

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment, Nicola Caisley, began an investigation into Eastern International Trade Company Limited (EITCL or the company), which provides massage services.

[2] The Labour Inspector completed her investigation and concluded that EITCL was in breach of minimum employment standards in several regards. The sole director of the company emailed the Labour Inspector acknowledging the findings detailed in a draft investigation report.

[3] The Labour Inspector finalised the investigation report and the company offered an enforceable undertaking which the parties signed on 31 March 2016. The compliance date in the enforceable undertaking was originally 6 April 2016 but by agreement the parties extended this to 6 May 2016.

[4] Subsequently the Labour Inspector filed this application in the Authority, claiming that EITCL was in breach of s 223B of the Employment Relations Act 2000 (the Act), for failure to comply with the enforceable undertaking and a breach of s 6 of the Minimum Wage Act 1983 for failure to pay to two employees the minimum wage. A compliance order and penalties are sought regarding EITCL's failure to comply with the enforceable undertaking.

[5] In July 2017 counsel for the Labour Inspector, along with the company's representative, filed in a joint memorandum. That memorandum advised the Authority that the parties had reached agreement that EITCL had breached s 223B of the Act by failing to comply with the enforceable undertaking and an appropriate level of penalty for that breach. They proposed a penalty based on the analysis for penalties set out by the Employment Court in its decision *Borsboom v Preet PVT Ltd*¹. The minimum wage matter was resolved.

The Authority's investigation

[6] The penalty in this matter has been determined on the papers. The information available in making this determination included the enforceable undertaking, the

¹ [2016] NZEmpC 143

statement of problem, the agreed terms of settlement and the joint memorandum. A case management conference was also held by telephone with the parties' representatives on 17 July 2017.

[7] EITCL accepts that it breached s 223B of the Act by failing to comply with the enforceable undertaking, which required the company to implement and maintain compliant employment agreements and wage, time and holiday pay records.

[8] As is permitted by s 174 E of the Act this determination has not recorded all the evidence and submissions received but has stated findings, express conclusions and specified orders made.

Setting the appropriate penalty

[9] The first step the process outlined in *Preet* is to identify the nature and number of the breaches. In the present case there is one breach, albeit an ongoing one, of s 223B of the Act. The maximum penalty for that breach by a company is \$20,000.

[10] I then move on to consider the severity of the breach and any aggravating and mitigating factors involved. The Labour Inspector identified the breach as being serious and significant. This assessment was based on the circumstances of EITCL having voluntarily entered into an enforceable undertaking concerning minimum employment standards, having received assistance from the Labour Inspector to achieve compliance and yet still failing to comply with the undertaking.

[11] A range of matters are covered in the enforceable undertaking. The only inadequacy relating to employment agreements concerned the absence of a description of duties. There were failings regarding the adequacy of information in wage and time records, and holiday and leave records, as well as retention of records issues.

[12] In terms of mitigating factors, since the filing of this claim in the Authority, the company has complied with the terms of the enforceable undertaking by implementing a compliance system to record wage, time and holiday information, implemented compliant employment agreements and implemented payslips.

[13] The company has also cooperated with the Authority process including participation in mediation.

[14] I regard the company's recognition that it had not complied with the enforceable undertaking, as well as its subsequent achievement of compliance, as requiring a substantial reduction in penalty. Employers should be encouraged to act promptly once there have been inadequacies in their processes identified by the Labour Inspectorate. A reduction to \$4,000.00 is appropriate.

[15] The third step of the *Preet* process involves considering the employer's ability to pay. No particular question regarding the ability to pay has been raised by the parties and thus I make no reduction for that.

[16] The parties did agree that a portion of the penalty should be paid by way of instalments and I am satisfied that instalments are appropriate.

[17] The final step involves consideration of whether the provisional penalty of \$4,000 is proportionate to the seriousness of the breach. In some cases this assessment can involve considering the provisional penalty against the level of any underpayments. However, I have not needed to order any payments to be made. I accept that the lack of records kept by the company in some regards made it difficult for the Labour Inspector to determine whether the entitlements had been properly recognised by the company.

[18] I consider that a final total penalty of \$4,000 is sufficient to punish and deter EITCL and to deter other small businesses from any such similar non-compliance with enforceable undertakings.

Orders

[19] I order Eastern International Trade Company Limited to pay a total penalty of \$4,000.00 for its breach of the Employment Relations Act.

[20] I order that the company pay the penalty to the Employment Relations Authority, for payment into a Crown bank account as follows:

- (i) \$2,000.00 to be paid within five (5) working days of the date of this determination; and
- (ii) Four (4) equal monthly instalments of \$500.00, by the 28th day of each month, commencing in August 2017.

Costs

[21] No order for costs is sought.

Nicola Craig
Member of the Employment Relations Authority