

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 302
5563832**

BETWEEN ERIN SPENCE,
LABOUR INSPECTOR
Applicant

AND TAMEHANA HORTICULTURE
SERVICE LTD
respondent

Member of Authority: Eleanor Robinson

Representatives: Erin Spence, Labour Inspector, for Applicant
No attendance for the Respondent

Investigation Meeting: 29 September 2015 at Tauranga

Date of Oral Determination: 29 September 2015

Date of Written Determination 29 September 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 16 March 2015 the Labour Inspector, Ms Erin Spence, served on the Respondent, Tamehana Horticultural Service Ltd (Tamehana), an Improvement Notice issued under s. 223D of the Employment Relations Act 2000 (the Act).

[2] The Improvement Notice advised that Ms Spence reasonably believed that Tamehana had failed to comply with the provisions of the minimum employment standards by failing to provide employment records as requested by the Labour Inspector under s. 229 of the Act.

[3] The Improvement Notice required Tamehana to provide the requested records to the Labour Inspector before 5.00 p.m. on 17 April 2015. The requested records were specified as being:

- Employment agreements for all employees for the previous 6 years;
- Time and wages records for all employees for the last 6 years; and
- Holiday and leave records for all employees for the previous 6 years.

[4] In the absence of such records being provided as requested to the Labour Inspector, Ms Spence concluded that Tamehana had failed to comply with s.229(2) of the Act which

states: “Where any Labour Inspector makes any requirement of an employer under subsection (1)(c) or subsection (1)(d), that employer must forthwith comply with that requirement.

Note

[5] Tamehana was advised in writing on 28 July 2015 by an Authority Officer that a case management call would be held on 7 August 2015 at 10.00 a.m. and a contact telephone number was requested for that purpose. As no response was received by Tamehana, the written notification of the impending case management conference call was couriered to Tamehana on 29 July 2015, and was signed as received by Ms Brenda Sandhu the Director of Tamehana.

[6] Following the case management conference call, a written notification of the date and venue investigation meeting dated 10 August 2015 was couriered to Tamehana on 11 August 2015, and was signed as received by Ms Sandhu.

[7] The Notice of Investigation Meeting dated 10 August 2015 advised that: “*If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*”

[8] Tamehana did not attend the investigation meeting held on 29 August 2015, and Ms Sandhu advised the Authority Officer who telephoned it at 10.00 a.m. that Tamehana would not be attending the investigation meeting.

[9] Given the non-participation by Tamehana throughout the Authority’s process, I was satisfied that no good cause had been shown for Tamehana’s failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

Background Facts

[10] Tamehana is a limited liability company providing horticultural services.

[11] Ms Spence received a complaint on 11 February 2015 from Ms Tina Engel, an employee of Tamehana complaining that it had failed to comply with minimum statutory employment obligations including failure to pay her the minimum wage for work she had performed.

[12] Ms Spence contacted Tamehana on 27 February 2015 and spoke to Ms Brenda Sandhu, a director of Tamehana, who confirmed that Tamehana had not paid the complainant the minimum wage because they were paid on a piece rate.

[13] Ms Spence provided Ms Sandhu with information about the minimum wage rate, and requested time and wage records, holiday and leave records and an employment agreement (the Records) for the employees from the previous 6 years. Ms Sandhu agreed to provide the requested Records by post to Ms Spence within the week.

[14] The Records had not been received by 6 March 2015. Ms Spence contacted Tamehana by telephone and advised that an Improvement Notice would be issued if the requested Records were not provided.

[15] Ms Spence issued Tamehana with an Improvement Notice on 16 March 2015. The Improvement Notice was served on Tamehana at the Registered Office of the company.

[16] On 28 April 2015 Ms Spence contacted Tamehana by text message and advised that a compliance order would be sought at the Authority. Tamehana responded that the Records could not be provided as they were with the IRD. Ms Spence advised that the Records were to be forwarded to the Labour Inspector and provided Tamehana with further information as to its legal obligation to provide the Records.

[17] By letter dated 12 May 2015 Ms Spence advised Tamehana that an application would be filed with the Authority seeking a compliance order and penalties for non-compliance with the Improvement Notice.

[18] Tamehana did not provide the Records as requested and on 23 June 2015 Ms Spence filed a statement of problem in the Authority seeking compliance and a penalty against Tamehana for failing to provide employment records as requested by the Labour Inspector under s. 229 of the Act.

Determination

[19] I am satisfied that the Improvement Notice was properly served on Tamehana at the registered office address by a Labour Inspector on 16 March 2015.

[20] Tamehana has not complied with the Improvement Notice issued by the Labour Inspector on 16 March 2015 by failing to provide the Records as requested.

Compliance Order

[21] I make an order for compliance with the Improvement Notice issued on 16 March 2015 pursuant to s. 137 (1) (a)(iii) of the Act.

[22] Tamehana is ordered to comply with the Improvement Notice by providing the Labour Inspector with:

- the individual employment agreements;
- the time and wage records; and
- Holiday leave records for all employees employed by Tamehana within 6 years of the date of the Improvement Notice.

[23] Compliance is to take place within a period of 14 days of the date of this determination.

Penalty

[24] In circumstances in which there has been non-compliance with an Improvement Notice issued under s 223D of the Act, a penalty may be imposed by the Authority pursuant to s 223F of the Act.

[25] Tamehana had been served with an Improvement Notice and provided with oral and written information regarding its relevant legal obligations. It had been given a reasonable amount of time to ensure that the Records were provided as requested.

[26] It failed to comply with the request for the records made by the Labour Inspector. I consider that public policy considerations require employers to act responsibly in adhering to statutory imperatives.

[27] I am satisfied that the breaches and failure to comply with the Improvement Notice issued on 16 March 2015 are serious.

[28] I observe that the purpose of a penalty is to punish and deter other employers from such non-adherence to the statutory minima.¹

[29] I order Tamehana to pay a penalty of \$6,000.00 of which \$1,500.00 is to be paid to Ms Engels pursuant to s 136(2) of the Act, and \$4,500.00 to the Crown.

¹ *Tan v Yang and Zhang* [2014] 2 ERNZ 448 at [35]

Filing Fee

[30] I further order that Tamehana reimburse Ms Spence, the Labour Inspector, the filing fee in the sum of \$71.56.

Costs

[31] Ms Spence is seeking costs. The investigation meeting took approximately 30 minutes; accordingly a minimal amount is appropriate in recognition of the costs incurred by the Labour Inspector.

[32] Tamehana is ordered to pay a sum in the amount of \$300.00 as costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[33] The penalty amount, filing fee and costs are to be paid within 28 days of the date of this determination.

Eleanor Robinson
Member of the Employment Relations Authority