

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 103/09  
5164918

BETWEEN                      NICOLA LOUISE MEDWAY  
   Labour Inspector

AND                              BE GORGEIOUS NZ LIMITED  
   Respondent

Member of Authority:      G J Wood

Representatives:            Nicola Medway on her own behalf  
   No attendance by or for Respondent

Investigation Meeting:      7 August 2009 at Wellington

Determination:              7 August 2009

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**ORAL DETERMINATION OF THE AUTHORITY**

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[1]      The respondent (Be Gorgeous) was not represented at the investigation meeting. Attempts were made to contact the respondent through one of its directors, Mr Dhiraj Gogna. Unfortunately the support officer was unable to contact Mr Gogna or any other representative of Be Gorgeous. This was consistent with its failure to provide a statement in reply and to attend on the conference call, despite the support officer being able to contact Mr Gogna on the telephone on at least one occasion. I am satisfied that the notice of investigation meeting was served at Be Gorgeous's registered address. It was also sent to Mr Gogna's home address and Be Gorgeous's physical address.

[2]      Given the failure of Be Gorgeous to participate throughout the Authority's investigation process, and there being no good cause shown for it not to be represented at the investigation meeting, I determined to act as fully in the matter before the Authority as if Be Gorgeous has been represented.

[3] I accept the evidence given by Ms Medway, as I had no reason not to and it was consistent with the documentary evidence provided. I therefore make the following findings.

[4] Ms Gemma Holt was employed by Be Gorgeous as an account manager for the South Island between 14 July and 5 December 2008. When she left her employment, she was not paid holiday pay owing in the sum of \$796.95 gross, being 8% of her gross earnings.

[5] Ms Holt complained to a Labour Inspector, Ms Medway, about the failure to pay the sum owing. Ms Medway corresponded with Mr Gogna on a number of occasions, seeking wage and time and holiday records from Be Gorgeous, but without success. On the one occasion when she spoke to Mr Gogna, Mr Gogna did not deny that holiday pay was owing, but that Be Gorgeous had issues with Ms Holt over her allegedly breaching a restraint of trade clause in her employment agreement.

[6] Even if the above were true, that does not give an employer the right to withhold holiday pay owing. Mr Gogna was informed of this by Ms Medway. Be Gorgeous was also warned on several occasions that it had exposed itself to penalties for failing to pay the money and for failing to produce wage and time and holiday records. It took no remedial action.

[7] Eventually, Ms Medway filed in the Authority seeking penalties for failure to pay the money owing, failure to produce wage and time records and failure to produce holiday records (in the sum of \$10,000 for each breach), together with a claim for the \$796.95 gross, plus interest on that sum.

[8] I am satisfied that the Labour Inspector is entitled to the holiday pay owing for the use of Ms Holt, namely \$796.95 gross, as there is no evidence of Ms Holt taking any annual leave, and as that sum constitutes 8% of her earnings. Interest at 6% over the period 5 December 2008 to 7 August 2009 is \$32.10.

[9] The claims for penalties overlap and are best dealt with globally, even although a penalty is payable for each of the breaches, as they have all been proven. In all the circumstances, I consider that a penalty of \$3,000 is appropriate given the amount of holiday pay owing, but taking into account Be Gorgeous's tacit acknowledgment that it owes holiday pay and its failure to produce the records that it

is required by law to keep and produce on demand. There can be few cases of more clear breaches.

[10] Ms Medway also sought reimbursement of the \$70 filing fee. I accept that that is a reasonable expense because the intervention of the Authority was necessary in this case.

[11] I therefore order the respondent, Be Gorgeous NZ Limited, to pay to Nicola Medway (for the use of Gemma Holt) \$796.95 gross for unpaid holiday pay and \$32.10 gross in interest. I also order the respondent, Be Gorgeous NZ Limited, to reimburse Ms Medway the sum of \$70 for the filing fee. Finally, I order the respondent, Be Gorgeous NZ Limited, to pay to the Crown a penalty of \$3,000.

**G J Wood**  
**Member of the Employment Relations Authority**