

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 67  
5406412

BETWEEN                    MONICA SEARANCKE-  
   CLARKE, A LABOUR  
   INSPECTOR FOR THE  
   MINISTRY OF BUSINESS,  
   INNOVATION AND  
   EMPLOYMENT  
   Applicant

AND                            BRIGHT EYES CLEANING  
   SERVICES LIMITED  
   Respondent

Member of Authority:     Michele Ryan

Representatives:         Monica Searancke-Clarke, for the Applicant  
   Mark Matauaina, for the Respondent

Investigation Meeting:    28 May 2013

Determination:            31 May 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Labour Inspector, Ms Monica Searancke-Clark, seeks an order pursuant to s.137 of the Employment Relations Act to have the respondent, Bright Eyes Cleaning Service Ltd (Bright Eyes) comply with provisions contained in an Improvement Notice.

**Relevant information**

[2]     It is apparent from the written exchanges between the parties during the investigation by the Labour Inspector between March–October 2012, that she had two distinct but related areas of concern as regards Bright Eyes employment practices.

[3] The first was in regards to whether Bright Eyes had complied, pursuant to Part 6A of the Employment Relations Act, with its obligation to treat as continuous the employment and service related entitlements of employees who had transferred to Bright Eyes on 16 February 2012.

[4] Bright Eyes had advised the Labour Inspector that employees who had worked for a previous company had been terminated from its employ and had agreed to work for Bright Eyes as a new employer and with new employment agreements. Bright Eyes said employees had not "*transferred*" to it and Part 6A of the Employment Relations Act was not applicable in these circumstances.

[5] The second area of concern was whether Bright Eyes had appropriately paid a former employee minimum wages and holiday entitlements at the conclusion of her employment.

[6] Wage and time, and holiday and leave records associated with Bright Eyes' current and former employees had not been forthcoming despite numerous requests by the Labour Inspector.

[7] On 16 October 2012 the Labour Inspector issued and served on Bright Eyes an Improvement Notice.

[8] The Improvement Notice set out in accordance with s.223D of the Act:

- the provisions which the inspector believes Bright Eyes had not complied with;
- the Inspector's reasons for her beliefs;
- the nature and extent of the failures to comply;
- the steps that could be taken in order to comply with the Act; and
- the date by which Bright Eyes must comply

[9] The Labour Inspector advised Bright Eyes that she reasonably believed it had not complied with Part 6A, section 69J of the Employment Relations Act; section 23 of the Holidays Act; and section 6 of the Minimum Wage.

[10] To demonstrate compliance with the provisions of the Improvement Notice Bright Eyes was required to provide the Labour Inspector by 16 November 2012 with the following:

- (i) evidence of payment of \$1253.80 to the former employee, in the form of banking confirmation;
- (ii) full holiday and leave records for all past and present employees of Bright Eyes which would verify leave entitlements had transferred from the previous employer to Bright Eyes;
- (iii) evidence of payment of any arrears paid to other employees;
- (iv) evidence of calculation of arrears payments;
- (v) outline of attempts to contact past employees who have arrears owed to them;
- (vi) deposit slips/receipts made to the Ministry's Trust Account which reflect any arrears payments made;
- (vii) contact details for all employees of Bright Eyes.

[11] The Improvement Notice also informed Bright Eyes that if it wished to object to the Improvement Notice, it could do so under s.223E of the Employment Relations Act by lodging an objection in the Authority within 28 days after the date of issue of the notice.

[12] Bright Eyes did not furnish the Labour Inspector with any of the required information by the date stipulated nor did it object to the Improvement Notice.

[13] On 1 December 2012 Bright Eyes made a partial payment of \$962.52 (gross) to the former employee.

[14] On 18 December 2012 the Labour Inspector lodged a statement of problem with the Authority requesting orders for compliance with all provisions contained in the Improvement Notice.

[15] At the Authority's investigation meeting, Mr Mark Matauaina, Managing Director, Bright Eyes, accepted that employees had transferred to Bright Eyes on 16 February 2012 and were entitled to have previous respective employment and service related entitlements treated as continuous by Bright Eyes.

[16] Mr Matauaina provided documents which set out the monetary value sum he considered Bright Eyes' various employees were entitled as regards holiday pay but no further information such as employees' anniversary dates by which to calculate entitlements was given, nor were details as to how calculations of entitlements had been made. Mr Matauaina said he does not accept the Labour Inspectors assertion that arrears of wages (as recorded in the Improvement Notice) remain outstanding for the former employee.

### **Orders**

[17] I find that Bright Eyes has not complied with the provisions of the Improvement Notice and a compliance order is warranted.

[18] Bright Eyes is ordered to pay outstanding arrears of \$291.28 (gross) to the Labour Inspector. This is the sum recorded in the Improvement Notice minus the partial payment made by Bright Eyes in December 2012.

[19] Bright Eyes is to provide full holiday and leave records of all employees employed by Bright Eyes (current and former) to the Labour Inspector. For the sake of clarity the records must evidence;

- the commencement date of employment for employees who had worked for the previous employer and who transferred to it on 16 February 2012,
- continuity of service related leave entitlements (including sufficient information as to how entitlements have been calculated) of the number of holiday days (including alternative holiday days), and sick leave days accrued and transferred at 16 February 2012 with respect to each of the applicable employees and continuing until the date in which the documents are provided; and
- contact details of all past and present employees of Bright Eyes.

[20] The orders made at paragraphs [18] and [19] must be complied with on or by close of business on 18 June 2013.

[21] I further order that Bright Eyes reimburse the Labour Inspector for the Authority's filing fee in the sum of \$71.56.

### **Penalty**

[22] Mr Matauaina advised the Authority that Bright Eyes had not complied with the Improvement Notice because he had been in Samoa tending to family matters during the period in which compliance was required. I note there was no indication in Bright Eyes correspondence post the expiry date of compliance that this was the cause of Bright Eyes failure to comply.

[23] It is clear that Bright Eyes partially complied with the Improvement Notice (albeit after the expiry date for compliance) by way of payment of a portion of arrears in December 2012.

[24] It is also equally clear that Bright Eyes did not provide holiday and leave records or any of documentation requested in the Improvement Notice until after the Labour Inspector had lodged papers and paid a filing fee with the Authority. The holiday and leave records proffered for the Authority's investigation were inadequate for the purpose of the Improvement Notice, s. 130 of the Employment Relations Act and s. 81 of the Holidays Act.

[25] The Labour Inspector sought an order from the Authority to impose a penalty for breach of s.223D should Bright Eyes fail to comply with the Authority's compliance order with 7 days of this determination.

[26] A Labour Inspector is entitled to request a penalty for breach of an Improvement Notice and the Authority is able order penalties if satisfied on the evidence that the breach was wilful and deliberate as opposed to inadvertent. However the Authority is not able to issue a penalty for failure to comply with a compliance order pursuant to s.137. Section 138(6) of the Act provides:

*“Where any person fails to comply with a compliance order made under section 137, the person affected by the failure may apply to the court for the exercise of its powers under section 140(6).”*

[27] I am unable to order a penalty in response to this aspect of the Labour Inspector's claims.

**Summary of Orders**

[28] On or by 18 June 2013 Bright Eyes Cleaning Services Ltd is ordered to:

- (i) pay outstanding arrears of \$291.28 (gross) to the Labour Inspector;
- (ii) provide full holiday and leave records of all employees employed by it (current and former) to the Labour Inspector. The documents must evidence the requirements set out at paragraph [19] of this determination;
- (iii) reimburse the Labour Inspector for the Authority's filing fee in the sum of \$71.56.

Michele Ryan  
**Member of the Employment Relations Authority**