

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Lynn Booker, Labour Inspector (Applicant)  
**AND** Brett Charles Storey t/a The Alteration Shop (Respondent)  
**REPRESENTATIVES** Lynn Booker, Labour Inspector in person  
Brett Storey in person  
**MEMBER OF AUTHORITY** Robin Arthur  
**INVESTIGATION MEETING** 24 March 2006  
**DATE OF DETERMINATION** 3 April 2006

**DETERMINATION OF THE AUTHORITY**

[1] The applicant Labour Inspector seeks orders requiring the respondent to pay, with interest, outstanding pay for holidays, public holidays and alternative holidays to a former employee, Thomas Tai; to pay penalties for breaching the Holidays Act 2003 and for not providing properly requested wage, time and leave records; and to reimburse her filing fee for this claim.

[2] The investigation meeting on this matter also dealt with another matter in which the Labour Inspector was applying for orders in respect of another employee. Mr Tai attended the meeting to answer any questions from the Authority in relation to the claim made on his behalf by the Inspector. The respondent objected to Mr Tai's presence and said that he would have bought a legal representative if he had known the meeting was public and would involve others than himself, the Inspector and the Authority member. I am satisfied that the respondent was properly notified of the meeting. Following an earlier telephone conference with him and the Inspector, I had provided an extension of time for him to provide a statement in reply. The respondent was given ample opportunity to prepare for the meeting and arrange assistance from a legal representative. During the investigation meeting the Inspector, Mr Tai and the respondent answered questions. The Inspector and the respondent had an opportunity to make any additional comments they wished to make.

[3] The respondent's business employs ten staff and advertises itself as offering Auckland's finest clothing alteration service. Its clients include some high profile fashion houses.

[4] The respondent accepts that Mr Tai worked for him from 9 February 2000 to 17 February 2005 as a courier driver. The Inspector's application relates only to statutory entitlements arising in 2004 and 2005.

[5] Mr Tai presented a letter of resignation to the respondent on 17 February 2005 and left work that day. Mr Tai had no written employment agreement. The respondent has not disputed the Inspector's calculation of the pay for holidays, public holidays and alternative holidays owed to Mr

Tai. The respondent accepts that he was requested to provide wage, time and leave records by the Inspector but did not provide them. He says that he is aggrieved because Mr Tai left without giving more notice and he had to do the courier work himself until a replacement was found.

### **Holiday pay**

[6] In the absence of wage, time and holiday records requested by the Inspector under s229(1)(c) of the Employment Relations Act 2000, the Inspector relies on Tai's evidence of his earnings and entitlements which is not disputed by the respondent. Having reviewed the Inspector's calculations I am satisfied that at the date of his resignation Mr Tai had entitlements under the Holidays Act 2003 to payment of \$2579.72 gross holiday pay, \$104.00 gross public holiday pay and \$212.72 alternative holiday pay and that the respondent has failed to pay these entitlements. **The respondent is ordered to pay Mr Tai the sum of \$2896.44 gross in outstanding holiday pay, public holiday pay and alternative holiday pay.**

[7] The respondent is not entitled to withhold Mr Tai's statutory entitlements because he considers Mr Tai did not provide sufficient notice of resignation. In the absence of an express term in a written agreement, there is an implied term that both parties will give reasonable notice of termination of the agreement. However any argument the respondent may have had that Mr Tai breached an implied term of his employment by leaving on short notice would also have to consider the respondent's own breach of the statutory requirement for written employment agreements. Whatever the merits of those arguments, they do not extinguish Mr Tai's right to be paid what he was owed under the provisions of the Holidays Act 2003. Despite the Labour Inspector confirming those entitlements, the respondent repeatedly refused to pay what he owed to Mr Tai.

### **Interest**

[8] The Authority has discretion to award interest on unpaid holiday pay. The respondent's deliberate withholding of Mr Tai's statutory entitlements warrants an award of interest for the period he has been denied what is owed to him. The interest rate calculated under clause 11 of Schedule 2 of the Employment Relations Act is to be at a rate not greater than the 90-day bill rate at the date of the order plus 2 per cent. Today's 90-day bill rate (rounded to one decimal place) is 7.5 per cent. In the present finance market I exercise my discretion to set interest at one per cent point higher than this, that is at the rate of 8.5 per cent a year. **The respondent is ordered to pay interest on the amount of \$2896.44 owed to Mr Tai at the interest rate of 8.5 per cent for the period from 18 March 2005 to the date of this order, which I calculate to amount to \$256.98.**

### **Penalties**

[9] I am satisfied that the respondent is liable for failure to comply with the requirements of sections 24 and 25 of the Holidays Act 2003 to calculate and pay holiday pay owing to Mr Tai. I accept the Inspector's submission that this warrants imposing a penalty under s75 of the Holidays Act. The respondent had no argument that Mr Tai had not worked for him and accrued the minimum statutory entitlements. His refusal to pay it was deliberate and unacceptable. A penalty is warranted.

