

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 202  
5333801

BETWEEN	LABOUR INSPECTOR (JO- ANN DUFF) Applicant
AND	OVER THE TOP LIMITED First Respondent
AND	LOUISA JANE PATTERSON Second Respondent

Member of Authority: Philip Cheyne

Representatives: Jo-Ann Duff, Applicant in person  
Louisa Patterson, Representative for First Respondent  
and Second Respondent in person

Investigation Meeting: 8 December 2011 at Queenstown

Determination: 15 December 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Unusually, this is a case where it is helpful to summarise steps taken in the Authority's investigation.

[2] Stephen Beck worked as a helicopter pilot for a company called Over the Top Limited. When he resigned issues arose concerning his holiday pay. A complaint was made to a Department of Labour officer who sought some information and passed the file to the Labour Inspector who endeavoured to get time and wages records without success. Proceedings were then lodged with the Authority for penalties and compliance against a company called *Over The Top Helicopters Limited*.

[3] Louisa Patterson is the principal of *Over The Top Helicopters Limited* and the first respondent (*Over The Top Limited*). Service of the initial proceedings brought a response from her to the effect that *Over The Top Helicopters Limited* is a non-operating shelf company and suggesting that the matter be referred to first respondent (*Over The Top Limited*). The Labour Inspector lodged an amended statement of problem in the name of the first respondent which the Authority served on the first respondent on 11 February 2011. The first respondent failed to lodge a statement in reply.

[4] The file was trapped in the Authority's Christchurch office as a result of the February earthquake. The file was eventually referred to me in May 2011. On my review of the file there appeared to be a difficulty with the original correspondence relied on by the Labour Inspector for the penalty and compliance claims. Nonetheless it appeared that Ms Patterson had been less than helpful so I required her personally and the first respondent to provide copies of Mr Beck's employment agreements, his time, wage and holidays records and any written consents authorising deductions from his wages. I also alerted Ms Patterson to the possibility of her being joined as a party to the proceedings for the purposes of s.134A of the Employment Relations Act 2000. Notice of these orders was served on Ms Patterson on 15 July 2011. Ms Patterson requested an extension of time which I granted. Nothing was received within the extended time. Two weeks later on 7 September 2011, in response to the Authority's inquiry, Ms Patterson sent an email saying *The information was posted earlier in the week*. The posted item arrived at the Authority on 9 September 2011. The envelope appeared to be postmarked 7 September 2011. No employment agreement and only partial time and wage records were provided. I decided to join Ms Patterson personally to the proceedings given the delay and limited compliance. The material provided to the Authority was copied to the Labour Inspector.

[5] The Labour Inspector lodged a further amended statement of problem. I directed the first respondent to lodge a reply within 14 days and Ms Patterson to lodge a reply limited to issues related to s.134A of the Employment Relations Act 2000 also within 14 days. Ms Patterson was provided the relevant extract from the Act. A reply from both respondents was lodged with the Authority.

[6] Next we convened a phone conference and made arrangements for an investigation meeting. I made further directions requiring the respondents to provide specific documents relating to Mr Beck's employment arrangements and wage records. Statements of evidence were also timetabled. Ms Patterson provided some of the wage records but did not provide the draft employment agreement or a copy of a letter to Mr Beck dated 25 November 2009. The respondents did not provide any statements of evidence.

[7] At the investigation meeting I heard evidence from the Labour Inspector, Mr Beck and Karl Sankey (the Department of Labour official who first dealt with Ms Patterson). Ms Patterson and Wayne Matheson (the company accountant) both gave oral evidence and answered questions. I obtained from them all the documents required for present purposes.

[8] I turn now to the issues.

### **Holiday pay arrears**

[9] Mr Beck worked for Over The Top Limited for a number of years. It is common ground that he left in May 2009. Ms Patterson told me (and it is not disputed) that upon Mr Beck's departure there was no obligation on the company to re-engage him or on him to resume work with the company. The disengagement must be regarded as a termination of the employment.

[10] There are some emails between Mr Beck and Ms Patterson in June and July 2009 about him returning to work for the company. They agreed on 24 July 2009 as a return date. Mr Beck preferred not to have to regularly work weekends. Ms Patterson wanted him to share in the weekend work. Previous written employment agreements had included restraint of trade provisions. Mr Beck did not wish to be bound by a restraint. These matters were not resolved. What was finalised was the rate of pay. Ms Patterson offered to pay Mr Beck \$350.00 per day plus holiday pay without any additional payment for weekend work. Mr Beck agreed. He commenced work at \$350.00 per day with his payslips showing holiday pay accruing as usual. A draft written employment agreement was put together and provided to Mr Beck. Neither

party signed the agreement. As an aside the payslips and the draft correctly record the employer's identity.

[11] On 25 November 2009 Ms Patterson sent Mr Beck an email asking him to discuss with her any points arising from the draft agreement before 30 November 2009 and advising him that if she did not hear from him about the matter she would assume that all the provisions were acceptable and he would receive his salary under the terms and conditions of the draft agreement. Mr Beck did not respond.

[12] On 15 April 2010 Mr Beck gave two weeks notice of resignation. He left to go to work for a competitor. Over The Top Limited did not pay Mr Beck any of his accrued holiday pay.

[13] The position for the company is that either Mr Beck was working under the pre-existing arrangement under which holiday pay was paid on a "pay as you go basis" in which case there is no holiday pay to pay; or Mr Beck was working under the unsigned written employment agreement which he breached by failing to give the stipulated period of notice of resignation. Under this second scenario, after allowing for a deduction for default in accordance with the unsigned written agreement and a second deduction which Mr Beck has consented to, Over The Top Limited owes Mr Beck \$908.00 in holiday pay.

[14] For present purposes the only issue for determination is what if any holiday pay is owed to Mr Beck. That is not difficult. The pay records at the end of his employment record his holiday pay entitlement at \$5,908.00. That is the sum that must be paid or properly accounted for.

[15] Mr Beck acknowledges a debt to Ms Patterson of \$1,500.00. By consent, that sum may be deducted from the arrears of holiday pay.

[16] I am not satisfied that Over The Top Limited has established a right to any further deduction. While the draft agreement includes a provision permitting a deduction of up to 2 weeks wages in the event of any default in giving notice of resignation, Mr Beck never gave any written authorisation pursuant to the Wages Protection Act 1983 allowing any such deduction. Here, the respondents have

attempted to give the company such authority by sending Mr Beck the 25 November 2009 email. It would be inconsistent with the Wages Protection Act 1983 to allow an employer in effect to give themselves such authorisation.

[17] It follows that Over The Top Limited must pay to the Labour Inspector for the benefit of Mr Beck holiday pay of \$5,908.00 (gross) less a deduction of \$1,500.00. There was no claim for interest.

### **Penalties - s.82 Holidays Act 2003 & s.229(1)(d) Employment Relations Act 2000**

[18] S.82 of the Holidays Act 2003 permits a Labour Inspector to request an employer to provide them with access to an employee's holiday and leave records. An employer who receives such a request must comply as soon as practicable. S.83 permits evidence of a failure to comply with s.82 to be given in an action before the Authority. If satisfied that the employer failed to comply and the failure prevented an accurate claim being brought, the Authority may make a finding to that effect. Such a finding affects the burden of proof with respect to the claim. S.75 specifies that an employer who fails to comply with s.83 is liable to a penalty. Given that s.83 just sets out the evidential consequences of a failure to comply with s.82, it may be that s.75 was meant to refer to s.82.

[19] S.229(1)(d) of the Employment Relations Act 2000 permits a Labour Inspector, for the purposes of performing their functions and duties under various statutes, to require any employer to supply a copy of the wages and time records and holiday and leave records of an employee of that employer. The employer must comply with any such requirement forthwith (s.229(2)). An employer who, without reasonable cause, fails to comply with such a requirement is liable to a penalty imposed by the Authority (s.229(3)).

