

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 439
3049773

BETWEEN A LABOUR INSPECTOR
Applicant

AND HEALTHOP LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Joseph Perrott, counsel for the Applicant
Greg Bennett, advocate for the Respondent

Investigation Meeting: 18 June 2019 at Whangarei

Submissions Received: 11 and 24 June 2019 from the Applicant
12 and 19 June 2019 from the Respondent

Determination: 24 July 2019

DETERMINATION OF THE AUTHORITY

- A. The Labour Inspector (the Inspector) had reasonable grounds to issue the Improvement Notice dated 18 April 2019 (the Improvement Notice).**
- B. Healthop Limited (Healthop) is ordered to comply with the Improvement Notice by 31 October 2019.**
- C. Healthop is ordered to pay a penalty of \$7,000 to the Authority pursuant to s223F of the Employment Relations Act 2000 (the Act) within 21 days of the date of this determination. On payment, the penalty is to be transferred to the Crown Account.**
- D. Healthop is ordered to pay costs of \$2,225 plus the filing fee of \$71.56 to the Inspector within 21 days of the date of this determination.**
- E. The Inspector may apply to the Authority for further orders in respect of arrears of wages, interest and leave entitlements owed by Healthop to employees.**

Employment Relationship Problem

[1] The applicant, A Labour Inspector (the Inspector), seeks orders requiring compliance by the respondent employer Healthop Limited (Healthop) with an Improvement Notice dated 18 April 2018.

[2] In addition to the order for compliance with the Improvement Notice, the Inspector seeks orders against Healthop: for the payment of a penalty pursuant to s 223F of the Employment Relations Act 2000 (the Act) for failing to comply with the Improvement Notice; an order that Healthop pay interest on arrears owed to all employees from the date the Improvement Notice was to be complied with, namely 8 June 2018; and an order that Healthop pays costs and expenses related to the bringing of the claim.

[3] Healthop denies that it has failed to comply with the Improvement Notice stating that it is still working through the issues and claims that the Inspector has breached the New Zealand Bill of Rights Act 1993 (NZBORA) by failing to provide Healthop with notes of interviews and by referring in his investigation to a previous matter involving Healthop and the Labour Inspectorate.

The Investigation Meeting

[4] The investigation meeting took just over half a day. The Inspector filed a witness statement. Mr Mark Flannagan and Mrs Karen Flannagan, directors of Healthop both filed witness statements.

[5] Each of the witnesses giving evidence before the Authority swore on oath or affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[6] As permitted under s 174 of the Act, this determination does not set out all the evidence and submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matter.

Issues

[7] The issues for determination by the Authority are as follows:

- (a) Did the Inspector have reasonable grounds pursuant to s 223D of the Act to issue the Improvement Notice dated 18 April 2018?

- (b) If so, should the Authority exercise its discretion and issue a compliance order requiring Healthop to comply with the Improvement Notice?
- (c) If Healthop failed to comply with the Improvement Notice, should the Authority exercise its discretion and order it to pay a penalty pursuant to s 223F of the Act?
- (d) Did the Inspector act in breach of the NZBORA during its investigation of Healthop?
- (e) Costs and expenses.

Healthop

[8] Healthop is a company which was incorporated in New Zealand on 11 September 2006. Mr and Mrs Mark and Karen Flannagan are joint directors and shareholders of Healthop. Healthop owns and operates the Subway franchise located in Dargaville.

Labour Inspector's visit to Subway, Dargaville

[9] As part of a strategy by the Labour Inspectorate to focus on employment standards in fast food franchises in the Dargaville and Whangarei areas, Healthop was selected for assessment.

[10] On 25 September 2017, the Inspector visited the Subway site in Dargaville and spoke with Healthop director, Mrs Flannagan. The inspector explained that the purpose of his visit was to check that minimum employment standards were being maintained within fast food franchises in the area. The Inspector asked Mrs Flanagan questions about the operation of the franchise. She provided the Inspector with brief details concerning the length of time Healthop had operated Subway in Dargaville and the number of staff employed. Following the interview, the Inspector informed Mrs Flannagan that he would be issuing her with a written request for Healthop's employment records.

Request for employment records

[11] The day following the interview, the Inspector sent Mrs Flannagan a letter requesting employment records in respect of Healthop's employees including: a list of current and former employees and their contact details, details of any current or former employees on work permits or visas, copies of employment agreement templates, wages and time records

for all employees for the last 12 months, and holiday and leave records for all employees for the last 12 months.

[12] Healthop did not respond to the request. This was partly because Mr Flannagan, who was responsible for Healthop's record keeping, was away for a period of time. In October and November 2017, the Inspector again requested Healthop, both verbally and in writing, for its employment records.

[13] On 22 November 2017, Mr Flannagan sent an email to the Inspector apologising for the delay in providing the requested information. Mr Flannagan explained that the family had suffered a personal tragedy. Understandably, this had a major impact on them and their participation in the Inspector's investigation. Mr Flannagan attached various employment records to his email in response to the Inspector's request.

[14] The Inspector reviewed the material provided and on 20 December 2017 made a further request of the Flannagans for additional records. These were supplied by the Flannagans in February 2018.

[15] Upon an examination of the records, the Inspector considered there may have been breaches of sections 49 and 56 of the Holidays Act 2003 (the Holidays Act) in relation to those employees who had worked on a public holiday which would otherwise have been a working day for him or her and employees who had not worked on public holidays that would have otherwise been a working day.

Improvement Notice

[16] On 18 April 2018, the Inspector issued an Improvement Notice under s223D of the Act. The Improvement Notice set out the minimum employment legislation, namely sections 49 and 56 of the Holidays Act, that the Inspector considered Healthop may have failed to comply with. Among other things, the Improvement Notice set out the steps required of Healthop to comply with the Improvement Notice.

[17] The steps included Healthop calculating entitlements for all employees to public holidays not worked which would have been an otherwise working day for him or her over the past six years, and calculating the entitlements for all employees to alternative holidays for public holidays worked which would have been an otherwise working day for the past six years.

[18] Other requirements included the provision by Healthop:

- (a) of its calculations of entitlements to public holidays not worked which would have been an otherwise working day, for all its employees for the past six years and payment of arrears to employees that were entitled to payment for those days;
- (b) of its calculation of entitlements to alternative holidays for public holidays worked which would have been an otherwise working day for all employees for the past six years and to issue alternative holidays to those employees that were entitled to alternative holidays for those days.

[19] Healthop was required to comply with the Improvement Notice by 8 June 2018. Under s 223E of the Act, Healthop was able to object to the Improvement Notice.

[20] Healthop failed to comply with the Improvement Notice as required because the Flannagans claimed to still be working through the issues. No objection to the Improvement Notice was filed by or on behalf of Healthop.

[21] The Inspector gave evidence and provided the Authority with his contemporaneous file notes documenting his efforts to obtain compliance by Healthop with the Improvement Notice.

First Issue

Did the Labour Inspector have reasonable grounds pursuant to s 223D of the Act to issue the Improvement Notice dated 18 April 2018?

[22] Section 223D of the Act states that a Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the “relevant Acts” may issue the employer with an Improvement Notice that requires the employer to comply with the provision. “Relevant Acts” include the Holidays Act 2003.¹

[23] The Labour Inspector says that following an analysis of the employment records provided by Healthop, he concluded that they had failed to comply with provisions of the Holidays Act in relation to employees who did not work on a public holiday “which would have been an otherwise working day”, for employees who did work on public holidays

¹ Section 223(1) of the Employment Relations Act 2000.

“which would have been an otherwise working day” and the provision of “alternative holidays” to such employees.²

[24] The Labour Inspector says that he spoke with Mr Flannagan about the matter on 1 March 2018 but Mr Flannagan was not helpful. Mr Flannagan told the Inspector that Healthop did not require employees to work specific days and hours, rather the employees were able to work or not work as they saw fit. According to the Flannagans, they have no ability to control the work patterns of their staff. Healthop was able to discipline employees but had no other form of control.

[25] Following the discussions between the Inspector and Mr and Mrs Flannagan, and taking into account his own analysis and review of Healthop’s records, the Labour Inspector concluded that there were established patterns of working days and that Healthop was in breach of the Holidays Act.

Investigation report and analysis

[26] The Inspector emailed an investigation report to Mr and Mrs Flannagan on 14 March 2018. The Flannagans were informed that Healthop had ten working days to provide its response to the investigation report and analysis. Some information was provided by the Flannagans to the Inspector in November 2017 and February 2018 and on 17 April 2018, they attended a meeting with the Inspector. At the meeting the Inspector spoke with the Flannagans about his views and invited feedback. The Flannagans agreed to review the public holiday and alternative holiday entitlements and provide their calculation method to the Inspector. The Improvement Notice was issued by the Inspector on 18 April 2018.

[27] I have viewed the inspector’s analysis of days of work. I concur with the submission by counsel for the Inspector that there is a strong indication that there are issues with the way in which Healthop is dealing with employee entitlements under ss 49 and 56 of the Holidays Act. Specifically, one employee Kelsey Hansen worked 32 out of 35 Fridays between 28 October 2016 and 23 June 2017. She did not receive an alternative day for working on a public holiday, namely, 14 April 2017, being Good Friday, Easter weekend. Ms Hansen worked 28 out of 35 Mondays between 31 October 2016 and 26 June 2017 but did not receive a number of alternative days to which she was entitled for payment. Ms Hansen

² Holidays Act 2003

worked 32 out of 35 Tuesdays between November 2016 and 27 June 2017 and also did not receive payment for working public holidays or alternative days.

Subway employment agreement

[28] Clause 12.2 of the Subway employment agreement states:

Statutory holidays shall be taken and paid in accordance with the provisions of the Holidays Act 2003. The Employer shall be entitled to require the employee to work on a statutory holiday. If the employee is required to work on a statutory holiday, payment for the statutory holiday will be made at time & a half the employee's current rate of pay. If the employee works on a statutory holiday and that is a day that the employee would normally work, then the employee is entitled to an alternative paid holiday (a day off that can be taken at a later date that both parties agree to). If the employee works on a statutory holiday and that is a day that the employee would not normally work, then the employee is entitled to payment at time & a half but not to an alternative paid holiday. A normal day of work shall be deemed as a "normal day" if the employee has worked this day for the previous four weeks.

Statutory Holidays are those Public Holidays recognised by the Holidays Act. Such holidays include: Christmas Day, Boxing Day, New Years Day, 2 January, Good Friday, Easter Monday, Anzac Day, Labour Day, Queens Birthday, Waitangi Day and the anniversary of the province in which the employee lives e.g. Auckland Anniversary Day.

[29] The interpretation of this clause, in my view, is that an alternative holiday entitlement is available to an employee where he or she works on a public holiday which is an otherwise working day for that employee. Those entitlements have not been given to employees of Healthop because the Flannagans say that there was never a regular pattern of work. It is my view that the Labour Inspector's analysis of days worked, which is based on information provided by Healthop, strongly indicates a pattern of work and that employees have accrued entitlements under ss 49 and 56 of the Holidays Act but these have not been recognised. This needs to be addressed by Healthop and arrears calculated and paid to the affected employees.

[30] In the circumstances, it was reasonable for the Labour Inspector to issue an Improvement Notice. The Improvement Notice has not been complied with.

Second Issue

If the Labour Inspector had reasonable grounds to issue the Improvement Notice, should the Authority exercise its discretion and issue a compliance order requiring Healthop to comply with the Improvement Notice?

[31] Section 137(1)(iii)(b) of the Act states:

Power of Authority to order compliance

(1) This section applies where any person has not observed or complied with

–

(a) Any provision of –

(iii)(b) An Improvement Notice that section 223D(6) provides may be enforced by a compliance order.

[32] I consider the Labour Inspector had reasonable grounds to believe that Healthop had failed to comply with the Holidays Act and accordingly issued an Improvement Notice requiring compliance. The Improvement Notice seeks to address Healthop's non-compliance with minimum employment provisions contained in the Holidays Act.

[33] I consider the Inspector engaged fully with Healthop and the Flannagans before issuing the Improvement Notice. Meetings were held, conversations were had and an investigation report prepared and provided to Healthop by the Inspector. The Inspector carried out a reasonable investigation process and, as I have found, had reasonable grounds to issue an Improvement Notice.

[34] I order Healthop to comply with the Improvement Notice dated 18 April 2018 by 31 October 2019.

Third Issue

If Healthop failed to comply with the Improvement Notice, should the Authority exercise its discretion and order it to pay a penalty pursuant to s 223F of the Act?

[35] An appropriate penalty is determined by considering relevant matters identified in s 133A of the Act, guided by the methodology developed and applied by the Employment Court in *Boorsboom v Preet Pvt Limited*.³ The Court has recently summarised the applicable framework in this way⁴:

The considerations follow (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case): the object stated in s 3 of the Act (statutory consideration 1); the nature and extent of the breach or involvement in the breach (statutory consideration 2); whether the breach was intentional, inadvertent or negligent (statutory consideration 3); 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 (statutory consideration 4); whether the person in breach has paid an amount in compensation, reparation

³ [2016] NZEmpC 143 at [138] – [151].

⁴ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5); the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6); previous conduct (statutory consideration 7); deterrence, both particular and general (*Preet* additional consideration); culpability (*Preet* additional consideration); consistency of penalty awards in similar cases (*Preet* additional consideration); ability to pay (*Preet* additional consideration); and proportionality of outcome to breach (*Preet* additional consideration).

Statutory Consideration 1 - Object of the Act

[36] The object of the Act includes promoting effective enforcement of employment standards, particularly through powers conferred on Labour Inspectors. Issuing an Improvement Notice is an exercise of one of those enforcement powers.⁵ Healthop's failure to comply with the Notice issued to it undermined effective enforcement of employment standards.

Statutory Consideration 2 – Nature and extent of the breach

[37] Healthop's failure to comply with the Improvement Notice is treated as a single breach of the Act. The maximum penalty available under the Act is \$20,000. Accordingly Healthop is liable to a provisional penalty of \$20,000.

Statutory Consideration 3 – Was the breach intentional, inadvertent or negligent?

[38] The breach was the result of Healthop's deliberate business decision to take no steps to comply with the Improvement Notice, nor to lodge an objection to it. The Flannagans insisted that they had no control over their employees. They said their employees made their own decisions about whether or not they came to work and therefore they were treated as "casuals". This treatment suggested that they knew that the payment of public holiday entitlements was an important obligation. They failed to pay those entitlements for business reasons, in my view.

Statutory Consideration 4 – The Nature and Extent of any Loss or Damage

[39] The employees have not been paid for working on statutory holidays nor have they received an alternative day off at the time these entitlements became due⁶. Healthop's business on the other hand has gained the benefit of not paying its employees their entitlements when they were due.

⁵ Employment Relations Act 2000, ss 223A and 223D.

⁶ *A Labour Inspector v Daleson Investment Limited* at para [31].

Statutory Consideration 5 – Steps to Mitigate Effects of the Breach

[40] Healthop has taken no steps. It failed to comply with the requirements of the Improvement Notice and failed to provide the Inspector with calculations requested by him. At the Authority's investigation meeting, the Flannagans continued to claim that their employees were casual and not entitled to entitlements under the Holidays Act. There was no evidence of contrition by them. The requirement to calculate and pay public holiday and alternative holiday entitlements is a long standing and clear obligation of employers. I consider the correct starting point for assessing an appropriate penalty to be 60%. This amounts to \$12,000.

Statutory Consideration 6 – Circumstances of the Breach, and any vulnerability

[41] Healthop has been in business for almost thirteen years, a considerable period of time. It was its responsibility to know and apply the relevant laws and, in my view, it has deliberately ignored its obligations in relation to holiday pay entitlements to its employees.

[42] The Authority heard evidence from the Flannagans that their employees were predominantly young, many were of school age, many were university students. This category of employees, in my view, are particularly vulnerable. They are not experienced, do not necessarily know what their legal rights are and are in a position where they wish to work and do not want to "rock the boat", which may result in no longer being offered work. I have taken these factors into account as well as the fact that the Flannagans suffered a personal tragedy during the Inspector's investigation which must have affected their ability to consider their actions in respect of the Improvement Notice. Also, they did take steps to provide the Inspector with information and calculations requested by him.

[43] I consider a 25% reduction in penalty is warranted after considering the circumstances of the breach. The amount of the provisional penalty is \$9,000.

Statutory Consideration 7 – Any previous Breaches or Penalties?

[44] Healthop has not previously appeared before the Authority. Taking into account this factor, I consider a reduction of 50% appropriate, reducing the penalty from \$9,000 to \$4,500.

Statutory Consideration 8 - Deterrence

[45] The amount of penalty to be imposed should have regard to the deterrent effect on a particular person, including a company, and on the wider community of employers. Making a business decision not to pay minimum employment entitlements is not acceptable. I consider a penalty of at least \$5,000 appropriate to deter other employers from failing to comply with the requirements of Improvement Notices issued to them by Labour Inspectors.

Additional Consideration 9 - Culpability

[46] A number of factors increase Healthop's culpability including the number of affected employees, the financial gain obtained by it in not complying, and the vulnerability of the employees affected. I consider an increase of 20 percent for this factor is warranted. The provisional penalty is \$6,000.

Additional Consideration 10 – Consistency

[47] The penalties imposed on employers in other cases for failure to comply with an Improvement Notice has to be considered to ensure no significant inconsistency with the provisional result for Healthop.

[48] In a recent decision of the Authority in *A Labour Inspector v Bombay Gymkhana Limited*⁷, the Member undertook an analysis of cases between 2015 and 2018 involving breaches of Improvement Notices. The Member imposed a penalty of \$5,000 in the circumstances of that case where the employer had taken some steps to comply with the Improvement Notice. Taking into account the considerations so far, I consider a provisional penalty of \$7,000 to be appropriate.

Additional Consideration 11 - Ability to Pay

[49] No information was provided to the Authority as to Healthop's ability to pay.

Additional Consideration 12 – Proportionality of Outcome

[50] Is the amount of \$7,000 reached as the provisional penalty proportionate to the seriousness of the breach and harm occasioned by it? The amount equates to 35 percent of the maximum permitted for a single breach and is consistent with the range of penalties in similar cases.

⁷ [2019] NZERA 268 at paras [30] to [33]

[51] Given the important purpose of an Improvement Notice and the need to deter employers from not complying with one, together with the factors considered above, including the vulnerability of the employees, the amount of \$7,000 is a proportionate penalty to impose.

Fourth Issue

Did the Inspector act in breach of the NZBORA?

[52] Section 27 of the NZBORA confers a right to the observance of natural justice by any public authority with the power to make a determination in respect of a person's rights and obligations. The NZBORA applies, in my view, to the Inspector in the performance of his public duties.

[53] The Inspector met with Mrs Flanagan on 25 September 2017, explained his role and the purpose of his visit. Following his visit, he recorded in a handwritten note, details of this meeting. This was a practical and sensible step by him, as he would subsequently be preparing a written investigation report and would no doubt require his notes to complete it. I do not consider the Inspector infringed Mrs Flanagan's rights under the NZBORA.

Fifth Issue

Costs and Expenses

[54] The Inspector is entitled to a contribution to his costs of representation in bringing a successful application. Applying the Authority's usual daily tariff for an investigation meeting that lasted for just over half a day, the sum of \$2,225 is the appropriate level for such an award of costs. Healthop must pay the Inspector costs in the sum of \$2,225 within 21 days of the date of this determination. Healthop must also reimburse the Inspector \$71.56 for the fee paid to lodge his application in the Authority, within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority