

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 369/07
5083618

BETWEEN KRIS METCALF (LABOUR
INSPECTOR) Applicant

AND M TOROK HOLDINGS LTD
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Applicant in person
 John Kahukiwa for Respondent

Investigation Meeting: 27 November 2007

Determination: 27 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] During 2003 and 2004 Ms Tracey Crawford worked as a hairdresser in a salon operated by the respondent, M Torok Holdings Ltd. It is not in dispute that Ms Crawford received no holiday pay in relation to the period she worked for the respondent. This was because, at the time, the respondent held to the view that she was engaged pursuant to a contract for services. However in a determination dated 3 October 2006 (AA309/06) the Authority determined that Ms Crawford had in fact been an employee.

[2] In March 2007 Ms Crawford sought the assistance of a Labour Inspector in pursuing a claim for holiday pay. On 8 June 2007 Mr Metcalf submitted claims for \$4,592.87 (payment for annual holidays) and \$2,148.75 (payment for statutory holidays) to the respondent on her behalf. Mr Rodney Rundstrom, former director of the respondent, replied:

“the company has no bank accounts or assets and hence no means to make the payment awarded. No provision was made for this claim as the company reasonably understood that no such claim was being pursued.”

[3] The respondent did not meet the request for payment and in due course Mr Metcalf lodged the claim in the Authority along with a claim for interest, a penalty claim pursuant to s.135 of the Employment Relations Act 2000 and a claim for disbursements of \$70.00 in relation to the fee for filing this action.

[4] The respondent has advised that neither the obligation to pay holiday pay nor the quantum claimed (which was calculated from records provided by the respondent) is disputed. The respondent wishes to defend only the claim for penalty. Its defence is that it simply could not pay as it had no assets whatsoever by the time the entitlement to holiday pay was established.

[5] Mr Rundstrom told me in his evidence that the business the company operated was sold in 2005. By the end of March 2006 the final accounts had been completed and the assets of the company had been distributed. The respondent's bank account had been closed and it ceased to be registered for GST purposes. Mr Rundstrom also advised that he retired as a director on 31 March 2006, although he acknowledged that his name may have remained on the Companies' Register for some time thereafter. By this time, he said, the winding up of the respondent would have proceeded but for the proceedings in the Employment Relations Authority.

Determination

[6] Penalties are punitive in nature. In this case the employer's liability for holiday pay was not established until October 2006, by which time the company was without assets. In such circumstances punishment is not appropriate. No penalty is awarded.

[7] The applicant is entitled, as already established, to the undisputed sums owed for annual and statutory holidays. The Inspector has also claimed interest on these sums pursuant to Clause 11 of the Second Schedule to the Employment Relations Act 2000 which provides:

“in any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the Authority thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.”

[8] Pursuant to this provision I order the payment of interest, from the date of this determination to the date of payment, at the rate of 9% per annum.

[9] Finally I am satisfied that the filing fee should be reimbursed.

[10] **I therefore make the following orders:**

- i. The respondent is ordered to pay to the applicant the sum of \$6,741.62 gross being payment for annual and statutory holidays, plus interest on that amount at the rate of 9% per annum from the date of this determination until the date of payment, and**
- ii. The respondent is further ordered to pay to the applicant the sum of \$70.00 costs.**

Yvonne Oldfield

Member of the Employment Relations Authority