

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 125
5599808

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

AND KEO THAI RESTAURANT
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Catherine Milnes, counsel for the Applicant
 Francis Parker, advocate for the Respondent

Investigation meeting: 26 July 2016 in Christchurch

Submissions: At the investigation meeting

Determination: 29 July 2016

**DETERMINATION OF THE AUTHORITY FOLLOWING AN ORAL
INDICATION**

Orders

- A. By consent, Keo Thai Restaurant Limited will enter into a new Enforceable Undertaking with Labour Inspector Wendy Higgins on 29 July 2016.**
- B. Keo Thai Restaurant Limited must pay a penalty, to the Employment Relations Authority for transfer to the Crown account, of \$4,500 for its breach of an enforceable undertaking entered into on 25 May 2015.**

- C. In recognition of the difficult financial circumstances the respondent has been in the Authority orders payment of the penalty by instalments:**
- (i) the first instalment of a minimum of \$500 to be paid on or before 20 August 2016,**
 - (ii) the second instalment of a minimum of \$500 to be paid on or before 20 September 2016,**
 - (iii) the third instalment of a minimum of \$500 to be paid on or before 20 October 2016,**
 - (iv) the fourth instalment of a minimum of \$1,000 to be paid on or before 20 November 2016,**
 - (v) the fifth instalment of a minimum of \$1,000 to be paid on or before 20 December 2016, and**
 - (vi) the sixth and final instalment of \$1,000 to be paid on or before 20 January 2017.**
- D. If any of the above payments are missed or short-paid the full amount outstanding becomes immediately due and payable.**
- E. Within 28 days of this determination Keo Thai Restaurant Limited must reimburse the Labour Inspector the filing fee of \$71.56 she paid to bring these proceedings.**

Employment relationship problem

[1] On 9 December 2015, Labour Inspector Bridget Zonneveld lodged an application for the Authority to order compliance with an enforceable undertaking (EU) and for a penalty to be imposed on Keo Thai Restaurant Limited (Keo Thai) for its failure to comply with the enforceable undertaking. The Labour Inspector also sought legal costs pro rata on the daily rate of \$3,500 and reimbursement of the filing fee.

[2] The EU was entered into by Francis Parker on behalf of Keo Thai on 25 May 2015. Mr Parker is a director of Keo Thai.

[3] In the EU, Keo Thai agreed to provide copies of written employment agreements, wages and time records compliant with s 130 of the Employment Relations Act 2000 and holiday and leave records compliant with s 81 of the Holidays Act 2003 (the HA). The EU set the last date for Keo Thai to provide evidence of its compliance with identified minimum code standards as 15 July 2015.

[4] Keo Thai partially complied with the EU but despite considerable information, feedback, education and extensions of time from Ms Zonneveld it did not fully comply. On 9 December 2015, Ms Zonneveld lodged these proceedings. Since then the only document received by the Labour Inspectorate and the Authority is a brief statement in reply suggesting that the Authority should contact Keo Thai's accountant.

The investigation meeting

[5] At the investigation meeting, the Labour Inspectorate withdrew its application for a compliance order. That is because it was clear that Keo Thai was unable to comply. Mr Parker gave evidence that Keo Thai recently instructed its accountant to set up a computerised payroll system and that has been done. He said compliance with the statutory requirements to keep wages and time records and holiday and leave records for the period set out in the EU could not be achieved. However, he considered that compliance could now be demonstrated, once he met with Keo Thai's accountant later this week.

[6] The parties agreed they would enter into a new EU on Friday, 29 July 2016 whereby Keo Thai would demonstrate compliance by supplying records for a period of two weeks from the end of June 2016.

Costs

[7] At the investigation meeting, the Labour Inspectorate withdrew its claim for legal costs. However, it is very clear that if the new enforceable undertaking is not complied with a Labour Inspector will bring further proceedings for compliance, seek a further penalty and will seek legal costs on a pro rata basis.

Consideration of a penalty

[8] The only issues that remain for my determination are whether I should impose a penalty, and if so, what amount that should be.

[9] I indicated that I was likely to impose a penalty. Mr Parker submitted it should not be a large penalty and showed me Keo Thai's financial statements to 31 March 2016 to prove its difficult financial situation. He also applied for any penalty to be payable in instalments. The Labour Inspector agreed that instalment payments were acceptable in the circumstances.

[10] A penalty is imposed for the joint purposes of punishment and deterrence¹. It is not a compensatory payment.

[11] Section 223C(2) of the Employment Relations Act 2000 (the Act) provides that an employer who fails to comply with an enforceable undertaking that remains in force is liable to a penalty recoverable by a Labour Inspector and imposed by the Employment Relations Authority.

[12] Mr Parker admits Keo Thai did not fully comply with the May 2015 EU. That undertaking remains in force.

[13] The Labour Inspector accepts that the individual employment agreements were supplied as agreed. However, Keo Thai does not dispute that there are multiple requirements set out under s 130 of the Act and s 81 of the HA that it has not complied with.

[14] Section 135 of the Act provides that the maximum penalty for an individual is \$10,000 and the maximum penalty for a company or corporation is \$20,000. As at 1 April 2011, the maximum penalties for an individual under s 135 of the Act rose from \$5,000 to \$10,000.

[15] There are few decided cases on penalties for breaches of s 223C of the Act mainly because few EU's are entered into. Labour Inspectors usually issue Improvement Notices instead.

¹ *Tan v Yang & Zhang* [2014] NZ EmpC 65

[16] The following non-exhaustive list of factors is useful in deciding whether impose a penalty, and, if one is to be imposed, what amount should be ordered to be paid. I will look at:

- the seriousness of the breach,
- whether the breach is one-off or repeated,
- the impact if any on the employees, including considering the vulnerability of the employees,
- the need for deterrence,
- remorse shown by the party in breach,
- and the range of penalties imposed in other comparable cases.²

Seriousness of the breach

[17] Ms Milnes submits that the breaches are serious. The statutory obligations to keep correct records are long-standing and basic provisions of employment law in New Zealand. She submits that a failure to comply with the EU raises concerns about whether employees received all of their entitlements. Without appropriate records, that cannot be assessed.

[18] Mr Parker submits that he prides himself on being a good employer. He says none of his staff members have complained to him about missing out on any entitlements. However, under questioning, he admitted that if a staff member did want to query any aspect of their pay or leave there would have been insufficient records to allow them to assess whether they had received their minimum entitlements.

[19] I consider the breaches to be serious, but not extremely serious.

² *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

Was the breach one-off or repeated?

[20] Prior to the EU, Keo Thai did not meet its obligations to keep compliant records. Once the Labour Inspector pointed out that Keo Thai was not complying with minimum standards required of an employer it agreed to comply. However, it failed to comply with the EU.

[21] Mr Parker submits it was a one-off breach and that it now has employment agreements and keeps timesheets. However, I do not consider there was only a one-off breach.

[22] I agree with Ms Milne's submission that the Labour Inspector went to extraordinary lengths to educate, assist and facilitate Keo Thai to obtain compliance. Keo Thai was given many extensions amounting to many opportunities to comply.

[23] That was a hollow promise. Despite multiple opportunities, Keo Thai failed to bring its systems up to the level that compliance requires for a period of almost a year after the expiry of the dates in the EU. The breaches were sustained and not inadvertent. Keo Thai was warned a number of times over a period of months that it needed to comply and that there would be negative consequences if it did not do so.

The impact on the employees

[24] Ms Milnes submits that because of the state of the recordkeeping, no one could say with 100% certainty whether each employee was paid correctly and received their other minimum entitlements.

[25] Mr Parker does not consider there has been any impact on the employees.

[26] I consider the lack of records had a minor impact on the employees.

Vulnerability of the employees

[27] Ms Milnes submits that the affected employees are recent migrants who because of that were unfamiliar with their rights and entitlements in New Zealand. She also said that the front-of-house staff is young, and invited me to consider that as evidence of vulnerability.

[28] Mr Parker says that none of the staff is under 23 years old and that five out of about seven staff have New Zealand residency now. He does not consider them particularly vulnerable.

[29] I agree with Ms Milnes' submissions that new migrant employees, especially when relatively young, are generally more vulnerable than more experienced employees with more time living and working in New Zealand or those employees born here.

The need for deterrence

[30] There may be no need for specific deterrence of Keo Thai if Mr Parker is correct that its record-keeping is now compliant. More generally, deterrence is necessary for all employers, and specifically hospitality businesses where the hours of work vary depending on the seasons and on customer demand. It is even more important to deter ethnic eateries, which tend to employ a large proportion of new migrant employees, from failing to comply with minimum standards.

[31] Keeping of accurate records is a form of protection for employers as well as employees as then both parties can be satisfied, and can prove, that all minimum entitlements have been received.

Remorse for the breach

[32] I accept that Mr Parker came to the investigation meeting and gave an honest explanation about pressure on him and the business over the last several months that caused him to ignore the EU and these proceedings. However, I did not detect genuine remorse for Keo Thai's failure to comply with its obligations until actions taken very recently. I consider the recent attempt to comply by engaging the company's accountant to implement a computerised payroll system to be because of these proceedings rather than because of genuine remorse about lack of compliance.

Levels of penalty in comparable cases

[33] I have been able to find only Authority determinations, and no Employment Court decisions, that have imposed a penalty for failure to comply with EUs. In *Labour Inspector v Swan*³ a penalty of \$2,000 was imposed. I note that the employer

³ [2015] NZERA Auckland 101

was an individual and not a company and was a recently discharged bankrupt. Those facts affected the size of the penalty ultimately imposed.

[34] In *Labour Inspector v Discount Food Warehouse Limited*⁴ the EU had not been complied with initially, but the failure to comply with the Holidays Act 2003 had been fully complied with by the time of the investigation meeting. In that case the penalty was set at \$3,500 and was global penalty for more than one breach.

Conclusion

[35] In this case, there has been no compliance and I have taken into account Keo Thai's difficult financial position, I consider the imposition of a penalty is appropriate in the amount of \$4,500.

Christine Hickey
Member of the Employment Relations Authority

⁴ [2016] NZERA Christchurch 104