

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 129/10
5288984

BETWEEN

LABOUR INSPECTOR
(HENNING)
Applicant

A N D

OUTDOOR CREATIONS
(DUNEDIN) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: John Henning for Applicant
No appearance for Respondent

Investigation Meeting: 27 May 2010

Determination: 2 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector, John Henning, wants Outdoor Creations (Dunedin) Limited (Outdoor Creations) to pay its previous employee, Rebecca Te Ngahue, her entitlements under the Holidays Act 2003 for holiday and leave payments and interest on those payments. The Labour Inspector also seeks a penalty for the failure of Outdoor Creations to pay holiday and leave payments together with legal costs of \$70 being the filing fee.

[2] There was no appearance at the investigation meeting on behalf of Outdoor Creations. The Authority is satisfied from two affidavits of service lodged with the Authority that Outdoor Creations was served at its registered office and address for service with a notice of direction, notice of investigation meeting and statement of problem on 12 March 2010. The Authority is also satisfied from the second of the two affidavits that the director, John Brockbank, was also served with a notice of

direction, notice of investigation meeting and statement of problem on 11 March 2010.

[3] There was no reason advanced as to why a representative failed to appear at the scheduled investigation meeting on behalf of Outdoor Creations. I proceeded therefore to hear from the Labour Inspector and Ms Te Ngahue.

Calculation of payments owing

[4] I am able to ascertain from the evidence of Mr Henning and the correspondence attached to the statement of problem that the Labour Inspector attempted from February 2009 onward to obtain some records from the company but it was not until May 2009 when some very limited time records were provided on behalf of Outdoor Creations. No other records as required to be kept by an employer under the Holidays Act 2003 were provided. There was no written employment agreement between the parties to the employment.

[5] Mr Henning then, in consultation with Ms Te Ngahue, was able to compile a schedule of days that were worked and from that was able to ascertain bereavement leave days and days that were public holidays throughout the employment period. The Labour Inspector assessed various amounts owing. The schedule and assessment was then forwarded to Mr Brockbank as director of Outdoor Creations so that he could make any comment in relation to the same. Mr Brockbank disputed in writing that any money was owing and said that in fact the company was owed money by Ms Te Ngahue.

[6] The Labour Inspector did not, aside from accepting that there had been a \$500 payment to Ms Te Ngahue, agree that there was any basis for not meeting the payments as assessed. I have considered this and I accept the Labour Inspector's reasoning on that matter. Outdoor Creations then instructed solicitors. A solicitor, Jarrod Lovely, raised further issues and disputes with the Labour Inspector about the sum assessed. The Labour Inspector advised Mr Lovely that he did not accept there was any basis for a dispute about the assessment and gave what in my view were sound reasons for such a conclusion. The Labour Inspector stated that payments had to be made as assessed or legal action would be taken.

[7] Mr Lovely then advised the Labour Inspector that his client had instructed him that \$200 a fortnight was being paid to Ms Te Ngahue in respect of the moneys

outstanding. Ms Te Ngahue advised the Labour Inspector that there were no such payments and the Labour Inspector was able to verify from an assessment of her bank statements that no payments had been made. The Labour Inspector did advise Mr Lovely that an arrangement for payment of \$200 a fortnight was acceptable and provided details of the Department of Labour's own bank account in order that payments could be made. No payments I am satisfied, after hearing evidence from both Mr Henning and Ms Te Ngahue, were forthcoming.

[8] Mr Henning has assessed the following amounts are due and owing to Ms Te Ngahue. The Labour Inspector was able to ascertain the gross earnings from the Inland Revenue Department records as \$12,929.

[9] Ms Te Ngahue did two runs in her role with Outdoor Creations. The first was to Milton which was paid at \$100 net and the second to Queenstown which was paid at \$150 net.

[10] The Labour Inspector calculated that payment for six public holidays throughout the working period was owed. When he gave his evidence, Mr Henning asked for an adjustment to be made to the assessed figure in the schedule for the public holiday leave because two rather than the one run should be assessed at the higher rate of \$150. That adjustment is appropriate and on that basis there is a net figure of \$700 for public holiday leave owing.

