IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 256
5560060

	BETWEEN	KATE FEENEY, LABOUR INSPECTOR Applicant
	AND	NAARI COLLECTION LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Rebecca Denmead, Counsel for the Applicant Chirag Ahuja, Advocate for the Respondent
Investigation Meeting:	21 August 2015
Oral determination:	21 August 2015
Written record issued:	21 August 2015

DETERMINATION OF THE AUTHORITY

A. By order under s137(2) of the Employment Relations Act 2000 (the Act) Naari Collection Limited (NCL) must, by no later than Friday 4 September 2015, deliver to the Labour Inspector a true and complete copy of its wage, time, holiday and leave records for its former employee Kalpana Nandni and, if one was completed, its written employment agreement with Ms Nandni.

B. Within 28 days of the date of issue of the written record of this determination, NCL must pay to the Labour Inspector $4000 as a penalty for its failure to produce the records and employment agreement of Ms Nandni when earlier required to do so under s 229(1)(c)(i) and (d) of the Act.

C. NCL may also pay the Inspector $71.56 in reimbursement of the fee paid to lodge this application.

Employment Relationship Problem

[1] Labour Inspector Kate Feeney sought a compliance order and a penalty against Naari Collection Limited (NCL) following the company's failure to provide wage, time and holiday records and its written employment agreement for Kalpana Nandni, a former employee of NCL. The Inspector required the records and employment agreement for the purpose of investigating a complaint received from Ms Nandni.

[2] The Inspector advised NCL on 4 March 2015 that she required the documents by 11 March (that was seven days later). In doing so she was exercising statutory powers granted to labour inspectors under s 229 of the Employment Relations Act 2000 (the Act). On NCL's behalf Chirag Ahuja responded to the Inspector's email on 6 March. Companies Office records show Mr Ahuja was a director of NCL from 1 March 2014 to 14 August 2015. He is the son of its sole remaining registered director Neelam Ahuja.

[3] Mr Ahuja's 6 March email stated the company had closed down last year, its paperwork was in a warehouse or with its accountant and, as he was "very busy these days and running a new business", he needed until 27 March to respond to the request.

[4] The Inspector responded with an email setting out her statutory powers to require the records and drawing Mr Ahuja's attention to the penalty provisions for not complying with the request. She restated the 11 March deadline. On 11 March Mr Ahuja sent a further email stating that he "will need some time and can provide by 27th March".

[5] On 16 March the Inspector sent Mr Ahuja a further email suggesting that she meet him or NCL director Neelam Ahuja at the office of NCL's accountant or some other convenient location on the next day or the day after so the Inspector could look at the requested information. In a response email Mr Ahuja stated "the records have moved to 2 to 3 places" since the business closed and he would have to search "and then can only provide you by 27th March". He also advised that he had contacted Ms Nandni and said that she had told him that she had made no complaint but was contacted by another person and the Inspector to make a complaint. His email ended with the statement that "her records will be sent to you by 27th March 2015".

[6] The Inspector responded with an email on 18 March formally cautioning Mr Ahuja about obstructing her investigation and against contacting Ms Nandni directly again. By email on 27 March Mr Ahuja responded:

> Thanks for the warning but I am not causing any obstruction. I am only asking for time. I have tried searching docs but could not find yet. I need more good 10 days or so as I will have to take off from work and then hunt for them.

[7] In her application to the Authority, lodged on 2 June 2015, the Inspector stated that she had still not received the records relating to Ms Nandni.

[8] NCL's statement in reply, lodged by Mr Ahuja, accused the Inspector of being "blatantly biased" against him for not agreeing to his request for further time. He said if he "was allowed until 27th March in the first instance, I am sure I would have had sufficient time and mental peace to organise myself to locate the documents". He described the Inspector as "rigid and biased against me and did not give me the chance to resolve it through any other means".

[9] Two other aspects of the background to this matter were relevant and noteworthy. Firstly, Neelam Ahuja – the sole director of NCL since Mr Ahuja ceased to be a director on 14 August 2015 – is also the sole director of a company called Khoobsurat Limited. Khoobsurat Limited was the respondent company in an application lodged by the Inspector on 25 September 2014 on which the Authority issued a determination on 23 July 2015.[1] The Authority member who conducted the investigation of that matter found the Inspector had uncovered "a systemic abuse of vulnerable employees" who were not paid the minimum wage for each hour worked. The member also concluded wage and time records lodged by Khoobsurat Limited were "fabrications". He ordered Khoobsurat Limited to pay $18,515.71 for underpaid wages and a penalty of $30,000 for multiple breaches of minimum employment standards.

[10] Secondly, the Companies Office records for NCL and Khoobsurat Limited showed the Registrar had posted notices for their removal from the register. The Inspector had objected to their removal and provided copies of correspondence from the Registrar confirming the removal action was suspended for six months. A check of the Companies Office register online made shortly before I began delivering this

[1] *Feeney v Khoobsurat Limited* [2015] NZERA Auckland 217 (Member Crichton).

determination orally today showed both NCL and Khoobsurat Limited remained registered.

The investigation

[11] The Inspector and Mr Ahuja attended the investigation meeting today and, both under oath, answered questions from me about aspects of the Inspector's claim. Mr Ahuja and counsel for the Inspector had the opportunity to ask additional questions and make closing submissions on the three issues for determination.

(i) Was a compliance order still necessary to require NCL to provide Ms Nandni's records and, if so, what should that order be?

[12] The Inspector's evidence was that production of the records remained necessary for the conduct of her investigation into Ms Nandni's complaint. While the Inspector could have proceeded with a wage arrears claim (relying on Ms Nandni's evidence and in the absence of NCL records) she believed the records existed because NCL had complied with previous requests for records of other employees in 2013. Having those records would assist her in pursuing the arrears claims for Ms Nandni and the Inspector sought a compliance order for the purpose of getting them.

[13] Mr Ahuja said he had still not located those records but was "101 per cent" sure they existed. He believed they were stored at one of six addresses in Auckland – one being his home address and the other five being business premises. He said he had looked for the records "a little bit" but not thoroughly. He said he was "100 per cent sure" he could provide Ms Nandni's records within the period of 10 to 20 days.

[14] On that evidence I have accepted issuing a compliance order would serve some practical and necessary purpose and would not be a futile exercise. Accordingly, by order under s137(2) of the Act NCL must, by no later than Friday 4 September 2015, deliver to the Labour Inspector a true and complete copy of its wage, time, holiday and leave records for its former employee Kalpana Nandni and, if one was completed, its written employment agreement with Ms Nandni.

(ii) Should NCL be ordered to pay a penalty for failing to provide Ms Nandni's records before now?

[15] NCL was liable for a penalty because it failed to comply with the requirement of a Labour Inspector to produce wage, time and holiday records: sections 229(1)(c)(i), (2) and (3) of the Act.

[16] There may have been a valid question of whether a penalty should be imposed on NCL if the required records had been produced sometime soon after the seven day period initially required by the Inspector (or at the meeting she proposed for 17 or 18 March). However that was not a consideration because the records were not even provided by the deadline Mr Ahuja himself set of 27 March (or even by the extended period of a further "ten days or so" that he then suggested on 27 March). Neither were they produced at any time in the 133 days between 10 April and 21 August 2015. If they had been produced at any one of those dates later than the Inspector's initial deadline of 11 March, there would still have been a potential liability for a penalty but its level might have been reduced to account for belated compliance.

[17] Mr Ahuja advanced two unconvincing arguments about the delay. One was that he did not continue to search for the documents because the Inspector had not agreed to or approved his request for an extension of time to do so. The other was that he would have been able to continue the search, on NCL's behalf, if the Inspector had not disturbed his "mental peace".

