

[3] The Improvement Notice required KRSVP Limited to provide copies of signed employment agreements as provided to all staff now employed by KRSVP Limited, provide all wage and time records for all employees for the period 1-17 August 2014 and to review current employees' employment agreements to ensure that they meet minimum mandatory requirements.

[4] In the absence of such information being provided as requested, Mr Norton concluded that KRSVP Limited has failed to comply with the Improvement Notice and with s.229(1)(c) of the Act.

Preliminary matters

[5] The Statement of Problem in this matter was served on KRSVP Limited at its address for service on 2 July 2015. A Statement in Reply was not filed, but KRSVP Limited wrote to the Authority on 24 July 2015 stating, amongst other things, that KRSVP Limited was winding down and from the end of July KRSVP Limited would be finished.

[6] KRSVP Limited was advised in writing on 28 July 2015 by an Authority Officer that a case management telephone conference call would be held on 10 August 2015 at 10:30 am. This letter was couriered to KRSVP Limited at its address for service and a copy of the letter was emailed to Sanjhe Prasad the director and shareholder of KRSVP Limited on 2 August 2015.

[7] KRSVP Limited could not be contacted on 10 August 2015 and the telephone conference proceeded without it. Directions were issued for this investigation meeting and a notice of direction and notice of investigation meeting were sent to KRSVP Limited on 19 August 2015 and emailed to Mr Prasad on 13 August 2015. The notice of investigation meeting advised that *"If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant."*

[8] KRSVP Limited has chosen not to attend today and has not contacted the Authority to explain why it cannot or will not attend. KRSVP Limited remains an incorporated company and there was no apparent reason why this matter could not continue today in its absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Act.

[9] I also note that KRSVP Limited changed its name from S & LJ Prasad Limited to KRSVP Limited on 27 August 2015. I have seen the certificate of incorporation which registers the change of name and I am satisfied that it is the same company. There are however two points to note. First, the recent change of name indicates to me that KRSVP Limited is active or will become active in some way and is unlikely to be liquidated and is certainly not “finished” as is suggested it would be in its letter of 2 July 2015. Second, most of the contact and activity in respect of this matter was conducted with KRSVP Limited when it was named S & LJ Prasad Limited. This is of no consequence to this matter other than that I have now recorded the respondent as KRSVP Limited and I note that any reference to S & LJ Prasad Limited in the evidence before the Authority has been treated as a reference to KRSVP Limited.

Background Facts

[10] KRSVP Limited is a limited liability company operating a vineyard labour contracting business in Marlborough.

[11] On 11 August 2014 various Labour Inspectors, Immigration Compliance Officers and Inland Revenue staff conducted a site visit at Cable Bay Wine Ltd, 1479 Redwood Pass Road, Seddon, Marlborough. The site visit revealed that a group of eight workers were on site undertaking vineyard labour tasks such as pruning.

[12] When interviewed one worker (Paea Lonitienisi) advised that he was not an employee but rather he transported the workers to the site and was paid transport costs by them. He also advised that the employer of the remaining workers was Mr Prasad (the director and shareholder of KRSVP Limited). Interviews with the other workers indicated that they were unable to identify who they were employed by, only two workers had had employment agreements, they had all worked various lengths of time (some had only just commenced work) and those that had been paid had received cash payments as well as IR330 tax forms to complete and payslips. Two workers gave false identities and were subsequently found to be on visitors' visas.

[13] Subsequent investigation revealed that KRSVP Limited was the only labour contractor retained and used by Cable Bay Wine Ltd at the site and Cable Bay Wine Ltd did not employ any workers directly to undertake vineyard labour at the site.

[14] On 25 August 2014 Mr Norton wrote to KRSVP Limited advising it that an investigation had commenced and served on it a notice requesting that it produce all employment agreements, wage and time records and holiday records.

[15] KRSVP Limited responded to this letter and notice on 4 September 2014 (received by Mr Norton on 12 September 2014). The response included four employment agreements and KRSVP Limited claimed that these four employees were the four workers who worked for it in August 2014.

[16] On 16 September 2014 Mr Norton advised KRSVP Limited that it had failed to provide wage and time records for the four employees for whom employment agreements had been provided, nor had it provided employment agreements and wage and time records for the other workers who were working at the Cable Bay Wine Ltd site on 11 August 2014.

[17] In an interview on 31 October 2014 Mr Prasad stated that there were two employees working for KRSVP Limited at the Cable Bay Wine Ltd site in August 2014. He confirmed that KRSVP Limited kept wage and time records for its employees and would provide those records to Mr Norton. Mr Prasad said he knew other people were working with these two employees, but he insisted KRSVP Limited was not paying them.

[18] In an interview on 2 December 2014 Mr Lonitienisi stated that the workers working at the Cable Bay Wine Ltd site on 11 August 2014 were working for KRSVP Limited. He also stated he was not working for KRSVP Limited, but did say he was supervising.

[19] Mr Norton has reviewed the invoices that Cable Bay Wine Ltd has paid to KRSVP Limited for work undertaken at the site in August 2014. Based on the work undertaken and the amount of worker hours required to complete that work Mr Norton has concluded that KRSVP Limited would have needed at least 6.3 employees working eight hour days on each of the 24 working days in August 2014 to complete the work for which it was paid.

