

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 586
5438687

BETWEEN DAVID MYATT (LABOUR
INSPECTOR)
Applicant

A N D LANE 1 IMPORTS LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: David Myatt, in person
 No appearance for Respondent

Investigation meeting: 20 December 2013 at Auckland

Date of Determination: 23 December 2013

DETERMINATION OF THE AUTHORITY

- A Under s 137 of the Employment Relations Act 2000 (the Act) Lane 1 Imports Limited (Lane 1) must comply with the requirements of the Improvement Notice issued to it on 20 September 2013 under s 223D of the Act by no later than 14 days from the date of this determination.**
- B Under ss 135 and 223F of the Act, Lane 1 must pay a penalty of \$2,000 for failing to comply with the Improvement Notice.**
- C Lane 1 must pay the Labour Inspector the sum of \$71.56 in reimbursement of the amount paid by the Ministry on the Inspector's behalf to lodge his application in the Authority.**

Non-appearance of the respondent

[1] Lane 1 failed to file a statement in reply, and failed to attend the investigation meeting.

[2] Being satisfied that Lane 1 had been properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting, I proceeded to investigate the matter in the absence of Lane 1.

Employment Relationship Problem

[3] The Improvement Notice stated that the Labour Inspector, Mr Myatt (the Inspector) reasonably believed that Lane 1 had failed to comply with:

- **ss 27 and 81 of the Holidays Act 2003 – employer must pay employee for annual holiday before the holiday is taken, employer must keep a holiday and leave record that complies with the Holidays Act.**
- **s 4 of the Wages Protection Act 1983 – no deductions from wages except in accordance with Act.**
- **ss 65 and 130 of the Employment Relations Act 2000 – employees to have written employment agreements and employer must keep a wage and time record.**

[4] The Improvement Notice required Lane 1 to take action to ensure compliance with the provisions detailed above by 18 October 2013, however the Inspector said that despite having repeatedly drawn to the attention of both Mr Sachida Nand Sharma and Ms Sanjeeta Sharma, directors of Lane 1, there was no evidence of the required remediation furnished to him.

[5] The Inspector is seeking an order under s 137(1)(a)(iiib) of the Act for compliance.

[6] The Inspector also seeks a penalty under s 223F(1) of the Act.

Background facts

[7] In response to a complaint made by one of Lane 1's former employees, the Inspector investigated the wage, time and holiday records (the records) of Lane 1 and

discovered that at least one employee had been underpaid wages, had not received her correct minimum standard entitlement to final holiday pay and had not received a written employment agreement pursuant to the Act and the Holidays Act 2003.

[8] The Inspector stated that information and guidance had been provided to Lane 1 in order that Lane 1 could rectify matters on a voluntary basis.

[9] The Inspector stated that he spoke personally with one of the company directors, Ms Sharma about the arrears of wages owing to one of its former employees and was informed that this would be rectified the following week.

[10] The issue was only partly rectified and so the Inspector decided to enforce measures, initially in the form of an Improvement Notice.

[11] The Improvement Notice had been signed by the Inspector and was dated 20 September 2013.

[12] Section 223D of the Act requires that such a notice state, among other things:

- The provision which the Inspector believes the employer had not complied with;
- The Inspector's reasons for that belief;
- The nature and extent of the failure to comply;
- The steps that could be taken in order to comply; and the date by which the employer must comply.

[13] Accordingly, the Improvement Notice cited the failure to comply with ss 27 and 81 of the Holidays Act 2003, s 4 of the Wages Protection Act 1983 and ss 65 and 130 of the Employment Relations Act 2000 as evidenced by the wage, time and holiday information investigated by the Inspector, and outlined the steps required to achieve compliance.

[14] As the Inspector did not receive a satisfactory response from Lane 1, he made an application for a compliance order to the Authority.

[15] Lane 1 was served with the statement of problem but no statement in reply was filed in the Authority.

[16] I was satisfied from the Inspector's evidence that Lane 1 had failed to meet its statutory obligation to comply with the Improvement Notice and he was entitled to have the requirements of that notice enforced by way of a compliance order issued by the Authority.

[17] The compliance order is made on the terms set out at the head of this determination.

The penalty

[18] I was also satisfied that the Inspector had made out the grounds for a penalty to be imposed on Lane 1 for its failure to comply with the Improvement Notice. The failure to comply with the provisions of the Holidays Act, Wages Protection Act and Employment Relations Act is a serious matter. A failure to respond properly to an Improvement Notice, which has the purpose of correcting matters without resort to legal proceedings, makes matters worse.¹ In the present case the Inspector's evidence and the apparent lack of any real effort by Lane 1 to engage and explain its position support a conclusion that its actions (or rather, omissions) are deliberate and not inadvertent.² The harm caused is that at least one employee is left short of her statutory entitlements, others may be in the same position.

[19] A penalty under s 223F is appropriate. The only question is the appropriate level of such a penalty and a range that, since April 2011, may go up to \$20,000 for a company³. On that scale I consider that a penalty of \$2,000 is appropriate. Lane 1, despite assurances by one of the directors that there would be compliance with the Improvement Notice, has not complied. Such behaviour is not acceptable and the penalty imposed is to deter it and other employers from acting in a similar manner.

[20] Under s 136 of the Act, Lane 1 must pay the penalty to the Authority for transfer to a Crown bank account.

¹ *Erin Spence, Labour Inspector v Oakridge Masonry Limited* [2002] NZERA Auckland 414 at [23].

² *Xu v McIntosh* [2004] 2 ERNZ 448

³ Section 135(2) of the Act

Costs

[21] The Inspector is also entitled to reimbursement by Lane 1 of the fee of \$71.56 paid by the Ministry of Business, Innovation and Employment to lodge his successful application in the Authority.

Anna Fitzgibbon
Member of the Employment Relations Authority