

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 414
5390805

BETWEEN ERIN SPENCE (LABOUR
INSPECTOR)
Applicant

AND OAKRIDGE MASONRY
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: E Spence in person for applicant
No appearance for respondent

Investigation meeting: On the papers

Determination: 22 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 5 June 2012 the labour inspector, Erin Spence, served on Oakridge Masonry Limited (OML) an improvement notice issued under s 223D of the Employment Relations Act 2000 (the notice).

[2] The labour inspector says no action has been taken on the notice, and she seeks an order under s 137(1)(a) of the Act for compliance with the notice.

[3] The labour inspector also seeks a penalty under s 223F of the Act for the failure to comply with the notice.

Attempts to resolve the matter in the Authority

[4] The statement in reply was to have been lodged by 21 August 2012, and an extension was given to 28 August 2012. OML did not lodge a statement in reply and

has not communicated with the Authority, but on 18 September 2012 the Authority was contacted by a person apparently engaged by OML on a consultancy basis to bring its accounting records up to date and file its tax returns. She indicated that she would discuss with the directors of OML a payment plan or a settlement offer. In the light of the delays to that date I directed that any payment plan be filed by 26 September 2012, with the labour inspector to have an opportunity to reply.

[5] A proposed payment plan was lodged. The labour inspector found it unacceptable and, for reasons explained to the parties at the time and which will be discussed later in this determination, the Authority was in any event unable to move immediately to make an order embodying the terms of the proposal (or of any plan for payment by instalment). Accordingly the Authority entered into exchanges with the person acting as OML's consultant in an attempt to obtain detailed information regarding OML's financial position, as well as of any response OML may have to the application for a penalty. It was able to ascertain only in a general way that there have been ongoing efforts to complete OML's tax returns as well as discussions with the IRD regarding a schedule for the payment of taxes.

[6] OML was warned of the implications of a failure to provide any more detailed information, and of the failure to respond to the application for a penalty. The response has been as set out above. I have therefore proceeded to determine the matter on the papers.

Background

[7] OML employed Vaughan Palmer as a casual employee before, by agreement, the parties entered into a relationship of principal and contractor. The present matter concerns only the period of casual employment, and Mr Palmer's concern that he did not receive the payments of holiday pay and public holiday pay owed to him.

[8] The concern centred on the fact that Mr Palmer had been paid at an hourly rate of \$28, which OML said was inclusive of holiday pay. The labour inspector investigated the matter and provided OML with an opinion to the effect that the rate of pay was not an inclusive rate, as well as details of the amounts calculated as owed.

The amounts were \$1,755.85 in respect of public holiday pay and \$2,122.87 in respect of holiday pay.

[9] The parties attempted to resolve the matter themselves, but the labour inspector became involved again when they were unable to do so. After further discussion the labour inspector agreed to consider an enforceable undertaking under s 223B of the Act for payment of the outstanding amount by instalments. Payments were to commence on 30 March 2012. The necessary document was drafted but OML did not sign or return it. No payments were made under the undertaking.

[10] After receiving a warning in May 2012 that an improvement notice would be served, OML suggested a further instalment plan which was not acceptable to the labour inspector.

[11] The notice was served on OML on 5 June 2012. Section 223D requires that such a notice state, among other things:

- the provision the inspector believes the employer has not complied with;
- the inspector's reasons for that belief;
- the nature and extent of the failure to comply;
- the steps that could be taken in order to comply; and
- the date by which the employer must comply.

[12] Accordingly the notice cited failures to comply with: section 65 of the Employment Relations Act in that there was no written employment agreement; s 46 of the Holidays Act 2003 in that no payment was made for public holidays; s 27(1)(b) and (2) of the Holidays Act in that the employee's employment had come to an end and no payment was made in respect of the employee's final period of employment. The reasons for holding that belief included findings made from the records provided by OML, and discussions with its director Stewart Wilson. The failure was said to be systemic and that it was ongoing.

[13] The steps to be taken in order to comply with the provisions were that OML provide to the labour inspector a cheque made out to the Department of Labour for the

sum of \$3,878.72, being the total of the amounts owed under the Holidays Act. This was to occur before 5 pm on 7 July 2012.

[14] The notice also advised that, if the employer wished to object to the improvement notice, it could do so under s 223E of the Employment Relations Act by lodging its objection in the Authority within 28 days after the date of issue of the notice. Thus had OML wished to challenge the labour inspector's conclusion regarding the all-inclusive nature of the rate paid to Mr Vaughan, lodging an objection was the appropriate method of doing so.

[15] In addition the notice explained the enforcement procedures available to the labour inspector, including the possibility of an application for a compliance order and of the liability to a penalty.

[16] No objection to the notice was lodged and no payment has been made.

Compliance order

[17] The notice has not been complied with and an order for compliance is warranted.

[18] In considering the contents of the order I have taken into account s 138(4A) of the Employment Relations Act, which reads:

If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[19] The order sought here relates in whole to the payment to an employee of a sum of money. Payment by instalments can be ordered only if the employer's financial position requires, which is a high hurdle. Since only very generalised information has been available in respect of the employer's financial position I am not satisfied that the position is such that an order for payment by instalments is required.

[20] OML is therefore ordered to comply with the improvement notice by making a payment to the Ministry of Business Innovation and Employment (comprising in part the former Department of Labour) in the sum of \$3,878.72.

[21] Section 138(5) of the Act permits the Authority to adjourn a matter when it makes an order for compliance, without imposing a penalty or making a final determination, to enable the order to be complied with during the adjournment.

[22] This matter has already been the subject of very extensive delays, and several attempts at resolution. For that reason I do not consider a further adjournment would serve any purpose and proceed under s 137(3) to specify a time within which the compliance order is to be obeyed. I further order that payment be made under the order by the close of business on 14 days from the date of this determination.

Penalty

[23] No reason for the failure to observe the improvement notice has been provided. In any circumstances a failure to make payments owed under the Holidays Act – which is the underlying difficulty here – is a serious matter. The failure to act on a notice whose purpose is the correction of the underlying difficulty without resorting to legal proceedings, makes matters worse. Accordingly it is appropriate to reflect the seriousness of the circumstances, and to reinforce the role and importance of improvement notices, by ordering the payment of a penalty.

[24] OML is ordered to pay into the Authority a penalty in the sum of \$750.

Summary of orders

[25] OML is ordered to comply with the improvement notice by:

- making a payment to the Ministry of Business Innovation and Employment in the sum of \$3,878.72; and
- making the payment by the close of business on 14 days from the date of this determination.

[26] Interest is to be paid on the above amount calculated at 5% pa from 5 June 2012 to the date of payment.

[27] OML is also ordered to pay a penalty in the sum of \$750 for the failure to comply with the improvement notice.

Costs

[28] I further order that the labour inspector be reimbursed for the Authority's filing fee in the sum of \$71.56.

R A Monaghan

Member of the Employment Relations Authority