IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 107
5581436

	BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
	A N D	SPRINGAS ENT LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Geraldine Kelly, Counsel for Applicant Karyn Cullingford, Advocate for Respondent
Investigation Meeting:	4 July 2016 at Christchurch
Submissions Received:	4 July 2016 for Applicant 4 July 2016 for Respondent
Date of Determination:	11 July 2016

DETERMINATION OF THE AUTHORITY

A penalty of $1,000 is imposed on the respondent for failing to provide holiday and leave records.

Employment relationship problem

[1] The Labour Inspector (Mr Vikram Lakhera) seeks penalties against the respondent for allegedly having breached obligations under the Employment Relations Act 2000 (the Act) and the Holidays Act 2003.

[2] The respondent resists the imposition of penalties on the basis that any breaches were not intended, and that the respondent has had difficulty in communicating with the Labour Inspector due to computer and postal problems. In

addition, the respondent has relied on its payroll provider in terms of its compliance and it would appear that the payroll provider may have made errors.

Brief account of events up to the investigation meeting

[3] The respondent operates a store and café on the main West Coast road in Springfield. On 28 March 2013, an Improvement Notice was served on the respondent under s.223D of the Act.

[4] On 6 March 2015, the Labour Inspector returned to the premises of the respondent to carry out an audit. During the visit, the Labour Inspector served a notice on the respondent seeking copies of the following documents:

(a) Time and wage records for all employees for the previous three months;

(b) Holiday and leave records for all employees for the previous three months;

(c) Any documentation relating to deductions the business takes from the wages of any of its employees;

(d) Employment agreements for all current employees;

(e) Payslips for all employees for the previous three months; and

(f) Final pay records for employees who had left in the previous three months.

[5] The Labour Inspectorate sought the production of these records by 19 March 2015.

[6] On 19 March 2015, Mrs Karyn Cullingford, one of the directors of the respondent, emailed Mr Lakhera to say that she had been unable to provide the information to date, but would do so by the first week of April. Mr Lakhera gave an extension until 27 March 2015 in order to do so.

[7] On 29 March 2015, Mrs Cullingford provided a copy of one employment agreement which she said was representative of all of the agreements given to her staff. She said that only one of the employment agreements had been signed and

returned by her staff. She also provided timesheets. She said she was having trouble printing from her payroll provider's system but would get reports to him by the following day.

[8] Mr Lakhera replied, and advised Mrs Cullingford that she had not provided records covering the period he had requested (as they did not cover December 2014). She also needed to provide the rest of the employees' leave, time and wages records. He also advised her that the respondent was in breach of s.64 of the Act (requiring an employer to retain copies of an individual employment agreement or terms and conditions of employment).

[9] Mr Lakhera sent Mrs Cullingford a further email on 2 April 2015 seeking holiday and leave records. It is clear from the reply from Mrs Cullingford that she had relied on her payroll provider to provide the Labour Inspector with what he sought.

[10] On 14 April 2015, Mr Lakhera asked Mrs Cullingford for the contact details of the person who did the payroll for the respondent. It is Mr Lakhera's evidence that he was never given this information.

[11] On 22 April 2015, Mr Lakhera sent a detailed email setting out what information was still missing in respect of named employees.

[12] On 16 September 2015, the Labour Inspectorate lodged its application for penalties with the Authority on the basis that no response had been received to Mr Lakhera's email of 22 April 2015, and that no further information had been provided.

[13] Following a case management conference call on 29 April 2016, during which it became evident that Mrs Cullingford was confused and uncertain as to what information the Labour Inspector still required, Mr Lakhera wrote to the respondent on 12 May 2016 setting out what further information was still required.

[14] On 24 May 2016, some of this information was received by the Labour Inspector but not all. Accordingly, Mr Lakhera wrote a further letter to the respondent on 30 May 2016 setting out what information was still missing. It appears that the respondent sent further documentation to Mr Lakhera, which arrived on Friday, 1 July 2016, the last working day before the investigation meeting.

[15] However, this documentation still did not give the Labour Inspector sufficient information with respect to the holiday and leave entitlements of the respondent's staff. It did, however, appear to indicate that the payroll provider itself may have miscalculated some holiday pay that is owing to a member of staff.

[16] Having assimilated the various pieces of information that had been sent to the Labour Inspector over a period of more than 12 months, the Labour Inspectorate modified its application in terms of the orders it was seeking. Taking into account that modified application, the following issues need to be decided by the Authority.

The issues

[17] The issues are as follows:

(a) Has the respondent failed to provide employee records required to be produced by the Labour Inspector? If so, should a penalty be imposed?

(b) Has the respondent failed to comply with ss.63A and 64 of the Act? If so, should a penalty be imposed?

(c) Has the respondent failed to comply with the requirements provided under ss.22, 49, 50, 56 and 81 of the Holidays Act? If so, should a penalty be imposed?

(d) Does the respondent still owe its employee, Rachel Tapp, holiday leave entitlements?

Has the respondent failed to provide records?

[18] The statutory requirements to keep relevant records are set out in s.130 of the Act and s.81 of the Holidays Act.

[19] The Labour Inspector gave evidence that, by the time of the investigation meeting, the key records that remained to be provided were holiday and leave records. Mr Lakhera said that he still did not have enough information to enable him to work out whether the respondent's obligations with respect to the payment of holiday pay had been observed with respect to any given member of staff.

[20] It became clear during the evidence of Mrs Cullingford that she still did not understand what the obligations were in respect of the information that the respondent

needed to keep, in order to comply with its obligations to keep holiday and leave records, and that she had been relying on her payroll provider to not only keep this information but to provide it to the Labour Inspector. She says that she had been told by the payroll provider that it had provided information directly to the Labour Inspector. Mr Lakhera, however, said that that was not the case.

[21] It is certainly clear that the Labour Inspector has not been provided with the information he has been seeking over a period of time. I do not believe that there has been any deliberate failure to cooperate with the Labour Inspector. There has perhaps, however, been some burying of heads in the sand by the directors of the respondent company.

[22] I accept that Mr Cullingford suffers from ill health and that Mrs Cullingford is struggling to run her business, and is clearly stressed. However, over a year has passed since Mr Lakhera first served notice on the respondent to provide information, including holiday and leave records. The request was not onerous, as only three months of records were required. I do not accept that the Cullingfords have not had the time within that 12 month period to properly understand their obligations as employers, and to provide the limited records required.

[23] It is probable that the respondent's payroll provider has all the information that is required to satisfy the Labour Inspector that the respondent is complying with its obligations under s.81 of the Holidays Act. However, the obligation under the Holidays Act lies with the respondent as an employer, and not with the payroll provider. Clearly, the payroll provider has contractual obligations to the respondent but that is a matter between them.

[24] It is not a sufficient discharge of its duties for the respondent to simply say that it left the matter in the hands of the payroll provider. A sensible approach would have been for Mr and Mrs Cullingford to have asked the payroll provider to send them the holiday and leave records for each employee, so that they could have checked that proper information was being kept. They could then have provided the information to the Labour Inspector.

[25] I am satisfied that the respondent has failed to comply with its requirement to produce copies of holiday and leave records which the Labour Inspector requested of the respondent on 6 March 2015.

Should a penalty be imposed on the respondent for its failure to comply with the requirement under s.229?

[26] Section 229(3) of the Act provides as follows:

> Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subsection (1)(c) or subsection (1)(d) is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.

[27] I believe that, whilst the respondent has reasons for not complying with its requirement to produce the records requested by the Labour Inspector (a lack of understanding, stress, ill health and reliance on the payroll provider), none of those reasons together give sufficient cause for the respondent not to have complied for over a year. The respondent apparently was able, despite these hindrances, to run its business since March 2015. It was, therefore, also able to produce the records required.

[28] Accordingly, I find that it is appropriate to impose a penalty upon the respondent under s.229(3) of the Act.

[29] I will consider the quantum of the penalty separately below.

Has the respondent failed to comply with s.63A and s.64 of the Act?

[30] The relevant parts of s.63A of the Act provide as follows:

> **63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement**
> (1) This section applies when bargaining for terms and conditions of employment in the following situations:
> …
> (e) in relation to terms and conditions of an individual employment agreement, including any variations to that agreement:
> …
> (2) The employer must do at least the following things:
> (a) provide to the employee a copy of the intended agreement under discussion; and
> (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
> (c) give the employee a reasonable opportunity to seek that advice; and
> (d) consider any issues that the employee raises and respond to them.
> (3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.
(5) The requirements imposed by this section are in addition to any requirements that may be imposed under any provision in this Act.
(7) In this section, **employee** includes a prospective employee.

[31] Section 64 of the Act provides as follows:

> **64 Employer must retain copy of individual employment agreement or individual terms and conditions of employment**
> (1) When section 63A applies, the employer must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment (as the case may be).
> (2) If an employer has provided an employee with an intended agreement under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not—
> (a) signed the intended agreement; or
> (b) agreed to any of the terms and conditions specified in the intended agreement.
> (3) If requested by the employee, the employer must, as soon as is reasonably practicable, provide the employee with a copy of the employee's—
> (a) individual employment agreement or current terms and conditions of employment retained under subsection (1); or
> (b) intended agreement retained under subsection (2).
> (4) An employer who fails to comply with subsection (1), (2), or (3) is liable, in an action brought by a Labour Inspector or the employee concerned, to a penalty imposed by the Authority.
> (5) Before bringing an action under subsection (4), the Labour Inspector must—
> (a) give the employer written notice of the breach of this section; and
> (b) give the employer 7 working days to remedy the breach.
> (6) To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not—
> (a) signed the intended agreement; or
> (b) agreed to any of the terms and conditions specified in the intended agreement.

[32] During the course of the investigation meeting, Mrs Cullingford said that she tended to give the employment agreements to the staff members on the day that they started work. They then took them away and often failed to return them. Whilst this may not be best practice, as it is better to give the agreement to the employee before they start work, I do not believe that it is necessarily a breach of s.63A(2) of the Act, so long as the employee has the chance to seek independent advice, and the respondent will consider and respond to issues that may be raised.

[33] Section 64 of the Act requires the employer to retain a signed copy of the employees' individual employment agreements. It appears that Mrs Cullingford has

difficulty in getting her staff to return their employment agreements signed. She says that they are mostly young people, some of whom will be in their first job.

[34] I do not believe that s.64(1) of the Act can be intended to mean that an employer faces a penalty if the sole reason they have not retained a signed copy of the employment agreement is that the employees have failed or refused to sign the agreement. I believe that the intention behind s.64(1) is to require the employer to obtain a copy of the employment agreement once it has been signed. My interpretation of s.64(1) is confirmed, in my view, by the provision at s.64(2) of the Act which requires that the employer must retain a copy of an intended agreement even if the employee has not signed it.

[35] With respect to this obligation, Mrs Cullingford stated that she kept a copy of the agreements that she had given to the staff on the computer. Once a copy was signed and returned to her, she would then take a photocopy of it and give that copy to the employee.

[36] In light of this, I do not believe that the respondent is in breach of s.64(2) of the Act, as a copy of the intended employment agreement is clearly retained by it, albeit a soft copy on the computer system.

Has the respondent failed to comply with the requirements under ss.22, 49, 50, 56 and 81 of the Holidays Act?

Section 22

[37] Section 22 deals with the calculation of annual holiday pay if holiday is taken in advance. Mr Lakhera stated in evidence that he could not tell if there had been a breach of the Act under s.22, as he did not have sufficient records. However, he believed that there was. Until further information is disclosed by the respondent, however , I am unable to determine this issue.

Sections 49, 50 and 56

[38] Mr Lakhera said that he was now satisfied that there had been compliance with these sections in light of the evidence of Mrs Cullingford.

Section 81

[39] I have already dealt with this above.

Have Rachel Tapp's holiday leave entitlements been correctly calculated?

[40] The Labour Inspector said he was satisfied that Ms Tapp's outstanding holiday entitlement has been largely paid, although it appeared that she is still owed the amount of $2.70. As it is not permissible to compromise minimum entitlements, the respondent will need to pay Ms Tapp this outstanding amount.

Conclusion

[41] I am satisfied that it is appropriate to impose a penalty on the respondent for its failure, for over a year, to provide the Labour Inspector with holiday and leave records which are compliant with the requirements of the Holidays Act.

What is the quantum that is appropriate?

[42] Section 135 of the Act provides as follows:

> **135 Recovery of penalties**
> (1) Any action for the recovery of a penalty may be brought,—
> (a) in the case of a breach of an employment agreement, at the suit of any party to the employment agreement who is affected by the breach; or
> (b) in the case of a breach of this Act, at the suit of any person in relation to whom the breach is alleged to have taken place; or
> (c) if permitted in the particular penalty provision, by a Labour Inspector.
> (2) Every person who is liable to a penalty under this Act is liable,—
> (a) in the case of an individual, to a penalty not exceeding $10,000:
> (b) in the case of a company or other corporation, to a penalty not exceeding $20,000.
> (3) A claim for 2 or more penalties against the same person may be joined in the same action.
> (4) In any claim for a penalty the Authority or the court may give judgment for the total amount claimed, or any amount, not exceeding the maximum specified in subsection (2), or the Authority or the court may dismiss the action.
> (4A) The Authority or the court may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it.
> (4B) In determining whether to give judgment for a penalty, and the amount of that penalty, the Authority or the court must consider whether the person against whom the penalty is sought has previously failed to comply with an improvement notice issued under section 223D.
> (5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—
> (a) the date when the cause of action first became known to the person bringing the action; or

> (b) the date when the cause of action should reasonably have become known to the person bringing the action.
>
> (6) Despite subsection (5), if a court refuses to make a pecuniary penalty order under section 142E, an action for the recovery of a penalty under this Act in relation to the same matter must be commenced within 3 months after the refusal.

[43] The Employment Court has given guidance as to what factors are relevant when considering penalty issues. In *Xu v. McIntosh*[1] Chief Judge Goddard said the following:

> [47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?
>
> [48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. Here, the defendant was harmed to a significant degree by the withholding of her pay and she was disadvantaged by the breach of s 164 which the first plaintiff later used to obstruct her pursuit of justice. At the time, however, the breach of s 164 of the Employment Relations Act 2000 was more inadvertent than malicious. The deduction from wages was deliberate but, while such actions are to be discouraged, it did comparatively little harm as the amount deducted was only $80. Generally, employers are punctilious to comply with the Wages Protection Act 1983 and the first plaintiff will be sufficiently deterred by the totality of the remedies against him.

[44] In *Tan v. Yang & Xhang*[2] Judge Inglis suggested that the following non-exhaustive list of factors could be relevant when considering penalty issues:

- The seriousness of the breach;
- Whether the breach is one off or repeated;
- The impact, if any, on the employee/prospective employee;
- The vulnerability of the employee/prospective employee;
- The need for deterrence;
- Remorse shown by the party in breach; and

[1] [2004] 2 ERNZ 448
[2] [2014] NZEmpC 65 at [32]

- The range of penalties imposed in other comparable cases.

[45] Whilst, at first sight, a failure to keep or to provide copies of records may not seem like a serious breach of minimum obligations, such failures can actually mask significant breaches. Without the keeping of records, and without cooperating fully with a Labour Inspector in its investigations, breaches (whether deliberate or inadvertent) can be hidden and can continue.

[46] I accept Mrs Cullingford's evidence that she has not deliberately failed to provide records. I do not believe she has done so with a view to hiding unlawful behaviour. However, the respondent is an employer and, as such, has clear obligations under the employment legislation. These obligations are no less important than complying with food hygiene regulations or in paying its taxes.

[47] It is not clear whether the non provision of records has had any impact on employees, although it is certainly possible that, once Mr Lakhera has received full holiday and leave records, he might find there have been further underpayments. It is certainly arguable that the employees in question are vulnerable, as they tend to be young people of student age.

[48] Whilst Mrs Cullingford did not show remorse for the failure to date, she did show a willingness to rectify the ongoing failure to provide records by undertaking to urgently get in touch with the payroll provider and to give it her consent for it to cooperate fully with Mr Lakhera in providing him with any records he requires.

[49] The maximum penalty that the Authority can impose against a company is $20,000. Such a sum would be for the most egregious and deliberate breach. I believe that the respondent comes nowhere near that level of seriousness.

[50] I also wish to take into account the likely impact on the business if a significant penalty were imposed. Whilst no financial records were provided to the Authority, (which means that the Authority is unable to ascertain that the financial position of the respondent **requires** the order of payment of the penalty by instalments, as is envisaged by s.135(4A)) Mrs Cullingford did indicate that she has had to make payments of holiday pay owed to staff out of her own personal account, and has indicated that she has had to take out a loan on behalf of the respondent to tide it over its current quiet period.

[51] Taking all of the factors into account, I impose a penalty of $1,000 on the respondent. That sum is to be paid into the Authority, which will then be paid by the Authority into a Crown bank account.

Concluding remarks

[52] During the investigation meeting, Mrs Cullingford showed an intention to treat the matter of the provision of holiday and leave records as a priority. I believe that she was sincere in that. However, she must be aware that, if the Labour Inspector makes a further application against the respondent for further breaches of its legal obligations under the employment legislation, it is likely that any future penalties to be imposed on the respondent would be higher, possibly significantly so.

Orders

[53] I order the respondent to make the following payments:

(a) The sum of $1,000, being a penalty payable to the Crown;

(b) The sum of $2.70 to be paid to Ms Rachel Tapp by way of unpaid holiday pay; and

(c) The sum of $71.56, being the lodgement fee incurred by the Labour Inspector.

Costs

[54] If the Labour Inspectorate seeks a contribution towards its legal costs it should first seek to agree those costs with the respondent. If they are unable to reach agreement within 14 days of the date of this determination, then Ms Kelly may, within a further 14 days, lodge and serve a memorandum of counsel setting out the contribution towards costs that the Labour Inspectorate seeks. The respondent will then have a further 14 days within which to lodge and serve a reply.

David Appleton
Member of the Employment Relations Authority