

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 168
3022552

BETWEEN BOMBAY GYMKHANA
 LIMITED
 Applicant

AND A LABOUR INSPECTOR
 Respondent

Member of Authority: Robin Arthur

Representatives: Sanjay Sharma, Counsel for the Applicant
 Sarah Blick, Counsel for the Respondent

Investigation Meeting: 16 March 2018

Further information: Memorandum from Applicant counsel on 19 April 2018
 and Memorandum in reply from Respondent counsel on
 30 April 2018

Determination: 24 May 2018

DETERMINATION OF THE AUTHORITY

A. The Improvement Notice issued by a Labour Inspector to Bombay Gymkhana Limited on 12 October 2017 is varied on the terms set out in this determination.

B. Costs are to lie where they fall.

[1] On 12 October 2017 Labour Inspector George Shorrocks issued an Improvement Notice to Bombay Gymkhana Limited. The Notice is a device Inspectors may use to ensure employers comply with employment standards and relevant Acts.¹ The Notice must identify statutory provisions that the Inspector believes an employer is failing to comply with, information about the reasons for that belief, steps the employer could take to comply and state a date for compliance.²

¹ Employment Relations Act 2000, s 223D and s 223A(b) and (c).

² Employment Relations Act 2000, s 223D(2).

[2] An employer may lodge an objection to a Notice within 28 days of its issue. The Authority must then examine whether there has been a failure to comply with the specified provisions, the extent of any such failure and any resulting loss to workers. Depending on what that examination finds the Authority may then confirm, vary or rescind the Notice.³

[3] BGL exercised its statutory right of objection. Its statement of problem, lodged on 7 November 2017, asked the Authority to rescind the Notice because it did not accept the Inspector's conclusions that the company had breached various employment standards. BGL denied it:

- (i) failed to record hours worked in each pay period, contrary to the requirements of s 130(1)(g) of the Employment Relations Act 2000 (the ER Act);
- (ii) failed to pay an employee his annual holiday pay when the employee's employment came to an end, contrary to s 27 of the Holidays Act 2003 (HA);
- (iii) failed to pay time and a half for employees working on a public holiday, contrary to s 50 of the HA;
- (iv) failed to provide an employee with an alternative holiday (for a worked public holiday), contrary to s 56 of the HA;
- (v) failed to pay an employee for an outstanding alternative holiday entitlement when the employee's employment came to an end, contrary to s 60 of the HA; and
- (vi) failed to keep required records, in breach of s 81(2)(c), (e-j) and n of the HA.

[4] In reply the Inspector said he was not satisfied BGL had established compliance with the identified employment standards. He asked the Authority to confirm the Notice. However, if the Authority upheld some of BGL's objections regarding specific provisions, the Inspector asked for an order varying the Notice so any remaining failures would still be subject to the requirements of the Notice.

³ Employment Relations Act 2000, s 223E.

The Authority's investigation

[5] By agreement the parties attended mediation to attempt to resolve their differences over the content of the Notice and compliance with it. When they were unable to do so the Authority proceeded with arrangements for an investigation meeting.

[6] Written witness statements were lodged by Mr Shorrocks, BGL's director Ravi Singh and two former employees of BGL, Ranjit Singh and Shakeel Salman Khan. Each man attended the investigation meeting and, under oath or affirmation, confirmed the content of their own statement and answered questions from the parties' representatives and me. An interpreter of Hindi was available to assist witnesses with translation of questions and answers where requested. The representatives also provided oral closing submissions. At the conclusion of the meeting the determination was reserved.

[7] Some weeks after the meeting BGL's counsel sought leave to adduce further evidence about dates and amounts of final payments made to employees. The Inspector did not oppose that further evidence, comprising a spreadsheet and some bank deposit records, being lodged and did not seek further examination of the witnesses about it or to provide any further evidence as a result. This additional material comprised part of the evidence considered in reaching the determination made.

[8] As permitted by s 174E of the ER Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] BGL owned and operated an East Auckland restaurant trading as Raviz Botany. It sold this restaurant business under a settlement concluded on 6 April 2017. The Notice issued in October 2017 concerned obligations to employees whose employment by BGL had ended by the April date.

[10] The issues raised by BGL's objections, and what might happen to the requirement of the Notice as a result, have been considered under the following four headings.

1. Record keeping: wage and time records and holiday and leave records

[11] In the course of discussion of his evidence at the investigation meeting the Inspector accepted it was now neither necessary nor useful to require BGL to correct its inadequate records of the hours of work of its former workers. He agreed the Notice should be varied to remove those requirements. The specific example concerned the time records of Ranjit Singh and Shakeel Salman Khan that did not record their start or finish time for each day. Instead the record showed the letters L/D rather than starting and finishing times or hours worked. The letters used referred to working on the Lunch service and the Dinner service on that day. The times that the restaurant was open for lunch service (from 12 noon to 2.30 pm) and open for dinner service (from 5.30 to 10.30 pm) did not necessarily record the actual hours that each worker worked on each day. While those opening hours might reflect the general pattern of hours worked, the use of the letters L/D did not accurately record when kitchen staff may have started earlier or stayed later to do preparation and clean up work. For that reason the records BGL kept failed to meet requirements of s 130 but no useful purpose was served by requiring them to be amended now, particularly as the prospect of doing so accurately was very limited.

