

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 368  
5632190

BETWEEN            LABOUR INSPECTOR OF THE  
                              MINISTRY OF BUSINESS  
                              INNOVATION AND  
                              EMPLOYMENT  
                              Applicant

A N D                NZ CONTRACTING LIMITED  
                              Respondent

Member of Authority:    T G Tetitaha  
  
Representatives:        M Denyer, Counsel for Applicant  
                              S Eden, Counsel for Respondent  
  
Investigation Meeting:    9 November 2016 at Auckland  
  
Submissions Received:    9 November 2016 from both parties  
  
Date of Oral  
Determination:        9 November 2016  
  
Date of Determination:    11 November 2016

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**The orders are as follows:**

- (a)    The respondent has breached s65 of the Employment Relations Act 2000 and s81 of the Holidays Act 2003.**
- (b)    I decline to award a penalty for non-provision of the employment agreement to Lionel Te Kanawa. The application is dismissed.**
- (c)    There is an order for a penalty of \$500 to be paid by NZ Contracting Limited to the Crown pursuant to s.135 and 136(2) of the Employment Relations Act 2000.**

- (d) **NZ Contracting Limited is to pay to the Chief Executive of the Ministry of Business Innovation and Employment the sum of \$1,000 towards its costs.**

### **Employment relationship problem**

[1] The Labour Inspector seeks penalties for the failure to provide one employee with a written employment agreement and failure to keep a holiday and leave record for three employees.

### **Relevant Facts**

[2] The applicant, David Myatt, is a Labour Inspector empowered pursuant to s229 of the Employment Relations Act 2000 (the Act) to enter business premises to interview any person therein about compliance with the provisions of the Minimum Wage and Holidays Acts.

[3] The respondent employer, NZ Contracting Limited, operates an earthmoving business, including hiring out trucks, diggers, bobcats and drivers.

[4] On or about 16 October 2015 Mr Myatt and two colleagues visited the respondent's business premises. They interviewed Joseph Mudaliar, Sanjay Ratnam and Lionel Te Kanawa. As a result of those interviews Mr Myatt left a notice pursuant to s.229(1)(d) of the Act requiring production of the wage and leave records and employment agreements for each of the three employees by 23 October 2015.

[5] The respondent directors, Shabana Ali and Mohammed Ali attended Mr Myatt's office on 22 October 2015. They provided him with copies of draft employment agreements for Mr Mudaliar and Mr Ratnam. They did not have an employment agreement for Mr Te Kanawa. Ms Ali advised Mr Myatt that at the time no employment agreement had been offered to Mr Te Kanawa because he was a casual employee undergoing training.

[6] The Alis also produced a copy of the wage records for Mr Mudaliar and Mr Ratnam. No wage record was produced for Mr Te Kanawa.

[7] On 23 October 2015 Mr Myatt emailed Mrs Ali asking for further wages, time, holiday or leave records for Mr Mudaliar, Mr Ratnam and/or Mr Te Kanawa. He also asked for job descriptions for Mr Mudaliar and Mr Ratnam.

[8] On 9 November 2015 Ms Ali provided the job descriptions only.

[9] On or about 12 May 2016 Mr Myatt completed and sent to the respondent employer a copy of his audit report. There is a dispute about whether the respondent received a copy of that audit report.

[10] By 28 June 2016 Mr Myatt had received no further information and filed proceedings in the Authority.

**Was there a breach of s.65 of the Act by the non-provision of a written employment agreement to Lionel Te Kanawa?**

[11] It is accepted by the respondent that there has been a breach because no written employment agreement was provided to Mr Te Kanawa. The breach is therefore proved.

**Was there a failure to keep a holiday and leave record for each employee as required by s.81 of the Holidays Act 2003?**

[12] It is accepted by the respondent that there has been a breach because at the time the record was produced to the Labour Inspector it was incomplete and non-compliant with the Holidays Act 2003. The breach is therefore proved.

**Remedies**

[13] Given there have been proven breaches, I am required to consider whether penalties should issue and, if so, the quantum.

[14] There is well established law in respect of the award of penalties. I have discretion to either award a penalty or dismiss the action.<sup>1</sup> There are several relevant factors set out below:

[15] **Seriousness of the breach:** This must include consideration of the degree and culpability of the person in default. In respect of the breach pertaining to the failure to

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<sup>1</sup> Section 135(4) of the Act.

provide an employment agreement (employment agreement breach), I agree with the applicant's submission that best practice for an employer is always to provide an employment agreement prior to the employment commencing.

[16] However, it is acknowledged that this can be impracticable. This is especially if an employee is required to start work immediately and there are ongoing negotiations about terms and conditions of employment. There are often practical problems arranging for casual employees to sign contracts for one off short term engagements.

[17] The evidence was the respondent offered to start negotiations towards signing an agreement with Mr Te Kanawa. He initially refused to sign anything, then indicated he would sign the following week. He then left and did not return.

