

NOTE: orders for payments of penalties appear at paragraphs 11 and 19 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 443/09
5285063

BETWEEN JOSAINE VERENA INGHAM
(LABOUR INSPECTOR)
Applicant

AND AUGUST MODELS AND
TALENT LIMITED
Respondent

Member of Authority: R A Monaghan
Representatives: J Ingham, in person for applicant
No appearance for respondent
Investigation Meeting: 9 December 2009
Determination: 10 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector seeks an order for payment, for the use of Timothy Plant, of \$258 (gross) in outstanding wages pursuant to the Minimum Wage Act 1983. The employer said to be in default is August Models and Talent Limited (AMTL).

[2] The inspector also seeks penalties for AMTL's failure to:

- a. pay minimum wages¹; and
- b. provide the Labour Inspector with a wages and time record².

¹ Section 10 of the Minimum Wage Act and s 135 of the Employment Relations Act 2000.

² Sections 229(3) and 135 of the Employment Relations Act.

Preliminary matter

[3] AMTL did not file a statement in reply. It did not appear and was not represented at the scheduled investigation meeting. The statement of problem and notice of meeting were properly served at its registered address for service.

[4] On 8 December 2009 it came to the Authority's attention that AMTL alleged it was unaware of the scheduled meeting date. Since the relevant documents were properly served I do not accept this, but record further that an Authority support officer telephoned AMTL to confirm its intentions. He asked to speak to the company's director. When he identified himself he was told the director was busy. He left a message confirming the details of the meeting and asking that the director contact him if there was any problem. There was no further contact.

Failure to pay minimum wage

[5] AMTL employed Mr Plant as a casual employee. Its business includes providing extras for television programmes and commercials. Mr Plant was employed in that capacity. On 17, 25 and 29 September 2008, and 1 and 9 December 2008, Mr Plant worked as an extra on the Shortland Street television programme. He completed the call sheets required to confirm his attendance and support his claim for payment.

[6] Mr Plant was not paid for work done on the above dates. Accordingly the Labour Inspector seeks an order for payment calculated as 21.5 hours at \$12 per hour (being the minimum adult hourly rate in force at the time) = \$258.

[7] I am satisfied Mr Plant is entitled to the payment sought. Interest is payable on that amount calculated at the rate of 4.8% from the date of this determination to the date of payment. Payment is ordered accordingly.

Penalty for failure to pay minimum wage

[8] In June 2009 the Labour Inspector contacted a Stephen Laing, and was subsequently referred to AMTL's director, regarding the failure to pay Mr Plant. On

1 July 2009 the director advised that she would check whether Mr Plant had worked on the days claimed, and made an offer of payment in a lesser sum and relating to other dates. Although at the time two of the dates the Labour Inspector provided were not correct, the dates were corrected during the later approaches detailed below.

[9] The failure to pay is proved.

[10] In the absence of any reply from AMTL, the failure is unexplained. Since the failure to pay wages due to an employee is a serious matter, and nothing has been advanced by way of explanation or mitigation, an order for the payment of a penalty is warranted.

[11] ATML is therefore ordered to pay a penalty in respect of the failure in the sum of \$1,000.

[12] The Labour Inspector has asked for an order under s 136(2) of the Employment Relations Act that the payment be made to Mr Plant. Since there are public policy reasons why orders for the payment of penalties are made in favour of the Crown, the making of orders for payment to an affected individual or organisation should not be regarded as automatic. This is particularly so where the affected party has sought and obtained other remedies in respect of the same set of facts.

[13] Here there is an order for the payment of unpaid wages, plus interest. I decline to make a further order for the payment to Mr Plant of the penalty.

Failure to provide wage and time record

[14] By letter dated 1 July 2009 the Labour Inspector requested copies of AMTL's wage and time record within 14 days of the date of the letter. The letter was sent by email message to the company's director, and by post.

[15] There was no response. By email message to AMTL's director on 17 July 2009 the Labour Inspector made further requests both for payment of the unpaid wages and for the production of the wage and time record. There was no response. By letter dated 27 July 2009 the Labour Inspector attached a notice under s 229(1)(c)

of the Employment Relations Act requiring production of wages, time and holiday records, and warning that a failure to produce the records within 10 days of the date of the notice may result in a penalty being awarded. The letter was sent by email attachment to AMTL's director, and in the post.

[16] There was still no response. By email message to the company's director dated 10 September 2009 the Labour Inspector drew AMTL's attention to s 132 of the Employment Relations Act (which refers to the implications of a failure to produce a wage and time record) and corrected the dates in respect of which payment was sought.

[17] There was still no response.

[18] The failure to produce the record is serious, and the disregard of repeated approaches in respect of the matter is an aggravating feature. An order for the payment of a penalty is warranted.

[19] AMTL is therefore ordered to pay a penalty in respect of the failure in the sum of \$1,250.

[20] The Labour Inspector has asked for an order under s 136(2) of the Employment Relations Act that the payment be made to Mr Plant. For reasons essentially the same as those expressed above, I decline to make that order.

Summary of orders

[21] AMTL is ordered to pay to the Labour Inspector, for the use of Timothy Plant, the sum of \$258 (gross) plus interest calculated as 4.8% from the date of this determination to the date of payment.

[22] AMTL is ordered to pay to the Labour Inspector the sum of \$1,000 as a penalty for its failures to pay the minimum wage to Mr Plant.

[23] AMTL is ordered to pay to the Labour Inspector the sum of \$1,250 as a penalty for its failure to produce the wage and time record.

Costs

[24] I further order that AMTL reimburse the Labour Inspector for the filing fee of \$70.

R A Monaghan

Member of the Employment Relations Authority