

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 110
5552348

BETWEEN DOUGLAS KARL HIXON
(LABOUR INSPECTOR)
Applicant

A N D NCHR LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Ella Tait, Counsel for the Applicant
Ping Zeng, Advocate for the Respondent

Investigation Meeting: 3 August 2015 at Auckland

Date of Determination: 3 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector (Mr Hixon or the Labour Inspector) seeks a compliance order in respect of the respondent's (NCHR) failure to comply with an improvement notice and penalties for the same failure. NCHR says that it is ready, willing and able to meet the arrears of wages and between the filing of the statement of problem and my investigation meeting, it did so.

[2] The improvement notice Mr Hixon served on NCHR was dated 10 October 2014 and identified arrears of wages owing to seven employees dating from June and July 2013 together with a failure to supply a putative employment agreement and a failure to provide wage and time records which complied with the law.

[3] As I have already noted, NCHR paid the arrears of wages on 25 June 2015 using funds from another legal entity.

[4] The evidence of the applicant Labour Inspector was confirmed by affirmation, was unchallenged, and I accepted it at face value.

[5] Evidence for NCHR was to the effect that the employer had sought advice from the Ministry of Business, Innovation and Employment (MBIE) when it received the improvement notice from Mr Hixon, that it endeavoured to follow the advice given, and that despite the best efforts of Mr Hixon, until latterly NCHR did not understand the nature of its obligations under New Zealand law. I note that the governing director of NCHR, Ping Zeng, does not speak English as a first language.

[6] The status of NCHR is still in issue. The company is no longer trading and was in the process of being deregistered until the present proceeding was on foot when, by way of application from the Labour Inspectorate, the deregistration process was paused. I was told and accept that NCHR has no funds and is not trading.

The issues

[7] As counsel for Mr Hixon has helpfully identified, the three issues for the Authority are:

- (a) Did the respondent fail to comply with the improvement notice;
- (b) Ought compliance to be ordered in respect of any failure; and
- (c) Should penalties be ordered?

Did the respondent fail to comply with the improvement notice?

[8] I am satisfied on the evidence I heard that the respondent, NCHR, did fail to comply with the improvement notice. The improvement notice has three basic limbs to it: an identified failure to meet minimum wage payments in respect of seven former employees; the failure to provide a proposed employment agreement that would apply for future employees; and a failure to provide wage and time records which comply with the law.

[9] As to the first, as I have already indicated, there was a failure to pay the arrears of wages owed for nearly two years from the date that those wages were owed. That is a fundamental breach of NCHR's obligation to its employees.

[10] I observe that NCHR maintained that these employees were engaged on a “*piece work*” basis and that the employer disputes the claims made against it by the former employees, which claims are supported by Mr Hixon. Notwithstanding those issues, prior to my investigation meeting, NCHR caused full and final payment of the arrears of wages to be made from a legal entity associated with NCHR but not from NCHR itself which has no funds.

[11] In terms of the other two aspects to the improvement notice, NCHR’s position is that it has endeavoured to meet its obligations to the Labour Inspector but the evidence I heard from Mr Hixon (which I accept) is that, although he received a document from NCHR which he was unable to open electronically, and he promptly reverted to NCHR and asked it to resend it, that latter step never happened and so the short point is that, whatever NCHR’s intentions in the matter, it did not provide Mr Hixon with either the putative employment agreement or a compliant wage and time record.

[12] As with all improvement notices, this particular notice had a date stipulated by which the matters identified in the improvement notice were to be rectified. In the present case that date was 7 November 2014, and I am satisfied on the unchallenged evidence of Mr Hixon that by that date, none of the matters identified in the improvement notice had been rectified.

[13] It follows from that conclusion that there was no compliance with the improvement notice.

Should a compliance order issue?

[14] I am satisfied that the proper course is for the Authority to require compliance with the matters in the improvement notice which have not already been rectified. That is, the provision of a template employment agreement which would apply to future employment and evidence of a compliant wage and time recordkeeping system.

