

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 155/08
5125957
5130106
5132202

BETWEEN LABOUR INSPECTOR JON
 HENNING
 Applicant

AND BROADBAT LIMITED
 1st Respondent

AND GREGORY KEITH THOMAS
 2nd Respondent

Member of Authority: James Crichton

Representatives: Jon Henning in person
 Greg Thomas for Respondents

Investigation Meeting: on the papers

Submissions Received: 29 August 2008 from the applicant
 No submissions from the respondents

Determination: 22 October 2008

DETERMINATION OF THE AUTHORITY

Consolidation of proceedings

[1] The applicant Labour Inspector (Mr Henning) filed three separate statements of problem citing the first respondent (Broadbat) on each occasion. Those three statements of problem were filed respectively on 3 June 2008 (in respect to file number 5125957), 5 August 2008 (in respect to file number 5132202) and 11 July 2008 (in respect to file number 5130106). The latter two also cite Gregory Keith Thomas as second respondent.

[2] Because each of the files concern similar facts and because the same parties are involved in each file, by notice of direction dated 23 September 2008 I advised both parties that in the interests of administrative convenience I had consolidated the three files and would deal with them together.

[3] In consideration of that decision, Mr Henning filed consolidated submissions and, to ensure that Broadbat had an appropriate opportunity to consider its position further, I gave Broadbat an extension of seven days on the original timetable I set for their submissions to be received, and notwithstanding that extension, have received no submissions whatever from Broadbat.

[4] I have satisfied myself that Broadbat have had every reasonable opportunity to participate in the Authority's process and I am not persuaded that justice would be served by further attempts to encourage Broadbat to respond to Mr Henning's various applications.

[5] Accordingly, I have decided to deal with the three matters together and on the basis of the material now before me.

The factual matrix

[6] It is helpful to briefly put into context the present dispute. Broadbat Limited is a company registered at Wellington whose director and shareholder is Gregory Keith Thomas, the second respondent in two of the matters before me.

[7] The registered office of Broadbat Limited was, in late 2006, also the registered office of another company McKellar Property Services Limited (McKellar). In September 2006 or thereabouts, the business of Southern Cleaning Services was purchased from Southern Cleaning Services Limited (Southern) a Dunedin incorporated company by McKellar as nominee for Broadbat. As part of the agreement for sale and purchase, the conditional purchaser McKellar agreed with Southern to accept liability for all staff holiday pay accrued at the date of possession. In addition, McKellar effectively took over the staff of Southern (in so far as staff elected to accept the change) with effect from the date of settlement.

[8] As Mr Henning correctly points out in his submission, those undertakings made by McKellar, to some extent, simply repeat the effect of Part 6A of the

Employment Relations Amendment Act (No. 2) 2004 which provides a measure of protection for those employees.

[9] As a matter of fact, the employees who are the subject of the three applications being dealt with in this determination are all plainly now employees of Broadbat because their names and wage records (such as they are) all appear as part of Broadbat's wages books.

[10] It follows that I am satisfied that all the employees referred to in the several applications filed in the Authority by Mr Henning against Broadbat are, in truth, Broadbat employees and that the obligation or obligations that Mr Henning seeks to enforce are properly matters to be addressed as against Broadbat.

[11] The only other matter that I consider relevant in this general context, before I turn to the specifics of the applications before me is the fact that this is not the first occasion that a Labour Inspector has been forced to bring an application against Broadbat in relation to the employees that Broadbat inherited from Southern. My colleague Helen Doyle issued a determination dated 20 December 2007 dealing with a similar application in respect to seven employees or former employees of Broadbat. As in the present case, Broadbat did not appear when the matter came before the Authority and Ms Doyle made orders against Broadbat in relation to those individual employees or former employees. I understand from Mr Henning that that earlier determination of the Authority against Broadbat has still not been satisfied.

