

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 94
5555932

BETWEEN

LYNETTE RUSSELL
(SENIOR LABOUR
INSPECTOR)
Applicant

AND

DENTICE FACILITIES
MANAGEMENT (2011)
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Ella Tait, Counsel for Applicant
No appearance for the Respondent

Investigation Meeting: 29 September 2015 at Wellington

Submissions Received: At the investigation meeting

Determination: 29 September 2015

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Lynette Russell, seeks orders the respondent, Dentice Facilities Management Limited (Dentice):

- a. Comply with one of the requirements of an Improvement Notice issued in accordance with section 223D of the Employment Relations Act 2000 on 6 May 2014. It requires Dentice pay \$3,881.27 (being holiday pay owing to an ex-employee – Michelle Redshaw);
- b. Pay interest on the above sum;
- c. Be penalised for failing to comply with the Improvement Notice; and

d. Pay a contribution toward the Labour Inspectors' costs.

[2] Dentices's position is largely unknown given the lack of a Statement in Reply and its failure to participate meaningfully in the Authority's process.

Non-appearance of the Respondent

[3] Dentice was neither present nor represented at the investigation meeting. That raised the question of whether or not I proceed in its absence.

[4] The Authority has been sending its correspondence to Dentice's registered address. The address is that of an accountant retained by Dentice. There is no doubt it is being received given confirmation by the accountant. There is also no doubt the documents are being passed to Dentices' sole director, Gary Leadbeater, given the accountant's advice and a response from Mr Leadbeater to one of those items.

[5] The accountant signed to acknowledge receipt of the notice of investigation meeting at 8.25am on 17 August 2014. The notice includes advice that should a respondent fail to attend the meeting, the Authority may proceed and issue a determination in favour of the applicant. I am therefore satisfied Dentice is, or at least should be, aware of the investigation and the consequences of non-attendance.

[6] In the circumstances, and given the lack of an explanation for the absence, I consider it appropriate to continue. Both Ms Russell and Ms Redshaw are entitled to have their claims resolved.

Background

[7] Dentice provides cleaning services in Auckland and Wellington. It employed Ms Redshaw in August 2010. She left its employ on 5 June 2012.

[8] On 26 July 2012 she approached the Labour Inspectorate complaining she was yet to receive holiday pay owing on termination.

[9] An investigation ensued with various exchanges between the Labour Inspectorate (the individual responsible changed during the process) and Mr Leadbeater. The outcome was that the Inspector concluded Dentice owed Ms Redshaw \$3,881.27 and resulted in the issue of an improvement notice requiring payment. There is no evidence of compliance hence the present application.

Determination

[10] As already said Ms Russell seeks an order Dentice pay outstanding holiday pay, interest thereon and receive a penalty for its failure to comply with the Improvement Notice.

[11] The monies sought must be payable. I am satisfied the Improvement Notice was properly served and Dentice has not objected to it.¹ There is then correspondence from Mr Leadbeater which is attached to the Statement of Problem and suggests he acknowledges monies owe. Even if that was not the case there is the lack of any form of defence along with s.132 and a failure to produce time and wage records. Payment shall be ordered accordingly.

[12] Ms Russell also seeks interest. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Dentice has, by failing to make payments properly due, continued to have use of money rightfully belonging to Ms Redshaw. This is, I conclude, a circumstance in which interest should be payable especially in the absence of a contrary argument. The applicable rate is prescribed in the Judicature (Prescribed Rate of Interest) Order 2011. It is currently 5%. The monies were payable upon cessation. As of the date of this determination the interest payable is \$449.80. It is increasing daily.

[13] Turning to the claim for a penalty. Ms Russell's evidence, along with the correspondence between herself and Mr Leadbeater, satisfies me there has been no compliance. Section 223F of the Employment Relations Act 2000 provides for the imposition of a penalty in such circumstances.

[14] The evidence shows little, indeed no, attempt by Dentice comply with its obligations as an employer. The correspondence also evidences numerous instances upon which Mr Leadbeater makes promises of compliance but fails to honour them.

[15] This is an instance in which a penalty is appropriate. When the principles to be applied in such a situation are considered I conclude the failures, along with the unfulfilled promises, the considerable period over which Dentice has avoided its responsibilities (in excess of three years) and a lack of remorse lend themselves to a

¹ Section 223E of the Employment Relations Act 2000

strong statement of condemnation.² Having reviewed the evidence, the case law and recent penalty impositions, I consider a penalty of \$7,500 to be appropriate. Payment is to be made to the Crown via the Ministry of Business, Innovation and Employment.

[16] The costs claim is minimal and limited to reimbursement of the Authority's filing fee. The cost was incurred and the claim has been totally successful. Dentice will therefore pay a further \$71.56 as reimbursement of costs.

Conclusion and Orders

[17] For the above reasons I order Dentice Facilities Management Limited, to make the following payments no later than 4.00pm Tuesday 13 October 2015:

- a. \$3,881.27 (three thousand, eight hundred and eighty one dollars, twenty seven cents) gross. Payment is to be made to Lynette Russell, Senior Labour Inspector, for disbursement to Ms Redshaw; and
- b. An additional \$449.80 (four hundred and forty nine dollars and eighty cents) being interest owing as of the date of this determination. This will increase by \$0.53 (fifty three cents) with each calendar day that passes between 29 September 2015 and the date of payment; and
- c. A further \$7500.00 (seven thousand, five hundred dollars), being a penalty pursuant to section 135 of the Employment Relations Act 2000. Payment is to be made to the Crown via the Ministry of Business, Innovation and Employment; and
- d. A further \$71.56 (seventy one dollars and fifty six cents) as a contribution towards MBIE's costs. Payment is to be made to the Ministry of Business, Innovation and Employment.

M B Loftus
Member of the Employment Relations Authority

² *Tan v Yang & Zhang* [2014] NZEmpC 65