

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 104
5607761

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF BUSINESS
 INNOVATION AND
 EMPLOYMENT
 Applicant

A N D DISCOUNT FOOD
 WAREHOUSE LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Greg La Hood, Counsel for Applicant
 Ashok Rohit, Advocate for Respondent

Investigation Meeting: Determined by consideration of the papers

Submissions Received: 23 May 2016 from the Applicant
 No submissions from the Respondent

Date of Determination: 8 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector (Richard Lewis) makes a claim for the imposition of penalties against the respondent for having breached employment standards in respect of its employees under the following provisions:

- (a) Section 130 of the Employment Relations Act 2000 (the ER Act) and s.81 of the Holidays Act 2003 (the Holidays Act), relating to the keeping of wage, time, holiday and leave records;

- (b) Sections 16 and 18 of the Holidays Act for failure to provide four weeks' annual leave;
- (c) Section 49 of the Holidays Act for having failed to pay employees for an unworked public holiday;
- (d) Section 50 of the Holidays Act for failure to pay time and a half to employees for their work on a public holiday; and
- (e) Section 56 of the Holidays Act for failing to provide an alternative holiday for employees who worked on a public holiday.

[2] In its statement in reply, the respondent effectively acknowledged the breaches, stating that it has implemented a proper record keeping system of hours worked, holiday pay, and other leave for all employees and has made payment of all arrears to two employees who had suffered underpayments due to the respondent not having a proper system in place.

[3] The respondent disclosed a significant amount of documentation with the statement in reply but did not specifically address the Labour Inspector's application for penalties.

No further response from the respondent

[4] The statement in reply was received by the Authority on 7 March 2016. The Labour Inspector confirmed, after receipt of the statement in reply, that the only unresolved issue remained the imposition of a penalty for non-compliance with an enforceable undertaking which the respondent had entered into on 16 June 2015.

[5] On 24 March 2016, the Authority issued directions, including a proposal that the matter be considered on the papers alone, without a face-to-face investigation meeting, subject to the comments from Mr Lewis and Mr Ashok Rohit, director and shareholder of the respondent. Neither the Labour Inspector nor Mr Rohit responded to the Authority's directions and, accordingly, the Authority imposed a deadline for the parties to provide written submissions.

[6] Mr La Hood requested an extension to the timetable for the lodging and service of the Labour Inspector's submissions, which the Authority granted. Further

email correspondence passed between the Authority, Mr La Hood, Mr Lewis and Mr Rohit but Mr Rohit did not reply to any of these emails.

[7] The Labour Inspector's submissions were received from Mr La Hood on 23 May 2016, but Mr Rohit did not provide submissions in reply.

[8] On 29 June 2016, the Authority advised the parties that the respondent had failed to respond to communications to it dated 24 March, 7 April and 30 May 2016 from the Authority and had also failed to provide the submissions in reply. Accordingly, the Authority was going to proceed to determine the matter by consideration of the papers alone, without the benefit of submissions from the respondent. As at the date of the release of this determination, no word has been heard from the respondent.

[9] This determination addresses the issue of the imposition of penalties.

Background

[10] The respondent operates two food stores in Christchurch. On 9 April 2015, the Labour Inspector visited one of these food stores as part of the Labour Inspectorate's supermarket and petrol station audit programme. Two employees were interviewed, as well as the director of the respondent, Mr Rohit.

[11] Having examined time, wage and holiday records and individual employment agreements provided by the respondent, the Labour Inspector prepared an Enforceable Undertaking that was signed by Mr Rohit on behalf of the respondent on 16 June 2015. The Enforceable Undertaking identified a number of breaches of the Holidays Act. The date for compliance with the Enforceable Undertaking was extended from 10 July to 31 July 2015 at the respondent's request.

[12] Documentation that was eventually provided pursuant to the Enforceable Undertaking was found by the Labour Inspector to be insufficient in respect of the compliance with the requirements of employment standards legislation and the Enforceable Undertaking entered into by the respondent. Furthermore, the Labour Inspector found that there were no time, wage and holiday records provided, there was no calculation of worked and unworked public holidays provided, nor any evidence of payment for those days. There was also an inaccurate calculation of alternative holidays pursuant to s.56 of the Holidays Act.

[13] On 14 September 2015, the Labour Inspector met with Mr Rohit to discuss the documentation provided and to give him the opportunity to provide further explanations. The Labour Inspector heard from Mr Rohit that actual hours were not always recorded, as employees had flexible hours but there were no timesheets to confirm this. In addition, it emerged that Mr Rohit had no record of alternative holidays, he had calculated holiday pay at 6% of gross earnings, and employees' hours had been reduced on public holidays so he could still pay the usual amount.

[14] The Labour Inspector's application to the Authority for penalties and compliance orders was lodged on 11 February 2016. Originally the Labour Inspector had sought orders for payment of arrears to four employees of the respondent but now accepts that the respondent has paid those arrears in full.

