

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 61/09
5152657

BETWEEN Amanda Kendrick, Labour
Inspector, Department of
Labour
Applicant

AND T & M Hill Limited
Respondent

Member of Authority: Denis Asher

Representatives: Amanda Kendrick represented the Department
No appearance by or for the company

Investigation Meeting New Plymouth, 13 May 2009

Determination: 13 May 2009

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In her application filed on 19 February 2009 Ms Kendrick said the Company had failed to comply with a demand notice for unpaid holiday pay and public holidays: a compliance order was sought.

- [2] In its statement in reply filed on 20 March, and amongst other things, the Company said it had no dispute with paying \$590.00 (i.e. its approximate calculation of what was owed) but, in respect of the balance, *“the statement of claim is incorrect as the hours have been overstated by the ex-employee”*. The possibility of a counter-claim for *“malicious mischief”* was raised.

Background

- [3] By letter dated 30 October 2008 the Department of Labour advised the Company it had completed an investigation into an alleged non-payment of various wages and holiday, etc pay claims. The investigation included an examination of the Company's relevant wage and time records and discussion with its director, Trevor Hill. The Department advised the Company it owed the relevant ex-employee arrears of \$727.83.
- [4] By letter dated 19 November the Department answered various questions raised by Mr Hill in respect of its itemised calculation.
- [5] Another letter, this one dated 2 December, was sent to the Company as it had not responded to the claim for arrears. The Company was put on notice that, under s. 224(1) of the Employment Relations Act 2000 (the Act), it had 7 days to comment on the pay claim.
- [6] By letter dated 5 January 2009 the Department returned to the Company a cheque made out for \$590.20: not only did the cheque not reflect the Department's calculation but it was made out to the ex-employee and not, as requested, the Department.
- [7] A demand notice pursuant to s. 224(1) of the Act, also dated 5 January, was served on the Company for the sum of \$727.83, being payable under the Holidays Act 2003 and the Minimum Wages Act 1983. Payment in full was not made and the statement of problem followed 6-weeks later.

Telephone Conference

- [8] I convened a telephone conference of the parties on 3 April: on behalf of the Company Mr Hill repeated its position that payment of approximately \$590.00 was accepted, that a cheque for that sum had been presented to the

Department but had been returned and that he did not want to engage in mediation as the ex-employee had threatened violence and he had taken out a trespass order against that person. I was satisfied mediation would not constructively resolve the matter: s. 159 of the Act applied.

[9] I asked Mr Hill to return the cheque, properly made out, to the Department. I asked Ms Kendrick to seek instruction from the ex-employee if that would settle the matter. An investigation in New Plymouth was agreed for 13 May in the event settlement was not achieved.

[10] It was subsequently confirmed that part-payment had been received and remitted to the ex-employee who continued to seek compliance with the order for the balance. As it happened, and at late notice, Mr Hill advised the date for the investigation was no longer suitable: having heard his explanation (“... *I am still calving cows and the inclement weather ... is taking all of my time ... so it is doubtful that I can attend ...*” – fax received 11 May 2009) I directed that the investigation would continue on the agreed date – s. 160 of the Act applied.

Discussion and Findings

[11] At the commencement of today’s investigation I received advice from a support officer that Mr Hill had telephoned her with confirmation he would not be attending but that the Company would pay the balance of \$137.63 if the Department forewent its claim for the filing fee of \$70. I asked the support officer to advise Mr Hill he should put that offer in writing to Ms Kendrick as it was for the Department to determine the acceptability or otherwise of the offer.

[12] Having taken evidence from Ms Kendrick in respect of the demand notice served on the Company and in light of its concession and part-payment of \$590 to the Department, I was satisfied the respondent had not challenged the calculation in the period available to it and there was – having regard to all of the circumstances – no reason to not grant the compliance order sought by the applicant. I gave an oral determination to that effect at the conclusion of today’s investigation.

Determination

[13] The Company is to comply with the demand notice of 5 January 2009 and is to pay to the Department of Labour the sum of \$727.83. Because of part-payment already made, the effect of this compliance order is that the Company is to pay to the Department the outstanding sum of \$137.63.

[14] Costs are reserved.

Observation

[15] The Company's conduct goes to the heart of good faith: that is because there is clear evidence it – through the actions of Mr Hill – has deliberately set out to prolong and obstruct the resolution of this matter. Despite claiming it had evidence to challenge the Department's calculation that evidence was never put to the Department, despite clear notice of the opportunities to do so and the consequences of failing to do so; similarly, no counter-claim was ever filed. Mr Hill is also on record as stating it was his intention to delay and obstruct (telephone call to the Department's New Plymouth Service Manager, 16 February). Further evidence of the absence of good faith lies in Mr Hill's failure to attend today's investigation, despite his previous agreement to do so and his less than satisfactory, and late, grounds for attempting to have today's investigation vacated (see par 10).

[16] Failure to promptly pay the outstanding sum to the Department will only result in greater cost to the Company. Refusal to pay can only result in greater cost – cost that is out of all proportion to the sum involved – fines, sequestration of property and – in some situations – imprisonment.

Denis Asher

Member of the Employment Relations Authority