

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 565
5430192

BETWEEN DAVID MYATT,
LABOUR INSPECTOR
Applicant

A N D PACIFIC APPLIANCES
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: David Myatt, Labour Inspector in person
No representation for the Respondent

Investigation: On consideration of the papers

Date of Determination: 11 December 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] Via a *Statement of Problem* received by the Authority on 26 August 2013, the Labour Inspector informs that the respondent, Pacific Appliances Limited (PAL) has failed to comply with the requirements of an Improvement Notice served on the registered office of the company on 24 July 2013.

[2] The Labour Inspector further informs that the respondent has not complied with the 28 day deadline allowed within the notice; by rectifying the statutory breaches that had been notified. And the respondent has not lodged an objection to the notice with the Employment Relations Authority.

[3] The Labour Inspector now urges the Authority to issue a compliance order pursuant to s.137(1)(a)(iiib) of the Employment Relations Act 2000 (the Act),

requiring the respondent to comply with the notice within a specific timeframe as determined by the Authority.

[4] The Labour Inspector also requests that the Authority considers imposing a penalty upon the respondent for the failure to comply with the notice.

[5] The Authority notes that the *Statement of Problem* was delivered by courier to the registered address of PAL on 28 August 2013. Receipt of the documents was signed for by “Sala Akoui”¹, a director of the company as evidenced by the Companies Office Register. On 12 September 2013, the Authority sent a reminder to the respondent regarding the essential requirement to file a statement in reply. This was delivered by courier on 13 September 2013 to the registered office of PAL and signed for by “Steve Pio”. The Authority is satisfied that the respondent is aware of its obligations in regard to the orders sought by the Labour Inspector. The respondent has failed to engage with the Authority at all and pursuant to clause 12 of Schedule 2 of the Act, the Authority now acts to determine this matter as if the respondent had been represented.

Background

[6] The matters before the Authority relate to a complaint received by the Labour Inspector from Mr Taotofi Asa Afoa on 1 June 2012; or more correctly, his sister acting on his behalf. The Labour Inspector wrote to Ms Salamanaia Ah-Kuoi, the sole director of PAL on 15 November 2012. The letter contained a request for PAL to forward copies of Mr Asa Afoa’s wage, time and holiday records and any other relevant information pertaining to his employment.

[7] In response to the Labour Inspector’s request, via a letter dated 20 November 2012, PAL informed that Mr Asa Afoa commenced his employment on 12 March 2012 as a shop assistant and was subsequently dismissed on 12 June 2012. PAL also informed that the business had engaged a sub-contractor to train Mr Asa Afoa and that Mr Asa Afoa’s family had agreed to a bond of \$2,500 being paid for the purpose of training him. Relevant to the matters raised by the Labour Inspector in the improvement notice, there is also some mention of Mr Asa Afoa being re-assigned from his duties as a shop assistant to being trained on a courier run and rather than being \$13.50 per hour, he received a “gross training allowance” of \$375.00 per week.

¹ Salamanaia Ah-Kuoi

The enforcement process

[8] Via a comprehensive (and conciliatory) letter to PAL dated 5 July 2013, the Labour Inspector responded in some detail to the PAL letter of 20 November 2012. In concluding his letter the Labour Inspector made reference to the prospect of voluntary compliance in regard to the matters being pursued on behalf of Mr Asa Afoa, and the desirability of PAL entering into an Enforceable Undertaking. Appended to the Labour Inspector's letter was a draft copy of an Enforceable Undertaking for the consideration of PAL and subsequent signature.

[9] The Labour Inspector also provided a number of relevant brochures containing information about employment related subjects relevant to the compliance issues being advanced.

[10] Regrettably, there is no evidence of any response to the Labour Inspector's very rational approach. As a result, he issued an Improvement Notice (the Notice) under s.223D of the Employment Relations Act 2000.

The content of the Improvement Notice

[11] The Notice informs that the Labour Inspector reasonably believes that PAL has failed to comply with:

Section 12A of the Wages Protection Act 1983; and

Section 6 of the Minimum Wage Act 1983; and

Sections 23, 27 and 81 of the Holidays Act 2003; and

Section 65 of the Employment Relations Act 2000.

[12] In summary, PAL is required to take action to ensure compliance with the above statutory provisions. The details of the non-compliance are set out and the steps PAL can take to ensure compliance are clearly conveyed. These include conducting an audit of the wage, time and holiday records of Mr Asa Afoa; and

... where it is identified that any minimum standards employment entitlements have been underpaid, accurately assess the quanta of arrears due, and prepare a cheque in the sum of the aggregate of these arrears;...

[13] PAL is also required to pay the sum of \$2,500 as reimbursement of the premium that was charged for Mr Asa Afoa's employment.

[14] Additionally, PAL is required to become familiar with the minimum standards legislation pertaining to employee entitlements as well as ensuring that appropriate employment agreements are in place for affected employees.

[15] Compliance with the terms of the Notice was required by 21 August 2013 and the possible consequences of failing to do so, including compliance proceedings with the Authority and potential liability for a penalty to be awarded against the company, are outlined.

[16] Finally, PAL is informed of the right to lodge an objection to the Notice, within 28 days of the date of issue.

[17] The Authority notes that in addition to serving the Notice on 24 July 2013, the Labour Inspector wrote to PAL the next day informing that:

This process is designed to provide you as an employer with an opportunity to rectify breaches of minimum standards employment legislation without incurring the costs of formal action against you, and to put in place systems and practices that will prevent recurrence for the benefit of your workplace.

[18] In concluding his letter, the Labour Inspector invites PAL to contact him should they wish to discuss any of the matters that have been raised with the company.

Determination

[19] The Authority is satisfied that the Improvement Notice has been properly served by the Labour Inspector and that PAL has been made fully aware of the company's legal obligations under the relevant employment legislation.

[20] Pursuant to ss.137(1)(a)(iiib) and 223D(6) of the Employment Relations Act 2000, Pacific Appliances Limited is ordered to comply with the requirements of the Improvement Notice; served on the registered office of the company on 24 July 2013. Taking into account observance of the usual public holidays during December 2013 and January 2014, compliance is required by not later than 24 January 2014.

[21] The Authority accepts that the Labour Inspector has taken reasonable steps to enable PAL to comply with the company's various legal obligations, prior to resorting to bringing matters to the Authority. Regrettably, PAL has not accepted the options available to the company and the progression of events has culminated in a failure to comply with the Improvement Notice. Given the failure of PAL to acknowledge the statutory role of the Labour Inspector and the associated failure to comply with the Improvement Notice, it is appropriate that a penalty should be awarded. However, the Authority understands that PAL is a small operation and any penalty awarded should take into account the scale of the business.

[22] Pursuant to sections 133 and 223F of the Employment Relations Act 2000, a penalty of the sum of \$1,500.00 is imposed. This sum is to be paid by Pacific Appliances Limited to the Authority for subsequent payment into the Crown Bank Account.

Costs

[23] Pacific Appliances 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