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Spence (Labour Inspector) v Samjen Limited (Auckland) [2013] NZERA 958; [2013] NZERA Auckland 574 (16 December 2013)

Last Updated: 11 June 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2013] NZERA Auckland 574
5437887

BETWEEN ERIN SPENCE, LABOUR INSPECTOR

Applicant

A N D SAMJEN LIMITED Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person

Craig Aspinall, Director of Respondent

Submissions Received: 6 December from the Applicant

11 December from the Respondent

Investigation Meeting: On the papers

Date of Determination: 16 December 2013

DETERMINATION OF THE AUTHORITY

A. There is no order for a penalty.

B. I order that Ms Spence, the Labour Inspector, be reimbursed for the Authority's filing fee in the sum of \$71.56.

Employment relationship problem

[1] The Labour Inspector, Ms Erin Spence, served on the respondent, Samjen Limited (Samjen) an improvement notice under [s.223D](#) of the [Employment Relations Act 2000](#) (the Act) requiring compliance by 5 September 2013.

[2] The improvement notice advised that Ms Spence reasonably believed that

Samjen had failed to comply with:

- [Section 27\(1\)\(b\) of the Holidays Act 2003](#) – employer must pay employee annual holidays when the employee's employment has come to an end.

[3] The improvement notice required Samjen to take action to ensure compliance with the above provision of the [Holidays Act](#) by 5:00pm on 5 September 2013. Prior to the issuing of the improvement notice, Ms Spence said arrangements had been made for Samjen to voluntarily pay the outstanding holiday pay but it had failed to do so.

[4] Samjen paid the outstanding holiday pay on 30 October 2013.

[5] The Labour Inspector is seeking an order that the Authority award a penalty against Samjen under s.223F(1) of the Act for failing to comply with the improvement notice under s.223D. The Labour Inspector also seeks reimbursement of the \$71.56 filing fee.

Background Facts

[6] In response to a complaint made by one of Samjen's former employees, Ms Spence began investigations into whether there was outstanding holiday pay due by Samjen pursuant to [s.27\(1\)\(b\)](#) of the [Holidays Act 2003](#). Ms Spence states that there was numerous correspondence between her and Mr Craig Aspinall, director of Samjen between March and July 2013 regarding the outstanding holiday pay. Ms Spence says that she tried to have an improvement notice served on Samjen on the 26 July but this was not possible because the business had closed. The improvement notice was finally served on 15 August giving Samjen until 5 September to comply.

[7] On the 4 September, Ms Spence received an email from Samjen that the outstanding holiday pay had been made when in fact it was not made until after she informed Samjen of an application to be filed in the Authority for a compliance order. The respondent did not comply with the improvement notice until 30 October.

[8] On the 4 November 2013, Ms Spence filed an application in the Authority seeking a penalty under s.223F(1) of the Act for failure by Samjen to comply with the improvement notice by the due date and seeking reimbursement of the \$71.56 filing fee.

[9] Mr Craig Aspinall responded to the statement of problem largely relying on the respondent's financial difficulties as the reason for non-compliance with the improvement notice by the due date. Mr Aspinall seeks that no penalty be imposed because of the financial burden that it would place on Samjen.

[10] I find that Samjen did not comply with the improvement notice within the time specified because of the financial difficulties it was facing. However, it had complied with the improvement notice by the time Ms Spence brought her application in the Authority seeking a penalty. I decline to order a penalty.

Costs

[11] I order Samjen to reimburse Ms Spence, the Labour Inspector, for the Authority's filing fee in the sum of \$71.56.

Anna Fitzgibbon

Member of the Employment Relations Authority

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