[20] Given all of the information received by Mr Norton and the calculations he completed in connection with the vineyard labour work undertaken by KRSVP Limited at the Cable Bay Wine Ltd site, he concluded that KRSVP Limited was likely to have had at least seven employees working for it at the Cable Bay Wine

Ltd site during August 2014. Mr Norton has also concluded that KRSVP Limited was failing or had failed to comply with minimum employment standards required under the Act, having reviewed the employment agreements provided and because of the failure to provide wage and time records.

[21] As a result of these conclusions Mr Norton served the Improvement Notice on KRSVP Limited on 6 May 2015 informing it that it must comply with the minimum employment standards of:

- having written employment agreements for all employees;
- including all mandatory provisions in those employment agreements;
- keeping time and wage records; and
- producing time and wage records for the period 1 August 2014 to 17 August 2014 (in response to the notice of 25 August 2014).

[22] KRSVP Limited has not provided any evidence to show it has complied with the first three parts of the Improvement Notice nor has it provided any copies of wage and time records.

Compliance order

[23] I am satisfied that the Improvement Notice complies with the requirements of the Act and was properly served. In the absence of evidence to the contrary I conclude that KRSVP has not complied with the Improvement Notice.

[24] In the Statement of Problem filed in this matter Mr Norton sought compliance orders under s.137 of the Act requiring KRSVP Limited to comply with the Improvement Notice and the notice of 25 August 2014. However, given that it is not clear that KRSVP Limited is currently operating (i.e. employing anyone) and the wage and time records requested are now over twelve months old there is little to be achieved in pursuing compliance and Mr Norton abandons that part of his claim.

[25] I would have made an order for compliance with the Improvement Notice served on 6 May 2015 pursuant to s.137(1)(a)(iiib) of the Act within 28 days of the date of this determination, but that is not required now.

Penalty

[26] Mr Norton seeks penalties for the failure to comply with the Improvement Notice and for the failure to comply with the notice of 25 August 2014 (requiring KRSVP Limited to provide wage and time records).

[27] Given the failure to comply with the Improvement Notice a penalty is appropriate.

[28] However, as the failure to comply with the notice of 25 August 2015 is based on a failure to provide wage and time records, which is also part of the failure to comply with the Improvement Notice, and I am not persuaded that two separate penalties is appropriate nor possible, given s.223F(2) of the Act, I will order a single penalty only for breach of the Improvement Notice.

[29] I am grateful for the helpful submissions of counsel for the applicant in respect of this matter and in particular relating to the quantum of any penalty. These have aided my decision on quantum of the penalty.

[30] I have been referred to, and have considered, the list of factors the Employment Court set out as being relevant to the question of quantum of any penalty¹. In this case it is my view that the relevant circumstances include:

- This matter has been ongoing for over 15 months and there have been many opportunities for, and obligations imposed upon, KRSVP Limited to show that it has complied with the minimum employment requirements and in particular provide copies of employment agreements and wage and time records (and it has on previous occasions said it would provide this material) yet it has failed to do so. The actions (or lack thereof) complained of have been ongoing for a significant period and this adds to the gravity of the breach;
- The breaches of the Improvement Notice are serious preventing the Labour Inspector from fulfilling his duties and leaving it open for the Labour Inspector and the Authority to conclude that KRSVP Limited has not met and does not currently meet the minimum employment requirements. As counsel

¹ *Tan v Yang and Zhang* [2014] 2 ERNZ 448 at [32].

for the applicant stated the failure to provide records raises concerns about how employees have been treated;

- The employees at risk of KRSVP Limited's failings are part of a small but significant Pacific Island community in Marlborough, a group that is described by Mr Norton as vulnerable and often exploited in the labour market and that may well have been the case here;
- There seems to be little remorse from KRSVP Limited, it has denied much of what was put to it regarding the workers on site at Cable Bay Wine Ltd such denials not being credible in light of the evidence;
- KRSVP Limited has chosen not to participate and explain itself in the Authority process. Rather it has sought to avoid any action by stating it is being wound down despite activity on the New Zealand Companies Register suggesting otherwise.

[31] I also observe that the purpose of a penalty is to punish and deter other employers from such non-adherence².

[32] I have also considered the range of penalties imposed in other comparable cases³ particularly since the decision of the Employment Court in *Tan v Yang and Zhang*⁴. Counsel for the applicant submitted that the recent cases evidence that penalties imposed for behaviour of this type (breaches of improvement notices) range between \$6,500 to \$8,500 and in this case any penalty should fall in that range. I believe this to be an accurate assessment of the current range for this type of case and feel that the factors in this case tend to place it in the middle of this band.

[33] Given the relevant factors, the need to punish and deter and the range of penalties recently ordered in the Authority I order KRSVP Limited to pay a penalty of \$7,500. Payment is to be made to the Crown via the Employment Relations Authority.

² Ibid at [35].

³ See for example *Erin Spence, Labour Inspector v Tamehana Horticulture Service Ltd* [2015] NZERA Auckland 303, *Labour Inspector (Vikram Lakhera) v Peniel Construction Limited* [2015] Christchurch 122, *Lawrence Owen Norton (Labour Inspector) v NZX3 Vineyard Contractors Limited* [2015] NZERA Christchurch 91 and *Lynette Russell (Senior labour Inspector) v Dentice Facilities Management (2011) Limited* [2015] NZERA Wellington 94.

⁴ Op. cit.

Costs

[34] I further order that KRSVP Limited reimburse Mr Norton the filing fee of \$71.56.

Peter van Keulen
Member of the Employment Relations Authority