

amongst other things that another employer was partially liable for the holiday pay which was the subject of the Demand Notice. In the Notice of Direction which followed the telephone conference, I directed that the parties should further engage with each other to ensure that the calculations originally made by Mr Dirkzwager were accurate. The arrangement was that I was to talk to the parties again once that discussion had been held.

[3] A further telephone conference was convened on 15 March 2010 at which Mr Saville chose not to participate despite the Authority taking all proper steps to notify him of the obligation. In anticipation of that further telephone conference, Mr Dirkzwager filed submissions with the Authority to further support the original application.

[4] Despite his engagement in the original telephone conference, Mr Saville failed to participate subsequently, did not engage in the second telephone conference, did not file a statement in reply and did not engage further with the Authority's process. Notwithstanding that failure to engage, I am satisfied that all proper steps had been taken to engage with Mr Saville and that he had simply chosen not to participate. It goes without saying that such behaviour is not appropriate in the good faith environment in which we now operate and does Mr Saville no credit.

[5] Notwithstanding the failure of Mr Saville to participate appropriately, I am satisfied the matter should be concluded and the purpose of this determination is to attend to that.

The law

[6] In the normal course of events, a Demand Notice must be responded to within 28 days by way of objection. Mr Saville did not object to the serving of the Demand Notice in this case but because of his representations at the first telephone conference, I gave him the indulgence of allowing him further time to engage with Mr Dirkzwager because he considered that Mr Dirkzwager's calculations were in error. Mr Saville took no real advantage of that concession and the matter remains for determination by the Authority on the original basis.

[7] The original Demand Notice served on Mr Saville on 11 June 2009 relates to the holiday pay due and owing for a former employee of Mr Saville, one Ken Bird who is owed the sum of \$4,579.90 gross.

[8] The factual position is that Mr Bird was a cleaner employed by the former owner of the entity which Mr Saville purchased. By virtue of the nature of his employment, Mr Bird was an employee covered by Part 6A of the Act and Mr Bird was a category of worker specifically included in Part 6A by the effect of Schedule 1A of the Act. Schedule 1A of course identifies the categories of worker to whom Part 6A applies.

[9] Part 6A broadly provides for continuity of employment where the employer's business is to be restructured. Mr Bird's former employer was in just that situation. Pursuant to s.69A of the Act, Mr Bird elected to transfer his employment to the new employer (Mr Saville) on the same terms and conditions as he previously enjoyed with the former owner of the business. Once that election has been made by a worker, their various entitlements in the employment relationship pass from the old employer to the new employer. In Mr Bird's case, those entitlements included his holiday pay which by reason of his continuous employment, had not been paid out.

[10] The law is clear that Mr Saville inherits that obligation once he inherits the staff member. Mr Saville may say that he has not been adequately remunerated by the previous owner of the business for the transfer of Mr Bird's holiday pay entitlement. That may well be the position, but that is a matter between Mr Saville and the previous owner of the business and cannot affect Mr Bird's entitlement to his holiday pay in terms of the law as it presently stands.

Determination

[11] Pursuant to the power conferred on the Authority in section 137 (1)(a)(iv), I now order compliance with the Demand Notice issued by the Labour Inspector under s.225 of the Employment Relations Act and dated 11 June 2009 and require compliance with that Demand Notice by the payment by Mr Saville of the sum of \$4,579.90 gross to Mr Dirkzwager for the use of Mr Bird being unpaid holiday pay.

[12] Mr Saville has 30 days from the date of this determination to satisfy this order: Section 137 (3) applied. A failure to do so within that time frame will result in the Authority's order being filed in the District Court for enforcement: Section 141 applied.

Costs

[13] Mr Saville is also directed to pay to the Labour Inspector the sum of \$70 being the reimbursement of the filing fee incurred by the Labour Inspector in this matter.

James Crichton
Member of the Employment Relations Authority