

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Rama Yeleswaram, Labour Inspector (Applicant)
AND Brentor Holdings Ltd t/a Captains Casino (Respondent)
REPRESENTATIVES Rama Yeleswaram In person
Amelia Sarsfield, Advocate for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 4 March 2005
DATE OF DETERMINATION 9 March 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The Labour Inspector seeks to recover for the use of Thomas Coates (a former employee of Brentor Holdings Ltd t/a Captains Casino) arrears of holiday pay alleged to be owing to him and arrears of holiday pay alleged to be owed to him in respect of lieu days he was entitled to for days worked by him on statutory holidays.

Note: The parties do not dispute that the correct name for the respondent in this matter is Brentor Holdings Ltd t/a Captains Casino. The respondent's name on the Authority's record and this Determination has been amended accordingly.

Background

Mr Coates was employed by the respondent as a Bar worker from 9 September 1999 until his resignation which took effect from 20 August 2003.

In October 2003 Mr Coates made a complaint to the Employment Relations Service of the Department of Labour alleging non payment of annual and statutory holiday pay.

The Labour Inspector commenced and completed a thorough investigation of Mr Coates' claims. Unfortunately (and this is not in dispute between the parties) the respondent has not kept the time and wage record that is required pursuant to s.130 of the Act. The Labour Inspector has, therefore, assessed the arrears owing in reliance on the information provided by the worker including some work rosters. She has been assisted too by the admissions by the respondent in respect to holidays taken and statutory days worked.

Unfortunately, the respondent did not respond to the formal demand made by the Inspector. Nor was the matter resolved in mediation. It now falls to be determined following a formal investigation meeting.

The Evidence

The essence of the worker's situation as submitted by the Labour Inspector and the worker is this. Mr Coates took two weeks paid leave in respect of each of his first three years of employment. He was entitled to three weeks paid leave in respect of each of those years and the Labour Inspector seeks to recover for his use arrears of holiday pay owed to him in respect of his entitlement to a third weeks leave for each of the years in question. In respect of his last 11 months of employment it is submitted that Mr Coates was entitled to 6% of his gross earnings. Mr Coates in fact took two weeks leave in that 11 month period and the Labour Inspector seeks to recover (in respect of that period) the difference between the gross pay he received in respect of the leave taken and 6% of gross earnings for that period.

The Labour Inspector also seeks a penalty in respect of the respondent's failure to keep the wage and time record required under s.130 of the Act. The Labour Inspector also seeks costs in this matter.

The respondent's position (submitted by Ms Sarsfield) is that Mr Coates received cash payments to compensate him for the third week of annual leave to which he was entitled. The only submission made by the respondent in respect of its failure to pay the arrears alleged to be owed on the demand of the Labour Inspector is that an agreement was reached with Mr Coates to pay a sum he requested at the time of his resignation (\$1300 net). In the event Mr Coates did not conclude this agreement reached between himself and Ms Sarsfield to finalise the relationship. It was also of concern to her that having failed to abide by the agreement they shook hands on Mr Coates has made no further effort to sit down with her to resolve matters face to face.

Discussion and Determination

It is not in dispute that the respondent has kept no wage and time record in relation to Mr Coates' employment.

Section 130 of the Act requires each employer to keep a wage and time record for each employee employed. Where an action to recover arrears of wages or other monies owing is taken and evidence is brought to show that the employer has failed to keep/produce a wage and time record and this has prejudiced the ability to bring an accurate claim under s.131 of the Act the Authority may (unless the employer proves the employee's claims are incorrect) accept, as proved, all claims made by the employee as to the wages paid and hours, days and time worked.

Fortunately in this case the Inspector's investigation has resulted in a large amount of undisputed evidence being made available to the Authority (including information provided by the respondent). This information (albeit there are gaps) allowed the Inspector to reconstruct the history of wages paid, holidays taken and statutory days worked by Mr Coates. The availability of this information lessens to a considerable degree the extent to which I must rely only on information provided to the Labour Inspector by Mr Coates.

The major difference (and it is significant) in the evidence of the parties in relation to the claim for arrears of annual holiday pay lies in Mr Coates' claim he did not take and was never paid for a third

week of annual leave in the first three years of his employment. The employer's representative submitted (not convincingly) that he received an extra week's pay in cash to compensate him for the third week of his entitlement. Ms Sarsfield acknowledged she had not personally made any of these payments and had not seen any documented record in the company's records to support this claim. Neither do the records of payments made to Mr Coates show any extra payment being made by the respondent to him. In all I find it most improbable that Mr Coates received the payments claimed.

I note too such payments would not satisfy the purpose of the statute that employers are to allow employees three weeks **holiday on pay** following each completed year of employment. The law (s.11 of the Holidays Act 1981) is clear on this point. The law is likewise clear (s.7A) that workers are entitled to a paid holiday in lieu when they work on a statutory holiday in circumstances where they receive ordinary pay for the statutory day worked. (Mr Coates received his ordinary pay for the statutory days he worked).

Section 131 of the Employment Relations Act 2000 provides for the recovery of arrears of wages or other monies owing to a worker where an employer has failed to meet its statutory or contractual obligations to pay wages, holiday pay or other monies payable to an employee. In this case the Labour Inspector is bringing the action for recovery of arrears of holiday pay.

I find the Labour Inspector has proven arrears are owed to the worker in respect of annual holiday pay and pay for lieu days not allowed or paid. My orders (below) reflect my assessment of the sums owed to the worker.

Determination

The respondent is directed to pay to the Labour Inspector for the use of Mr Coates \$3,728.41 gross in arrears of holiday pay as follows:

- \$2,262.24 gross as arrears of annual holiday pay owing to him.
- \$1,466.17 gross as arrears of holiday pay in respect of lieu days he is entitled to for statutory holidays worked by him.

From the net sum to be paid (arrived at after deducting PAYE) the respondent is entitled to deduct \$500 net in recognition of the debt owed by him to the respondent.

Penalty

The Act is clear¹. Section 130 requires every employer to keep a wage and time record in respect of each employee. The employer's representative acknowledged in her evidence that no wage and time record has been kept by the respondent.

Given the respondent's admissions I find the case for a penalty to be proven and I direct (pursuant to ss.130 (4), 133 & 135 of the Act) that the respondent pay a penalty of \$1000. The penalty is to be paid to the Authority from where it is to be paid to the Crown Bank Account.

The respondent in this matter is strongly counselled to take steps to meet their statutory obligations in this regard.

¹ Employment Relations Act 2000.

Costs

The Department through the Labour Inspector has been put to considerable cost in pursuing this matter to resolution where it has been successful.

Accordingly I direct the respondent to pay to the Labour Inspector the sum of \$500 to reimburse the Department for costs incurred in bringing this matter to a conclusion.

Summary of orders

The respondent is directed to pay the following:

- **To the Labour Inspector for the use of the worker \$3728.41 gross being arrears of holiday pay (for annual holidays and lieu days) owed to him. From the net sum (after PAYE) the employer is entitled to deduct \$500 being repayment of a loan to the worker.**
- **To the Labour Inspector costs in the sum of \$500 net.**
- **To the Employment Relations Authority \$1000 as a penalty for failure to keep the wage and time record required to be kept pursuant to s.130 of the Employment Relations Act 2003.**

Janet Scott
Member of Employment Relations Authority