

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 199
3028354

BETWEEN A LABOUR INSPECTOR
Applicant

A N D ANTARA AG FARMS GP
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Alistair Miller, Counsel for Applicant
Kate Ashcroft and Carolyn Moffat, Counsel for
Respondent

Investigation Meeting: On the papers

Date of Determination: 21 December 2018

DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination, Antara AG Farms GP Limited must pay to the Authority, for transfer to a Crown Bank account, a penalty of \$500.00.

B. Costs are reserved.

Employment relationship problem

[1] The Labour Inspector seeks a penalty pursuant to s 223F of the Employment Relations Act 2000 (the Act) for Antara AG Farms GP Limited's failure to comply with an Improvement Notice dated 24 November 2017. The Improvement Notice required Antara to calculate and pay holiday pay owing to one of its employees at the end of her employment.

- [2] Antara opposes the imposition of a penalty on the basis that:
- (a) It has complied with the Labour Inspector's Improvement Notice albeit not within the timeframe provided;
 - (b) The failure to comply with the Improvement Notice arose because Antara believed it did not need to comply, in this case by paying holiday pay to the former employee, as it had a valid basis for deducting money owed to it from that holiday pay.

Relevant facts

[3] Antara employed Rochelle Watson and Ricki Weir from 12 February 2016 to work in its sheep milking business. Antara says Ms Watson and Mr Weir were a couple and were employed together, as is common in the farming industry; Ms Watson and Mr Weir started their employment together, shared the accommodation provided as part of their employment and ended their employment at the same time, on 29 November 2016.

[4] Ms Watson's employment agreement and Mr Weir's employment agreement both contained a general deductions clause, which provided:

Deductions may be made by the Employer from the employee's remuneration and/or final pay including any holiday pay for any overpayment, default by the employee for the costs of any uniforms and/or protective clothing and equipment or other property belonging to the Employer that are not returned or are damaged by the employee, for debts owing to the Employer, for leave in excess of paid entitlements under statute or expressed herein, or for any other deduction by agreement or as otherwise provided for in this agreement.

[5] Mr Weir signed a service tenancy agreement on 13 February 2016 (the Tenancy Agreement), which provided for both Mr Weir to be the tenant of a property provided by Antara, with both Mr Weir and Ms Watson being the occupants of the property provided under the Tenancy Agreement. The Tenancy Agreement also had a deductions clause, which authorised Antara to deduct certain costs associated with the tenancy from the tenant's final pay. Antara considered that Ms Watson was bound by the terms of the Tenancy Agreement as she was an occupant of the property.

[6] When Ms Watson resigned from her employment she signed a resignation form, which included the following:

I hereby give authority for any outstanding monies owing from cell phone, house rental, repairs and maintenance and any other debts incurred, may be deducted from my final pay wages and/or final monies owing as specified in clause 6.2 of my Individual Employment Agreement.

[7] When Ms Watson and Mr Weir left their employment, they owed money to Antara for the purchase of some calves, the purchase of a trailer and cleaning costs. Antara believed Ms Watson and Mr Weir jointly owed the money and as Antara had various consents to make deductions from Ms Watson's final pay and Mr Weir's final pay, it did so in order to account for the debt.

[8] On 22 December 2016, Ms Watson contacted the Labour Inspectorate and complained that Antara had made deductions from her final pay, being the holiday pay she was owed at the end of her employment, without her consent.

[9] The Labour Inspector investigated Ms Watson's complaint.

[10] On 12 April 2017, the Labour Inspector requested wage and time records and holiday and leave records from Antara pursuant to s 229 of the Act.

[11] On 19 April 2017, Antara provided the records to the Labour Inspector.

[12] The Labour Inspector reviewed the records and was not satisfied that the deductions from both Ms Watson's final pay and Mr Weir's final pay were lawful and he concluded that they were both owed their final pay.

[13] Antara met with the Labour Inspector on 4 October 2017, where Antara explained why it had withheld the money otherwise owed as final pay to Ms Watson and Mr Weir.

[14] In response to this, on 24 October 2017, the Labour Inspector served an Improvement Notice on Antara in respect of payment of both lots of final pay.

[15] On 24 November 2017, Antara provided more information to the Labour Inspector, which set out the amounts Antara believed Ms Watson and Mr Weir owed it and the basis for the deductions from their final pay, including the various consents.

