

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 386
3011611

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

A N D NEW LUCKY STAR
 RESTAURANT LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Martin Denyer, Counsel for Applicant
 Tony Kwok, Representing the Respondent

Investigation Meeting: 12 December 2017 at Auckland

Submissions Received: 7 December 2017 from Applicant
 None from Respondent

Date of Determination: 14 December 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The Applicant, a Labour Inspector, claims that the Respondent, New Lucky Star Restaurant Limited (New Lucky Star), failed to pay its employees public holiday entitlements as required by ss.46, 47 and 50 of the Holidays Act 2003.

[2] The Labour Inspector further claims that New Lucky Star failed to keep holiday and leave records in accordance with s.81 of the Holidays Act 2003.

[3] The Labour Inspector seeks to recover penalties for failing to comply with the Holidays Act 2003 pursuant to ss. 75(1)(b), 75(2)(c) and 75(2)(e) .

[4] New Lucky Star has accepted the breaches and stated its willingness to be compliant in future.

The issues

[5] The issue for determination is a quantum of penalty in respect of the Holidays Act 2003 (HA) breaches.

Background facts

[6] New Lucky Star operates a restaurant located in Papatoetoe, Auckland. New Lucky Star's business hours are from 10am to 3pm, and 5pm to 10pm, Monday to Sunday. There are two directors of the company: Mr Tony Ping Kwan Kwok and Mr Yam Ching Wong.

[7] In late 2015 after receiving a complaint, a Labour Inspector conducted an investigation at New Lucky Star as a result of which an Improvement Notice relating to breaches of the HA was issued on 3 September 2015. The Improvement Notice required improvement by 1 October 2015

[8] By 9 November 2015 the Labour Inspectorate was satisfied that New Lucky Star's response to the Improvement Notice was satisfactory.

[9] During April 2016 New Lucky Star was selected for a follow-up visit as part of the Counties Manukau Labour Inspectorate Re-Audit Programme. The purpose of the follow-up visit was to check whether New Lucky Star had maintained compliance with the breaches which had been identified in the Improvement Notice issued to it on 3 September 2015.

[10] A Labour Inspector sent a letter to New Lucky Star on 6 May 2016 to advise of the commencement of the investigation and to request all employees' wages and time records, holiday and leave records and employment agreements. The letter requested that New Lucky Star provide the following for two current full time employees and two current part-time employees by 20 May 2016:

- (a) Copies of the written employment agreements;
- (b) Copies of the wages and time records from 1 October 2015 to 6 May 2016;
and
- (c) Copies of the holiday and leave records from 1 October 2015 to 6 May 2016.

[11] The Labour Inspector received four employees' wages and time records, timesheets, employment agreements, tax declaration forms and leave request forms by 26 May 2016, but no holiday and leave records.

[12] Accordingly the Labour Inspector contacted Mr Kwok on 26 May 2016 via text message to ask whether he had kept any other record of the employees' entitlements to annual holidays, public holidays, sick leave and bereavement leave.

[13] By reply text message dated 26 May 2016, Mr Kwok confirmed that New Lucky Star used handwritten records to record the employees' annual and public holiday and sick leave, and copies of these had been sent.

[14] The Labour Inspector met with Mr Kwok on 7 September 2016 to seek clarification on whether New Lucky Star paid time-and-a-half to its employees when they worked on public holidays, and how New Lucky Star maintained the holiday and leave records.

[15] During the meeting Mr Kwok confirmed that he did not pay time-and-a-half as the employees preferred a paid day off at their normal rate instead of receiving time-and-a-half.

[16] Failure to pay time-and-a-half had previously been identified as a breach in the Improvement Notice issued on 3 September 2015.

[17] In regard to keeping holiday and leave records, Mr Kwok explained that he kept wages and time records, timesheets and leave request forms instead of a separate holiday and leave record. An analysis of those records by the Labour Inspector confirmed that New Lucky Star failed to keep some of the mandatory information as required by s.81 of the HA.

[18] Following the meeting on 7 September 2016 the Labour Inspector had reasonable grounds to believe that New Lucky Star failed to provide minimum public holiday entitlements which could affect other employees in the workplace. As a result, the Labour Inspector issued another notice requesting all employee records between 3 September 2016 and 15 September 2016. The information was to be received by no later than 4p.m. on Thursday, 22 September 2016.

[19] The Labour Inspector received 14 employee wages and time records, timesheets, leave request forms, employment agreements and tax code declaration forms between 19 and 22 September 2016. However only ten employees were identified who had worked on public holidays. The ten employees' wages and time records, timesheets, leave request forms, employment agreements and their tax declaration forms have been provided to the Authority.

[20] The Labour Inspector examined and analysed employment agreements, wages and time records, timesheets and leave request forms. The Labour Inspector found that New Lucky Star failed to maintain compliance with the HA as it failed to pay time-and-a-half to ten employees, failed to provide alternative holiday entitlements to seven employees, failed to

provide public holiday entitlement during the period of annual holidays to one employee, and failed to keep compliant holiday and leave records for ten employees.

[21] The Labour Inspector sent New Lucky Star a copy of the investigation findings on 10 April 2017, accompanied by a letter seeking New Lucky Star's intentions with regard to payment of the arrears, and invited comment on the matter.

[22] In response New Lucky Star provided proof of payment of the arrears by sending copies of cheques paid to employees confirming that it had paid the total arrears of \$2,716.91 gross as calculated by the Labour Inspector on 18 April 2017.

Penalty action

[23] The Labour Inspector submits that despite being given an opportunity to comply with the minimum employment standards, New Lucky Star has been found repeatedly breaching the same issues as identified previously in the Improvement Notice that was issued on 3 September 2015. As a result, the persistent breaches by New Lucky Star have resulted in employees being financially disadvantaged and deprived of their minimum entitlements.

[24] While New Lucky Star has paid the public holiday arrears to the affected employees, matters relating to alternative holiday entitlements and non-compliant holiday and leave records remain unresolved.

[25] Given the serious and systematic breaches of the HA by New Lucky Star, the Labour Inspector seeks penalties to be awarded by the Authority to deter New Lucky Star from continuing to breach the minimum employment standards.

[26] In *Borsboom v Preet PVT Limited*¹(*Preet*) the full court of the Employment Court identified the factors for imposing a penalty for breach of minimum employment standards under the Act.

[27] In determining the penalty claim I follow the four step approach as set out by the Employment Court in *Preet*².

Step 1: Identify the nature and number of the breaches and the maximum penalty available

[28] The Labour Inspector has claimed penalties in respect of the following breaches:

¹ *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discounted Tobacco Limited* [2016] NZEmpC 143

² [2016] NZEmpC 143 at [151]

- (a) Failure to keep holiday and leave records – ten breaches (one per employee);
- (b) Failure to pay time-and-a-half – ten breaches (one per employee); and
- (c) Failure to pay holiday pay – one breach (one employee).

[29] The Labour Inspector submits that a global penalty is appropriate for the annual payments to Xiao Tong Lei, who is the only worker who is not paid time-and-a-half and not paid where he did not work a public holiday.

[30] It is also submitted that a global penalty could also be applied for the record keeping breaches and for the under-payments generally, leading to a grand total for maximum penalties of \$40,000, ie one global penalty for arrears and one for record keeping breaches.

[31] The Labour Inspector notes that this globalisation is somewhat of a liberal approach as there could be individual penalties applied for each breach against each employee, but submits that this globalisation approach is appropriate in the particular circumstances of this case.

Step 2: Assessment of the severity of the breaches

[32] The Labour Inspector has identified as aggravating features of this case the following:

- (a) The minimum code employment entitlements and standards are universally well known³;
- (b) The employees were temporarily underpaid;
- (c) There were ten affected employees per breach when globalised;
- (d) There were other breaches apparent for which penalties are not sought, eg failure to provide alternative holidays; and
- (e) Repeated breaches following the issuance of and apparent compliance with an Improvement Notice.

[33] The Labour Inspector identifies as ameliorating factors the following:

- (a) New Lucky Star has paid back all arrears to the employees;

³ *Labour Inspector v Cypress Villas Limited* [2015] NZEmpC 157

- (b) New Lucky Star has accepted the breaches and stated a willingness to be compliant (although it is noted that further records still do not appear to be totally compliant);
- (c) New Lucky Star did keep some records, although no separate holiday and leave records were kept; and
- (d) New Lucky Star may have attempted to provide some alternative to proper holiday entitlements, for example, extra day off.

[34] The Labour Inspector notes that the penalties have been globalised so that each applies to failures in respect of ten employees and taking into account the mitigating and ameliorating factors, the Labour Inspector submits that each penalty can be reduced 50% from the maximum to \$10,000 each.

[35] I observe that New Lucky Star had been made aware of the requirements through the issuance of the Improvement Notice on 3 September 2015, following which it had engaged the assistance of an accountant to achieve compliance. This course of action was further employed in 2016 when the Labour Inspector provided New Lucky Star with a copy of the investigation report, and payment of the arrears was then made to the employees.

[36] However it appears since that time there is an ongoing concern resulting from an analysis of leave and holiday records provided for the Authority's Investigation, which indicate ongoing non-compliance.

[37] As submitted by the Labour Inspectorate, the minimum code employment requirements and standards are universally well-known and employers in New Zealand are expected to know the minimum legal requirements in respect of their employees and adhere to them. Ignorance of the law is no defence.⁴

[38] I accept that New Lucky Star's failure to maintain correct records in respect of holiday and leave records was more negligent than deliberate, however it is no excuse to offer, as did the Director of New Lucky Star, that it wished to minimise the cost of engaging an accountant.

[39] In the circumstances I find that the penalty should be set at the level submitted as appropriate by the Labour Inspector of 50% in respect of the two heads of breach, being \$10,000.00 each head of breach.

⁴ *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [29]

Step 3: Financial circumstances of New Lucky Star

[40] New Lucky Star presented a copy of its financial reports for the year ended 31st March 2017 at the Investigation Meeting.

[41] Based on those reports I do not apprehend that New Lucky Star could not meet any penalties awarded.

[42] Accordingly there is no adjustment made to the provisional penalties at this stage of the process.

Step 4: Proportionality or totality test

[43] The Labour Inspector submits that standing back and looking at the breaches in the round total penalties of \$20,000 would due justice in all the circumstances, apportioned as follows:

- | | | |
|-----|-------------------------|-----------------|
| (a) | Record keeping failures | \$10,000 |
| (b) | Holiday pay failures | \$10,000 |
| | Total: | \$20,000 |

[44] For consideration by the Authority four cases have been submitted as assisting the Authority in reaching the decision in this matter:

- (a) *Labour Inspector v Just Kebab Limited* [2016] NZERA Auckland 383 which involved a single worker, arrears of \$33,361 minimum wage and holiday pay. There was no engagement by the respondent during the processing of the matter and the penalties awarded were \$40,000 of a total potential maximum of \$80,000.
- (b) *Auckland Drainage Plumbing Services Limited* [2017] NZERA Auckland 134 in which there were arrears of \$7,872.10 minimum wage and holiday pay. The penalty awarded was 15% of the total provisional breaches being \$17,280.
- (c) *IXL Petroleum and Gas Limited* [2017] NZERA 128 Auckland in which there were arrears of \$14,587.91 minimum wage, holiday pay, alternative days and deduction. The respondent had a limited means to pay and a penalty of \$14,000 was considered appropriate.

- (d) *BBS* [2017] NZERA Auckland 172 in which there were 7 separate heads of breach affecting 16 employees, and a total of \$1818.02 owed to the employees in result of the breaches. The penalty awarded was \$57,120.00.

[45] The Labour Inspector submits that whilst multiple employees under each breach elevate the seriousness of the breach, in the circumstances an order for \$20,000 penalties would do justice in this case. In support of this submission the Labour Inspector notes the prompt payment of the arrears by New Lucky Star.

[46] Mr Kwok during the Investigation Meeting accepted that New Lucky Star had failed to fully comply with the requirements of the legislation and would therefore accept any penalty awarded. I note also that the non-compliance had not been driven by a wish to prevent employees being treated fairly, nonetheless that was the consequence.

[47] Considering fully all the circumstances, and assisted by the submissions of the Labour Inspector, that I determine that applying a penalty of \$20,000 is appropriate.

[48] **Accordingly I order that New Lucky Star pay the MBIE trust account a total of \$20,000. Payment is to be made within 28 days of this determination.**

Filing fee

[49] The Labour Inspector seeks reimbursement of the filing fee for the application being \$71.56.

[50] **I order that New Lucky Star pays the Labour Inspector the Authority's filing fee in the sum of \$71.56.**

Costs

[51] The Labour Inspector seeks a contribution to its costs based upon the normal daily tariff in the Authority of \$4,500.00 for a full hearing day.

[52] The Investigation Meeting occupied one half of a day.

[53] **I order New Lucky Star to contribute \$2,250.00 towards the Labour Inspectorate's actual costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

Eleanor Robinson
Member of the Employment Relations Authority