

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 34
5398912

BETWEEN SARAH LOUISE MILLAR-
SMITH (Labour Inspector)
Applicant

A N D BETHLEHEM FLORAL
STUDIO 2007 LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Cheryl George, Advocate for Respondent

Investigation Meeting: On the papers

Date of Determination: 30 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector (the Labour Inspector), alleges that the respondent employer (Bethlehem) has failed to fully comply with an Improvement Notice issued by the Labour Inspector pursuant to s.223D of the Employment Relations Act 2000 (the Act). Bethlehem resists that claim.

[2] Improvement Notices are designed to improve the range of tools available to a Labour Inspector to assist good practice amongst employers by attempting to encourage conformity with the employment law statutes.

[3] In the particular circumstances of this case, a complaint was made from an ex-employee of Bethlehem and was investigated by the Labour Inspector who established, inter alia, that there were various underpayments of holiday leave, statutory holiday leave and sick leave.

[4] Because Bethlehem failed to comply with the demand for payment of those sums, an Improvement Notice was issued on 30 August 2012. That notice required payment and also required compliance with the holiday and leave records mandated by the Holidays Act 2003.

[5] As a consequence, the arrears were paid but holiday and leave records compliant with the Holidays Act 2003 were not provided.

[6] The Labour Inspector was concerned that, in the absence of a commitment to comply with the law by Bethlehem, existing staff might suffer.

[7] Because of the continuing default, the Labour Inspector seeks compliance with the Improvement Notice within seven days of the Authority's determination together with a penalty in the event that Bethlehem fails to comply within the seven day timeline, together with a claim for reimbursement of the filing fee.

[8] The statement in reply filed by Bethlehem proceeds almost exclusively on the footing that the Labour Inspector's calculations are wrong because, while the Labour Inspector maintained that the subject employee's hours "*were variable from week to week, year to year*", Bethlehem maintained that the subject employee worked set hours and days every week.

[9] The same argument was advanced by Ms George in the telephone conference with the Authority on 22 November 2012 but that issue no longer falls for the Authority to determine because the payments required by the Labour Inspector have now been made by Bethlehem.

[10] The only issue still outstanding, and the reason that the claim is before the Authority at all, is because the second part of the Improvement Notice has not been attended to and that bears no relationship at all to Bethlehem's claim about the hours that the subject employee worked or did not work. The issue is a simple one; the Improvement Notice requires Bethlehem to provide evidence to the Labour Inspector that it is now complying with the law in respect of the keeping of leave records that conform with the Holidays Act 2003. This has nothing to do with the subject employee's payment of arrears of wages for various kinds of leave. It has to do with the compliance of this business with the law of the land as it applies to the maintenance of appropriate leave records for staff.

[11] Bethlehem makes the point in its statement in reply, and it is acknowledged by the Authority, that it is a small business with a very small staff. While that observation is accepted at face value, it does not excuse non-compliance with the law. The purpose of the rules in the Holidays Act 2003 which stipulate the requirements for the maintenance of leave records for employees is to ensure that, if there is a complaint from an employee, the matter can be addressed promptly and the relevant records are available for inspection, both by the parties (employer and employee) and by the requisite officials of the State such as the Labour Inspector. In the absence of proper record keeping of the sort required by the Holidays Act 2003, the prospect for even the smallest business to get into a pickle is real indeed. In the particular circumstances of this case, Bethlehem has already had to go through the process of being investigated by a Labour Inspector because of an alleged default and the Labour Inspector's investigations disclosed that Bethlehem was not maintaining the appropriate leave records required by the law. If those leave records had been properly kept in accordance with the statute, then Bethlehem would not have sustained the difficulties that it did, both in engaging with the Labour Inspector and in incurring considerable professional fees in trying to resolve the issue.

Determination

[12] The Authority is satisfied on the evidence before it that there may well have been dispute about the hours worked by the subject employee, but as payment of the various arrears concerning that employee have now been made by Bethlehem, the Authority is unable to take that matter any further.

[13] The issue which is still in play is the second aspect of the Improvement Notice which has not been addressed in the statement in reply and which the Authority is satisfied remains unfulfilled. It is the requirement that Bethlehem complies with the record keeping requirements of the Holidays Act 2003 so as to avoid future disputes of this very kind. There is nothing before the Authority which would suggest that Bethlehem has complied with this aspect of the Improvement Notice and there is no basis on which Bethlehem can decide whether or not it is going to conform with the law set by Parliament.

[14] It follows that Bethlehem is directed to comply with the Improvement Notice issued to it by the Labour Inspector on 30 August 2012 and that compliance with the

remaining aspect of the Improvement Notice not yet fulfilled is to be made within 14 days of the date of this determination.

[15] Forthwith on the receipt of this determination by the Labour Inspector, the Authority asks that the Labour Inspector take all practicable steps to ensure that Bethlehem understands what it is it has to do in order to fulfil the terms of this order of the Authority.

[16] In the event that Bethlehem fails to fulfil the terms of this compliance order within the 14 days stipulated by the Authority, the Authority directs that Bethlehem is to pay a penalty pursuant to s.223F of the Act, such penalty to be in the sum of \$1,000 and to be payable to the Labour Inspector for crediting to the Crown account.

[17] Finally, Bethlehem is directed to pay the Labour Inspector's filing fee of \$71.56, such payment to be made to the Labour Inspector in reimbursement.

James Crichton
Member of the Employment Relations Authority