

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 125
3249299

BETWEEN LABOUR INSPECTOR
 Applicant

AND FLYING DUSTERS LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Petrina Siania, counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 1 March 2024 in Oamaru

Date of Determination: 1 March 2024

DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral indication delivered on 1 March 2024.

Employment relationship problem

[1] The applicant is employed by the Ministry of Business, Innovation and Employment (MBIE) and is a warranted Labour Inspector under s 233 of the Employment Relations Act 2000 (the ERA). I will refer to her as the LI.

[2] Flying Dusters Limited operates a cleaning service. Paula Cooney is the sole director and shareholder.

[3] Nikki-Mae Waddell did some work for Flying Dusters Limited, but was not paid. Ms Waddell complained to MBIE and her complaint was referred to the LI. In the meantime, Ms Waddell received some wages and holiday pay from Flying Dusters Limited.

[4] The LI investigated the complaint, speaking to and seeking information from Ms Waddell and Ms Cooney. The LI came to the view that Flying Dusters Limited had not complied with several legislative provisions with respect to the employment of Ms Waddell and issued Flying Dusters Limited with an improvement notice under s 223D of the ERA. The notice required Flying Dusters Limited to take various steps with respect to any other employees and to pay Ms Waddell some arrears calculated under the Minimum Wage Act 1983 and the Holidays Act 2003.

[5] Flying Dusters Limited did not take the steps required by the improvement notice.

[6] The LI now applies for a compliance order under s 137 of the ERA and a penalty under s 223F of the ERA.

The Authority's investigation

[7] Flying Dusters Limited did not lodge a statement in reply. Nonetheless, Ms Cooney participated in a case management conference.

[8] Flying Dusters Limited was given a further opportunity to lodge a statement in reply and an opportunity to lodge an objection to the improvement notice to set out grounds (if any) to extend time for that objection. Flying Dusters Limited took neither opportunity.

[9] Directions were made for statements of evidence and documents to be lodged and served ahead of an in-person investigation meeting.

[10] The LI complied with the Authority's directions. Flying Dusters Limited did not.

No grounds for an adjournment.

[11] The investigation meeting was set for Oamaru on 1 March 2024. I am satisfied that Flying Dusters Limited was served with the notice of meeting and the statements

of evidence with a bundle of documents. However, there was no appearance for Flying Dusters Limited today.

[12] I am also satisfied that Flying Dusters Limited was served with the LI's improvement notice, the statement of problem and the Authority's directions in this matter.

[13] Flying Dusters Limited has barely engaged with the Authority's investigation process, despite the opportunities and prompts it was given.

[14] Counsel received an email from Ms Cooney late last night and forwarded it to the Authority early this morning. Ms Cooney also sent a similar message to the Authority this morning. In the messages, Ms Cooney says she has been unwell since 26 January 2024, is unable to attend any appointments and asked for "this" to be rescheduled. Ms Cooney also says that she has had to shut down her business.

[15] Counsel opposed an adjournment and was ready to proceed.

[16] Flying Dusters Limited has not shown good cause for its failure to attend. The application was unsupported by any independent verification and arrived at the last minute even though Ms Cooney said she had been unwell for about a month. The application was the Authority's first contact from Flying Dusters Limited since 19 December 2023. Ms Cooney had more than a month after the case management conference to take steps as directed before the illness commenced, but had not.

[17] Flying Dusters Limited put itself in the position where it could only defend the application with leave of the Authority. Despite that, Flying Dusters Limited has done nothing to explain its failure to engage with the Authority's process.

[18] The investigation meeting proceeded and I heard evidence from the LI and Ms Waddell.

A compliance order is appropriate

[19] I find that the LI had reasonable grounds for her conclusion that Flying Dusters Limited was failing to comply with provisions in relevant Acts. The grounds are set out in the LI's investigation report dated 3 April 2023 and the improvement notice dated 6 April 2023. It is not necessary to set them out here, but I will mention two points.

[20] It appears from communications received by the LI that Ms Cooney considered that Ms Waddell had been engaged on an unpaid work trial. That view was never likely to prevail for the reasons given by the LI. In any event, Flying Dusters Limited paid some wages to Ms Waddell on 7 October 2022 as an employee, so she is entitled to the benefit of all minimum entitlement provisions.

[21] Ms Cooney also considered that Ms Waddell was not working when being transported by her between Flying Dusters Limited's client properties. That appears to be why Ms Waddell was paid for 16.9 hours rather than for 23.5 hours. The LI set out grounds for her view that Ms Waddell was performing work for the purposes of the Minimum Wage Act 1983 when being transported between clients. I would agree.

[22] Section 137 of the Employment Relations Act 2000 gives the Authority power to order compliance where a person has not complied with an improvement notice that s 223D(6) of the ERA provides may be so enforced. A person may be ordered to do any specific thing for the purpose of preventing further non-compliance with the improvement notice.

[23] An improvement notice is a tool by which the LI is entitled to recover arrears under both the Minimum Wage Act 1983 and the Holidays Act 2003.¹

[24] A proper response by an employer is to comply with the notice or to lodge an objection within 28 days in the Employment Relations Authority. Flying Dusters Limited did neither.

[25] Under s 137 of the Employment Relations Act 2000, I order Flying Dusters Limited to comply with the improvement notice of 6 April 2023 issued to it by the Labour Inspector, by taking all the steps listed at paragraphs 6.1.1 – 6.1.7 and 6.2.1 - 6.2.5 of the notice. Flying Dusters Limited must comply within 28 days of the date of this determination. This order is subject to the following adjustment.

[26] The LI recalculated the arrears of wages and holiday pay to be paid to Ms Waddell, based on Ms Waddell's evidence that she worked 23.5 hours rather than 24 hours. The arrears of wages under the Minimum Wage Act 1983 reduces to \$139.92 and the arrears of holiday pay under the Holidays Act 2003 reduces to \$11.20.

¹ *Labour Inspector of Ministry of Business, Innovation and Employment v IT-Guys NZ Limited* [2019] NZEmpC 115.

Paragraphs 6.1.4 and 6.1.6 of the improvement notice are amended to require Flying Dusters Limited to pay \$139.92 and \$11.20, respectively. These amounts if paid to the LI are for the use of Ms Waddell.

Summary

[27] The investigation meeting proceeded in the absence of Flying Dusters Limited as no good reason was shown for its non-attendance and I was not satisfied that leave should be granted to defend the application in any event.

[28] As set out above, Flying Dusters Limited must comply with the Authority's order within 28 days. A copy of section 140 of the Employment Relations Act 2000 is attached, to bring to Flying Dusters Limited's attention the powers available to the Employment Court on the LI's application, should it breach the Authority's compliance order.

[29] A penalty is claimed. Counsel offered to provide written submissions but I declined, to avoid delay in determining the matter. On further consideration, I will reserve the penalty claim. If the LI through counsel wants to provide any submissions, they should do so within 7 days of today. If Flying Dusters Limited wishes to make any submissions about penalty, it must provide a written statement within 14 days of today.

[30] Costs and witness expenses are also sought. I will determine those matters at the same time as the penalty claim. Either side may make submissions on these points on the same timetable.

Philip Cheyne
Member of the Employment Relations Authority