[15] The arrears of wages issue has, as I have already noted, already been satisfied and so does not need to be dealt with here.

[16] I make the orders for compliance really for the sake of completeness; given the evidence that I heard which I accept that NCHR will cease trading shortly, the requirement to comply with Mr Hixon’s improvement notice simply emphasises the

point that employers need to understand that when they receive an improvement notice from a Labour Inspector they need to comply with it in order to avoid the sort of process that NCHR has become involved with in the present case.

Should penalties be ordered?

[17] During the course of the investigation meeting, I gave earnest consideration to this aspect of Mr Hixon's claim, partly because it seemed to me that NCHR had taken some steps to engage appropriately with the statutory process and partly because of my anxiety about the utility of making an order for penalties to apply against an employer that, on the evidence I heard, will not trade again.

[18] I received helpful submissions on the issue of penalty from counsel for the applicant Labour Inspector who, amongst other things, emphasised the need for deterrent such that a clear message was sent, not just to this employer but to all others who became aware of this matter that failure to comply with an improvement notice would sound in penalties, even where the evidence was that the employer was not continuing to trade.

[19] Of course, the purpose of a penalty as Her Honour Judge Inglis said in *Tan v. Yang & Zhang* [2014] NZEmpC 65, "... is to punish and deter others from engaging in such conduct". Looked at in that way, with the emphasis Her Honour places on "others", the status of this employer is less important than the precedent setting value of the case itself.

[20] That said, I am disposed to levy a lesser penalty here than I might otherwise because I am satisfied on the evidence I heard that there was some attempt by NCHR to comply, albeit belatedly, and particularly in respect of the advice Ping Zeng says that he got from MBIE where it appears he endeavoured to do what was required of him insofar as he understood it.

[21] I must say that although Ping Zeng made it clear that his English was good enough not to require an interpreter for my investigation meeting, and the issue was directly canvassed at the telephone conference I convened to set the investigation meeting up, I was not satisfied that Ping Zeng had as good a grip of the English language as may have been necessary to understand precisely what it was that he was supposed to do and I apply a discount for that reason.

[22] I accept without reservation Mr Hixon's point that the reason that Labour Inspectors habitually engage with employers in writing (albeit electronically), is so that translations can be obtained if English language is a problem.

[23] Clearly, there was no evidence in the present case that translation was sought and all of the evidence before me suggested that a belated and unsatisfactory effort was made to respond appropriately to Mr Hixon but the very fact that some effort was made coupled with Ping Zeng's engagement through the entirety of the Authority's process, seems to me to be a proper basis on which I should remit some of the penalty I might otherwise have awarded against the employer.

[24] This is not a case where the employer has refused to engage and even on Mr Hixon's evidence, it is apparent that NCHR sought to try to engage with him, albeit unsatisfactorily and not as expeditiously as it ought.

[25] I accept the submission for Mr Hixon that the usual range for breaches of this magnitude would be between \$5,500 and \$7,000 but because of the factors that I identify, I direct that a penalty of \$2,500 be payable by NCHR to the Labour Inspector for lodging to the Crown account.

Determination

[26] NCHR is to comply with the as yet unresolved aspects of the improvement notice served on the company by Mr Hixon on 7 November 2014 and compliance is to be attended to within 28 days of the date of this determination.

[27] That compliance order will be satisfied once I have received a certificate from Mr Hixon that he has received from NCHR a template employment agreement which it would offer to future employees (assuming there were any), together with a time and wages record system which would apply, assuming there were to be future employees.

[28] NCHR is also to pay a penalty to the Employment Relations Authority for lodging to the Crown account in the sum of \$2,500 for its several breaches of the improvement notice.

[29] Lastly, NCHR is to pay to the Labour Inspector \$71.56 being reimbursement of the Authority's filing fee.

[30] This determination constitutes the written record of an oral determination given at the conclusion of the investigation meeting.

Costs

[31] There are no issues as to costs.

James Crichton
Member of the Employment Relations Authority