[11] There was an assessment of outstanding payment in terms of six days that the employee took for bereavement leave. The employer claimed to have made a payment for bereavement leave, however I accept that there is no record to reflect that. The Labour Inspector was satisfied that the bereavement leave taken by Ms Te Ngahue fell within the definition in s.69(2)(b) of the Holidays Act 2003 and further that Ms Te Ngahue had been employed for six months at the time of the bereavement leave. Mr Henning asked for a further adjustment to be made to the bereavement leave claim of \$100 because two of the runs over this period would have been undertaken at the higher Queenstown rate. That is appropriate and increases the claim from \$600 to \$700 net for bereavement leave.

[12] Ms Te Ngahue accepted that from the amount she was owed a net payment received of \$500 would have to be deducted.

Determination

[13] I am satisfied that the amounts as assessed by the Labour Inspector are owing to Ms Te Ngahue. Mr Henning was able to provide to the Authority following the investigation meeting after checking with Ms Te Ngahue and the Inland Revenue Department the tax rate that would apply to earnings by Ms Te Ngahue of 40 cents in the dollar.

Annual holidays

[14] The gross payment received by Ms Te Ngahue as shown by the Inland Revenue Department records is \$12,929. I have then calculated gross amounts for the outstanding leave entitlements as \$1960 gross. Both figures total \$14,889 which, when multiplied by 8%, equals \$1,191.12 gross annual holiday leave owing.

[15] Tax is then to be deducted from that sum to reach a net figure of \$714.67. After deducting \$500 net from that figure there is a balance of \$214.67 due and owing for annual holiday leave.

[16] I order Outdoor Creations (Dunedin) Limited to pay to the Department of Labour for the use of Rebecca Te Ngahue the sum of \$214.67 net being annual holiday pay.

Public holidays

[17] There is also a sum owed for public holidays that fell during the period Ms Te Ngahue was working for Outdoor Creations and for which she was not paid in the sum of \$700 net.

[18] I order Outdoor Creations (Dunedin) Limited to pay to the Department of Labour for the use of Rebecca Te Ngahue the sum of \$700 net being public holiday leave.

Bereavement leave

[19] There is also a sum owed for bereavement leave taken by Ms Te Ngahue while she was working for Outdoor Creations in the sum of \$700 net.

[20] I order Outdoor Creations (Dunedin) Limited to pay to the Department of Labour for the use of Rebecca Te Ngahue the sum of \$700 net being bereavement leave.

Total owing

[21] There is a net total payment due and owing to Ms Te Ngahu of \$1,614.67.

Interest

[22] The Authority has the power to award interest on unpaid holiday and leave payments under s.84 of the Holidays Act 2003. I intend to award interest from the date that the schedule Mr Henning prepared and made his assessment against was sent to Outdoor Creations on 30 July 2009.

[23] I order Outdoor Creations (Dunedin) Limited to pay to the Department of Labour for the use of Rebecca Te Ngahue interest on the sum of \$1,614.67 under clause 11 of the Second Schedule of the Employment Relations Act 2000 from 30 July 2009 to the date of payment at the rate of 4% which rate does not exceed the 90 day bill rate at the date of this order plus 2%.

Penalty

[24] The Labour Inspector seeks a penalty under s.75 of the Holidays Act 2003 for the failure by Outdoor Creations to pay annual holiday pay, payment for public holidays and bereavement leave. These payments are statutory entitlements.

[25] I accept there may have been some initial financial difficulties on the part of Outdoor Creations but there was no attempt to liaise with the Labour Inspector about the assessments and set up a suitable payment regime for these statutory entitlements.

[26] In the circumstances, I consider that a penalty should be awarded of \$600. I order Outdoor Creations (Dunedin) Limited to pay half of that penalty to Rebecca Te Ngahue being \$300 and the balance of \$300 is to be paid into the Authority and then into the Crown bank account.

Costs

[27] I order Outdoor Creations (Dunedin) Limited to pay to the Labour Inspector the sum of \$70 being the filing fee.

Helen Doyle
Member of the Employment Relations Authority