

C Danmel Farm Limited is to pay the Labour Inspector costs in the sum of \$583.33 together with reimbursement of the filing fee in the sum of \$71.56.

Employment relationship problem

[1] Danmel Farm Limited (Danmel Farm or the company) came to the attention of the Labour Inspectorate in a roundabout way.

[2] A complaint was lodged with the Ministry of Business Innovation and Employment (MBIE) by a former employee of a company called Hight Farms Limited (Hight Farms) regarding minimum entitlements. Hight Farms was subsequently struck off the company register after a special resolution of the shareholders.

[3] Labour Inspector Eva Belley met the directors of Hight Farms to discuss the complaint. She was advised that one of the directors of Hight Farms, Daniel Higinbottom, employed employees with the company Danmel Farm. I understand from Mr Higinbottom that Danmel Farm carries on the business of share milking.

[4] Ms Belley met with Mr Higinbottom and one of the other directors of Hight Farms, Peter Wright on 9 April 2014. Both directors acknowledged in that meeting a lack of employment agreements and record keeping. Ms Belley advised that she would not investigate the complaint against Hight Farms as it sounded like a personal dispute about a family member and she was satisfied that the company had ceased operating.

[5] Ms Belley did however advise that she would require Danmel Farm to show compliance in relation to its recordkeeping and employment agreements and on 15 April 2014 served an improvement notice based on her findings on the company.

[6] The improvement notice under s 223D of the Employment Relations Act 2000 (the Act) provided steps the employer could take to comply with the improvement notice and in particular the lack of compliant employment agreements, time and wage records and holiday entitlements and payments relating to public holidays.

[7] Ms Belley and another Labour Inspector, Mike Heyward, visited Danmel Farm on 17 June 2014 to collect the compliance documentation. Ms Belley accepted the Federated Farmers employment agreements that she was shown. She saw holiday records Mr Higinbottom had recorded in his diary. Ms Belley made some recommendations about these records being maintained on separate sheets rather than as I understand it on the day in question in the diary. Mr Higinbottom printed payslips for Ms Belley and Mr Heyward to view as well as timesheets. Ms Belley had recommended the use of timesheets earlier. Ms Belley advised Mr Higinbottom that she would close the investigation but that someone else from the Labour Inspectorate would revisit the farm to see whether compliance was maintained.

[8] On 3 February 2015, Labour Inspector Vikram Lakhera was assigned to undertake a follow up visit of Danmel Farm to check compliance had been maintained.

[9] Between February and May 2015 there were two notices issued to Danmel Farm under s 229 of the Act and s 82 of the Holidays Act 2003.

[10] The first notice dated 9 March 2015 required the provision of information within 7 days from the date of the notice. The information required was start dates of employment for two employees, remuneration package details, payslips from 1 October 2014 to 31 January 2015, business bank statements showing wages paid to farm staff between the same dates and details around meal intervals and rest periods/breaks. I note that this same information had been requested earlier on 13 February by Mr Lakhera and Mr Higinbottom had advised the request was with his accountant.

[11] On or about 12 March 2015 Mr Higinbottom sent an email to Mr Lakhera which provided all the information requested except for the pay slips. Mr Higinbottom advised he was still trying to print these pay slips off from CashManager Payroll system.

[12] On 16 March 2015 Mr Lakhera emailed Mr Higinbottom and advised how to set up a read only function on the CashManager for him to have a look at the required information. He also requested, after looking at the bank statements, leave records including public and annual holidays for two employees from 1 October 2014 to 31 January 2015, copies of pay records *ie detailed payslips* for the two employees

between the same dates. He asked for some clarification of the salary for one of the employees.

[13] On 18 March Mr Higinbottom sent a brief email advising one of the employees had taken no days off to date and clarifying the salary of the other employee as requested.

[14] On 28 April 2015 Mr Lakhera issued the second notice under s 229 (1) of the Act requiring supply of a copy of wage, time and holiday records by 5pm, 8 May 2015. Danmel Farm was specifically required to provide:

- Time and wage records for all employees for the past 6 months;
- Holiday and leave records for all employees for the past 6 months;
- Any documentation relating to deductions the business taken from the wages of any of its employees;
- Employment agreements for all current employees;
- Payslips for all the employees for the past 6 months
- Final pay records for employees who left in the past 6 months.

[15] On 29 April 2015 Mr Lakhera sent an email to Mr Higinbottom advising amongst other matters that if he did not have specific records then he should let Mr Lakhera know.

[16] On 29 April 2015 Mr Higinbottom sent an email to Mr Lakhera in which he advised that he had the holiday records and time records and was working to sort out correct payslips. He wrote that Mr Lakhera had seen the time sheets, holiday records, sick days and the bank statements. Some leave records were also provided.

