IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 122
5560809

	BETWEEN	LABOUR INSPECTOR (VIKRAM LAKHERA) Applicant
	A N D	PENIEL CONSTRUCTION LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Ella Tait, Counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	12 August 2015 at Christchurch
Oral determination delivered:	12 August 2015
Written determination issued:	17 August 2015

DETERMINATION OF THE AUTHORITY

Introduction

[1] This determination is a written record of an oral determination delivered on 12 August 2015.

Employment relationship problem

[2] The applicant Labour Inspector (Mr Lakhera) seeks a compliance order requiring that the respondent (Peniel) provide wage, time and holiday records and employment agreements for its staff, and a penalty for the employer's failure to comply with the Labour Inspector's requirements pursuant to law.

[3] Peniel has not responded to the Labour Inspector's application, was not involved in the Authority's telephone conference, failed to file a Statement in Reply and did not attend my investigation meeting.

[4] To ensure that the absence of Peniel from my investigation meeting was deliberate rather than inadvertent, I deferred the start time of the investigation meeting by 15 minutes to ensure that Peniel had every proper opportunity to attend if it was proposing to, but in the result I determined to proceed after the failure of Peniel to appear 15 minutes after the stipulated start time for the investigation meeting.

[5] The applicant Labour Inspector, Mr Lakhera, is a warranted Labour Inspector employed pursuant to s.223 of the Employment Relations Act 2000 (the Act) while Peniel is a construction business trading through a limited liability company and based in Christchurch.

[6] An audit of Peniel was undertaken by the Labour Inspectorate in 2014 and that resulted in the serving of an Improvement Notice on Peniel in August 2014. In October 2014, Peniel provided evidence of its compliance with its statutory obligations and I observe at this point that, given Peniel's previous involvement with the Labour Inspectorate and the more or less satisfactory outcome of the first engagement, I would have expected that Peniel would have undertaken its obligations more conscientiously in the present case. Sadly, that expectation proved entirely misplaced.

[7] Mr Lakhera indicated to Peniel in February of this year that the Inspectorate proposed to conduct a follow-up audit to ensure continued compliance and from that date through until the beginning of March 2015, there were a series of attempts by the Labour Inspector to engage appropriately with Peniel with a view to progressing the audit.

[8] The evidence I heard satisfies me that the Labour Inspector diligently pursued Peniel, used his best endeavours to engage appropriately with Peniel, dealt with all of Peniel's excuses and evasive behaviour but was still unable to fulfil his statutory obligations because of Peniel's failure to engage in the audit process.

[9] Matters crystallised in the middle of March 2015. The final date given by the Labour Inspector for Peniel to comply with the notice was 10 March 2015. A request for a short extension was made to 13 March 2015 but there has been absolutely no

compliance with the Labour Inspector's notice since that date and that failure has had the consequence that the Labour Inspector is unable to establish whether Peniel's practices continue to comply with the statutory minimum code.

[10] I am satisfied that Mr Lakhera sought provision of Peniel's employment records on 13, 17, 25, 26 February 2015 and 2 March 2015 and those requests, properly made in accordance with the Labour Inspector's statutory obligations, were all ignored or evaded by Peniel. I have no difficulty in concluding that Peniel has failed to comply with the requests made to it by the Labour Inspector and that in consequence, I should order compliance with the notice most recently issued to Peniel and dated 2 March 2015 and I make that order in reliance on s.229 of the Act and s.137 of the Act.

[11] Section 229 sets out the powers of a Labour Inspector which, broadly, allows the Inspector to require the production to him or her of wage and time records and identifies that the penalty for a failure to respond appropriately to such a request lies both in terms of the prospect of an order for compliance (s.229(4) and s.137) and penalty (s.229(3)).

[12] I am satisfied that there should be a compliance order made in this matter and a penalty ought to be levied as well.

[13] Concerning the latter matter, counsel for Mr Lakhera has referred me to the leading case of *Tan v. Yang & Zhang* [2014] NZEmpC 65 where Her Honour Judge Inglis set out a list of factors which can usefully be considered when considering the issue of the level at which a penalty ought to apply.

[14] The principal elements that I need to consider in the present case are first the seriousness of the breach and secondly the question of deterrence.

[15] Dealing with the seriousness of the breach first, I have been persuaded by the Labour Inspector that this was a serious breach. I am particularly drawn to that conclusion because of the fact that this employer had already engaged with the Inspectorate on an earlier occasion and appears to have substantially complied with the law on that occasion. I would have thought it axiomatic that an employer in that position would deal appropriately with the minimum statutory obligations in further engagements with the Inspectorate.

[16] Clearly this is an employer which has had first-hand experience of the consequences of a failure to meet minimum standards and notwithstanding that, has failed absolutely on the second occasion to engage appropriately with the Inspector.

[17] The material that the Labour Inspector sought was not complex or difficult or ought not to have been and as I have remarked on a number of occasions, the requirements that an employer keep accurate wage, time and holiday records is not just a requirement of the law made to benefit statutory officers such as the Labour Inspector but indeed ought to be part and parcel of good business practice.

[18] No business can succeed if it does not keep proper records of its debtors and creditors for example, and I remain at a loss to understand why any business would think it was appropriate to not treat their staff with the same level of care. After all, put at its simplest, employees of a business are people to whom that business owes money and owes money on a regular basis and the only way that that can properly be accounted for is by the retention of proper wage and time records.

[19] While it seems to me important to emphasise the commonsense business practice of retaining adequate wage, time and holiday leave records, it is also important to emphasise that the retention and provision of this documentation when requested by a proper person is a requirement of the law and will be strictly enforced. Labour Inspectors by virtue of their statutory role must be able to access wage and time records of employers in order to establish that minimum code payments are being made and so a failure to provide such information goes to the heart of the ability of the Labour Inspector to perform his or her role appropriately.

[20] The second major factor that I think is important in this case is the continuing need for deterrence and for the Authority to speak clearly about the consequences for employers who fail to fulfil their statutory obligations. As the Court observed in *Tan*, *"the purpose of a penalty is to … punish and deter others from engaging in such conduct"*. I agree with the Labour Inspector that the structure of s.229 is such as to allow the Inspector to apply to the Authority for penalties where there has been a failure by an employer to comply with its statutory and business obligations.

[21] Finally, I note that there has been precious little engagement by Peniel in either the Labour Inspector's process or indeed in my investigation. Peniel has had nothing whatever to do with the Authority's process and very little to do with the

Labour Inspector's work prior to the matter being filed in the Authority. That suggests to me a casual *laissez faire* approach which does Peniel no credit and I am entitled to take that behaviour into account in considering the quantum of penalty that ought to apply.

[22] Counsel for the applicant Labour Inspector has directed me to a number of decided cases to assist me in reaching a quantum of penalty. I have reflected on that question and concluded that in the particular circumstances of this case, a penalty of $6,500 is appropriate. That represents my assessment of the condemnation that I consider the Authority ought to have of an employer which simply will not engage appropriately with a statutory officer.

Determination

[23] Peniel Construction Limited is directed to comply with the applicant Labour Inspector's notice of 2 March 2015 and compliance with that notice is to be effected within 28 days of the date of this determination.

[24] Moreover, Peniel Construction Limited is to pay a penalty in the sum of $6,500 into the Authority for the credit of a Crown Bank Account such penalty being levied for the respondent's failure to comply with the requirements set out by the Labour Inspector in his 2 March 2015 notice.

[25] In addition, the respondent employer is to pay to the Labour Inspector the sum of $71.56 being the filing fee that the Labour Inspector incurred in filing his application in the Authority.

James Crichton
Member of the Employment Relations Authority