

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 123  
5345797

BETWEEN THE NEW ZEALAND HOUSE  
INSPECTION CO  
(WELLINGTON) LTD  
Applicant

AND NICOLA LOUISE HAPE  
MEDWAY, LABOUR  
INSPECTOR OF THE  
DEPARTMENT OF LABOUR  
Respondent

Member of Authority: P R Stapp

Representatives: Gary Adrian Koornneef, for the Applicant  
Alex Leulu, Counsel for the Respondent

Investigation Meeting: 20 July 2011 at Wellington

Determination: 22 July 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This application is an objection by the New Zealand House Inspection Co (Wellington) Limited (NZHIC) to demand notices issued by a Labour Inspector of the Department of Labour.

**The Issues**

- Are there grounds to uphold the objection to the demand notices served on the NZHIC?
- Are the outstanding amounts identified in the demand notices owed by NZHIC?

- Is this a matter for interest as claimed by the Department of Labour? If so, how much interest is payable?

### **The facts**

[2] After an investigation and having given NZHIC the opportunity to comment and respond and upon notice a Labour Inspector of the Department of Labour served demand notices on NZHIC (1 April 2011) in respect of:

- (i) \$5,307.19 gross outstanding amount of holiday pay for Barry Marsh an employee of NZHIC;
- (ii) \$5,385.64 gross outstanding amount of holiday pay for Brian Marsh an employee of NZHIC.

[3] NZHIC has not paid the above sums and objected to the demand notices on the grounds that both Barry and Brian Marsh did not complete their obligations under their employment agreements and sign off the completion of their employment, that they did not return company property and allegedly they caused a loss of income to the company.

[4] Mr Koornneef personally was joined to the proceedings by me upon receipt of the statement in reply from the Department of Labour because it claimed that Mr Koornneef as the company's sole director by his actions directed and/or authorised the default of the holiday pay and that he should be held jointly and severally liable to pay the amounts recoverable by way of the demand notices issued. The background is recorded in a Minute issued by me on 24 June 2011. Since Mr Koornneef was put on notice of my action to join him to these proceedings the Department has sought leave for him to be struck out from the proceedings in accordance with s.221 of the Act, because of the stringent requirements to have him made jointly and severally liable.

[5] The same Minute recorded that I considered mediation under s 159 of the Act. The application requires a determination by the Authority on the objection to the demand notices.

### **Outcome**

[6] I agree that it is entirely appropriate and proper for the Department to withdraw its claim in respect of Mr Koornneef personally. This records that Mr

Koornneef has been struck out from the proceedings in accordance with s.221 of the Act. For completeness the NZ House Inspection Co (Wellington) Limited remains a party.

[7] There has been no enforcement action taken by the NZHIC over the matters alleged in respect of contractual issues with Messrs Barry and Brian Marsh and NZHIC. The employment agreements have no provision for authorisation for any deductions.

[8] The company and its director have not denied the calculations of the annual holiday pay arrears as calculated by the Labour Inspector. Mr Koornneef confirmed that the demand notices were received.

[9] I am satisfied that the Inspector has met the statutory requirements in issuing the demand notices under the Employment Relations Act 2000.

[10] Since the entitlements exist, the calculations have not been denied, and in the absence of any authorisation to make deductions, this is a matter for the Authority to uphold the demand notices. While NZHIC has raised contractual matters and refused to pay the entitlements under the terms of the contract, at law it cannot off set and counterclaim against a statutory entitlement.

[11] The matters raised by NZHIC are entirely separate matters. They have nothing to do directly with the calculation and payment of holiday pay, I hold. Indeed there is no provision under the employment agreement affecting this application in regard to the statutory entitlement to holiday pay. The grounds for objection are not in order and I reject them.

### **Orders of the Authority**

[12] I order the NZ House Inspection Co (Wellington) Limited to comply with the demand notices for \$5,307.19 gross (Barry Marsh) and \$5,385.69 gross (Brian Marsh). The NZ House Inspection Co (Wellington) Limited is required to pay these sums to the Labour Inspector care of the Department of Labour by Friday 26 August 2011.

[13] In addition this is a matter for interest. Interest arrangements changed from 1 April 2011. There has been an amendment to the Employment Relations Act 2000 on

the rates that apply. The rates are now prescribed under the Judicature (Prescribed Rate of Interest) Order 2011, which applies to proceedings commenced before, on, or after 1 July 2011. The employees, Messrs Barry and Brian Marsh, have been denied the use of money that they were lawfully entitled to receive at the time of the demand notices being served on 1 April 2011. Interest is calculated at a rate of 5% pa under the Judicature (Prescribed Rate of Interest) Order 2011 pursuant to clause 11 of Schedule 2 of the Employment Relations Act (the application was lodged in the Authority on 30 May 2011). The interest payment is to be paid for the period from the date the sums were lawfully due; that is 1 April 2011 until the date of the Authority's investigation meeting (20 July 2011), and further thereafter until the date the sum is paid.

[14] My calculation of the interest for 111 days is as follows in the sums of:

- (i) \$80.70 for the use of Barry Marsh; and
- (ii) \$81.89 for the use of Brian Marsh.

[15] Leave is granted to include the additional rates of interest for the period between 21 July 2011 and the date of the payment being made and for such sums to be entered on the record upon application from either party with proof of payment.

[16] Leave is granted to vary this order where there is mutual agreement on payment, otherwise this order applies. Leave is granted (because payment by instalment was discussed) to return to the Authority (whereby NZHIC will need to provide evidence that the financial position of the employer requires an instalment arrangement). The information given to me to date does not meet the threshold for instalment arrangements and there was no agreement for such by the inspector because the information from the respondent was not adequate.

### **Summary of Orders**

[17] The New Zealand House Inspection Co (Wellington) Limited is ordered to pay the Labour Inspector at the Department of Labour by Friday 26 August 2011:

- a) \$5,307.19 gross holiday pay arrears ( for the use of Barry Marsh)
- b) \$5,385.69 gross holiday pay arrears (for the use of Brian Marsh)

- c) \$80.70 gross interest calculated at 5% (for the use of Barry Marsh)
- d) \$81.89 gross interest calculated at 5% (for the use of Brian Marsh)
- e) Leave is reserved for any variation on additional sums of interest and instalments.

**Costs**

[18] Costs are to lie where they fall.

P R Stapp  
Member of the Employment Relations Authority