[17] On 5 May 2015 Mr Higinbottom supplied time sheets for all employees and partial holiday and leave records and medical certificates as required under the notice but no further information about wages and holiday and leave entitlements.

[18] Mr Lakhera says that Danmel Farm has time but no wage record and very limited holiday and leave records which do not show the entitlement and calculation for each employee as required under s 8A (1)(h) of the Minimum Wage Act 1983 and

s 81 of the Holidays Act 2003. Mr Lakhera say that this has prevented him assessing whether the employment practices of the company comply with minimum employment standards.

[19] The Labour Inspector seeks:

- (a) An order for compliance with the notice of 28 April 2015 issued under s 229(1)(d) of the Act; and
- (b) Penalties under s 229 (3) of the Act for the failure to comply with all requirements made under s 229 (1) (d) of the Act.

[20] Danmel Farm says that it has supplied all the information required of it except payslips which it was unable to retrieve from CashManager rural payroll system and that it does not understand what it has done wrong and that there should be no penalty awarded.

The issues

[21] The issues for the Authority to determine are as follows:

- (a) Was there compliance with the requirements of the notice issued under s 229 of the Act on 28 April 2015;
- (b) If there was not compliance then should an order for compliance be made;
- (c) If there has been a failure to comply, should the Authority award a penalty and if so, in what amount?

Was there compliance with the requirements of the notice issued under s 229 of the Act?

[22] The information provided to Mr Lakhera for wages did not satisfy the requirements of a wage record in s 130 of the Act and/or s 8A (1) of the Minimum Wage Act 1983. The pay slips would have provided the amount paid to each employee for each pay period and the method of calculation and together with the time sheets would have been an adequate record. Mr Higinbottom I accept had some issues with extracting the information and so the pay slips have not been provided.

[23] There was a record of sick days, statutory days worked and days off for the employees provided by Mr Higinbottom. I do not find that it was a record completely compliant however with the requirements of a holiday and leave record as set out under s 81 of the Holidays Act 2003.

81 *Holiday and leave record*

- (1) *An employer must keep a holiday and leave record that complies with this section.*
- (2) *The holiday and leave record must contain the following information for each employee:*
 - (a) *the name of the employee:*
 - (b) *the date on which the employee's employment commenced:*
 - (c) *the days on which the employee actually works, if the information is relevant to the calculation of entitlements or payment for entitlements under this Act:*
 - (d) *the employee's current entitlement to annual holidays:*
 - (e) *the date on which the employee last became entitled to annual holidays:*
 - (f) *the employee's current entitlement to sick leave:*
 - (g) *the dates on which any annual holiday, sick leave, or bereavement leave has been taken:*
 - (h) *the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken:*
 - [(ha) *the portion of any annual holidays that have been paid out in each entitlement year (if applicable):]*
 - [(hb) *the date and amount of payment, in each entitlement year, for any annual holidays paid out under section [28B](#) (if applicable):]*
 - (i) *the dates of, and payments for, any public holiday on which the employee worked:*
 - (j) *the number of hours that the employee worked on any public holiday:*
 - [(ja) *the day or part of any public holiday specified in section [44\(1\)](#) agreed to be transferred under section [44A](#) or [44B](#) and the calendar day or period of 24 hours to which it has been transferred (if applicable):]*
 - (k) *the date on which the employee became entitled to any alternative holiday:*
 - (l) *the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:*
 - (m) *the cash value of any board or lodgings, as agreed or determined under section [10](#):*
 - (n) *the details of any payment to which the employee is entitled under section [61\(3\)](#) (which relates to payment in exchange for an alternative holiday):*
 - (o) *the date of the termination of the employee's employment (if applicable):*
 - (p) *the amount paid to the employee as holiday pay upon the termination of the employee's employment (if applicable):*
 - (q) *any other particulars that may be prescribed.*
- (3) *The holiday and leave record must be kept—*

- (a) *in written form; or*
(b) *in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.*

[24] I do not find there was full compliance with the requirement by the Labour Inspector for provision of wage, holiday and leave records. I do record the Labour Inspector had seen employment agreements for at least two of the employees.

Should an order for compliance be made?

[25] Section 229 (4) of the Act provides that where there is an allegation that a person has not complied with a requirement to produce wage and time, holiday and leave records or employment agreements the Labour Inspector may apply under s 137 of the Act for an order for compliance with the requirements.

[26] A view was formed, not unreasonably, by Mr Lakhera after his first meeting with Mr Higinbottom on 10 February 2015 that the information on the payslips when supplied would be detailed and include annual leave and public holiday entitlements. Mr Higinbottom said in his evidence that he did not recall giving that impression at that first meeting. Mr Higinbottom clarified in his evidence that the only information the payslips would contain was the amount paid to the employee each pay period and the calculation of that. Leave was recorded manually in a separate part of Mr Higinbottom's diary that he understood satisfied Ms Belley's recommendation of recording leave on a separate sheet rather than on the day the leave occurred. Ms Belley in an email dated 28 April 2014 to Mr Higinbottom had wanted to see proof of time, wage and holiday records (*possibly ...from your payroll system*) backed up with time sheets. Mr Higinbottom did not enter leave information into the payroll system.