The legal basis for, and the principles applying to the imposition of penalties

[15] Section 130 of the ER Act requires every employer at all times to keep a wages and time record in written form or in a form or manner that allows the information in the record to be easily converted into written form. Section 130(4) of the Act provides that every employer who fails to comply with any requirement of the section is liable to a penalty imposed by the Authority (not exceeding \$20,000 pursuant to s135(2)(b) in the case of a company or other corporation). Section 130(5) provides that an action to recover a penalty under subsection (4) may also be brought by a Labour Inspector.

[16] Section 75 of the Holidays Act provides that an employer who fails to comply with any of the provisions listed in subsection (2) is liable to a penalty not exceeding \$20,000 if the employer is a company or other body corporate. The sections in question include ss.16, 49, 50, 56 and 83; all sections which the Labour Inspector asserts were breached. Section 83 relates to a failure to keep or provide access to holiday and leave records.

[17] Section 223C of the Act provides that an employer who fails to comply with an Enforceable Undertaking that remains in force is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.

Should a penalty be imposed?

[18] The respondent admits in its statement in reply that proper leave and holiday records were not kept in accordance with the requirements of the Holidays Act. This, in turn, led to breaches of the Holidays Act, resulting in employees being underpaid in respect of their minimum entitlements.

[19] It is further clear that aspects of the Enforceable Undertaking were not complied with, as the actions required by the undertaking were not completed within the extended deadline agreed between the Labour Inspector and the respondent.

[20] The Employment Court has given guidance as to what factors are relevant when considering penalty actions. In *Xu v. McIntosh*¹ and in *Tan v. Yang & Xhang*², the Court set out principles to guide the Authority in deciding on whether a penalty should be imposed and, if so, the amount. These principles can be distilled into the following:

- (a) A penalty is imposed for the purpose of punishment of a wrongdoing, that will consist of breaching the ER Act or another enactment or an employment agreement;
- (b) Not all such breaches will be equally reprehensible;
- (c) It is necessary to consider how much harm has been occasioned by the breach, including the vulnerability of the employee or prospective employee;
- (d) It is necessary to consider how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it;
- (e) It is necessary to consider the perpetrator's culpability, including whether the breach was technical and inadvertent or flagrant and deliberate;
- (f) The remorse shown by the party in breach is relevant;

¹ [2004] 2 ERNZ 448

² [2014] NZEmpC 65 at [32]

- (g) One should consider whether the breach was one-off or repeated; and
- (h) The range of penalties imposed in other comparable cases.

[21] First, I am satisfied that it is appropriate to impose a penalty on the respondent as the breaches of the Holidays Act appear to be systematic. It is not known whether the respondent deliberately failed to comply with its obligations under the Holidays Act, or did so through inadvertence, but even if the breaches stem from inadvertence, as an employer, the respondent had obligations in law to ensure that its actions were compliant and up to date with minimum employment standards.

[22] No evidence has been heard from the four employees who were underpaid by reference to their rights under the Holidays Act, but it can be safely inferred that the employees, working in retail, would not have been highly paid, and were also probably migrants. As such, they were likely to have been vulnerable.

[23] It is not known the extent to which Mr Rohit is remorseful for the failings to comply with the Holidays Act, but the Authority should take into account that there has now been complete compliance.

[24] I agree with the submission of Mr La Hood that a failure to keep proper time, wage, holiday and leave records is a serious matter, as it is highly likely to lead directly to other breaches of the legislation and, worse, can hide those breaches. The lack of records prevents an employee from easily enforcing his or her rights and presents a similar impediment to the Labour Inspectorate.

[25] There is a need for deterrence. Whilst the respondent may not have had available to it the resources of larger companies, any business that chooses to employ people simply must ensure that it complies with the obligations governing employment in New Zealand. Turning a blind eye to those obligations, or taking a guess at them, is unacceptable.

Conclusion

[26] I conclude that a penalty is appropriate and I agree with the submission of Mr La Hood that a global penalty for all of the breaches is warranted. Mr La Hood suggests that that should be “*in the range of*” \$5,000. I believe that this would be at the high end of the range that is appropriate and set the penalty at \$3,500.

[27] That sum is to be paid into the Authority, which will then be paid by the Authority into a Crown bank account.

Orders

[28] I order the respondent to make the following payments:

- (a) The sum of \$3,500, being a penalty payable to the Crown;
- (b) The sum of \$71.56, being the lodgement fee incurred by the Labour Inspector.

Costs

[29] If the Labour Inspectorate seeks a contribution towards its legal costs, it should first seek to agree those costs with the respondent. If they are unable to reach agreement within 14 days of the date of this determination, then Mr La Hood may, within a further 14 days, lodge and serve a memorandum of counsel setting out the contribution towards costs that the Labour Inspectorate seeks. The respondent will then have a further 14 days within which to lodge and serve a reply.

David Appleton
Member of the Employment Relations Authority