



- B. Within 28 days of the date of this determination, L P Joyce Limited is to pay a penalty of \$4200.00 to the Crown for failure to comply with the requirement to provide written employment agreements, wage and time records and holiday and leave records.**
- C. L P Joyce Limited is to make a contribution of \$700.00 to the Labour Inspector's costs, along with paying \$71.56 for the filing fee. These amounts are to be paid within 28 days of the date of this determination to the Applicant.**

### **Employment relationship problem**

[1] The Labour Inspector of the Ministry of Business, Innovation and Employment, George Shorrocks, sought orders that L P Joyce Limited (LPJ or the company):

- (a) Complies with a notice from the Labour Inspector in writing on 6 May 2016 that the company supply copies of written employment agreements, wage and time records and holiday and leave records (the requirement letter);
- (b) Pays a penalty for failure to comply with the notice to provide the employment agreements and records; and
- (c) Makes a contribution towards the Labour Inspector's costs.

[2] LPJ did not file a statement in reply in this matter. However, Lance Joyce, the sole director of the company, participated in the Authority's case management conference held by telephone on 10 February 2017. At the telephone conference Mr Joyce said that the records had been provided to Mr Shorrocks some time ago. This position had previously been asserted by Mr Joyce with Mr Shorrocks in July 2016. At that point Mr Shorrocks informed Mr Joyce that he had not received the information as requested. This response did not result in Mr Joyce providing any records at that time.

[3] At the case management conference Mr Joyce stated that he would get the agreements and records together and send them to Mr Shorrocks and that this should be able to occur by 17 February 2017.

[4] Some agreements and records were subsequently provided by Mr Joyce to Mr Shorrocks on 17 February 2017. Two days before the investigation meeting further records were supplied by Mr Joyce.

[5] The investigation meeting was held on 16 March 2017. Mr Shorrocks and Mr Joyce attended the meeting and gave evidence.

[6] The Authority gave an oral indication of its preliminary findings at the end of the investigation meeting. This was subject to further information being supplied by the parties as to whether there was now full compliance with the Labour Inspector's requirement letter.

[7] On 30 March 2017 the Labour Inspector's representative confirmed that further records had been received from LPJ and that the application for a compliance order could therefore be dispensed with.

### **Account of events**

[8] LPJ conducts a business of car maintenance and repairs, trading as Pit Stop Greenlane.

[9] LPJ had involvement with the Labour Inspectorate in 2014. This resulted in Mr Joyce entering into an Enforceable Undertaking with a Labour Inspector dated 26 June 2014. Mr Joyce acknowledged in the Undertaking that holiday pay and minimum starting-out wages had not been paid for a former employee. The Undertaking required the company to make various payments to the former employee.

[10] The Labour Inspectorate subsequently wrote to the company on 24 July 2014 stating that the company was compliant with the Enforceable Undertaking.

[11] On 18 April 2016 the Labour Inspector, Mr Shorrocks, commenced a re-audit investigation to check for sustained compliance with minimum employment standards, given the Labour Inspectorate's previous investigations into LPJ.

[12] On 6 May 2016 a telephone call was made by Mr Shorroch to Mr Joyce regarding the re-audit. Mr Joyce provided Mr Shorroch with an email address to send the requirement letter <sup>1</sup> to.

[13] The requirement letter was sent on 6 May 2016 to the email address provided by Mr Joyce. That letter required LPJ to produce employment agreements for two full time and two part time current employees, and wage and time records and holiday and leave records from the beginning of February 2014. These documents were requested pursuant to s 229 of the Employment Relations Act 2000 (the Act). The letter required the records to be supplied by 27 May 2016.

[14] On 30 May 2016 Mr Shorroch phoned Mr Joyce. Mr Joyce stated that he had the employment agreements on hand and was ready to scan/send via email but needed a bit more time to get all the MYOB <sup>2</sup> system information for the wage and time records and holiday and leave records. Mr Shorroch granted Mr Joyce and LPJ an extension to 31 May 2016 for the employment agreements, and 3 June 2016 for the wage and time records, and holiday and leave records. Mr Joyce accepted the extension dates.

[15] Mr Joyce sought further extensions in June and July 2016. He made statements that he was almost ready, or about, to send in the documents. Nothing was received before this case was filed on 7 October 2016.

[16] In February 2017 after the Authority's case management conference, Mr Shorroch received two employment agreements and eight leave application form relating to five employees for leave over the period from 2014 to 2016.

[17] On 14 March 2017 Mr Joyce provided the Authority and the Labour Inspector with pay records from the start of February 2014 to 18 May 2016. Further records were provided after the investigation meeting.

### **Labour Inspector's powers**

[18] Under s 229(1) of the Act labour inspectors are given powers for the purpose of performing their functions and duties. These powers include the power under subs (1)(d) to require any employer to supply to the Labour Inspector a copy of the wages

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<sup>1</sup> Referred to as a Sustainable Compliance Check

<sup>2</sup> Mind Your Own Business accounting software

and time record, holiday and leave record, or employment agreement, or both, of any employee. Under subs (2) where a requirement is made the employer must “forthwith” comply with that requirement. Failure to do so may result in a penalty being imposed under subs (3).

### **Employment agreements**

[19] The requirement letter required the provision of employment agreements for two full time and two part time current employees. Mr Shorrocks did this to get a sample of agreements covering any full time and part time staff.

[20] Mr Joyce gave evidence that all the company’s staff in the relevant period were full time, so that he understood that he had complied with what the Labour Inspector wanted by sending in two employment agreements.

[21] As at the time of the investigation meeting, this aspect of the Labour Inspector’s requirement letter request has been complied with.

### **Wage and Time Records**

[22] The requirement letter seeks wages and time records from the beginning of February 2014. Records were provided two days before the investigation meeting for four employees, including Mr Joyce himself. I do not make a determination on the adequacy of these records in terms of what information the company is required to keep under s 130 of the Act, as the Labour Inspector’s case concerns only the failure to supply records.

[23] As at the date of this determination, this aspect of the Labour Inspector’s requirement letter has been complied with.

### **Holiday and Leave Records**

[24] The requirement letter seeks holidays and leave records from the beginning of February 2014. LPJ has provided leave application forms for five employees. Also, included in the pay records which the company provided were the weekly dollar values of annual holidays owed to the employees.

[25] At the investigation meeting Mr Joyce initially considered that he had now provided everything which the company held on employees’ holidays. However, on

further questioning, he said that there were probably additional records on, for example, sick leave, which could be generated from MYOB, which had not yet been provided. He expressed a willingness to provide further documents to the Labour Inspector if the company had not yet provided all that it was supposed to provide.

[26] The Labour Inspector subsequently advised that further records had been provided and that the application for compliance could be was dispensed with.

### **Breach of s 229 of the Act**

[27] Mr Joyce appropriately accepted that the company had received Mr Shorrocks's request for documents in May 2016, and that Mr Shorrocks had not started to receive the documents until February 2017.

[28] The company clearly failed to provide the records required by the Labour Inspector on 5 May 2016 within the initial time given, or within the subsequent extensions of time granted by the Inspector. This failure continued for over nine months, until after the case was filed in the Authority.

[29] The reason given by Mr Joyce for the company's failure was that he, the sole director and manager, had been going through significant personal difficulties in the last few years. That situation had been very stressful for him and had made dealing with anything else too much for him. I accept that Mr Joyce's situation was difficult for him but still find that the company did not meet its obligations to provide the employment records for over nine months following the Inspector's request.

[30] I find that LPJ failed to comply with the requirement by the Labour Inspector forthwith for the purposes of s 229(2) of the Act.

### **Penalty**

[31] The Labour Inspector has sought a penalty for the company's breach of s 229 of the Act.

[32] I have found that LPJ breached s 229 of the Act and am satisfied that this is an appropriate case to consider the award of a penalty. The case is covered by s 133A of the Act which sets out the matters which the Authority must consider in determining the amount of penalties.

[33] Following the recent decision of the Full Bench of the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd (Preet)*<sup>3</sup> I now set out the four step test outlined by the Court to assess the appropriate penalty. In doing so I will refer to factors from s 133A where relevant.

#### *Step One*

[34] Step one is to identify the nature and number of breaches. Here there is one breach of section 229 (2) of the Act, that is the failure to provide records required by the Labour Inspector. The Labour Inspector did not suggest that there was a breach regarding each of the employees involved, as the failure alleged related to the Labour Inspector's request, rather than to any non-payment for example. No globalisation is therefore needed.

[35] The maximum penalty for a company for this breach is \$20,000.

#### *Step Two*

[36] Step two is to assess the severity of the breach, to establish a provisional starting point, including consideration of aggravating and mitigating factors. Labour Inspectors play an important role in the enforcement of minimum employment standards. The provision of written employment agreements and wages and time, and holiday and leave records is important as without such records it can be difficult to determine whether minimum employment standards have been complied with.

[37] In *Preet* the Court found the Employment Relations Act breaches to be the least serious breaches (compared to the Minimum Wage Act and Holidays Act breaches) and provisionally allocated \$10,000, being 50% of maximum penalty.

[38] *Preet* concerned failure to maintain wage and time records, whereas the present case concerns failure to provide the records. I would see failure to maintain records as a more serious matter, than a delay in providing records that did actually exist.

[39] I now look at any aggravating factors. LPJ does not have a clean record with the Labour Inspectorate as the company has previously had involvement with it. The

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<sup>3</sup> [2016] NZEmpC 143

previous matter did not go as far as the Authority and was of a somewhat different nature to the current case. The 24 July 2014 letter from the Labour Inspectorate indicates that Mr Joyce provided it with employment agreements, and wage and time records and holiday and leave records during that investigation.

[40] There are some mitigating factors. The company has now provided its records to the Labour Inspector, although the provision did not occur for around 10 months after the original request.

[41] In terms of whether the breach was deliberate, inadvertent or accidental, the evidence was that the company via Mr Joyce was aware that it was supposed to provide records but not that records were deliberately withheld for any bad motive. The situation was that Mr Joyce was stressed by events elsewhere and his attention was on those rather than on the request for records. The Labour Inspector accepts that the company has now made its best efforts to provide the documents requested, as it understood the request, since February 2017.

[42] The Labour Inspector also accepts that there is no issue of any harm being caused in this case, other than the Labour Inspector having to pursue the company to comply with the requirement letter and then file this case in the Authority. There is no indication of the employees being particularly vulnerable.

[43] Taking into account all of these factors I set the provisional penalty at \$6,000 being 30% of the maximum.

### *Step Three*

[44] Step three requires consideration of the means and ability to pay, which may result in a downwards adjustment. Here the business appears to be a relatively small one with perhaps four employees.

[45] Although not providing any financial records, Mr Joyce gave evidence which was not challenged by the Labour Inspector, regarding the company's weak financial position and reliance on an overdraft. I make a deduction of 30% for that factor, taking the total down to \$4,200.

*Step Four*

[46] Here I consider the proportionality or totality test; whether the provisional penalty after the first three steps is proportionate to the seriousness of the breach and harm occasioned by it. A consideration of other comparable cases can be undertaken at this point.

[47] In *Preet* penalties were required to be in proportion to the amount of money unlawfully withheld.<sup>4</sup> However, in this case there is no evidence of money being unlawfully withheld, in the period which the records relate to.

[48] Turning to comparable cases, *Firman v Insyn Ltd*<sup>5</sup> is an Authority decision also involving a failure to provide records. There a \$3,000 penalty was imposed for a breach of the requirement to provide wages and time records under s 130(2) of the Act when records were requested prior to the case (which also concerned other claims) being filed. Records were filed when directed by the Authority. The Authority in *Firman* assessed the starting point as \$5,000.

[49] I consider that of the four objectives of penalty awards outlined in *Preet*, the first two objectives, punishment of those who breach their obligations, and general and specific deterrence are particularly relevant here. This company had been investigated by the Labour Inspectorate and found wanting in 2014. Two years later it was not readily complying with the Labour Inspector's requirements. There were repeated requests for extensions but this did not result in provision of the records. What was provided was not done until well after the proceeding was filed in the Authority.

[50] In terms of the third objective outlined in *Preet* there is no necessity to compensate the victim here as there is no evidence of any monetary or non-monetary loss, or uncertainty by employees regarding entitlements due to failure to comply with the requirement for information.

[51] The Authority offered the parties the opportunity to discuss whether they could reached an agreed position on what the appropriate penalty was in this case, making it clear that this could not be undertaken as a consent determination, but rather would be information to input into the Authority's determination of the appropriate

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<sup>4</sup> *Supra* at [190]

<sup>5</sup> [2016] NZERA Christchurch 227

penalty. The parties agreed that \$5,000 was an appropriate penalty given the lack of bad intention on the company's part and on its financial circumstances.

[52] Standing back and looking at all of the factors and considering whether a penalty of \$4,200 would be right in all the circumstances, I find that it is.

[53] LPJ is ordered to pay a penalty of \$4,200 to the Crown within 28 days of the date of this determination for its failure to comply forthwith with the Labour Inspector's requirement.

### **Costs**

[54] The Labour Inspector has been successful in this case and has sought costs. I am satisfied that costs should follow the event. The investigation meeting lasted less than half a day, and was interrupted by a fire alarm. On the basis of the applicable notional daily tariff of \$4,500.00, I award the Labour Inspector \$700.00 as a contribution to its costs and \$71.56 for the filing fee. These sums are to be paid within 28 days of the date of this determination.

Nicola Craig  
Member of the Employment Relations Authority