[16] The Labour Inspector reviewed this material and concluded that Antara was owed money from Mr Weir and it had a valid basis to make deduction for that debt from his final pay. However, the Labour Inspector concluded that Ms Watson did not owe money to Antara and there was no basis for deduction to be made from Ms Watson's final pay.

[17] As a result the Labour Inspector withdrew the Improvement Notice of 24 October 2017 and served a new Improvement Notice, dated 24 November 2017, requiring Antara to calculate Ms Watson's holiday pay and to pay this to her as her final pay.

[18] Antara had until 22 December 2017 to comply with the Improvement Notice, by making the required payment to Ms Watson or it could object to the Notice. Antara did not do either of these things.

[19] On 19 January 2018, the Labour Inspector contacted Antara through its solicitor and advised that he intended lodge an application with the Authority seeking a compliance order and a penalty. The Labour Inspector invited Antara to make further submissions on the Improvement Notice and/or its reasons for not complying in order to avoid an application being lodged.

[20] Antara did not provide anything further so on 18 April 2018 the Labour Inspector lodged an application with the Authority seeking compliance with the Improvement Notice and a penalty for not complying.

[21] Antara remained of the view that Ms Watson owed it money and it had validly made deductions from her final pay but on 6 June 2018, it asked the Labour Inspector to provide payment details for Ms Watson so the final pay could be calculated and paid. On 10 July 2018, Antara paid Ms Watson her final pay being the holiday pay she was owed on termination of her employment.

Penalty

[22] The Labour Inspector seeks a penalty for the failure to comply with the Improvement Notice of 24 November 2017, pursuant to s 223F of the Act. The Authority's power to award penalties on this application is conferred under ss133-135 of the Act.

Should a penalty be imposed?

[23] I accept there is some credibility to the argument advanced by counsel for Antara that a penalty should not be imposed. Counsel says Antara's default on the Improvement Notice was because it genuinely believed it had, and arguably, it has, a right to deduct money from Ms Watson's final pay. In addition, in any event, it has now complied by paying Ms Watson, in circumstances where it has not been able to recoup the money Mr Weir and Ms Watson owe to it.

[24] However, whilst this explains why Antara did not comply with the Improvement Notice it does not excuse its default. The Improvement Notice was very clear about Antara's obligations to act or oppose the Improvement Notice and it did nothing.

[25] In this regard, I note that s 229(3) of the Act provides that a Labour Inspector may seek a penalty under the Act where an employer fails to comply with a requirement made of it to produce documents. Therefore, it is a similar provision in respect of a default on a demand from a Labour Inspector. However, s 229(3) applies where the employer does not have reasonable cause for its failure. There is no such proviso for s 223F, i.e. no reasonable cause exception - this indicates that the starting point for the failure to comply with an Improvement Notice is a penalty regardless of any reason for the failure.

[26] So, Antara's reason for the default does not persuade me that I should not award a penalty. Put simply the default alone warrants a penalty - the reason for the default may be mitigating in terms of the quantum of the penalty, but I should impose a penalty.

Assessing quantum of the penalty

[27] Section 133A of the Act lists the factors relevant to my assessment of the quantum of any penalty. In addition, in *Borsboom v Preet PVT Limited*¹ the Employment Court set out the considerations for awarding penalties, in the form of a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards. More recently, in *Allan Nicholson v Matthew Ford*²

¹ [2016] NZEmpC 143

² [2018] NZEmpC 132

Chief Judge Inglis analysed s 133A and *Preet* and set out guidance on applying the principles to the imposition of penalties. In particular Her Honour stated:

[18] Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):

1. The object stated in s 3 of the Act (mandatory statutory consideration 1);
2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);
7. previous conduct (mandatory statutory consideration 7);
8. deterrence, both particular and general (*Preet* additional mandatory consideration 1);
9. culpability (*Preet* additional mandatory consideration 2);
10. consistency of penalty awards in similar cases (*Preet* additional mandatory consideration 3);
11. ability to pay (*Preet* additional mandatory consideration 4); and
12. proportionality of outcome to breach (*Preet* additional mandatory consideration 5).

[28] I will apply this approach to my assessment of the penalty.

What is the number of breaches for penalty-setting purposes in this case?

[29] There is a single breach being a failure to comply with an Improvement Notice by calculating and paying Ms Watson's holiday pay.