[12] The Notice is to be varied by removing paragraph 6.1.1. which set out steps to comply with s 130 of the ER Act.

[13] For similar reasons the Inspector agreed to the variation of compliance steps set out in paragraph 6.1.2 for the addition of further information to rectify inadequate records of holiday and leave kept by BGL. However two of those steps – at the fourth and fifth bullet points of paragraph 6.1.2 of the Notice – required updating of its records to properly reflect the payments made later to workers, as a result of the Inspector's inquiries. They concerned details of dates, hours and payments for public holidays worked and details of dates and payments made for public holidays or alternative holidays not worked but for which the worker was entitled to be paid.

[14] Accordingly the Notice is to be varied by deletion of the first, second, third and sixth bullet points of paragraph 6.1.2 (and, consequentially, by deletion of

paragraph 6.2.1 which referred to evidence required about those records). BGL remains required to satisfy the Inspector it has properly recorded the details set out at the fourth and fifth bullet points of that paragraph (and, consequentially, by providing the Inspector with the evidence required at paragraph 6.2.2 of updated holiday and leave records for Ranjit Singh and Shakeel Salman Khan).

2. Payment for annual holidays

[15] Requirements set out in the Notice under this heading related to a payment due to a specifically named worker and to an audit of all former workers' records dating back to March 2015 to ensure their final annual holiday pay was calculated, paid correctly and the records updated.

[16] The employment of the one named worker had ended in May 2016 without payment to him of final annual holiday pay due. This breach was identified in the Inspector's September 2017 investigation report. At that time BGL responded that it had no contact details for that worker and, on legal advice, would instead pay his final annual holiday pay to IRD. By the time of the Authority investigation meeting, as a result of further efforts by BGL, BGL said the amount due had been paid to that worker. As a result the Notice requirements regarding that worker, found at the first bullet points of paragraph 6.1.3 and 6.2.3, could be complied with by BGL providing the Inspector with whatever documents confirmed that it had made the payment to the worker and had updated its records to show that payment. No variation of those points was needed.

[17] At the time of the investigation meeting BGL was not able to show it had completed the requirements of the Notice for an audit of final holiday pay to all former employees and for payment of any arrears due. However, in the evidence lodged subsequently, BGL has now provided bank statements showing further payments to six workers. Through counsel's memorandum Mr Singh apologised for forgetting those payments had been made from a different bank account. He also acknowledged he could not find any evidence of payments due to two other workers, so those payments were made on 6 April 2018. He provided documents as evidence of those recent payments.

[18] In terms of the Notice's requirements under that heading, set out in the second bullet point of paragraph 6.1.3 and second and third bullet points of paragraph 6.2.3,

what remained to do was for BGL to show the Inspector that the relevant records had been updated to reflect that additional information and payments.

3. Payment of time-and-a-half for public holidays worked

[19] The issue of payment of time-and-a-half arose because BGL's timesheets showed Ranjit Singh worked for the lunch and dinner services on 28 March 2016, which was the Easter Monday public holiday that year. BGL's wage records did not show he was paid the 50 per cent loading for work on that day.

[20] For the Authority investigation meeting Ranjit Singh had signed and confirmed a written witness statement saying he had not worked that Easter Monday. The written statement said he made a mistake when he filled out the timesheet and he had told Ravi Singh about it at the time. In his oral evidence Ranjit Singh said his witness statement was prepared for him by Ravi Singh. His oral evidence was more equivocal about what he had done and what he remembered about working that Easter Monday. As best as he could remember he thought the timesheet showing him working that day "maybe a mistake" as he usually had Monday off and was "always off" on the public holidays that fell in the period he worked at the restaurant between February and October 2016. He also suggested that the restaurant manager who prepared the timesheet, and whose initials were on it, had made a mistake. Ranjit Singh had not signed the timesheet.

[21] Ranjit Singh's evidence did not give sufficient grounds to ignore what the timesheet showed in preference for the recall, many months later, of him and Ravi Singh. If there were any real doubt about the actual circumstances on this point, the benefit of that doubt rested with the Inspector ensuring BGL complied with its statutory obligations. The Inspector could reasonably rely on the record made at the time to require BGL to pay Ranjit Singh for work on the Easter Monday. If the record was wrong as BGL now asserted, having to pay Ranjit Singh for what it said was a day he had not worked, was a price for not meeting its statutory obligation to make and keep an accurate record at the time.

[22] Accordingly, the requirements at 6.1.4 and 6.2.4 of the Notice for BGL, to pay Ranjit Singh for that day and to audit its payment for public holidays worked for all former employees, are not varied by this determination. BGL needs to complete the provision of its evidence of having done so.

4. Providing and paying for alternative holidays

[23] During his inquiries in April 2017 the Inspector spoke to Shakeel Salman Khan. Mr Khan had finished working at the restaurant in November 2016 and complained that he had not received any holiday pay until January 2017. On checking BGL's holiday and leave records the Inspector concluded BGL had not properly credited Mr Khan with 11 alternative holidays for working on public holidays. Consequently the Inspector also concluded Mr Khan was not properly paid for his entitlements to those days in the balance paid to him at the end of his employment.