[18] Neither have I accepted Mr Ahuja's submission that the Inspector was unduly rigid in her demand for the records and exercised her powers unfairly. He expected the Inspector would "do some kind of bargaining" about the deadline. He said that other Inspectors had previously agreed to requests for extensions and other agencies such as IRD and the Immigration Service often did so when asked.

[19] Section 229(2) of the Act states an employer must comply "forthwith" when required to provide records by a Labour Inspector. The Inspector's evidence was that seven days was routinely used as a reasonable period to meet that 'forthwith' standard. She had also proposed an alternative later time on 17 or 18 March to view the records (after her initial 11 March deadline) but that had not suited Mr Ahuja either.

[20] The reasonableness of the time given by the Inspector to comply with her request was, however, long since redundant as NCL had not met the deadlines that Mr Ahuja himself set and promised, of 27 March or ten or so days after that, or at any time since up until the day of this determination. NCL's liability for the penalty rests on that failure well beyond the period set by the Inspector.

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[21] Factors in determining the appropriate level of penalty include:[2]

- How much harm was caused (considering the seriousness of the breach and the impact on the employee affected, including any aspect of vulnerability); and
- Whether the breach was technical and inadvertent or flagrant and deliberate; and
- Whether the breach was one-off or repeated; and
- The need for deterrence; and
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

[22] NCL's failure to supply records (since admitted to exist) when required by an Inspector to do so was a serious breach of an important statutory standard. It was conduct undermining the Inspector's exercise of her powers for which NCL must be punished and from other employers must be deterred. Mr Ahuja's admission that the records were available somewhere – but not properly searched for and provided anytime during a period of more than 133 days – confirmed the conduct was deliberate rather than inadvertent. The harm caused was the delay in the Inspector properly carrying out and completing her statutory functions and delay in resolution of Ms Nandni's complaint (which could involve outstanding financial entitlements owed to her). No remorse was shown. Instead NCL, through Mr Ahuja's comments, blamed the Inspector for its own failings.

[23] Although NCL is a separate legal entity, the recent finding by the Authority that Khoobsurat Limited – of which Ms Ahuja was also the director – had breached employment standards to a degree that warranted a penalty was a factor confirming a

[2] *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC) at [47]-[48] and *Tan v Yang* [2014] NZEmpC 65 at [31].

penalty against NCL was also appropriate (but not affecting the level at which it was set on the basis on repeated breaches).

[24] In considering the level at which to set the penalty I also took account of the level of penalties awarded in other comparable cases for failure to provide records required under s 229 of the Act.[3] Each case turns significantly on its own facts. A wide range of penalties may reasonably result from the particular evidence and how it applies to each of the factors relevant in determining the appropriate level of penalty. Subsequent participation, co-operation or agreement by the previously errant employer may make a significant difference but was not apparent in the present case.[4]

[25] The circumstances of NCL's conduct, considered against the range of penalties imposed in comparable cases, warranted a penalty of $4000 under s 135 and s 229(3) of the Act. NCL must pay the penalty imposed within 28 days of the written record of this determination being issued.

(iii) Should NCL be ordered to reimburse the Inspector for the filing fee?

[26] In light of the outcome of this determination NCL must also reimburse the Inspector for the $71.56 fee paid to lodge the application.

Robin Arthur
Member of the Employment Relations Authority

[3] See, for example, *Begum v CK Hospitality Ltd t/a Masala Indian Restaurant (in liq)* [2015] NZERA Auckland 97 ($10,000); *O'Shea v Radley Haulage Ltd* [2015] NZERA Christchurch ($800); *Begum v Bucklands Beach Ltd* [2014] NZERA Auckland 479 ($6000); *Feeney v Balaji Sweets & Snacks NZ Ltd* [2014] NZERA Auckland 460 ($1800); *Kim v Three Doves Ltd* [2014] NZERA Christchurch 158 ($3500).

[4] See, for example, the Authority's determinations in the *Radley Haulage, Balaji Sweets* and *Three Doves* cases, above at note 3.