

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Lynn Booker (Labour Inspector) (Applicant)
AND Kirsty Gill t/a Gills Cleaning Services (Respondent)
REPRESENTATIVES Lynn Booker in Person
No appearance for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 14 September 2006
DATE OF DETERMINATION 15 September 2006

DETERMINATION OF THE AUTHORITY

[1] Mrs Lynn Booker, a Labour Inspector with the Department of Labour, claims Ms Janette Milne is owed \$555.69 for holiday pay. In addition to the payment of the holiday pay Mrs Booker seeks payment of interest on the sum, a penalty for the failure to keep and produce wage and time records, and costs.

[2] No statement in reply has been received from the respondent. Following a nil response to the initial notification of the employment relationship problem being filed in the Authority, a second letter was forwarded to the address for service of the respondent. The letter requested the respondent to file a statement in reply and advised that failure to do so would require the respondent to seek leave to respond to, or defend the matter. That letter was accepted and signed for by "GILL".

[3] On 3 July 2006 a copy of the notice of investigation meeting was couriered to the respondent. This document was accepted and signed for by "GILL". I am satisfied the respondent has been served notice of the investigation meeting.

[4] The investigation meeting commenced at 10.00am on 14 September 2006. The respondent did not make an appearance at that time. The notice setting down the investigation meeting sets out the consequences of non-attendance. I adjourned the meeting briefly at 10.05am to allow the respondent time to appear.

[5] During the adjournment I contacted Mr Michael Barraclough, Employment Relations Authority Support Officer, and asked him to try and make contact with the respondent on telephone numbers provided by the Labour Inspector.

[6] Mr Barraclough reports that he rang both Ms Gill's home phone number and her cell phone number. Neither phone was answer and so he left messages regarding the investigation meeting.

[7] I reconvened the investigation meeting at about 10.20am. It follows that the respondent has shown no good cause for failing to attend or be represented at the investigation meeting. I therefore determined to act as fully in the matter before me as if the respondent had duly attended or been represented, pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000.

Holiday pay claim

[8] Ms Milne was employed by Kirsty Gill t/a Gills Cleaning Services as a cleaner on 22 November 2002. At the time of the termination of her employment Ms Milne was paid an hourly rate of \$22.00 per hour.

[9] Wage and time records were provided to Ms Booker for the period 5 December 2004 to 28 August 2005. Despite requests, no further wage and time records have been provided. I am satisfied, pursuant to section 132 of the Employment Relations Act 2000, that Mrs Booker has shown that Kirsty Gill has failed to keep or produce wages and time records and that this has prejudiced Ms Milne's ability to bring an accurate claim under s.131 of the Act.

[10] Mrs Booker told the authority that she had calculated the holiday pay claim on the basis of the wages and time records that were produced together with Ms Milne's IRD Summary of Earnings for the period of her employment 2002-2004.

[11] I am satisfied that Ms Milne is owed \$555.69 gross for outstanding holiday pay.

Kirsty Gill t/a Gills Cleaning Services is ordered, pursuant to section 228(1) of the Employment Relations Act 2000 to pay to the Labour Inspector the sum of \$555.69 gross. This amount is to be paid within 28 days of the date of this determination.

Interest

[12] Mrs Booker has claimed interest on the above amount. As Ms Milne has not had the use of the money since the termination of her employment on 28 August 2005 I think it fit that she have interest on it.

Kirsty Gill t/a Gills Cleaning Services is ordered to pay interest of 8.5% on the outstanding holiday pay, from 28 August 2005 until the date of payment, in accordance with this determination.

Penalty

[13] In circumstances where an employer fails to keep adequate wages and time records, or fails to produce those records on request, section 130 of the Act provides for a penalty to be imposed by the Authority.

[14] Mrs Booker gave evidence as to the steps she took to allow Kirsty Gill to produce the requisite wages and time record. No records for the period 2002-2004 have been provided. Mrs Booker has concluded, reasonably in my opinion, that no such records have been kept. Accordingly, I find Kirsty Gill was in breach of section 130 of the Act.

[15] A penalty should not be ordered when the breach is trivial (*see Otago Southland Foods etc v Southern Foods Ltd* [1985] ACJ 656). In this matter Mrs Booker was unable to accurately make out Ms Milne's claim for unpaid holidays as a result of the wages and time records not being produced by Kirsty Gill. Instead the Labour Inspector had to rely on IRD Summaries. Under the circumstances it is appropriate that a penalty be imposed, but this should be at the low end of the range provided by the Act.

Kirsty Gill t/a Gills Cleaning Services is ordered to pay a penalty of \$250 under s.130 of the Act. The penalty is to be paid to the Crown.

Costs

[16] This application required a filing fee of \$70.00. It is appropriate that the respondent reimburse the fee.

Kirsty Gill t/a Gills Cleaning Services is ordered to pay to the Labour Inspector the sum of \$70.00, within 28 days of the date of this determination.

Mrs Booker is directed to serve a copy of this determination on Kirsty Gill t/a Gills Cleaning Services forthwith.

Vicki Campbell
Member of Employment Relations Authority