[18] Foreseeability of this resignation, in my view, might have been possible but not probable. This respondent would have been unlikely to have foreseen Mr Te Kanawa's resignation before an employment agreement could have been completed. Mr Te Kanawa has made himself unavailable despite attempts by the respondent employer to contact him about the terms of his employment.

[19] The employer has taken early responsibility for this breach. Mr Te Kanawa was the only affected employee out of 15 others. The evidence indicates this breach was of minimal seriousness.

[20] In respect of the breach for failure to provide holiday leave records (holiday record breach), this is more serious. This is because of the potential impact upon employees of inadequate record keeping depriving them of statutory rights to leave.

[21] **Breach one off or repeated:** The employment agreement breach was a one-off breach. Mr Te Kanawa was the only employee affected. Every other respondent employee has had a proper signed written agreement.

[22] The holiday record breach involved three employees. Although it was not as egregious as other breaches, it is not insignificant.

[23] **Impact, if any, upon employees of these breaches:** The employment agreement breach has had no impact upon other employees. The respondent's other

employees had agreements and Mr Te Kanawa's absence led to why no agreement being concluded.

[24] The evidence has not shown any impact of the holiday record breach on other employees or in particular these three employees. This may be due to the fact the respondent, since the involvement of the Labour Inspector, has become compliant.

[25] **Vulnerability of the employees:** There is little evidence of Mr Te Kanawa or the other employees vulnerability due to the employment agreement breach. The holiday record breach does leave employees vulnerable to possible abuses because they will not know, or may have no knowledge of, what their statutory rights to holidays will be without access to a properly kept leave record. This is especially important for long-term employees. One employee had been employed for at least 20 months and would have been eligible for annual leave.

[26] **Deterrence:** This is whether there is a need for deterrence in relation to the particular person or persons and the wider community of employers.

[27] There is no need for deterrence for this particular respondent because its holiday leave record is now compliant. It cannot comply in respect of the employment agreement breach because Mr Te Kanawa is uncontactable.

[28] I cannot see anything in this particular decision which would assist the public in general. I accept the respondent counsel's submission that given the multiplicity of case law around these types of breaches, this would not be the type of case that would provide much in the way of new law. I accept publication of these decisions do act as deterrents in themselves.

[29] **Remorse:** There has been some remorse shown by the respondent. That is evident especially in the early admission of breaches.

[30] **Comparable range of penalties:** The applicant provided two cases involving multiple breaches where the penalties have been between \$4,000 and \$10,000 respectively. A more comparable Authority case was *Dyer v. Beauty Management Riccarton Ltd* (ERA Christchurch, CA91/10, 16 April 2010). There the Member dealt with the same two breaches as are alleged here. She declined to award a penalty for the employment agreement breach because at that time no penalty was provided for in

the legislation. There is a now a penalty provided for. She awarded a penalty of \$1,000 for the holiday record breach.

[31] **Evaluation/Proportionality:** I now need to stand back and evaluate whether the anticipated outcome is one which is proportionate to the breach or breaches for which this penalty is to be imposed. In my view, the employment agreement breach does not justify any award of a penalty. A penalty is met by the publication of the decision as a warning to other employers of potential proceedings that may occur if they do not comply. This was a one-off situation, there were problems with trying to sign off a casual arrangement and there was an expectation it was going to be signed, but Mr Te Kanawa never turned up for work.

[32] In respect of the holiday record breach, information that may have prevented this hearing was not provided to the Labour Inspectorate at the time. It has been provided now, although albeit immediately before hearing. On these facts the respondent employer did slightly more than what appeared to have happened in *Dyer*. I am prepared to award a penalty of \$500.

### **Costs**

[33] The starting point for costs in the Authority is its daily notional tariff of \$3,500. This matter took a half day hearing time. Therefore the starting point shall be \$1,750.

[34] This has been a partially successful application insofar as the award of any penalty goes. This matter may not have proceeded to hearing if the respondent had obtained legal advice earlier and provided the relevant information that had been sought. The difficulties about receipt of the audit report were not made known to the applicant and to the Authority until relatively late. I note also in-house counsel representing the applicant.

[35] Taking into account the above matters a modest award of costs is warranted. In my view, an award of \$1,000 towards the applicant's costs is appropriate.

[36] Accordingly, the orders are as follows:

- (e) The respondent has breached s65 of the Employment Relations Act 2000 and s81 of the Holidays Act 2003.

- (f) I decline to award a penalty for non-provision of the employment agreement to Lionel Te Kanawa. The application is dismissed.
- (g) There is an order for a penalty of \$500 to be paid by NZ Contracting Limited to the Crown pursuant to s.135 and 136(2) of the Employment Relations Act 2000.
- (h) NZ Contracting Limited is to pay to the Chief Executive of the Ministry of Business Innovation and Employment the sum of \$1,000 towards its costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**