

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2025] NZERA 76  
3177393

BETWEEN ESSEX LIMITED  
Applicant

AND A LABOUR INSPECTOR  
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Tim Blake, counsel for the Applicant  
Michelle Brown, counsel for the Respondent

Investigation Meeting: 25 and 26 September 2024 in Rotorua

Submissions Received: Up to and including 19 November 2024 from the  
Applicant and the Respondent

Determination: 14 February 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Essex Limited trades as Hennessey’s Irish Bar in Rotorua (Essex). Between August 2021 and June 2022, a Labour Inspector conducted an investigation into Essex Limited regarding compliance with minimum employment standards. The investigation concluded that Essex had breached the following minimum employment standards:

- (a) Section 6 of the Minimum Wage Act 1983 by failing to pay four employees for every hour worked in the relevant pay periods;
- (b) Sections 21 and 22 of the Holidays Act 2003 (HA) by failing to calculate and pay annual holidays and annual holidays taken in advance of an employee’s entitlement at a rate that is based on the greater of an

employee's ordinary weekly pay (OWP) or average weekly pay (AWP) in respect of two employees;

- (c) Section 24 of the HA by failing to calculate and pay holidays due on termination at a rate that is based on the greater of an employee's OWP or AWE in relation to one employee;
- (d) Section 25 of the HA by failing to calculate and pay annual holidays on termination at a rate of eight percent for the periods one employee became entitled to the next annual holiday entitlement;
- (e) Section 49 of the HA by failing to pay one employee for unworked public holidays which would otherwise have been a working day at a rate that is not less than an employee's relevant daily pay (RDP) or average daily pay (ADP) for that day;
- (f) Section 56 of the HA by failing to pay one employee alternative holidays when they worked on public holidays that were otherwise a working day;
- (g) Section 60 of the HA by failing to pay alternative holidays at not less than the employee's RDP or ADP to three employees.

[2] On 10 June 2022, the Labour Inspector issued an Improvement Notice to Essex highlighting the above failures and requiring the applicant to remediate back to 12 August 2015.

[3] On 8 July 2022, Essex filed an objection to the Improvement Notice in its entirety. It says that the Improvement Notice was not justified and that the steps it was being required to undertake were unreasonable, oppressive and/or impossible. They say this is because:

- (a) It is a small business and it has struggled during and following the COVID 19 pandemic;
- (b) The steps required would involve a lot of work and expense;
- (c) Many business records no longer exist as they were destroyed in a flood in 2018;
- (d) A lot of former employees were migrant workers who may no longer be in New Zealand and the applicant wouldn't know how to contact them;

- (e) Even if the holiday pay was miscalculated, any miscalculation would be minor and would be made on the basis the applicant had been relying on a professional payroll company;
- (f) The Labour Inspector's selection of the applicant for an investigation is unfair, unreasonable and improper and her treatment of the applicant is inconsistent with how other employers have been treated;
- (g) The Labour Inspector should have waited to issue the Improvement Notice until after the complaints Essex had made to the Ministry of Business, Innovation and Employment (MBIE) and the Ombudsman were resolved.

[4] At the commencement of the investigation meeting, I was informed that Essex's complaints to MBIE and the Ombudsman are no longer live and Essex has provided the Labour Inspector with satisfactory evidence showing attempts to make contact with former employees. It was fair to say, however, there was tension between the parties as a result of the background to the investigation. This included apparently a false complaint by a competitor which led to a major disruption of Essex's business during a busy lunch time and which was later found to be false. The Labour Inspector, however, decided to continue with the investigation, albeit it seems on a more limited basis.

## **Discussion**

### *Issues with the Improvement Notice*

[5] Having regard to s 174E of the Employment Relations Act 2000 (the Act) I do not refer in this determination to all the evidence received during the investigation meeting. Further, whilst I have not referred to all the submissions made by the parties, I record I have fully considered them.

[6] The Improvement Notice was issued on 10 June 2022. It required Essex to review records and conduct calculations for all current and past employees from 12 August 2015 onwards. The Labour Inspector agrees that compliance with an Improvement Notice can only be required going back six years.<sup>1</sup> Accordingly, the Improvement Notice can only require Essex to go back to 9 June 2016.

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<sup>1</sup> *Danske Mobler Limited v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2024] NZEmpC 180.

[7] Essex says that the Improvement Notice is fatally flawed because it does not comply with s 223D of the Act. As the Labour Inspector noted, there is no prescribed form for improvement notices and whilst I understand Essex's concern in respect of some of the requirements the Labour Inspector has imposed on them, nonetheless the Improvement Notice informs Essex of the alleged breaches to be remedied, and states the steps they could take to comply. Again as noted by the Labour Inspector, an Improvement Notice need not be overly prescriptive.