The present applications

[12] Each of the three applications to the Authority concerns a claim under s.229(1)(d) of the Employment Relations Act 2000 together with a claim under s.82 of the Holidays Act 2003.

[13] Section 229(1)(d) of the Employment Relations Act gives a Labour Inspector power to require an employer to supply copies of all employment agreements and wages and time records in relation to the named individual employees while s.82 of the Holidays Act requires an employer to provide the holiday records of the named employees to the Labour Inspector.

[14] The difference between the first application (file number 5125957) and the other two is that for the first file, there has been partial compliance by Broadbat.

[15] In relation to each application, I am satisfied on the evidence before me that Broadbat has been properly served with the Labour Inspector's requirement that those items of information be provided.

[16] In relation to file number 5125957 only, I am satisfied on the evidence from the Labour Inspector that although there has been partial compliance, Broadbat has failed to fulfil its obligations in their entirety.

[17] The purpose of the statutory obligation to provide this information to the Labour Inspector on request, is self evident. The Labour Inspector cannot fulfil his statutory function without the provision of such information.

[18] As mentioned above, in respect to file number 5125957 Broadbat eventually provided a portion of the records on 6 August 2008. As Mr Henning correctly identifies, the provision of this incomplete information arrived after several deadlines set by me had been ignored by Broadbat and in any event were not a complete set of the documents the Labour Inspector required. Crucially, the failure of Broadbat to supply all of the information required meant that Mr Henning was unable to complete his statutory obligation. No information at all has been provided in respect to the two other files.

[19] Mr Henning notes in his submissions that Broadbat (via Mr Thomas) offered a variety of explanations as to why the information had not been provided including the contention that some of the information required had actually been sent to Christchurch (Mr Henning is based in Dunedin) and/or that the records had been sent to the Department of Labour at Dunedin but at an earlier date. Mr Henning, quite properly, has investigated these various claims and found no evidence whatever to support them.

[20] Furthermore, Mr Henning, in his submissions, reminds me that during a directions conference that I convened between Mr Henning and Broadbat's Greg Thomas, I directed that Mr Henning was to arrange for one of his colleagues in Wellington to call upon Mr Thomas at his place of work and make clear to him precisely what documents were required and then physically uplift them in order to obviate the apparently continuing difficulty of getting material by post from Wellington to Dunedin.

[21] Despite this effort by the Department of Labour to assist the employer to fulfil its obligations, even that initiative was unsuccessful. A Wellington Labour Inspector did attempt to contact Broadbat to make the appropriate arrangements but Broadbat have ignored that message. The message was left with Broadbat on 13 August 2008 and a Wellington Labour Inspector subsequently physically visited Broadbat's Wellington premises but Mr Thomas has declined to make himself available.

[22] Mr Henning submits that Broadbat has throughout the process failed to comply with the legitimate statutory requests of the Labour Inspector and with the directions made by the Authority. I accept that submission as factually accurate.

[23] In addition, Mr Henning submits that Broadbat has failed to respond at all to other statutory requests made by the Labour Inspector concerning over forty other workers who are covered by file number 5130106 filed with the Authority on 11 July 2008 and file number 5132202 filed with the Authority on 4 August 2008.

[24] Mr Henning further submits that, by reason of having obtained some of the records at least in respect to the employees covered by the initial application (that dated 3 June 2008 being file number 5125957) the Labour Inspector has been able to make some calculations in respect to the monies owed by Broadbat to those employees. In all but one case, the Labour Inspector indicates that the employees concerned have accepted that calculation as substantially accurate.

[25] Accordingly, the Labour Inspector asks me to make orders for the payment of those sums to the employees concerned but for orders requiring the production of information in respect to the other workers for whom no such calculations have yet been possible.

[26] I am satisfied that the evidence before me discloses that it is a proper exercise of my authority to make the orders requested by the Labour Inspector. I also intend to give consideration to the question of penalties.

Determination

[27] I direct that Broadbat is to make the following payments to the Labour Inspector at Dunedin in respect of the employees referred to in file number 5125957 filed in the Authority on 3 June 2008:

- (a) In respect of Tangiora Duff for to unpaid wages and holiday pay the gross sum of \$587.36;
- (b) In respect of Greg Cook for unpaid wages and holiday pay the gross sum of \$1,980.05;
- (c) In respect of Teresa McKenzie for unpaid wages and holiday pay the gross sum of \$3,114.83;
- (d) In respect of Daniella Bastos for unpaid wages and holiday pay the gross sum of \$1,174.52;
- (e) In respect of Tim Prendergast for unpaid wages and holiday pay the gross sum of \$4,146.03;
- (f) In respect of Des Douglas for unpaid wages and holiday pay the gross sum of \$8,135.34.

[28] In relation to each of the employees listed above, I accept the Labour Inspector's claim that there has been an unreasonable delay in the obtaining of the information on which those calculations are based and that to a real extent, the calculations prepared by the Labour Inspector are incomplete and unable to be absolutely verified because of the failure of Broadbat to supply all of the information which the Labour Inspector's request requires.

[29] That being the position, in relation to each of the orders I have made above, there has been a partial failure by Broadbat to supply all of the information sought by the Labour Inspector under s.229(1)(d) of the Employment Relations Act 2000 and/or ss.24 and 25 of the Holidays Act 2003.

[30] In respect to the requirements made by the Labour Inspector under the Labour Relations Act 2000, s.229(3) gives the Authority power to award a penalty on the application of a Labour Inspector.

[31] A similar provision is contained in s.75 of the Holidays Act 2003.

[32] There has been partial compliance. However, the statutory powers of the Labour Inspector exist to protect employees and it is not for the employer to pick and chose which information they will supply to the Labour Inspector and which they will withhold.

[33] Having weighed all of the factors in this matter and recognising that Broadbat has provided some information but not all, I direct that Broadbat Limited is to pay a penalty of \$500 in respect to each of the abovenamed employees, such penalty to be in the aggregate in each case for the breaches of the Holidays Act and the Employment Relations Act respectively. Each payment is to be made to the Employment Relations Authority at Christchurch who will then pay the sum concerned into the Crown bank account.

[34] In relation to the balance of the employee's affected being the employees covered in file numbers 5130106 and 5132202 I direct that Broadbat Limited is to supply to the Labour Inspector at Dunedin copies of all employment agreements, wages and time records and holiday records for the following employees:

Mike Nicholls
Carlos Barbosa
Michelle Kamphorst
Rovilson de Oliveira
Mark Julin
Ashley Jones
Adam Jones
Jamie Leckie
Ron Fogel
David Bird
Peter McMath
Ivan Rolton
Michael Nicholls
Kaisari Rowley
Lesley Christine Anfield
Mere Dean
Helen Hall
Evelyn Harris
Lorraine Keane
Janice Parkin
Margaret Parkin
Mark Booth
Blair Tobin

Rochelle Warwood
Rit Ranong
Joe Withington
Andrew McCormack
Lance McCormack
Kieran Cody
Rebecca Alexander
Tanya Tobin
Cheryle Sizemore
Margaret Simms
Neil Roberts
Gaynor Churchill
Shane Gaudelius
Alf Ferguson
Cindy Ferguson
Callum MacDonald
Annette Tackney
Michael Wilson-Allan
Kelly Russell

[35] It is appropriate that I consider penalties in relation to these orders as well. For the list of employees or former employees referred to in paragraph 34 above, Broadbat has failed entirely to provide the Labour Inspector with the wage, time and holiday records he legitimately seeks. Accordingly I direct that Broadbat is to pay a penalty of \$10,000 in respect of the collective breaches of the Employment Relations Act and the Holidays Act, such payment to be paid to the Authority at Christchurch who will then pay the sum concerned to the Crown bank account.

Costs

[36] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority