

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 176
3103674

BETWEEN A LABOUR INSPECTOR
Applicant

AND NUKUVAI LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Joseph Perrot, counsel for Applicant
No appearance for Respondent

Investigation Meeting: On the papers

Submissions and further 28 September and 6 October 2020 and 15 January 2021
information Received: from Applicant
12 March 2021 from Respondent

Determination: 30 April 2021

DETERMINATION OF THE AUTHORITY

- A. Nukuvai Limited has breached the Improvement Notice dated 3 October 2019.**

- B. Nukuvai Limited is ordered to comply with all elements of the Improvement Notice dated 3 October 2019 within 28 days of the date of this determination.**

- C. Nukuvai Limited is ordered to pay penalties to the Authority totalling \$5,000 within 28 days of the date of this determination. On receipt the penalties will then be paid into a Crown bank account.**

- D. Costs are reserved.**

Authority's process

[1] A Labour Inspector employed by the Ministry of Business, Innovation and Employment lodged an application with the Authority on 8 May 2020. The application sought compliance orders and penalties against Nukuvai Limited for a failure to comply with an Improvement Notice dated 3 October 2019 issued under s 223D of the Employment Relations Act 2000 (the Act).

[2] On 10 May 2020 the Authority contacted Ms Sapeta Danny, the sole director and shareholder of Nukuvai Limited, via email. The Authority advised Ms Danny that a statement of problem had been received and asked if she would accept service on behalf of the company via email. On 18 May 2020 Ms Danny acknowledged the Authority's email and confirmed the statement of problem could be served via email.

[3] The statement of problem was duly emailed to Nukuvai via Ms Danny on 19 May 2020. No statement in reply was received from Nukuvai and in order to progress the matter, a case management call was held on 3 August 2020. Ms Danny attended the call on behalf of Nukuvai.

[4] During the case management call timetable directions were made by the Authority. This included dates for the statement in reply, a bundle of documents, witness statements and submissions to be lodged with the Authority.

[5] The Labour Inspector met all of the timetabled directions, however, Nukuvai failed to comply, including the direction to lodge a statement in reply by 17 August 2020.

[6] This matter was allocated to me in January 2021 after the presiding Member left the Authority.

[7] In a Notice of Direction dated 12 January 2021 I set out a proposed process for dealing with this matter, including that it be dealt with on the papers currently before the Authority. In the Notice of Direction Ms Danny was advised that in the absence of a statement in reply and pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Nukuvai would require the leave of the Authority to reply or respond to the application.

[8] The parties were provided with seven days in which to oppose the proposed process or seek to have the directions in the Notice of Direction modified. No communications have been received from Nukuvai and the Labour Inspector consented to the proposal to deal with the matter on the papers.

[9] On 12 March 2021 the Authority once again contacted Ms Danny to ensure she had received the 12 January 2021 Notice of Direction. Ms Danny acknowledged she had received it.

[10] I am satisfied Nukuvai has been properly served with all relevant materials and has not shown good cause for its failures to meet the directed timetables. In the absence of a statement in reply I know of no reason why I should not continue and accordingly I have proceeded to act fully in this matter pursuant to clause 12 of Schedule 2 of the Act.

Employment relationship problem

[11] After an investigation by the Labour Inspectorate in September 2019 an Improvement Notice was issued to Nukuvai seeking improvements to meet its obligations relating to minimum employment standards.

[12] Nukuvai has failed to provide the necessary evidence demonstrating it has complied with the Improvement Notice. The Labour Inspector seeks compliance orders and penalties.

Issues

[13] In order to resolve the Labour Inspector's application I must determine the following questions:

- a) Did Nukuvai comply with the Improvement Notice?
- b) If not, should compliance orders be made?
- c) Should penalties be imposed?

[14] The Labour Inspector has consented to this matter being dealt with on the papers before the Authority which includes the statement of problem, associated documents, a statement and submissions received from the Labour Inspector.

[15] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the information received I have carefully considered all relevant material lodged with the Authority.

Background

[16] On 30 November 2018 the Labour Inspectorate instigated an operation investigating strawberry picking contractors in the Auckland region. Nukuvai was identified as a contractor to a strawberry grower and was selected for an assessment of its compliance with employment standards.

[17] During February and March 2019 Nukuvai was requested to and did provide relevant employment records. Following a review of the records a Labour Inspector met with Ms Danny to discuss the records and Nukuvai's business practices. The Labour Inspector had identified a number of compliance issues which were also discussed.

[18] The Labour Inspector completed a draft investigation report on 5 September 2019 and sought a response from Nukuvai. No response was received and on 3 October 2019 the Labour Inspector emailed his final report which recorded the following breaches of minimum standards:

- (a) Section 65 of the Act in that the employment agreements did not contain a plain language explanation of resolution of employment relationship problems;
- (b) Section 69OJ of the Act in that the employment agreements do not contain an employee protection provision;
- (c) Section 49 of the Holidays Act 2000 (HA) in that Nukuvai had failed to pay employees who did not work on a public holidays that would have otherwise been a working day for the employee at a rate not less than the employee's relevant daily pay or average daily pay for that day.

- (d) Section 56 of the HA in that Nukuvai failed to provide for alternative holidays to employees who worked on a public holiday and that day would otherwise have been a working day;
- (e) Section 81 of the HA in that Nukuvai failed to keep a complete holiday and leave record showing the date on which the employee became entitled to any alternative holiday and the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay.

[19] In his report the Labour Inspector noted that it was appropriate that an Improvement Notice be issued requiring Nukuvai to make changes to its records and business practices to ensure compliance with minimum employment standards

[20] Attached to the report was a spreadsheet setting out the Labour Inspector's calculations of amounts owed to employees for breaches of the HA.

[21] The Improvement Notice was duly issued setting out the following steps required to be taken by Nukuvai to comply with the provisions of minimum employment standards. Compliance was to be effected by 8 November 2019:

- (a) Provide employees with employment agreements that contain employee protection provisions and a plain language explanation for resolution of employment relationship problems;
- (a) Review all employee wage, time, holiday and leave records and identify employees who have entitlements for public holidays not worked on public holidays that would have been an otherwise working day and entitlements to alternative holidays;
- (b) Calculate arrears for affected employees using the Average Daily Pay (ADP) calculation method;
- (c) Issue arrears to employees;
- (d) Include in the holiday and leave record, details of public holiday entitlements or provide for the ability to record public holiday entitlements.

[22] The Improvement Notice required Nukuvai to provide to the Inspector the following evidence of the steps taken to comply with the requirements set out in the Improvement Notice:

- (a) Provide a copy of the new employment agreement template which contains employee protection provisions and a plain language explanation for the resolution of employment relationship problems;
- (b) Provide evidence of the method used to identify employees who have not received their entitlements for public holidays not worked on days that would have been an otherwise working day and entitlements to alternative holidays;
- (c) Provide evidence of the calculations and method used to determine employees' entitlements to arrears of wages for not working on public holidays that would otherwise have been a working day and for entitlements to alternative holidays.
- (d) Provide evidence of the payment of arrears to employees; and
- (e) Provide an updated holiday and leave record that contains public holiday entitlement information.

[23] The Labour Inspector advised Nukuvai of its right to object to the Improvement Notice including timeframes for doing so. No objection was lodged with the Authority within the statutory time period.

[24] On 13 November 2019 the Labour Inspector emailed Ms Danny following up on the Improvement Notice and reminding her that she had not provided the evidence showing how she had complied with the Improvement Notice. Ms Danny was advised of the steps available to the Labour Inspector to enforce compliance including lodging an application with the Authority.

[25] Despite a number of extensions being provided to Nukuvai to demonstrate compliance with the Improvement Notice the evidence required to be provided to the Labour Inspector did not eventuate.

Did Nukuvai comply with the Improvement Notice

[26] In the absence of any evidence to the contrary, I am satisfied the Labour Inspector has established that Nukuvai has failed to comply with the Improvement Notice issued by the Labour Inspector on 3 October 2019.

Compliance Orders

[27] Section 137(1)(a)(iiib) of the Act provides the Authority with a discretion to order compliance where any person has not observed or complied with an Improvement Notice.

[28] Given the failure of Nukuvai to discharge its obligations under the Improvement Notice, it is appropriate to exercise my discretion to make the compliance orders sought by the Labour Inspector. Accordingly Nukuvai Limited is ordered to comply with all elements of the Improvement Notice dated 3 October 2019 within 28 days of the date of this determination.

Penalties

[29] The Labour Inspector seeks penalties to be imposed on Nukuvai under s 223F of the Act which provides the Authority with the discretion to impose penalties on an employer who fails to comply with an Improvement Notice.

[30] The framework for assessing and fixing penalties is contained in s 133A of the ERA and set out in *Borsboom v Preet PVT Limited*.¹ In *A Labour Inspector v Matangi Berry Farm Limited* Judge Corkill applied an approach to penalty setting which assessed the factors in s 133A of the Act and then applied those and other considerations using the four step process in *Preet* to quantify the penalty.² I have followed that approach in reaching my conclusions as to penalties in this case.

Statutory Considerations

Objects of the Act

[31] The Act's declared objects include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.³ Those objects support the

¹ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

² *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43; [2020] ERNZ 67; (2020) 17 NZELR 353.

³ Employment Relations Act 2000, s 3.

need to impose a penalty on Nukuvai for its actions in failing to comply with the Improvement Notice.

[32] There were a number of areas identified by the Labour Inspector in his report, in which Nukuvai did not meet the required minimum employment standards. This included a failure to pay for public holidays in accordance with the HA. These actions undermined employment standards.

Nature and extent of the breaches

[33] Nukuvai committed one ongoing breach in its failure to comply with the Improvement Notice including a failure to pay and account for public holidays correctly. The total maximum penalty available in respect of the breach is \$20,000.

The nature and extent of loss or damage suffered by the worker

[34] The failure to comply with the Improvement Notice has led to employees being deprived of the use of money to which they were entitled at the time it became due. This has led to Nukuvai gaining an unfair advantage over its competitors because by retaining the money it has been able to reduce its costs and profit from the resulting cost reduction.

Whether the breaches were intentional, inadvertent or negligent

[35] The Labour Inspector submits Nukuvai's actions in not complying with the Improvement Notice were negligent rather than intentional. He says:

- (a) Evidence lodged with the Authority shows there has been some attempt by Nukuvai to comply with the requirements. Further, Ms Danny has expressed remorse about the non-compliance and indicated she fully intended to comply on or around 19 November 2019.
- (b) The Labour Inspectorate has identified previous non-compliance with minimum standards in 2017. This suggests Nukuvai has ongoing difficulty identifying and applying minimum employment standards within its business practices. There was a cross-over of issues identified in the 2017 and the 2019 investigations. This demonstrates that even when issues are pointed out to Nukuvai, Ms Danny has not been able to effectively address them.

What steps have been taken in mitigation?

[36] Nukuvai has attempted to comply with the Improvement Notice and has expressed remorse for non-compliance to the Labour Inspector.

Circumstances of the breach and vulnerability

[37] It is Nukuvai's responsibility to know and apply the relevant employment laws in New Zealand. Ignorance of the law is no excuse.

[38] The failure to comply with the Improvement Notice has likely affected all employees of Nukuvai during the picking seasons since 2018.

Previous conduct

[39] While Nukuvai has not previously appeared before the Authority, it has had previous involvement with the Labour Inspectorate. An Improvement Notice was issued to Nukuvai by a Labour Inspector on 25 June 2017. However, the Labour Inspector did not proceed any further on that occasion despite Nukuvai not providing evidence of compliance with that Improvement Notice. This was largely due to the Labour Inspector accepting advice from Nukuvai that it was no longer trading.

Preet Step 1 – Nature and number of the breaches

[40] The first step in *Preet* requires me to consider whether globalisation is appropriate. In this case there is only one breach. Accordingly no issue as to globalisation arises.

[41] The starting point for quantifying penalties amounts to \$20,000.

Preet Step 2 – Severity of the breaches

[42] This step involves a consideration of the severity of the breaches including deterrence, culpability and aggravating and ameliorating factors.

[43] The breaches in this case are of an Improvement Notice issued by a Labour Inspector which relates to failures to comply with minimum employment standards. It is important that a penalty is set at a level where it deters employers from failing to comply with Improvement Notices.

[44] In this case the degree of culpability of is high. During a picking season Nukuvai employs up to 50 employees. The failure to comply with the requirements of the Improvement Notice has the potential to provide financial gain for Nukuvai.

[45] The aggravating features of this case, while serious, are not the most serious conceivable breaches so the starting point for deductions or credits should not be the maximum penalty.⁴

[46] I consider an appropriate starting point is 40 per cent of the maximum penalties making a starting point of \$12,000.

[47] In regard to ameliorating factors, I have taken into account the intention expressed by Ms Danny to comply with the Improvement Notice and the remorse shown by her.

[48] I have reduced the resulting figure by a further 20 per cent having regard to the ameliorating factors including the recognition that the company was a “first offender”.⁵ This leads to a potential penalty of \$9,600.

Preet Step 3 – Means and ability of the respondent to pay

[49] The onus is on Nukuvai to provide the Authority with up-to-date and accurate information in support of any submission that it is financially unable to meet a potential penalty award.

[50] Nukuvai has failed to engage with the Authority in this process and as a consequence, it has not provided any information about its ability to pay.

[51] No deduction will be made under this heading. This leaves my penalty assessment at \$9,600.

Preet Step 4 – Proportionality

[52] This step is about ensuring the final amount of any penalty is proportional to the breaches and in line with other penalty amounts for multiple similar seriousness.

⁴ *Preet*, above n 2, at [167].

⁵ *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

[53] I have considered other cases in which penalties for breaches of an Improvement Notice have been considered.⁶ In *A Labour Inspector v Bombay Gymkhana Limited* the Member undertook an analysis of cases between 2015 and 2018 involving breaches of Improvement Notices.⁷ 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. In *A Labour Inspector v Healthop Ltd* the Authority imposed a penalty of \$7,000.⁸

[54] The end result of the comparisons and my reflection on proportionality including taking into account the Labour Inspector's submissions on this point is that I am satisfied a further reduction to \$5,000 is appropriate.

[55] Nukuvai Limited is ordered to pay penalties to the Authority totalling \$5,000 within 28 days of the date of this determination. On receipt the penalties will then be paid into a Crown bank account.

Costs

[56] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Labour Inspector shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Nukuvai shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority

⁶ *A Labour Inspector v Bombay Gymkhana Ltd* [2019] NZERA 268 at paras [30]-[33]; *A Labour Inspector v White Developments Ltd* [2017] NZERA Christchurch 87; *A Labour Inspector v Healthop Ltd* [2019] NZERA 439;

⁷ *Bombay Gymkhana Ltd* above n 6.

⁸ *Healthop* above n 6 at [51].