

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 170
5363646

BETWEEN BIPENDRA RAM
 Applicant

A N D DAVID MYATT (LABOUR
 INSPECTOR)
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
 Respondent in Person

Investigation meeting: 27 April 2012 at Auckland

Date of Determination: 21 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Ram) objects to the demand notice dated 19 October 2011 which has been duly served on Mr Ram.

[2] In that demand notice, the respondent Labour Inspector (Mr Myatt) determined that an amount of \$11,560.24 was due and owing by Mr Ram to a former employee, Chris Haddon, in respect of payments due to that employee pursuant to ss.24, 25, 26 and 27 of the Holidays Act 2003.

[3] Mr Ram filed his objection in the Authority on 15 November 2011 and a statement in reply was filed by Mr Myatt on 23 November 2011.

[4] At the investigation meeting, Mr Myatt confirmed in general terms before the Authority the progress in dealing with Mr Haddon's claim and the various exchanges which Mr Myatt had had with Mr Ram. Those exchanges, together with Mr Myatt's



extensive calculations and a documentary trail carefully prepared and annotated for the Authority, set out the nature and extent of the inquiries which Mr Myatt had undertaken in respect of the original complaint.

[5] In particular, Mr Myatt emphasised the inadequacy of Mr Ram's records as an employer, the absence of a wage and time record and the difficulty of obtaining straightforward answers to questions asked, over a significant period of time.

[6] Mr Ram acknowledged before the Authority that he had been difficult to engage with during the spring of 2011, when most of the work was done by Mr Myatt on the matter, but that was because of his obligations in terms of the Rugby World Cup. Mr Ram told the Authority that he was a Courier Post franchisee and that his business was particularly busy while the Rugby World Cup was on.

[7] Mr Ram also submitted that he had tidied up his business affairs and that with effect from the commencement of the current year, he had improved his record-keeping. He showed the Authority (and Mr Myatt) his wage and time book for the current year which appeared to be in standard form and appeared to have been correctly and properly maintained.

[8] However, the claim the Authority must consider is an historical one, Mr Haddon having left the employment on 2 July 2011.

[9] Mr Ram also made the point at the investigation meeting that he *"did not want to fight about the first five years of the claim"* but that in relation to the final complete year and the part year in which the employment ended, he maintained his records, though irregular, assisted in mitigating the total quantum of the amount determined as owed by Mr Myatt.

[10] In particular, Mr Ram maintained that records that he had kept in his diary for the 2010 and 2011 years enabled the Authority (and Mr Myatt) to see that Mr Haddon had taken various periods of annual leave during those two years, and it appeared that those periods of annual leave so recorded, were not taken account of by Mr Myatt in his workings.

[11] For the avoidance of doubt, the Authority notes that the information that Mr Ram relies upon is contained in his diaries for the two years in question under the yearly planner section of each diary. What the information amounts to is a recording



of Mr Haddon's first name (Chris) against a succession of dates during the course of both years. Mr Ram's evidence was that each annotation represented a day's leave unless it was annotated half in which case the annotation referred to half a day's leave.

[12] There are two difficulties with this evidence. The first is that it was not provided in a timely manner. Mr Myatt told the Authority in his evidence that Mr Ram had produced both diaries literally at the eleventh hour and well after Mr Myatt had completed his calculations of what was due and owing in respect of holiday pay for Mr Haddon.

[13] The second problem with the evidence provided by Mr Ram is that it is not in a proper format which complies with New Zealand employment law. While the Authority is minded to accept Mr Ram's assurances that this material in his diaries does represent a contemporaneous written record he made of leave taken by Mr Haddon, the fact remains that Mr Haddon's records which he provided to Mr Myatt are at variance with the records kept by Mr Ram.

[14] Having said that, the Authority thinks the diary entries on the yearly planner page of Mr Ram's diaries are genuine enough. They do appear to be contemporaneous and not manufactured after the event for the purposes of this claim and generally they have the ring of verisimilitude about them. A particular factor which encourages the Authority to take that view is that a number of Mr Ram's employees are included in the record and the record also refers to sick leave as well as annual leave.

[15] However, none of those points deal in any way satisfactorily with the fact that Mr Haddon's records are different from the employer's.

[16] Looking at the matter in the round, the Authority's considered view is that the proper course of action, taking all of the above matters into account, is to round down the amount demanded from Mr Ram to a net figure of \$11,000. In effect, this is giving Mr Ram the benefit of the doubt in respect of the final \$560.24 of the original demand notice and reflects the Authority's willingness to take the records which Mr Ram produced into account, notwithstanding their informality and notwithstanding also the fact that Mr Haddon disputes them.



Determination

[17] The Authority is satisfied that Mr Myatt has properly calculated the sums owing to the former employee, Mr Haddon, based on the information provided to him, that the information was at the relevant time the best available on which to make that calculation, that Mr Ram was given every opportunity to meet his obligations by informal contact between himself and Mr Myatt and that the matter remained unresolved at the point at which Mr Myatt served on Mr Ram a demand notice pursuant to s.224(1) of the Employment Relations Act 2000.

[18] The Authority is further satisfied that the demand notice was properly prepared and served and that, save for the allowance made by the Authority in respect of the deduction of the sum of \$560.24, Mr Ram's objection to the demand notice is not made out.

[19] Accordingly, the Authority directs that Mr Ram is to pay to the Labour Inspector (Mr Myatt) the sum of \$11,000 (gross) for the use of Mr Chris Haddon. The reduction in the total amount ordered to be paid by Mr Ram to Mr Myatt reflects the Authority's willingness to take into account the informal records which Mr Ram produced immediately before the investigation meeting.

[20] Mr Ram is to be commended for attending to improvements in his record keeping for the current year; accurate records in a proper format in accordance with the law will assist him to minimise the likelihood of having to resist claims of this sort in the future, where the total quantum owed is effectively at large because of the failure by the employer to comply with its statutory obligation to keep proper wage and time records.

Costs

[21] Costs are to lie where they fall

James Crichton

Member of the Employment Relations Authority

