

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 214
5459385

BETWEEN INGRID KIM (LABOUR
 INSPECTOR)
 Applicant

A N D HURUNUI HOTEL (2004)
 LIMITED trading as HURUNUI
 HOTEL
 Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 No appearance for Respondent

Investigation Meeting: 17 December 2014 at Christchurch

Date of Determination: 18 December 2014

DETERMINATION OF THE AUTHORITY

- A. Hurunui Hotel (2004) Limited is ordered to comply with the orders in the consent determination of the Authority dated 22 July 2014 and pay into Sherrie Kendall's account the gross sum of \$1,565.53; and to pay to the account of the Ministry of Business, Innovation and Employment (MBIE) the filing fee of \$71.56 by 5 January 2015.**
- B. Interest is payable on the amount of \$1565.53 at 5 % per annum from 19 August 2014 until the date of payment. That is a daily rate of 0.21 and as at the date of this determination is the amount of \$25.41. Interest owing is to be paid to Ms Kendall by 5 January 2015.**

- C. The issue of penalty has been adjourned to give Hurunui Hotel (2004) Limited an opportunity to comply by 5 January 2015.**
- D. Hurunui Hotel (2014) Limited is ordered to reimburse the Labour Inspector for the filing fee of \$71.56 for this application.**

Employment Relationship Problem

[1] The Labour Inspector, Ingrid Kim, says that the Hurunui Hotel (2004) Limited (Hurunui Hotel) has not complied with the consent determination of the Authority dated 22 July 2014.¹ Ms Kim was a party to the proceedings determined by consent and seeks an order that Hurunui Hotel complies with the consent determination and makes the monetary payments. Ms Kim also seeks a penalty and interest on the money owing and reimbursement of the filing fee.

[2] Orders were made in the consent determination for the Hurunui Hotel to pay its previous employee, Sherrie Kendall holiday pay in the sum of \$1,565.53 gross by no later than 19 August 2014 and for the Hurunui Hotel to reimburse the Ministry of Business, Innovation and Employment (MBIE) for the filing fee of \$71.56, again by no later than 19 August 2014.

[3] Ms Kim confirmed that the Hurunui Hotel has Ms Kendall's bank account details which the holiday pay was to be paid into and was advised by Ms Kim of the MBIE bank account for payment of the filing fee.

The investigation process

[4] No statement in reply was lodged by the Hurunui Hotel.

[5] The Authority decided to hold a telephone conference to progress the matter to an investigation meeting. A support officer at the Authority wrote to Ms Kim and the sole director of Hurunui Hotel, Travis Cooper, by email dated 20 November 2014. She advised of the date and time for the telephone conference of 28 November at 9.30am and provided in the email the known telephone numbers for both Ms Kim and Mr Cooper on which they would be contacted. There was advice that the matter could still be dealt with if either party failed to attend. I am satisfied from a tracking report that the email was delivered to Mr Cooper.

¹ [2014] NZERA Christchurch 109

[6] Attempts to contact Mr Cooper by telephone on 28 November 2014 for the telephone conference were unsuccessful. During that telephone conference the Authority arranged to conduct an investigation meeting on 17 December 2014.

[7] There was no further communication with the Hurunui Hotel. A track and trace from CourierPost confirms that on 1 December 2014 at 1.03pm Mr Cooper was served with a notice of investigation meeting which confirmed the date, time and venue for the meeting on 17 December 2014. Mr Cooper signed for the item. No further steps were taken by Hurunui Hotel and there was no good reason advanced as to why there was no appearance on behalf of the Hurunui Hotel at the investigation meeting.

[8] The Authority proceeded to hear evidence from Ms Kendall who confirmed that payment of holiday pay had not been received and Ms Kim confirmed that the filing fee had not been paid.

Compliance order

[9] The Hurunui Hotel has not paid the amounts which were agreed to and ordered in a consent determination of the Authority dated 22 July 2014. I am satisfied that a compliance order should be made under s 137 (2) of the Employment Relations Act 2000 (the Act).

Interest

[10] Interest was sought on the outstanding monies. I have considered whether interest is payable when ordering compliance. The Authority has had regard to the Employment Court judgment in *Wolfenden v New Zealand Film & Television School Ltd*² where it was found the Employment Tribunal, had no jurisdiction under the Employment Contracts Act 1991 (the ECA) to award interest when ordering compliance. The power to award interest under the ECA was set out in s 49 and was limited to proceedings for recovery of wages or other money under s 48 of the ECA.

[11] Under the Employment Relations Act 2000 the power to award interest is found in clause 11 of schedule 2 of the Act. It provides amongst other matter that in any matter involving the recovery of money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given. I find that the power to award

² [1999] 2 ERNZ 21 at [31]

interest that the Authority has is wider than that of the Tribunal which was considered in *Wolfenden*. In the exercise of my discretion I note that Ms Kim had originally sought an order from the Authority requiring compliance with an Improvement notice under s 223 D of the Act and penalties. Ms Kendall was then deprived of the use of her holiday pay. Hurunui Hotel has had the benefit and use of that money instead and it is fair that interest be payable.

[12] I conclude that interest should be awarded on the holiday pay ordered to be paid in the consent determination from 19 August 2014 until the date of payment at the rate prescribed under s 87(3) of the Judicature Act 1908 of 5%.

[13] To assist the Hurunui Hotel in paying this the daily rate is 0.21 and to the date of the issue of this determination there are 121 days so that is an amount of \$25.41 as at 18 December 2014 and for each day after the determination until payment there is an additional 0.21 owing.

Penalty

[14] There is some doubt as to whether a penalty is payable when there has been a failure to comply with a determination of the Authority. Ms Kim took a pragmatic approach and agreed that the best approach is to adjourn the issue of penalty to enable the compliance order to be complied with by the Hurunui Hotel under s 138 (5) of the Act. If there is compliance by the time ordered then there will be no penalty issue to consider.

Orders

[15] Under s 137 (2) of the Act Hurunui Hotel (2004) Limited is ordered to comply with the orders in the consent determination of the Authority dated 22 July 2014 and pay into Sherrie Kendall's account the sum of \$1,565.53; and to pay to the account of the Ministry of Business, Innovation and Employment the filing fee of \$71.56 by 5 January 2015.

[16] Interest is payable on the amount of holiday pay at 5 % from 19 August 2014 until the date of payment. That is a daily rate of 0.21 and as at the date of this determination is the amount of \$25.41. Interest is to be paid to Ms Kendall by 5 January 2015.

[17] The issue of penalty has been adjourned to give Hurunui Hotel an opportunity to comply by 5 January 2015.

[18] Should the Hurunui Hotel not comply with the orders made in this determination, the Labour Inspector may seek to enforce those orders through the District Court, or apply in the Employment Court for further orders. The Employment Court has powers³ to order a prison term of up to three months, a fine of up to \$40,000 or *sequester* the property of the person or persons in default.

Costs

[19] The Labour Inspector is entitled to a further \$71.56 for reimbursement of the fee paid to lodge the application for the compliance order.

Helen Doyle
Member of the Employment Relations Authority

³ Sections 138(6) and 140(6) of the Act