

*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 outstanding holiday pay, with interest, to a former employee, Dimple Jain; 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. The employee involved in that matter attended the meeting. The respondent objected to the presence of that employee 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 and the respondent answered questions and 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 Ms Jain worked for him from 10 November 2003 to 9 October 2004 as a machinist earning \$20,708 in that time. She resigned by email on 18 October 2004 while off work on annual leave. He accepts that he was requested to provide wage, time and leave records by the Inspector but did not provide them. He has not disputed the Inspector's calculation of the holiday pay owed to Ms Jain. He says that he is aggrieved by the claim on behalf of Ms Jain as he believes she resigned to work elsewhere rather than for the reason given of ill-health. Ms Jain had no written employment agreement.

## **Holiday pay**

[5] 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 Ms Jain's evidence of her earnings and entitlements which is not disputed by the respondent. I am satisfied that at the date of her resignation Ms Jain had a statutory entitlement to payment of \$890.48 holiday pay under the Holidays Act 2003 and that the respondent has failed to pay that entitlement. **The respondent is ordered to pay Ms Jain the sum of \$890.48 gross in outstanding holiday pay.**

[6] The respondent is not entitled to withhold Ms Jain's statutory entitlements because of an unsubstantiated claim that she began work elsewhere while on leave. He provided no evidence of his allegation. Despite the Labour Inspector confirming Ms Jain's entitlements, the respondent repeatedly refused to pay what he owed her.

## **Interest**

[7] The Authority has discretion to award interest on unpaid holiday pay. The respondent's deliberate withholding of Ms Jain's statutory entitlement warrants an award of interest for the period she has been denied what is owed to her. 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 holiday pay owed to Ms Jain at the interest rate of 8.5 per cent for the period from 19 October 2005 to the date of this order, which I calculate to amount to \$34.62.**

## **Penalties**

[8] 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 Ms Jain. I accept the Inspector's submission that this warrants imposing a penalty under s75 of the Holidays Act. The respondent had no argument that Ms Jain had not worked for him and accrued the minimum statutory entitlements. His refusal to pay was deliberate and unacceptable. A penalty is warranted.

[9] I am satisfied that the respondent is liable for failure to comply with the Inspector's request under s229(1)(c) of the Employment Relations Act 2000 to produce wage, time and leave records. The respondent's evidence at the investigation meeting was that he had such records but chose not to produce them because he was "aggrieved" by Ms Jain's claim when he had "agreed to give her a chance" and employed her. That is not sufficient reason to refuse to comply with the statutory requirement to produce the requested records. The respondent's deliberate action warrants a penalty.

[10] Ms Jain contacted the Labour Inspectorate regarding her claim on 9 May 2005. The Inspector's application for a penalty was made within 12 months of the claim coming to the Inspectorate's attention.

[11] For each breach, the Inspector has sought the maximum penalty in the case of an individual being \$5000. This 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 the 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 \$800 is warranted in respect of both breaches. **The respondent is ordered to pay to the Crown a penalty of \$800 for breaches of the Holidays Act 2003 and the Employment Relations Act 2000.**

[12] 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 Ms Jain. She said Ms Jain 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 Ms Jain has had a long wait for her entitlements. However the penalties imposed on the respondent are to punish him for breaking the law, not to compensate Ms Jain for the delay in getting what she is owed. The effect of the delay is already acknowledged by an award of interest, at commercial rates.

### **Filing fee**

[13] The Inspector has succeeded in her application. The Department of Labour is entitled to be reimbursed the sum of \$70 for her filing fee.

### **Summary of orders**

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

**(i) for the benefit of Dimple Jain, the sum of \$890.48 gross in outstanding holiday pay and the further sum of \$34.62 as interest on that amount; and**

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

**[15] The respondent is ordered to pay a penalty of \$800 for breaches of ss 24, and 25, of the Holidays Act 2003 and s229(1)(c) 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