

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 249/09
5139515

BETWEEN JOHN ROBINSON (LABOUR
INSPECTOR)
Applicant

AND WEIGHPAC AUSTRALASIA
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: S Blick, counsel for Applicant
M Tolhurst, counsel for Respondent

Memoranda received: 21 July 2009 from applicant
8 July 2009 from respondent

Determination: 29 July 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] The Labour Inspector filed a statement of problem seeking determinations that Weighpac Australasia Limited (“Weighpac”) owed specified sums of holiday pay to two named employees of Weighpac.

[2] Weighpac said in reply that the employees had been employed in a business which Weighpac purchased. The entitlements to holiday pay accrued before their entry into employment relationships with Weighpac and were a matter between the employees and their former employer. Weighpac was never a party to any agreement to meet the cost of those entitlements.

[3] The matter was referred to mediation but was subsequently withdrawn from both mediation and the Authority.

[4] Weighpac seeks costs in the Authority in the sum of \$1925. In support it refers to emailed communications in November 2008 between counsel and the labour inspector in which it was pointed out that the liability for payment arose prior to Weighpac's purchase of the business and that there was no apportionment or any provision regarding any liability of Weighpac's set out in the agreement for sale and purchase of the business.

[5] The labour inspector says his investigation into which employer is liable for the payments is ongoing, and that it would be premature to determine costs. Any determination of costs should await any determination regarding liability.

Background

[6] Documents available to the Authority indicate the former employer offered the employees two options regarding their outstanding entitlements to annual leave; either the former employer would pay them the outstanding amounts; or the entitlement would be transferred to Weighpac. The two employees on behalf of whom the present problem was filed responded to the former employer by choosing to have their entitlements transferred.

[7] The former employer relied on an alleged oral agreement between it and Weighpac to the effect that the entitlements could be transferred to Weighpac and would be observed. Weighpac denies entering into such an agreement, either with the former employer or the employees. Both Weighpac and the former employer pointed to a provision in the agreement for sale and purchase which read:

'15.3 ... it is agreed that the Purchaser is not obliged to employ any employees of the Vendor and the Vendor shall:

(a)...

(c) pay all other entitlements owing to the employees up to the date of possession, including holiday pay ...(unless any employee has accepted employment with the Purchaser on the basis that the Purchaser has agreed to take a transfer of any accrued entitlements the employee has with the Vendor).

Determination

[8] The problem has not been resolved, and the labour inspector has left open the possibility that a further application will be filed when he has completed his investigation into which employer is liable.

[9] I therefore reserve costs for 90 days from the date of this determination, on the following conditions:

- a. if no further application has been filed within that period in respect of the substantive employment relationship problem, and having particular reference to the issue of which employer is liable for the holiday pay in question, I will proceed to determine the present application for costs;
- b. if a further application has been filed in respect of the substantive employment relationship problem, and having particular reference to the issue referred to in (a) above, this application for costs will be further reserved pending the outcome of the substantive matter.

R A Monaghan

Member of the Employment Relations Authority