

- Leah Margaret Coombes - \$251.76

[2] The Labour Inspector also asks that pursuant to s.223(f) of the ERA, the Authority imposes a penalty on the respondent for failing to comply with an Improvement Notice.

[3] Finally, pursuant to s.75(1)(b) of the Holidays Act, the Labour Inspector asks the Authority to impose a penalty for failing to comply with a provision of s.75(2) of this Act. The Labour Inspector does not specify which provision of s.75(2) has, allegedly, not been complied with, but it would seem that the relevant provision, most probably, is s.75(2)(e) which relates to s.83 of the Holidays Act and the alleged failure to keep or provide access to holiday and leave records.

[4] The above matters are set out in the statement of problem received by the Authority on 27 June 2013 and couriered to the respondent on the same day; the receipt of which was signed on behalf of the respondent on 28 June 2013. The Authority has not received a statement in reply from the respondent.

[5] The Authority attempted to engage the parties in a conference call to discuss options in regard to progressing these matters. Unfortunately, despite numerous attempts, the Authority has been unable to obtain contact with the respondent and pursuant to clause 12 of Schedule 2 of the ERA, the Authority proceeds to determine matters “on the papers” in accordance with the evidence available.

Background

[6] Acting on complaints received from the employees in regard to a failure by the respondent to pay their annual holiday pay, upon the termination of their employment, the Labour Inspector visited the Copper Kettle Café and Tea-rooms at Ngatea.

[7] In the absence of any holiday and leave records, the Labour Inspector obtained relevant information from the employees, including their tax records, and on 26 March 2013, it is asserted that an *Improvement Notice* (under s.223D of the ERA) was served on the respondent. Some questions arise in regard to whether anyone in a decision making capacity, or anyone with ostensible authority, actually received the Improvement Notice.

[8] The evidence prepared by the Labour Inspector is that she has not been able to communicate with the apparent (Managing) Director of the respondent, Mr Dan Kuy. Rather, the only discussion has been with another person (Vicky), an employee (apparently) who accepted the original request for the provision of wage and time records. But it is not established if this particular person had any authority, or obligation to respond. The Labour Inspector records that there was reluctance on the part of “Vicky” to accept the Improvement Notice.

[9] The Improvement Notice dated 25 March 2013, informs the respondent that there is a reasonable belief that the respondent has failed to comply with the provisions of s.229 of the ERA; in that there has been a failure to provide wage and time records for all employees, including Rebecca Jane Clayton. The respondent was informed of the steps that could be taken to comply with the ERA, related to the provision of all written employment agreements and wage and time records for all employees. The respondent was required to “*complete improvement to ensure compliance*” by 5 April 2013; an extraordinarily short period of time being allowed, only five working days, particularly given that there is no proof that anyone with the necessary decision making power or appropriate authority, actually received the notice. Indeed, it would appear that the issuing of the improvement notice did not comply with s.223D(4) of the ERA. This is because this provision states that:

An improvement notice may be issued –

- a. by giving it to the employer concerned;
- b. if the employer does not accept the improvement notice, by leaving it in the employer’s presence and drawing the employer’s notice to it.

[10] The legal employer is Copper Kettle Ngatea Limited and according to the New Zealand Companies register, Mr Dan Kuy is the sole director and his residential address is recorded as being: 164 Fitzgerald Road, Drury, Auckland. The registered office of the company is 43 Orchard West Road, Ngatea. But the Improvement Notice was left at the Copper Kettle Café & Tearooms, State Highway 2, Ngatea; and upon the evidence of the Labour Inspector, the person who received the Improvement Notice was reluctant to accept it; possibly with some justification, if she was simply another employee without any authority to accept this document. Nor does it appear that any reasonable attempt was made to ensure that the “employer” was given the notice as required by s.223D(4) (above).

[11] In regard to the proceedings in the Authority, there has been an apparent failure of the respondent to engage in any due process at all. However, I note that there is no evidence that the Labour Inspector attempted to contact the sole director of the respondent company via correspondence, or any other means, such as the Improvement Notice being served (professionally) on the registered address of the company, and/or Mr Kuy's home address. As mentioned, the details of both of these addresses are available on the New Zealand Companies register.

Determination

[12] While I have some reservations in regard to the paucity of evidence regarding the Labour Inspector's efforts to ensure that the employer was made fully aware of its respective obligations under the ERA and the Holidays Act, I am satisfied that the statement of problem, setting out the nature of the claims currently before the Authority, has been appropriately served. And there has been no response for the respondent.

[13] I conclude that if Mr Kuy, as the apparent sole director of the respondent company, wished to present an alternative position to that advanced by the Labour Inspector he has had a reasonable opportunity to do so.

[14] Therefore, on the evidence currently available to the Authority, I am satisfied that the respondent has failed to meet certain requirements of the ERA and the Holidays Act, as set out earlier in this determination.

Orders of the Authority

[15] Pursuant to s.27 (2) and s.77 (1) of the Holidays Act 2003, and s.137 of the Employment Relations Act 2000, Copper Kettle Ngatea Limited is ordered to pay the Labour Inspector, for the use of the respective employees, the following gross sums:

- Rebecca Jane Clayton - \$1,135.28;
- Kimbaleigh Alex Phipps - \$59.84;
- Leah Margaret Coombes - \$251.76.

[16] The above sums must be paid not later than 21 days from the date of this determination.

[17] Pursuant to s.137 of the ERA 2000 and s.82 of the Holidays Act 2003, upon a proper request from a Labour Inspector, Copper Kettle Ngatea Limited shall provide access to, or a copy of, or a certified extract from, information contained in the holiday and leave records of the company relating to all employees.

[18] The above order is made upon the (possibly optimistic) assumption that the respondent has kept a holiday and leave record as required by s.81 of the Holidays Act. In the event that records have not been kept, the Labour Inspector has enforcement options available under the ERA and the Holidays Act.

[19] In regard to the imposition of penalties sought by the Labour Inspector, I am not satisfied that it is appropriate to award such in the circumstances. This is because it is not evident that the Labour Inspector has taken appropriate action to bring to the notice of the employer the requirements of the two respective Acts and the consequences of failing to comply. This should not be taken to be any criticism of the Labour Inspector as the Authority is conscious of the difficulties associated with that role in regard to the enforcement of employee's legal rights. The role is particularly difficult in circumstances where the owners or directors of businesses are absent from the day-to-day operations, or choose not to engage. And it is unclear exactly what the involvement of Mr Kuy was. Nonetheless, there were options available to the Labour Inspector to properly serve the Improvement Notice and there is no evidence that these were attempted.

[20] The penalties involved for failing to comply with statutory requirements can be high, up to \$20,000 for a company, hence the Authority has an obligation to ensure that all available steps are taken to ensure that a respondent company (or its officers) is fully aware of the consequences of failing to comply with legitimate requests from a Labour Inspector carrying out their statutory role; including the issuing of improvement notices. While it appears that the Labour Inspector failed to comply with s.223D(4) of the ERA on this occasion, in the event that proper steps are taken by the Labour Inspector in future, and if appropriate circumstances exist, the respondent should be aware that further transgressions in regard to the company's obligations under the ERA and the Holidays Act will not be treated with such forbearance in regard to the due consideration of penalties.

Costs

[21] Copper Kettle Ngatea Limited shall pay to the Labour Inspector the sum of \$71.56; being the application fee paid to the Authority.

K J Anderson
Member of the Employment Relations Authority