[10] I am satisfied that the respondent is liable for failure to comply with the requirements of s40(3) of the Holidays Act 2003 to pay time-and-a-half for work done by Mr Tai on 28 December 2004 and 4 January 2005 which were his transferred observance days for the Boxing Day and 2 January public holidays in those years. The respondent's refusal to pay that entitlement was deliberate and unacceptable. A penalty is warranted.

[11] I am satisfied that the respondent is liable for failure to comply with the requirements of s60 of the Holidays Act 2003 to pay for alternative holidays. The respondent's refusal to pay that entitlement was deliberate and unacceptable. A penalty is warranted.

[12] The Inspector has also applied for the imposition of two separate penalties for the respondent's failure to provide wages and time records requested under s229(1)(c) of the Employment Relations Act 2000 and holiday and leave records under s75(2)(e) of the Holidays Act 2003. The request for Mr Tai's wage and time records and holiday records, made to the respondent on 2 May 2005, was stated to be under s229(1)(c) and (d) of the Employment Relations Act 2000. Those provisions refer to wage, time, holiday and leave records. In evidence the respondent confirmed he had wages, time and leave records. He simply refused to hand them over, even when properly requested to do so, because he "feels aggrieved". To impose a penalty under the Holidays Act 2003 would 'double up' for the single event. However a single penalty under the Employment Relations Act is warranted because the respondent's refusal to provide the requested records was deliberate and unacceptable.

[13] Mr Tai contacted the Labour Inspectorate regarding his claim on 11 March 2005. The Inspector's application for a penalty was made within 12 months of the claim coming to the Inspectorate's attention.

[14] The Inspector has sought the maximum penalty of \$5000 in the case of an individual in respect of each breach. The maximum is reserved for the most serious of cases. The respondent accepted that his business was sophisticated and he had access to advice from his accountant and his lawyer on how he ran it. If each of the four statutory breaches identified above were taken separately, in the circumstances of this case, I consider they would each warrant a penalty in the range of \$500 to \$1000. Having regard to the totality of the respondent's conduct, the seriousness of his deliberate breach of an employee's statutory entitlement and the range of penalties imposed in similar cases, I consider a global penalty of \$1200 is warranted in respect of the four breaches. **The respondent is ordered to pay to the Crown a penalty of \$1200 for breaches of the Holidays Act 2003 and the Employment Relations Act 2000.**

[15] Following the investigation meeting the Inspector made an additional submission regarding the application of any penalties imposed on the respondent. She asked that half of any penalties imposed be paid to Mr Tai. She said Mr Tai had waited a considerable time for this matter to be resolved and had to provide information to her to prepare the claims. I accept that Mr Tai has had a long wait for his entitlements. However the penalties imposed on the respondent are to punish him for breaking the law, not to compensate Mr Tai for the delay in getting what he is owed. The effect of the delay is already acknowledged by an award of interest, at commercial rates.

### **Filing fee**

[16] The Inspector has succeeded in her application. The Department of Labour is entitled to reimbursement of \$70 for her filing fee.

### **Summary of orders**

[17] **The respondent is ordered to pay to the Labour Inspector:**

- (i) For the benefit of Thomas Tai, the sum of \$2896.44 gross in outstanding holiday pay, public holiday pay and alternative holiday pay, and the further sum of \$256.98 in interest on that amount; and**

**(ii) the sum of \$70.00 in reimbursement of the Inspector's filing fee.**

**[18] The respondent is ordered to pay a penalty of \$1200 for breaches of ss 24, 25, 40(3) and s60 of the Holidays Act 2003 and s229(1)(c) and (d) of the Employment Relations Act 2000. The penalty is to be paid into the Employment Relations Authority and then paid by the Authority into the Crown bank account.**

Robin Arthur  
Member of Employment Relations Authority