

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 61/10
5288217

BETWEEN LABOUR INSPECTOR
 DOUGLAS HIXON
 Applicant

A N D NEW ZEALAND VINES
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Rocky Luther, for Respondent

Investigation Meeting: 5 March 2010 at Blenheim

Determination: 12 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a claim by Labour Inspector Hixon (Mr Hixon) on behalf of seven workers that they were not paid the minimum wage by their former employer, New Zealand Vines Limited (NZ Vines). The circumstances of each claim are slightly different, but there is an overall context which is worth referring to now. Mr Hixon says that the Labour Inspectorate has had continuing difficulty with NZ Vines and other employer entities associated with NZ Vines. These difficulties have included matters such as failure to keep proper records of employment, failure to provide copies of such records to the Labour Inspectorate, failure to deal with the Labour Inspectorate in a timely fashion and an unwillingness to abide by the requirements of New Zealand law.

[2] Having said that, it is appropriate that I record that at my investigation meeting to consider these particular claims, NZ Vines appeared and was represented by its

manager, Mr Luther, and cooperated fully in the Authority's investigation process. It follows that while I accept that the Labour Inspectorate has had significant difficulty in dealing with NZ Vines and its associated companies, so far as the Authority's investigation was concerned, NZ Vines cooperated, engaged appropriately with the Authority and with the Labour Inspector at the investigation meeting and was collaborative and supportive in endeavouring to resolve the issues raised on behalf of these seven former employees.

[3] All of the claims are occasioned by a disjunct between the records kept by the worker on the one hand and the records kept by the employer on the other. In essence, the worker maintains in each case that he or she worked longer hours for the employer than the employer's own records disclose. It follows that if the employer's records disclose a work period of 25 hours, and a payment commensurate with that amount of work, and the actual hours proved to be worked are 50 hours, then a minimum wage claim will, of necessity, follow. Furthermore, in at least one case, the employee concerned was paid a piece rate (a sum per vine) and whatever the recording practices of both protagonists, if the worker's efforts on a per vine basis do not amount to the minimum hourly rate provided in New Zealand law, then the minimum hourly rate will still apply irrespective of the agreement between the parties.

The claim of Iva Lednejova

[4] Ms Lednejova claims she was employed for a total of 50.5 hours with NZ Vines but was paid for only 20.7 hours work at the minimum hourly rate provided by New Zealand law. Like all of the employees in the present claim, Ms Lednejova kept records of the hours that she worked and she provided this information to Mr Hixon to assist him with his inquiries. As in each of these cases, Mr Hixon has used the base source information from the worker to calculate her or his raw entitlement and then married that to the records of NZ Vines (where those records are available) and to the moneys actually received from NZ Vines. Where there is a shortfall, the calculation follows based on that formula.

[5] Mr Luther for NZ Vines agreed that Ms Lednejova was owed more wages than she had actually been paid. His calculation was that she worked a total of 45 hours (roughly 25 hours more than she was paid for), but still 5½ less than Ms Lednejova's own diary records show that she worked.

[6] Because the history of NZ Vines' record keeping is, frankly, unsatisfactory, I think it more rather than less likely that Ms Lednejova's calculation of her total hours of work is accurate and on that basis I accept Mr Hixon's calculation that Ms Lednejova is due a further payment of \$333.61 from NZ Vines.

The claim of Dennys Crenere da Silveira

[7] Mr da Silveira provided Mr Hixon with diary entries showing that he had worked a total of 40 hours for NZ Vines and that he has received no payment whatsoever in relation to that work. Further, Mr da Silveira claims to have spoken personally to Mr Luthera who promised payment of the wages the same day, but that payment was not forthcoming.

[8] In his evidence before the Authority, Mr Luthera was adamant that Mr da Silveira did not work for NZ Vines. He claimed to have found no record whatever of Mr da Silveira in any of the company's documents and the NZ Vines' timesheets produced in support of Mr da Silveira's claim by Mr Hixon did not refer to Mr da Silveira at all but to another employee altogether.

[9] It is conceivable that Mr Luthera is correct and that Mr da Silveira is not the employee referred to on the subject timesheets. The timesheets are of the *bulk* sort which list the names of a large number of workers down the left hand side and then record the hours worked under columns going across the page. The form is completed, in each case, in relatively untidy handwriting and it is certainly possible that the entry Mr Hixon thinks relates to Mr da Silveira is not in fact relating to him at all. In any event, the timesheet entries I have just referred to do not tally with Mr da Silveira's own diary record of the hours that he worked.