[8] The Improvement Notice however does not comply with s 223D(2) specifically 223D(2)(b) and (c). This became clear during the investigation meeting in respect of the statement of the Improvement Notice (2.1.7) where the allegation was made that Essex had failed to provide an employee with an alternative holiday when they worked on a public holiday and that day was an otherwise working day for the employee. The statement was based on an assumption by the Labour Inspector which was not tested. No interview was conducted with the employee and I find as a matter of fact, on the evidence before me, the employee in question did not work on a day which would otherwise have been a working day for them. Likewise an inquiry regarding the allegation in 2.1.6 of the Improvement Notice was difficult to resolve. Again, employees had not been spoken to by the Labour Inspector and it was difficult to follow the Labour Inspector's conclusions.

[9] I accept the submissions on behalf of Essex that at least some of the findings made by the Labour Inspector are in essence alleged findings which at the very least were challengeable. As indicated above, in a number of cases, employees were not interviewed and assumptions were made. Essex stresses that the Improvement Notice gives the impression it was to be them who quantified the extent of alleged failures instead of the Labour Inspector.

[10] During the investigation meeting it was conceded by the Labour Inspector that Essex had lost records in a flood which occurred on 28 April 2018. There was a suggestion that Smartly, a company providing payroll services, may have had some of the records electronically. However during the investigation meeting, it became clear that this was not the case.

[11] Essex's evidence was that there are no additional records to enable a recalculation as required by the Improvement Notice, prior to April 2018. The records held by Smartly were not enough to accurately and reliably recalculate pay and leave

entitlements. Although Mr Forbes who had filed a brief of evidence in support of Essex, proved to be an unreliable witness no doubt because of the uncomfortable position he found himself in as an employee of Smartly, and attempted to walk away from various aspects of his written brief, I consider it more likely than not that his evidence that Smartly records did not include employment agreements, timesheets, records of what particular days of the week were worked or how many hours were worked on any given day, was accurate.

[12] Following the investigation, Ms Burnett, Essex's director, has given further evidence on oath that she contacted Smartly by phone and email and it has been confirmed that Smartly do not hold any additional records. Since the investigation meeting, Ms Burnett has also searched Essex's computers but has been unable to locate any relevant additional information records.

[13] Ms Burnett also clarified the position regarding Bidaya Prajapati. This was an employee the Labour Inspector considered was not paid a day in lieu. As mentioned above, the evidence made it clear that Ms Prajapati would not normally work on Labour Day which in this case was Monday 28 October 2019. The Labour Inspector however did point out at the hearing that Ms Prajapati should have been paid for a day in lieu for New Year's Day Wednesday 1 January 2020. Ms Burnett's evidence was that amount has since been paid.

[14] Essex's view was that the Labour Inspector had issued its Improvement Notice on the basis that Smartly's calculations given to Essex were incorrect. Essex ended its relationship with Smartly, namely because it refused to stand by important aspects of its previously submitted evidence regarding its involvement in the preparation of Essex's payroll records. Nonetheless on a number of occasions, the Labour Inspector's findings were based on assumptions and not on interviews with affected employees. For this reason I find it difficult to accept that the calculations provided by Smartly were anything other than correct.

[15] A large number of the staff employed by Essex during the period the Improvement Notice applies, are no longer locatable. They have either returned home to their own countries, or have left no forwarding address. This means it is impossible for Essex to comply with the terms of the Improvement Notice. In this respect, and the Labour Inspector has accepted, reasonable efforts were made to contact affected staff.

## **Conclusions**

[16] The Improvement Notice issued by the Labour Inspector dated 10 June 2022 is varied in the following respects:

- (a) Insofar as the Improvement Notice required Essex Limited to review and conduct payment calculations for all current and past employees, Essex Limited is only required to do this from 1 April 2018.
- (b) The two shareholders of the company who are also technically employees, namely Rosemary Susan Burnett and Reginald Joseph Hennessy, are not required to be included in the above review and calculations.
- (c) Essex Limited is only required to conduct reviews and calculations in respect of those past employees it has contact details for.

## **Costs**

[17] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. My initial view is that in a case like this where it could be said both parties have a measure of success, and the Labour Inspector is carrying out a statutory duty, costs should lie where they fall.

[18] If, however, the parties are unable to resolve any issue of costs between them, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum [the other party] will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[19] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>2</sup>

Geoff O’Sullivan  
Member of the Employment Relations Authority

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<sup>2</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)