[20] Mr Sankey spoke to Ms Patterson on 23 September 2010 about the situation with Mr Beck. Ms Patterson told Mr Sankey that the employer was a company called *Over The Top Helicopter Company Limited*. Mr Sankey is not a warranted official so his communications cannot form the basis of any penalty action. The matter was escalated to Ms Duff who is a warranted Labour Inspector. It is Ms Duff's written

communications that are relied on. These communications all pre-dated the proceedings which were initially lodged with the Authority on 4 February 2011.

[21] There was a letter from the Labour Inspector dated 3 November 2010 addressed to *Over The Top The Helicopter Company Limited*. There is no proof that this letter was ever received by the addressee. In addition, the addressee is not a legal entity. It cannot be an employer. When there was no response to this letter Ms Duff sent an email on 22 December 2010 to Ms Patterson with a copy of the original letter attached. The Labour Inspector used an email address that a colleague had on file. Ms Duff received an electronic read receipt so the email was opened by someone. Even if I was to accept that the read receipt on the email is sufficient proof of the Labour Inspector requiring the production of records and documents, there is still the difficulty that the addressee of the attached letter is neither a legal entity nor an employer.

[22] Proceedings were then lodged with the Authority with the respondent identified as *Over The Top Helicopters Limited*. Those proceedings were served by the Authority. That produced an email from Ms Patterson advising the Authority that *Over The Top Helicopters Limited* is a shelf company and not an employer and suggesting that the matter be referred to *Over The Top Limited*. The Labour Inspector promptly lodged an amended statement of problem but did not require the now identified employer to produce records, instead relying on the Authority's processes.

[23] Penalties in this jurisdiction have traditionally been regarded as quasi criminal requiring a high standard of proof. I find that these penalty actions by the Labour Inspector fail for want of proof that the employer (*Over The Top Limited*) was required to produce records and documents.

#### **Penalties - s.75 & s. 28 Holidays Act 2003**

[24] S.28 of the Holidays Act 2003 regulates when an employer may pay holiday pay to an employee with their regular pay. In the present case, I have found that *Over The Top Limited* accrued Mr Beck's holiday pay in the usual way so that the company was obliged to pay him his holiday pay upon the termination of his employment. There was no breach of s.28 of the Holidays Act 2003.

[25] Over The Top Limited breached s.23 and s.27 of the Holidays Act 2003 and the Wages Protection Act 1983 but there is no claim for penalties for such breaches.

### **Penalty – s.134A Employment Relations Act 2000**

[26] As noted I joined Ms Patterson personally to these proceedings for the purpose of considering whether there should be a penalty imposed.

[27] At best, Ms Patterson was less than helpful to the Labour Inspector. However, all that conduct predated s.134A of the Act which came into force on 1 April 2011.

[28] The worst default by the respondents with respect to the Authority was the failure to lodge a statement in reply following the February proceedings. That occurred principally before 1 April 2011 but could be said to have continued after then as well.

[29] I have considered whether Ms Patterson's partial compliance with the Authority's directions about the provision of materials merits the imposition of a penalty. When I asked her to explain the various defaults she told me that she was not very good at getting on to things that seem to be a hassle. She also denied being motivated by any desire to get back at Mr Beck given the inconvenience of his sudden departure. I think I should give Ms Patterson the benefit of the doubt. While there has been substantial unnecessary cost caused to the Labour Inspector, that is best addressed by costs rather than the imposition of a penalty.

### **Summary**

[30] Over The Top Limited is to pay to the Labour Inspector for the benefit of Mr Beck \$5,908.00 (gross) being holiday pay, less a deduction of \$1,500.00.

[31] All penalty actions are dismissed.

[32] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum no later than 31 January 2012. The respondents may then lodge and serve any response in writing within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority