

Costs

[25] The costs claim is minimal. It is limited to reimbursement of the $70 fee incurred for filing the claim in the Authority. The cost was incurred and the claim has been totally successful. In such circumstances I consider it appropriate the claimed reimbursement occur. An order will be made accordingly.

Orders

[26] For the reasons given, the following orders are made:

(i) The respondent is to provide to the applicant the documents sought in Mr Henning's letter of a 29 March 2010, namely copies of all written

employment agreements between itself and Ms Tenorio; a copy of Ms Tenorio's wages and time record covering the entire period(s) of her employment and a copy of Ms Tenorio's holiday and leave record covering the entire period(s) of her employment.

(ii) The respondent is to comply with the order in (i) above no later than 3.00pm on Thursday 23 December 2010; and

(iii) The respondent is to pay to the Crown a penalty in the sum of $1,000.00 (one thousand dollars) with payment to be made through the Authority's Christchurch office no later than 3.00pm on Thursday 20 January 2011; and

(iv) The respondent is to pay to the Department of Labour a reimbursement of costs in the sum $70.00 (seventy dollars) with payment to occur no later than 3.00pm on Thursday 20 January 2011.

Mike Loftus
Member of the Employment Relations Authority