[24] For the Authority investigation Mr Khan signed and confirmed a written witness statement saying he had taken 11 paid days off in January and November 2016 while working for the restaurant. His written statement said nothing further was owing to him. In his oral evidence Mr Khan said his witness statement was prepared for him by Ravi Singh. His oral evidence was more equivocal about what days he had worked. At one point he was sure he had not worked on any public holidays and had those days off. At another, having been asked to look at BGL's records showing he had worked on "L/D" on days that were public holidays, he said he could not remember after a long period of more than two years.

[25] Mr Khan's evidence did not give sufficient grounds to ignore the conclusions reached by the Inspector from an analysis of BGL's records. If there were any real doubt about the actual circumstances on this point, the benefit of that doubt rested with the Inspector ensuring BGL complied with its statutory obligations. The Inspector could reasonably rely on the record made at the time to require BGL to pay Mr Khan for alternative holidays for the public holidays he appeared to have worked. If BGL's record was wrong, having to pay Mr Khan for what it said were days he had not worked or had already had taken as paid holidays, was a price for not meeting its statutory obligation to make and keep better records at the time.

[26] Due to the shortcomings identified by his analysis of BGL's records about Mr Khan's employment, the Inspector's Notice required BGL to audit its records for all former employees to ensure alternative holidays were provided if they worked a public holiday and, if those entitlements were not used, those employees were paid for them at the end of their employment. The example of Mr Khan provided reasonable

grounds for those requirements. It made them reasonable steps for the Inspector to take in ensuring relevant Acts were complied with.

[27] Accordingly, the requirements at 6.1.5, 6.1.6, 6.2.5 and 6.2.6 of the Notice for BGL – requiring evidence of payments made to Mr Khan for those days, an audit of other employee entitlements and payments for shortfalls – are not varied by this determination. BGL needs to complete the provision of its evidence to the Inspector of having taken and completed those required steps.

Discretionary factors

[28] In considering whether changes to a Notice are required the Authority exercises a discretion, indicated by the word “may” in s 223E(3) of the Act. In reaching the conclusions outlined above in this determination, discretionary factors considered include whether the remaining requirements were unduly onerous on a company in respect of a business that it no longer owns and operates and whether meeting those requirements at a much later time has any potential practical purpose. The need to make and keep accurate records results, in part, from the statutory right of to seek wage arrears up to six years after the end of their employment.⁴ Employers have a corresponding obligation to keep “at all times” accurate records of wages, time, holiday and leave.⁵ BGL had not fully met those statutory obligations during the time it was running the now-sold business. It is responsible for any inconvenience it now incurs in rectifying those failures. The requirements left in place as a result of the variations to the Notice made in this determination also have some practical purpose in relation to potential benefit to the former employees.

[29] I also considered Mr Singh’s allegation that the Inspector only investigated his business in late 2016 because Mr Singh had publicly criticised Immigration New Zealand. The criticism concerned delays in issuing work visas for staff at the restaurants Mr Singh ran through BGL and other companies. The public comment Mr Singh referred to was published in an Indian community newspaper the week before the Inspector’s first visit to the restaurant. The newspaper report did not name Mr Singh, describing him only as “the owner of a popular restaurant brand” who had requested anonymity. The report quoted him as saying:

⁴ Employment Relations Act 2000, s 142.

⁵ Employment Relations Act 2000, s 130 and Holiday Act 2003, s 81.

“Since the ‘Massala Episode’ erupted two years ago, all Indian restaurants are being painted with the same black brush. We operate an honest, health business, paying our employees in accordance with the laws in force. If they have the right to inspect our premises, check our records and be satisfied with our compliance, it is not fair to keep us hanging.

[30] Apart from Mr Singh’s allegation, there was no evidence of any causal link between his anonymous comments and the Inspector’s investigation. The Inspector’s evidence was that, to his knowledge, BGL’s Botany restaurant business was randomly chosen for investigation. Given the shortcomings identified in BGL’s compliance with the relevant employment standards for record keeping and certain payments to workers, Mr Singh’s allegation that BGL was “unfairly targeted” was not substantiated. It was not established as a factor that could warrant rescinding the requirements of the Notice issued to the company.

Order

[31] In addition to the variations to the Notice set out in this determination, paragraph 6.3 of the Notice is also varied by requiring BGL to complete the steps and provide the information listed in it by no later than 24 July 2018.

Costs

[32] The variation ordered represented a degree of success for both parties – BGL to have some requirements of the Notice accepted as completed or removed and the Inspector to have BGL required to complete remaining steps needed to satisfy the terms of the Notice. Neither party succeeded in the outcome they initially sought in this matter – BGL for rescinding the Notice, the Inspector for confirming it in its entirety. In those circumstances an order for costs to lie where they fell was appropriate. Each party must bear its own costs incurred for representation in this matter.

Robin Arthur
Member of the Employment Relations Authority