



New Zealand Employment Relations Authority Decisions

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McLean v Pavich (Auckland) [2011] NZERA 866; [2011] NZERA Auckland 31 (21 January 2011)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 31
5312262

BETWEEN CHRISTINE MCLEAN (LABOUR INSPECTOR) Applicant

AND AP & KE PAVICH (PARTNERSHIP) Respondents

Member of Authority: James Wilson

Representatives: Christine McLean (Labour Inspector) for the applicant

No appearance for the respondents Investigation Meeting: 23 November 2010 in Hamilton Determination: 21 January 2011

DETERMINATION OF THE AUTHORITY

The application

[1] Christine McLean, Labour Inspector (“the Labour Inspector”) seeks an order from the Authority requiring AP & KE Pavich (partnership) (“The Pavich’s”) to pay Mr Kio Miller (“Mr L Miller”) annual holiday pay owing of \$2,581.69 and interest on this amount from 24 September 2009 (the date on which Mr Miller left the Pavich’s employ) until the amount is paid in full. The Labour Inspector also requests that the Authority impose penalties against the Pavich’s for failure to produce wage and time records when requested by the Labour Inspector and non compliance with the relevant sections of the Holidays Act. The Labour Inspector also requests that the Pavich’s be ordered to reimburse the Department of Labour for the \$70.00 Authority filing fee.

The Authority’s investigation

[2] The *statement of problem* in this matter was filed by the Labour Inspector with the Authority in mid-July 2010. A copy of the statement of problem was forwarded, by courier, to the Pavich’s shortly afterwards. Courier records confirm that statement of problem was received by the Pavich’s on 21 July 2010. Despite several reminders a statement in reply had not been received by the beginning of September and I therefore arranged for a case management conference to be held with the parties, by telephone, on 14 September 2010.

[3] During the case management conference Mrs Pavich, on behalf of the Pavich’s, explained that she had been ill for a number of weeks and had therefore not had opportunity to file a statement in reply. She also said that she had in fact forwarded wage records in respect to Mr Miller to the Labour Inspector by courier when requested but that these seem to have gone astray. The Labour Inspector said that despite promises by Mrs Pavich to send the records and to deliver them in person, and an offer by the Labour Inspector to collect them, no wage records had ever been provided.

[4] During the course of the case management conference it was agreed that:

- Mrs Pavich would forward a statement in reply, and other relevant information, to the Authority on or before Tuesday, 28 September 2010.

- Mrs Pavich would include a copy of the courier post receipt (to confirm that she had sent wage records to the Labour Inspector) with the statement in reply.
- The Authority would hold an investigation meeting in Hamilton on 23

November 2010.

During the case management conference I emphasized to Mrs Pavich that it was important that she, or another representative of the Pavich's, attend the investigation meeting and produce any relevant evidence regarding the non-payment of Mr Miller's holiday pay and any arguments as to why I should not order the penalties requested by the Labour Inspector. I also advised her that should the Pavich's not be represented at this meeting the Authority would proceed on the basis that the evidence put forward by the Labour Inspector was uncontested.

[5] No statement in reply or any other information has been received from the Pavich's and despite the Authority confirming the time and place of the meeting with Mrs Pavich on several occasions, neither Mrs Pavich nor any other representative of the Pavich's attended the meeting. the Authority has heard nothing further from the Pavich's as to why they did not attend the investigation meeting or provide any information. Under the circumstances it is appropriate that I consider and determine the Labour Inspectors application without hearing further from the Pavich's.

Determination and orders

Unpaid annual holiday entitlement

[6] The Inspector has provided me with an excellent detailed and comprehensive report on her investigation into Mr Miller's claim that he was not paid his full entitlement to annual holidays at the time he left the Pavich's employment. In the absence of wage and time records the Labour Inspector has used Mr Miller's bank statements, his recall of what annual leave he took while employed and the Pavich's IRD records to calculate that Mr Miller was underpaid a total of \$2581.69 gross in annual holiday entitlements. **I accept the Labour Inspectors calculations without reservation and order AP & KE Pavich (Partnership) to pay the Labour Inspector, for the use of Mr Miller, the sum of \$2581.69 gross as annual holiday pay.**

Interest on the outstanding amount

[7] Mr Miller has been denied the use of the outstanding funds and is entitled to be reimbursed for that loss. An award of interest is the appropriate form of compensation. **AP & KE Pavich (Partnership) are ordered to pay the Labour Inspector, for the use of Mr Miller, interest at the rate of 5% p. a. on the sum of \$2581.69, from 24 September 2009 until this amount is paid in full.**

Request for penalties

[8] The Labour Inspector has suggested that I consider awarding penalties against the Pavich's for two separate breaches of their statutory obligations.

(i) A penalty in terms of section 130(4) of the Employment Relations Act (the Act) for failing to provide wage and time records to the Labour Inspector when requested to do so in terms of section 130(2) of the Act; and

(ii) A penalty in terms of [s. 75\(1\)\(a\)](#) of the [Holidays Act 2003](#) for failing to pay Mr Miller his entitlement to annual holidays in term of [s.16](#) and [s. 21](#) to [28](#) of that Act.

[9] The Pavich's failure to comply with their legal obligations as employers cannot be lightly dismissed as trivial or as simple administrative failures. These obligations (to pay annual holidays and to keep and produce wage and time records on request) are long-standing, basic provisions of New Zealand employment law. These obligations are similar in nature to a range of other legal obligations fundamental to being an employer, including for example the accounting for tax and GST, the payment of ACC levies and the provision a safe workplace. In the absence of any argument in mitigation provided by the Pavich's it is appropriate that a penalty be imposed at a level which reflects the seriousness of the breaches.

[10] **AP & KE Pavich (Partnership) are ordered to pay to the Authority within**

28 days of the date of this determination, for payment into the Crown Bank Account, the sum of \$2500 by way of a penalty for breach of section 130(2) [Employment Relations Act 2000](#); and

[11] **AP & KE Pavich (Partnership) are ordered to pay to the Authority within**

28 days of the date of this determination, for payment into the Crown Bank Account, the sum of \$2500 by way of a penalty for breach of [section 16](#) and [sections 21](#) to [28](#) of the [Holidays Act 2003](#).

[12] AP & KE Pavich (Partnership) are ordered to pay the Department of Labour the sum of \$70.00 as reimbursement of the filing fee paid by the Labour Inspector.

James Wilson

Member of the Employment Relations Authority

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