[27] Mr Higinbottom did confirm that he would now be able to print off and provide the relevant payslips as requested under the notice dated 28 April 2015. He has provided the time records already and company bank accounts showing the net amounts paid to the employees. He has employment agreements which he can provide.

[28] The Authority will not make a compliance order if it would serve no practical purpose. I have reflected on that particularly in light of the clarification that the pay slips will contain no leave detail. I am not satisfied that Mr Higinbottom can provide

the leave records in any other form than he has already provided to Mr Lakhera. I do note that amongst the leave records supplied is his note setting out what public holidays were worked and what amount of alternative days and holidays were owing at the relevant date to the employees at that time Shane, Josh and Chris.

[29] I intend to limit an order for compliance under s 137 of the Act to provision of the pay slips and employment agreements.

[30] I order that within 21 days of the date of this determination Danmel Farm Limited is to comply with the requirements of the Labour Inspector as set out in the notice under s 229 (1) of the Act and provide him with copies of payslips for all employees for the six months preceding 28 April 2015 and copies of employment agreement for current employees as at 28 April 2015.

Penalty

[31] Section 229 (3) of the Act provides that if an employer without reasonable cause fails to comply with the requirements of the Labour Inspector under s 229 (1)(c) and (1)(d) of the Act then a penalty may be imposed by the Authority.

[32] Mr McIlroy submits that guidance is available where the Authority is being asked to award a penalty from the non-exhaustive list of factors to be considered in the Employment Court judgment in *Tan v Yang and Zhang*.¹ I have considered those factors in this matter.

[33] The first factors I consider are the seriousness of the breach and whether it was one off or repeated. Mr McIlroy submits that Danmel Farm was on notice regarding the importance of keeping records because of the earlier audit by Ms Belley and improvement notice. Mr McIlroy submits that there were several opportunities for Danmel Farm to comply and the consequences of not doing so were made clear to Mr Higinbottom. Therefore the breach must be deliberate. Mr Higinbottom says that he was simply unable to extract from CashManager the relevant payslips. He says that there were significant steps forward in record keeping and having employment agreements since Ms Belley made the requirements clear including implementation of time sheet records filled in by employees. He said that he made serious attempts with his accountant to print off the payslips.

¹ [2014] NZEmpC 65

[34] In assessing seriousness of the breach I do take into account that there was some compliance and some improvement since the involvement of Ms Belley. I cannot rule out, at least with respect to the leave records, that there may have been a genuine misunderstanding about what the requirements were. There was no suggestion that Danmel Farm had previously been the subject of a penalty from the Authority. There was a failure though to provide the payslips or even direct Mr Lakhera to the company accountants for an extended period. The pay slips in this case are effectively the wage record and will show final pay details and any deductions.

[35] There has not been a complaint by an employee of Danmel Farm but Mr Lakhera has been unable to conclude with any certainty whether there has been compliance with minimum standards because the records are not complete and pay slips have not been provided. Farm workers, because of their roles and the often isolated environment in which they work, are vulnerable if full employment records are not kept. It is important that a Labour Inspector is able to ascertain if minimum employment standards are being met for farm workers and records should be provided to enable that to happen when a request is made.

[36] The purpose of a penalty is to punish and deter others from engaging in such conduct. Of particular concern in this case was the inability and/or failure to provide pay slips over an extended period to the Labour Inspector including up to the date of the Authority investigation meeting. I find that prevented him from ascertaining whether minimum employment standards had been adhered to.

[37] I note Mr Higinbottom's advice about the difficult financial state of the company because of the well-known issues facing the dairy industry and that he provides for his eleven children.

[38] I take into account all matters including the partial compliance with the requirements, the measure of improvement by Danmel Farm with record keeping and with employment agreements and the possibility, which I cannot rule out, of some confusion about the leave records. I am satisfied that there should be a penalty of \$2,700.

[39] I order that Danmel Farm Limited pay to the Authority a penalty in the sum of \$2,700 and the Authority will then make payment of that sum into the Crown Bank Account.

Costs

[40] Mr McIlroy sought costs on the basis of the daily tariff of \$3500 pro-rated and reimbursement of the filing fee of \$71.56.

[41] The meeting was somewhat delayed because of some car parking issues for the Labour Inspector. I think it fair in the round to award costs on the basis of one hour together with reimbursement of the filing fee of \$71.56.

[42] I order that Danmel Farm Limited pay to the Labour Inspector costs in the sum of \$583.33 together with reimbursement of the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority