

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 153/10
5293518
5293550

BETWEEN DAVID MYATT (LABOUR
INSPECTOR)
Applicant

AND ANTIPODEAN GROWERS
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Labour Inspector in person
No appearance for Respondent

Investigation Meeting: 29 March 2010

Determination: 1 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Brothers Santokh and Surinder Singh have been working in horticulture on the same land at Hobsonville for several years, Santokh since 2001 and Surinder since 2003.

[2] Inland Revenue Department records and other information show that until mid-2009 they were employed by the respondent company, Antipodean Growers Limited.

[3] In June 2009 the Singhs each received a letter advising that the directors of Antipodean Growers had decided to cease trading at the end of that month, as the premises were under new ownership and had to be vacated by then. The new occupiers of the land and premises have engaged the Singhs who continue to work there.

[4] A few weeks after their termination the Singhs complained to the Department of Labour Inspectorate that they had not received holiday pay which they had been told by their manager would be paid. They were aware that substantial amounts were owed for untaken holidays in the year of dismissal as well as for earlier years of employment.

[5] In response to the complaints the applicant Labour Inspector Mr Myatt commenced an investigation during which he communicated and corresponded extensively with a former manager of Antipodean Growers, Mr Mark Poulter, and a director of the company, Mr Noel McKenzie. Mr Poulter had written the letter advising the Singhs of their termination dismissal, on behalf of the directors Mr McKenzie and his wife Ms Maureen McKenzie.

[6] After taking into account the responses of Mr McKenzie to the Singhs' complaints Mr Myatt concluded in a detailed letter written to Mr McKenzie in November 2009 that Santokh was entitled to holiday pay arrears of \$9,766.89 gross and Surinder to \$11,229.48.

[7] Mr McKenzie responded by letter in December 2009 disclaiming the assessed entitlements. He explained in his letter that he would be overseas for some weeks but that his lawyer, whose name he gave, could be contacted about the matter in his absence. Although Mr McKenzie lives in Auckland he apparently frequently works overseas as an airline pilot.

[8] The requirement of the Labour Inspector for the respondent employer company to pay the arrears of holiday pay was not met and consequently applications were lodged by Mr Myatt in the Authority in January 2010, to recover the entitlements he had assessed.

[9] As well as recovery of the holiday pay, he claimed a penalty under s 75 of the Holidays Act 2003 and interest on the outstanding pay arrears, and he also sought recovery of the \$70 filing fee paid to lodge the two applications.

[10] As it appeared to the Authority that mediation was unlikely to contribute constructively to resolving the claims, they were scheduled to be investigated at a meeting without that prior step being taken.

[11] After the notice of meeting had been served on the respondent company on about 10 March, an email was received by the Authority on 12 March from Mr McKenzie who advised of his unavailability to attend the investigation meeting notified for 29 March. He advised that his work required him to be out of the country on a regular basis and that he was not in a position to say when he would be available in April. He said he wanted to attend the meeting and hoped it could be rescheduled.

[12] The Authority directed that the meeting would not be rescheduled unless Mr McKenzie gave a date in April when he or the company could attend, and provided the Labour Inspector was agreeable to a deferral to that date.

[13] Mr McKenzie was also advised by the Authority that because the respondent had not lodged a Statement in Reply at all to the applications, the company required leave from the Authority to respond to them and that even if the company did attend the investigation meeting, it would not immediately be able to be heard until it had sought and obtained that leave. The requirements of Regulation 8(3) of the Employment Relations Authority Regulations 2000 in this regard were referred to by the Authority.

[14] Nothing further was heard from Mr McKenzie or his lawyer or the respondent company, between 12 March and the date of the investigation meeting at which there was no appearance for or by Antipodean Growers.

[15] From that meeting the Authority was satisfied by Mr Myatt that he had obtained and used the best information available in the absence of any records from the respondent to establish the entitlements of Santokh and Surinder Singh. The brothers confirmed to the Authority the limited extent to which each had taken annual leave over the several years of employment with the company.

[16] The Authority is satisfied from the information provided at the investigation meeting that the entitlements of the employees to holiday pay have been made out and to the extent claimed.

[17] Although, as Mr Myatt pointed out, the claims had taken into account periods of employment going back further than six years before they were brought to the Authority, I consider there is no bar to any part of the claims as the entitlement to the holiday pay did not crystallise until the employment ended less than a year ago. There is no suggestion that the employees had been required to take any leave at an

earlier period but had refused to and had therefore forfeited their entitlements in any year.

[18] Antipodean Growers Limited is therefore ordered to pay to Mr Santokh Singh \$9,766.89 gross annual holiday pay, pursuant to ss 24, 25 and 26 of the Holidays Act 2003.

[19] The respondent is ordered to pay to Mr Surinder Singh \$11,229.48 gross annual holiday pay.

[20] On the sums assessed as due the company is also ordered to pay interest at 4% from 12 November 2009, when Mr Myatt wrote to the company notifying his assessment and requesting payment of the amounts.

[21] I am satisfied from the Authority's investigation that Antipodean Growers Ltd acted in breach of the Holidays Act 2003 by not paying the entitlements due at termination of the employment. A penalty is appropriate.

[22] I will accept that the breaches were not deliberate and that the employer did not intend to deprive the Singhs of their entitlements. Nevertheless, as an employer the company was responsible for setting up secure systems and keeping records to ensure that it knew at any time what holidays had been taken and what entitlements were due. At termination of the Singhs' employment the company had acknowledged that there were some entitlements but it simply did not pay them. In the circumstances, I award a total penalty of \$4,000 in respect of both claims, pursuant to s 75 of the Holidays Act. This must be paid to the Crown.

[23] Antipodean Growers Ltd is to reimburse to the Labour Inspector, Mr Myatt, the sum of \$140 as the filing fee paid for his two applications.

[24] As the Inspector is aware, an application may be made by him to the Authority for an order of compliance if this determination is not met by Antipodean Growers within a reasonable period of time.