



[4] The history of this file and Discount's involvement in the Authority's investigation to date, supports the Inspector's belief as being an entirely reasonable one in the circumstances.

[5] In the statement of problem Mr Taljaard has outlined in detail the exhaustive attempts he made to investigate the claims with Mr Pearce, and the various responses he received. Mr Taljaard allowed the company every opportunity and gave all relevant information about the claim but was not provided with the wage information needed to investigate the company's initial response that the employees were not employees but contractors. That assertion was later withdrawn, the company explaining that it had received bad advice from a consultant about the nature of the work relationship.

[6] There were also allegations made that the employees had stolen from their employer, yet no charges have been laid with the Police, or at least the employees are not aware of any although it has been a year since the employment ended.

[7] As well as having poor consultancy advice, Mr Raihman, during the investigation meeting, referred to a falling out with the company's accountants as a reason why information kept by Discount could not readily be obtained about wages and holiday payments.

[8] The company filed a statement in reply after the statement of problem was served on it. In it Discount noted that the parties had not tried to resolve the problem using mediation. The reason given was that mediation had not been offered by the Labour Inspector.

[9] Accordingly the matter was referred by the Authority to the Mediation Service to arrange a mediation, which the company from its reply appeared willing to undertake. However, the Mediation Service was unable to arrange a date with Discount and advised that no one from the company had called back or replied to emails requesting confirmation of mediation dates offered.

[10] To address that situation, the Authority issued a notice on 28 April 2009 directing the parties to mediation. The notice referred to s 159 of the Employment Relations Act and it expressly mentioned the requirement for the parties to comply with the direction and attempt in good faith to reach an agreed settlement to their differences.

[11] The formal direction was not complied with. Again the Mediation Service advised the Authority of a lack of success in contacting Mr Ward Pearce, let alone setting down mediation. The advice was that Mr Pearce had completely ignored phone messages left for him and emails sent to him, despite the direction. Mr Raihman when spoken to confirmed receipt of the direction notice, saying that he would discuss this with Mr Pearce, but he did not get back to the Mediation Service either.

[12] Next, in the usual way, the Authority advised the parties that it would hold a telephone conference to discuss a timetable for progressing the investigation.

[13] The company was notified of the day and time of the telephone conference and its purpose. Discount was advised that it would be contacted at its telephone number at that time.

[14] Although an Authority support officer rang Discount there was no reply or response from it and a date was then set down with Mr Taljaard for the investigation meeting.

[15] Notices were sent out to the company at both its registered office and place of business advising of the meeting on 7 August 2009.

[16] Mr Raihman attended the meeting on behalf of the company.

[17] He said that he had all of the information for verifying whether the employees were entitled to holiday pay and also showing that they had been overpaid wages because of mistakes in the pay rate for some of the hours. Unfortunately, he had not brought with him to the meeting records which had that information in them. Mr Raihman said that mediation was the appropriate place to discuss and try and settle the employees' claims as well as the company's claim, which he referred to as a counterclaim against them.

[18] The Authority noted that the company had had an opportunity to attend mediation but had failed to do so and it had also had an opportunity to discuss pursuing a so-called counterclaim when the telephone conference was held, but it had failed to take part in that as well.

[19] In any event any counter claim would have to be brought against the employees rather than the Labour Inspector who is the applicant in this case.

[20] It seems to me that Discount has remained intent on obstructing, evading or delaying the resolution of the employees claims brought through Mr Taljaard.

[21] I am satisfied the Inspector has calculated, in accordance with the Holidays Act, amounts due to the two workers. Under the Act the calculations are to be based on total gross earnings, and the figure used for that has been obtained by the workers from their IRD files. The information is that supplied by Discount itself, and may be assumed to be correct, despite Mr Raihman saying that it needs to be verified with records the company has persistently failed to supply. The calculations are also based on banking records produced by the employees and their evidence of any annual leave actually taken by them.

### **Determination**

[22] I am therefore satisfied from the evidence given by the Inspector and from Mr Guptill and Mr Doherty, that the claims have been properly and fully made out.

[23] I find that Mr Jason Guptill is entitled to recover \$3,371.44 gross as outstanding statutory annual holiday pay, and Mr Erran Doherty is entitled to recover \$8,659.56 for the same reason.

[24] I award interest to be paid on those arrears at the rate of 4.5%, which is to be applied from the date Mr Taljaard lodged the claim, 18 February 2009, until the arrears have been paid in full.

[25] I find that Discount Crane Hire Limited has deliberately tried to evade its statutory obligations (i) to pay holiday pay due to two employees and (ii) to supply information to the Inspector after being required to do so. Potentially there were four breaches of the Act for which a penalty of \$10,000 could have been sought for each, but the Inspector has reasonably confined the claim to a total maximum of \$10,000.

[26] The breaches are of s 75(2)(a) of the Holidays Act 2003, for failing to pay annual holiday pay on termination of employment, and s 75(2)(e) for failing to provide a holiday record to the Inspector upon request. I order the company to pay

\$5,000 for those breaches of the Holidays Act. The penalty is to be paid to the Crown.

[27] Discount is also ordered to pay \$70 to reimburse the filing fee on this application.

[28] As the Inspector is aware, an application may be made by him to the Authority for an order of compliance if this determination is not met by Discount Crane Hire Limited within a reasonable period of time.

A Dumbleton  
**Member of the Employment Relations Authority**