

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Auckland 107
5367536

BETWEEN	DAVID MYATT (LABOUR INSPECTOR) Applicant
AND	SPECIAL EVENT LABOUR HIRE LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	D Myatt in person B Britton, advocate for respondent
Investigation Meeting:	On the papers
Determination:	27 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Myatt, Labour Inspector, seeks an order that Special Event Labour Hire Limited (SELH) comply with a demand notice issued under s 224 of the Employment Relations Act 2000 and dated 23 November 2011.

[2] The notice demanded payment to a former employee of SELH, Harold George Saunders, of:

- (i) \$455 under the Minimum Wage Act 1983; and
- (ii) \$36.40 under the Holidays Act 2003.

[3] Payment has not been made, and no objection has been lodged under s 225 of the Act.

Background

[4] SELH entered into a contract with another company to work at the Ports of Auckland unloading new and second hand cars being brought into New Zealand, and to park the cars on the wharf. It employed Mr Saunders as a driver for that purpose.

[5] Mr Saunders lodged a complaint with the Department of Labour's labour inspectors, saying he had not received wages or holiday pay owed to him in respect of the last 4 days on which he worked for SELH. Those days were 28, 29 and 30 April and 18 May 2011.

[6] Mr Myatt investigated the complaint and believed on reasonable grounds that the amounts as subsequently set out in the demand notice were owed. Indeed SELH did not dispute that the money was owed, and instead said it could not pay because it had not been paid by the company with which it had contracted.

[7] In a letter dated 11 November 2011 Mr Myatt advised SELH of his belief that the money was owed, and that an inability to pay does not mean the money ceases to be owed. The letter gave SELH seven days in which to comment on the complaint and on the grounds for Mr Myatt's belief that the money was owed. No response was received, and a demand notice in the prescribed form was served on SELH on 23 November 2011.

Determination

[8] Section 225 of the Employment Relations Act reads in part:

(3) A demand notice has the consequences specified in subsection (4) –

(a) if no objection is lodged within [28 days after the demand notice is served on the employer]

...

(4) The consequences are that the demand notice –

*(a) imposes a legal requirement on the employer to comply with it; and
(b) is prima facie evidence before the ... Authority or (for the purposes of paragraph (d) before a District Court) that the employer owes to the employee the wages or holiday pay ... specified in the notice; and*

(c) may be enforced by the making by the Authority of a compliance order under s 137; and

(d) is enforceable as a judgment debt under s 141 (which applies with any necessary modifications)

[9] Section 137 of the Act sets out the powers of the Authority to order compliance, and applies among other things to failures to observe or comply with a demand notice.¹ The Authority may order a person to do any specified thing² and must specify a time within which the order is to be obeyed.³

[10] Section 138 sets out further provisions relating to orders for compliance. These include:

(3) Any time specified by the Authority under section 137 may from time to time be extended by the Authority on the application of the person who is required to obey the order.

(4) A compliance order ... -

(a) may be made subject to such terms and conditions as the Authority thinks fit (including conditions as to the actions of the applicant); and

(b) may be expressed to continue in force until a specified time or the happening of a specified event.

(4A) If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

(5) Where the Authority makes a compliance order ... it may then adjourn the matter, without imposing any penalty or making a final determination, to enable the compliance order to be complied with while the matter is adjourned.

[11] Here not only is the demand notice prima facie evidence that the money is owed, SELH has acknowledged it is owed. SELH repeated in its statement in reply to the Authority that it cannot pay.

[12] The information SELH has provided in support of its assertions of inability to pay was limited.

[13] It said the party with whom it contracted has refused to pay it, although it did not provide further financial details and provided only a selection of emailed messages indicating those parties are in dispute about whether payment is owed.

¹ Ref: s 137(1)(a)(iv)

² s 137(2)

³ s 137(3)

[14] The only financial information available took the form of a bank statement for a cheque account in the name of SELH, in respect of the period commencing 1 April 2011. The statement shows that: there was sufficient money in that account until about mid-late May to pay Mr Saunders; some modest payments were made to other individuals during that time; there were several small apparently food-related purchases and little other activity; and the account has been in overdraft and for the most part inactive since late May 2011.

[15] Finally it says it is not trading, which is supported by the activity in the cheque account although there is no information about any other accounts held by SELH.

[16] For that reason I make an order that SELH comply with the demand notice by paying to the labour inspector for the use of Mr Saunders the sums of:

- (j) \$455 under the Minimum Wage Act 1983; and
- (ii) \$36.40 under the Holidays Act 2003.

[17] Under s 138(5) the order is adjourned for 7 days from the date of this determination and without final determination to allow SELH to comply with the order or to approach the Authority with a proposal regarding an alternative arrangement.

[18] If at the end of that period SELH has not complied with the order, or approached the Authority with an acceptable proposal regarding an alternative, the determination containing the order will become final. The specified amounts will be payable on the date the determination becomes final.

Costs

[19] SELH is further ordered to reimburse the labour inspector for the filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority