

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 116
5436013

BETWEEN DAVID MYATT (LABOUR
 INSPECTOR)
 Applicant

AND DS&E LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Bing Liang, Advocate for the Respondent

Investigation Meeting: 11 March 2014 at Auckland

Determination: 1 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector seeks a compliance order to enforce the terms of an improvement notice served on the employer (DS&E) on 13 September 2013.

[2] Service of the Labour Inspector's statement of problem proved difficult initially but Mr Myatt helpfully undertook the matter himself and effected service of the hard copy material on 25 October 2013.

[3] Subsequently the Labour Inspector was able to serve an electronic copy of the documents on the director of the employer, Ms Bing Liang.

[4] Although a statement in reply was not subsequently filed in the Authority, Bing Liang has been engaged with the Authority throughout and even took part in the Authority's telephone conference notwithstanding that she was in China at the time.

[5] At the telephone conference that I convened with the parties, it was agreed that on Bing Liang's return to New Zealand, there would be an investigation meeting of the Authority at which she would have an opportunity of addressing me on the concern she had about the Labour Inspector's conclusions.

[6] In the interim, and as a sign of good faith, Bing Liang undertook to commence a repayment programme at the rate of \$100 per week to reduce the indebtedness of DS&E to a former employee who had consulted the Labour Inspector for assistance in relation to unpaid wage entitlements. The payment regime was to commence on Monday, 20 January 2014.

[7] I note that Bing Liang was as good as her word and that the repayment regime did in fact commence and has been maintained since.

[8] At the investigation meeting, Bing Liang told the Authority essentially that she was unfamiliar with New Zealand law when she set up her business, that she paid the subject staff member in cash on a regular basis and that because of that, she was now unable to prove that those payments that were made in cash had in fact been made.

[9] I reiterated to her the advice that Mr Myatt had already given to her, to the effect that there was nothing complex about the requirements of New Zealand law and that all that small business owners needed to do in order to satisfy the requirements of the law in respect of employment was to maintain the normal business records of payment one would expect them to retain in respect of any other party that they either owed money to or took money from.

[10] In particular, I referred to the necessity to have a written employment agreement and a wage book which recorded all of the payments made to each employee as well as a leave record recording all the leave taken by each employee. I indicated that those documents could be electronic or hard copy but that what was important was that when they were sought by a Labour Inspector in pursuance of his/her statutory obligations, it was most important that that material be provided immediately for the Labour Inspector to peruse.

[11] Plainly, on the evidence I heard in this case, it was apparent that what information was provided to the Labour Inspector was not provided promptly and had the appearance of having been created after the event. As I explained to Bing Liang, that creates a degree of suspicion which is difficult to overcome.

[12] The short point was that I was satisfied that there was no evidence to support the payments that Bing Liang said were made in cash and as a consequence, I told Bing Liang that I was obligated to make the order which the Labour Inspector sought.

[13] However, as part of her evidence to the Authority, Bing Liang made it clear that DS&E had ceased trading and, were it not for the intervention of the Labour Inspector, DS&E would have been wound-up by now.

[14] That being the position, I was satisfied, and the Labour Inspector accepted, that the only order that the Authority need make was an order to confirm the requirement that DS&E continues making payments at the rate of \$100 per week until the debt due to Mr Yungjie Ma is repaid in full.

[15] The improvement notice served on DS&E contained a number of other requirements as well but given the evidence that trading has ceased and there is no prospect of trading recommencing and DS&E being an employer again, the balance of the improvement notice need not be complied with.

Determination

[16] I now grant a compliance order pursuant to s.137(1)(a)(iiib) of the Employment Relations Act 2000 requiring that DS&E continue making payments by direct credit to the affected employee, Mr Yungjie Ma, at the rate of \$100 per week until the total amount owing of \$2,121 net is paid in full.

[17] Given the cooperation of Bing Liang for DS&E, there will be no order for the payment of any penalties provided that the payments being made by direct credit to Mr Yungjie Ma continue on a weekly basis and completely discharge the debt owed.

[18] In the event that those payments cease before the debt has been satisfied in full, leave is reserved for the Labour Inspector to seek penalties from the Authority.

James Crichton
Member of the Employment Relations Authority