Mandatory statutory consideration 1: the object stated in s 3

[30] Two aspects of the object are relevant for my analysis of the penalty in this case. First, the object as it relates to recognising that employment relationships must be built on trust and confidence and on good faith. And second, that the object is to promote the effective enforcement of employment standards.

[31] In terms of the obligations of good faith and mutual trust and confidence, I am satisfied that notwithstanding that Antara withheld Ms Watson's final pay in doing so it was not breaching the duty of good faith or trust and confidence. It was acting as it thought it could and, on the face of it, with consent from Ms Watson.

[32] But, weighed against that is that it was, in the Labour Inspector's view, wrong in its action and it should have responded appropriately to the Labour Inspector's enforcement powers.

Mandatory statutory consideration 2: the nature and extent of the breach

[33] Overall, I consider the breach minimal in terms of the underlying basis for the breach and the effect, but it is concerning that Antara did not respond appropriately to the Labour Inspector. It was however a one off breach and Antara did remedy it.

Mandatory statutory consideration 3: whether Antara's breach was intentional, inadvertent or negligent

[34] The breach was intentional but it was premised on a belief that compliance was not required. The level of culpability here is low.

Mandatory statutory consideration 4: the nature and extent of any loss or damage suffered by employee

[35] There is no evidence of any loss suffered by Ms Watson other than that which can be inferred from her not receiving her holiday pay. I cannot put much weight on this factor.

Mandatory statutory consideration 5: whether Antara has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach

[36] Antara has not paid any additional sums by way of compensation for the late payment of holiday pay but it has now paid the full amount owing to Ms Watson.

Mandatory statutory consideration 6: the circumstances in which the breach, or involvement in the breach, took place, including employee's vulnerability

[37] I have already canvassed this point – the circumstances of the default relating to Antara's view that it was owed money by Ms Watson and it had a right to deduct that money from her final pay mitigate against a large penalty being imposed.

[38] I have no evidence on Ms Watson's position and place little weight on any consideration of her vulnerability or the impact that non-payment had on her.

Mandatory statutory consideration 7: whether Antara has previously been found in proceedings under the Act or any other enactment, to have engaged in similar conduct

[39] There is no evidence to suggest Antara has engaged in similar conduct in the past. In fact the evidence shows that other than not complying with the Improvement Notice it did engage with the Labour Inspector and provided all the necessary information. An audit of the information supplied by it to the Labour Inspector did not show any other faults in terms of compliance with employment obligations.

Preet additional mandatory consideration 1: deterrence, having regard to the particular person to be penalised and the wider community of employers

[40] While there is nothing to suggest that Antara has engaged in similar conduct before, there is a need for Antara to understand that it should respect the powers of the Labour Inspector and if it disagrees with the approach or action then it should respond to that, not simply do nothing.

Preet additional mandatory consideration 2: degree of culpability

[41] As I stated above, Antara's breach was intentional but it was premised on a belief that compliance was not required and its default was remedied.

Preet additional mandatory consideration 3: the general desirability of consistency in decisions on penalties

[42] A review of other cases where a penalty has been imposed for one breach of minimum standards or breach of a record of settlement, indicates that penalties range from \$250.00 to \$5,000.00. A closer review shows that those at the higher end of this scale reflect incidences where there have been multiple breaches but these have been reduced to one global penalty.

[43] Most single breach penalties that are not global, are between \$250.00 and \$2,000.00. Those at the higher end of this scale tend to have aggravating features such as adverse impact on an employee or a failure to engage with a Labour Inspector so that the full extent of non-compliance is not clear.

[44] If I remove the cases where there have been aggravating features, as those features are not present here, most of the relevant single penalty awards are between \$250.00 and \$1,000.00.

Preet additional mandatory consideration 4: ability to pay

[45] Counsel has submitted that Antara has some financial limitations which may be relevant to the quantum of the penalty. I simply do not accept this submission, first because there is no evidence to support it and second because the quantum will be at the lowest end of the quantum scale financial means is irrelevant.

Preet additional mandatory consideration 5: is the anticipated outcome proportionate to the breach or breaches for which the penalty is imposed?

[46] Based on all of the factors above I intend to impose a penalty of \$500.00. Standing back and assessing this outcome against the breach I am satisfied that that is appropriate and proportionate.

Conclusion

[47] I will impose a small penalty on Antara and given the circumstances of the breach and all of the factors outlined in my assessment I set the penalty at \$500.00.

Costs

[48] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority