

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 241/07  
5090275**

BETWEEN      KRIS METCALF (Labour Inspector)  
Applicant

AND            MR SPARKEL LIMITED  
Respondent

Member of Authority:      Leon Robinson

Representatives:          Applicant In Person  
Gregory Maxwell Hand for Respondent

Investigation Meeting:      9 August 2007

Determination:              9 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1]    The applicant labour inspector Mr Kris Metcalf ("the Inspector") applies to the Authority pursuant to section 228 of the *Employment Relations Act 2000* ("the Act") to recover arrears of wages being gross annual holiday pay owing to Mr Timothy Watkin. Mr Watkin was formerly employed by the respondent limited liability company Mr Sparkel Limited ("Mr Sparkel"). The Inspector further seeks interest on the amount in arrears and also a penalty against Mr Sparkel pursuant to section 135 of the Act.

[2]    Contrary to the prescribed regulations, Mr Sparkel did not lodge a statement in reply. The inspector's statement of problem was served on Mr Sparkel on 14 June 2007 - the day after it was lodged in the Authority.

[3]    As no steps were taken, by a memorandum of 18 July 2007 I directed the matter proceed to an investigation meeting today and that Mr Sparkel be served with the memorandum and a Notice of Investigation Meeting. The memorandum particularly advised that Mr Sparkel could attend to seek the Authority's leave to defend the Inspector's application.

[4] Mr Gregory Maxwell Hand, a director of Sparkel ("Mr Hand") attends the investigation meeting today. He seeks leave to defend the application. The inspector's application was acknowledged as received by a person "Devlon" and Mr Hand identifies to the Authority that person as his key accounts manager. Notwithstanding this, Mr Hand says on oath that he has never seen the application. The inspector does not oppose the application for leave. It is always preferable that an employment relationship problem be investigated as to its substantive merits with the actual involvement of both parties, rather than on a default basis. For these reasons, I granted leave to Mr Sparkel to defend the inspector's application.

[5] As a result of Mr Sparkel's failure to take steps and because the substantive issue is today no longer contentious, I did not consider mediation would contribute constructively to resolution of the problem. Having given consideration to the matter of mediation, I proceeded to deal with the application. Mr Hand confirmed he was in a position to defend the matter today. This determination disposes of the inspector's application.

#### **The claim for wage arrears**

[6] By section 228 of the Act the inspector has standing to bring a claim for arrears of wages in an employee's name under section 131 of the Act. The inspector seeks to recover arrears of wages being holiday pay due to Mr Watkin under the *Holidays Act 2003*.

[7] While the inspector initially sought arrears in the gross sum of \$1,787.54 on Mr Watkins' behalf, correspondence between the parties post the lodgement of the application in the Authority has resulted in a revision of the sum in arrears as \$1,377.52. The inspector amends his claim and Mr Hand confirms to me that sum is accepted not only as to quantum but also as to liability. I am therefore satisfied that there has been default in payment to the employee Mr Watkin of wages in the form of annual holiday pay in the gross sum of \$1,377.52. **I order Mr Sparkel Limited to forthwith pay to the Inspector for Mr Watkins' credit the gross sum of \$1,377.52.**

[8] As Mr Watkin has stood out of his arrears of wages since the termination of his employment, it is right that he have interest on it. **I order Mr Sparkel Limited to**

**pay to the Inspector for Mr Watkins' credit interest on the sum of \$1,377.52 at the rate of 10% from 9 January 2007 until the date of payment.**

**The claim for penalty**

[9] Mr Sparkel has had notice of the inspector's claim for penalty against it.

[10] Under cover of letter dated 19 January 2007, the inspector served a notice requiring production of wage, time and holiday records held by Sparkel in respect of Mr Watkin. That notice dated 19 January 2007 pursuant to section 229(c) of the Act required production within 14 days.

[11] Mr Hand wrote by letter dated 2 February 2007 supplying to the inspector "*copy of Calculation of Holiday payments for Tim*" but failed to provide the actual and requested wage, time and holiday records.

[12] By letter dated 12 February 2007, the inspector acknowledged Mr Hand's advice of 2 February 2007 and further requested all wage and time records relating to Mr Watkin in respect of the period from 19 December 2005 to 2 February 2007. A further notice to produce dated 12 February 2007 and identical to that of 19 January 2007 was also enclosed.

[13] There was continued correspondence between the inspector and Mr Hand over the ensuing months.

[14] Mr Sparkel did not comply with either of the above-mentioned notices to produce. By letter dated 22 May 2007 the inspector wrote again to Mr Hand reminding him of the notice to produce dated 12 February 2007. The inspector further advised that if the full set of wage time and holiday records were not provided by 5.00 pm on Friday 8 June 2007, he would refer the matter to the Authority. Mr Sparkel did not comply.

[15] Although the inspector claims a penalty under section 135 of the Act, I consider any such appropriate penalty is better derived from subsection 229(3) of the Act which provides:-

*(3) Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subsection (1)(c) or subsection (1)(d) is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.*

[16] The subsections (1)(c)&(1)(d) are the provisions which empower the inspector to require production of wages and time records or any holiday and leave record.

[17] I am satisfied, on the balance of probabilities, that Mr Sparkel did not comply with the notice to produce dated 19 January 2007, the notice to produce of 12 February 2007 or the further request by the inspector's letter of 22 May 2006. I am satisfied that Mr Sparkel had no reasonable cause for its failures. Although Mr Hand explains that Mr Sparkel was genuinely trying to settle the matter with the inspector, I have concluded that Mr Sparkel's actions and moreover its inaction, served only to prevent and inhibit the inspector from effectively carrying out his statutory function. In these circumstances, I conclude a penalty is warranted. **I order Mr Sparkel Limited to pay a penalty of \$2,000.00 pursuant to section 229(3) of the Employment Relations Act 2000. Half of that penalty shall be paid into the Authority and the other half shall be paid to the Inspector for Mr Watkins' credit.**

[18] Finally **I order Mr Sparkel Limited to pay to the Inspector \$70.00 being the lodgement fee on this application.**

Leon Robinson  
**Member of Employment Relations Authority**