

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Lynette Russell Labour Inspector of the Department of Labour
(Applicant)

AND Brian Tehurunui Hemara trading as Bass Cleaning (Respondent)

IN ATTENDANCE Lynette Russell in person
Brian Tehurunui Hemara in person

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Palmerston North, 31 January 2006

DATE OF DETERMINATION 7 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for a compliance order where the Respondent has not complied with a Demand Notice issued by the Labour Inspector pursuant to section 224 of the Employment Relations Act 2000.

The background

[2] The applicant is a Labour Inspector designated pursuant to section 223 of the Act.

[3] The respondent carries on business in the cleaning industry in the Ohakune region. The Labour Inspector concluded that Mr Hemara employed Cameron Thomas Aniwaniwa Woon (the worker) from 24 November 2001 to 5 July 2003. The inspector says that the respondent was required to pay Mr Woon the gross sum of \$1,572.37 wages at the date of the termination of employment. The inspector wrote to the respondent on 13 October 2003, 10 November 2003 and 9 January 2004 requesting copies of the time and wage records and any other relevant documents that show the remuneration paid to the worker. No documents or records were provided by the respondent.

[4] On 9 November 2004 a Notice to Compile and Deliver records for Mr Woon by the 13 December 2004 pursuant to section 232 of the Act was sent to the respondent. There was no reply and no records were provided.

[5] On 9 June 2005 the inspector sent a letter to the respondent outlining a determination of holiday pay owed to the worker by the respondent based on the worker's bank and tax records. The letter requested payment in 7 days.

[6] On 15 June 2005 a pre demand notice pursuant to section 224 (1) (b) of the Act was sent to the respondent with an opportunity to reply and comment within 7 days.

[7] On 21 June 2005 the respondent telephoned the inspector upset that the calculation had been made on the worker's records without using the respondent's records. The inspector gave the respondent until 5 July 2005 to provide any further documentation for consideration. No documentation was received by the inspector.

[8] On 26 July 2005 a Demand Notice dated 28 July 2005 was made pursuant to section 224 of the Act and was handed by a professional server to Brian Tehurunui Hemara at Winstone Pulp International Limited on State Highway 49 Ohakune at 7.12 pm on 3 August 2005.

[9] The Demand Notice required the payment of a total gross sum of \$1,572.37 for outstanding annual holiday pay and to be paid to the worker. The payment has not been made for the amount in the Demand Notice. There has been no objection lodged by the respondent in accordance with the timeframe available under the Act.

The current proceedings

[10] The statement of problem was lodged in the Authority on 4 November 2005. No statement in reply was received from the respondent. Consideration was given by me to directing the matter to mediation. However, given the failure of the respondent to file a statement in reply, service of the Demand Notice had to be achieved through a professional process server and there has been no reply to the inspector's and the Authority's correspondence, I decided not to direct the parties to mediation because in all likelihood it would not be constructive. There was no guarantee that the respondent would co operate.

[11] Mr Hemara did not lodge a statement in reply and did not provide any relevant documents for any facts that he could rely upon.

Mr Hemara's position on the matter

[12] Mr Hemara challenged the Authority's jurisdiction to proceed given the rights of the Tangata Whenua. The Employment Relations Authority's jurisdiction applies under the Employment Relations Act.

[13] He has taken issue with the inspector's conclusion that Mr Woon was an employee, saying that he was a contractor. He has raised an issue about the length of Mr Woon's service and the dates he started, resigned and resumed the employment relationship.

Findings and order of the Authority

[14] I am satisfied that the Demand Notice is in order and meets the requirements of section 224 of the Act. It is *prima facie* evidence that the respondent owes the worker the holiday pay specified in the notice. The demand notice has placed a legal obligation on the employer to comply where there has been no objection in the timeframe provided under the Act. The respondent has not complied as required. The Demand Notice is able to be enforced by compliance order.

[15] I accept the Labour Inspector's evidence that Mr Woon was employed by Brian Tehurunui Hemara and that the employment was from 24 November 2001 to July 2003 to satisfy the *prima facie* evidence of the Demand Notice. My reasons for accepting the inspector's evidence is because of the following:

- Mr Hemara did not reply in writing to the inspector's correspondence when he had an opportunity to do so. He did not follow up his telephone call to the inspector.
- He only raised the issues of the real nature of Mr Woon's position and the timing and length of Mr Woon's employment relationship for the first time at the Authority's investigation meeting.
- Mr Hemara was given by me the opportunity to produce any documents and records to support his submissions. His issues were not supported by any documentation.

- Mr Hemara did not lodge a statement in reply (although he had an opportunity to respond and reply during the investigation meeting).
- The Labour Inspector worked out a sum for holiday pay based on Mr Woon's bank and tax records.
- Mr Hemara did not object under the Act to the Demand Notice if he disagreed with it.

[16] In addition, on balance where no direct evidence has been given by Mr Woon, and Mr Hemara did not offer up any supporting documents, I have accepted the Labour Inspector's evidence.

[17] Since Mr Hemara has not made the payment of the sum specified in the Demand Notice, and not objected to the notice, it is in order for a compliance order to be made under section 137 of the Act. I therefore order Brian Tehurunui Hemara trading as Bass Cleaning of 125 Miro Street Ohakune to pay the sum of \$1,572.37 under the terms of the Demand Notice to Cameron Thomas Te Aniwaniwa Woon. Brian Tehurunui Hemara trading as Bass Cleaning is to pay the sum by 3 March 2006.

[18] No costs were claimed.

P R Stapp
Member of the Authority