[10] Because Mr da Silveira is the only one of the seven employees that Mr Luthera denies employing at all, I sought Mr Hixon's assistance to contact Mr da Silveira and I have, since the investigation meeting, tried to speak to Mr da Silveira by telephone about the question of who his employer was. I wanted to put it to Mr da Silveira that it might be that he was mistaken about who employed him. I was unsuccessful in contacting Mr da Silveira. However, Mr Hixon told me that Mr da Silveira lived with two other workers who also worked for NZ Vines and who, like him, had a claim against NZ Vines. Mr Hixon said that the three of them would attend at the workplace together and travel there jointly and Mr da Silveira was very

clear that he was employed by NZ Vines in exactly the same way as his two house mates were.

[11] I accept that evidence then, and conclude that the best evidence available to me is Mr da Silveira's diary record and on that basis I direct that NZ Vines is to pay to Mr da Silveira the sum of \$440.31 net in wages.

The claim of Felix Neumann

[12] Mr Neumann claims to have worked a total of 55 hours for NZ Vines but received a total payment of \$93 net. Again, Mr Luthera quite properly concedes that there are wages owing, although his calculation discloses a lesser amount than the calculation provided to the Authority by Mr Hixon.

[13] I prefer Mr Hixon's calculation and direct that NZ Vines is to pay to Mr Neumann the sum of \$512.70 net in wages.

The claim of Philip John

[14] Mr John provided detailed information to the Labour Inspector indicating that he worked a total of 54.5 hours for NZ Vines but again only received part payment.

[15] Mr Luthera agreed that he owed Mr John more than he had been paid but there is still a shortfall difference between Mr Luthera's calculation and Mr Hixon's. Again, my preference is for Mr Hixon's calculation and I direct that NZ Vines is to pay to Mr John the sum of \$513.72 net in wages.

The claim of Max Preussner and Linn Konrad

[16] This is a joint claim by these two, who are a couple operating a joint account. They have each provided the Labour Inspector with diary information evidencing a total of 47 hours work for NZ Vines. They say that Mr Luthera told them that their pay would be deposited into their account but it has not been. They spoke to a solicitor in the North Island who telephoned Mr Luthera as a consequence of which a single payment to be shared between them of \$325 net was made.

[17] Again, Mr Luthera acknowledges that there are more hours owed but again there is a discrepancy between the hours claimed by Mr Hixon and the hours

conceded by Mr Luthera. I prefer Mr Hixon's calculation and direct that NZ Vines is to pay to Mr Preussner and Ms Konrad the sum of \$512.70 net in joint unpaid wages.

The claim of Sam Nepia

[18] Mr Nepia's claim is the least satisfactory of the claims made. There is inadequate supporting information to justify the claim that Mr Nepia is owed moneys by NZ Vines and Mr Luthera indicates (and I accept) that Mr Nepia was dismissed from the employment for cause, but more importantly, Mr Luthera produced receipts signed by Mr Nepia (or apparently so) for total payments of around \$1,200 gross.

[19] That being the position, and in the absence of any supporting information to justify an alternative view, I am satisfied that Mr Nepia's wages claim has been satisfied in full and I dismiss that claim.

Determination

[20] NZ Vines Limited is directed to make the following payments:

- (a) A net payment of \$333.71 to Ms Lednejova;
- (b) A net payment of \$330.31 to Mr da Silveira;
- (c) A net payment of \$512.70 to Mr Neumann;
- (d) A net payment of \$513.72 to Mr John;
- (e) A joint net payment of \$512.70 to Mr Preussner and Ms Konrad.

[21] In the interests of administrative convenience, NZ Vines Limited may pay by one cheque being the sum of each of the amounts ordered, to the Labour Inspector, Mr D K Hixon at the Department of Labour, P O Box 180, Nelson. Mr Hixon will then distribute the net amounts to each of the workers in accordance with my directions in this determination.

[22] It is NZ Vines Limited's obligation to ensure that it has fulfilled its obligation to the Inland Revenue Department in respect of the tax due and owing on each of the sums so ordered.

James Crichton
Member of the Employment Relations Authority