

[3] The Improvement Notice required Indique to take action to ensure compliance with the provisions detailed above by 27 April 2015. Indique was required to provide copies of amended employment agreements and accurate, correctly maintained, wage, time and holiday leave records, and to rectify that current and former employees had been correctly paid for public holidays.

[4] In the absence of such steps, Ms Quinn concluded that Indique had failed to comply with s.49, s.50, s.52 and s.81 of the Holidays Act 2003.

[5] Indique claims that it intends to comply with the Improvement Notice, but requires more time to be able to do so.

Note

[6] Mr Patel agreed during the course of a case management conference held on 3 August 2015 to an investigation meeting being held on 14 August 2015. A Notice of Investigation Meeting was sent to the parties following the case management conference confirming the date and venue.

[7] On 7 August 2015 the Authority received a letter from Mr Patel providing an explanation of the reasons for Indique's non-compliance with the Improvement Notice issued on 30 March 2015 and advised that he would be on a work trip from 11 August 2015 returning to New Zealand on 21 September 2015.

[8] Mr Patel had not sought leave of the Authority to be absent, or for the investigation meeting to be delayed.

[9] Ms Quinn attended the investigation meeting together with Counsel at the agreed time and date, however Mr Patel did not attend and an Authority Officer was unable to contact him by telephone or by email prior to the commencement of the Investigation Meeting.

[10] Given the agreement of Mr Patel during the case management conference held on 3 August 2015 that the matter would proceed on 14 August 2015, I was satisfied that, despite his advice on 7 August 2015 that he would be overseas on the agreed date, no good cause had been shown by Mr Patel for his failure to attend the investigation meeting as agreed and I consequently proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Act.

Background Facts

[11] Indique is a limited liability company operating as an Indian restaurant.

[12] There have been two previous Improvement Notices served on Indique. The first Improvement Notice was dated 24 October 2014 and required Indique to provide the Labour Inspector with time and wage records.

[13] Ms Quinn followed up the Improvement Notice by email and telephone, and received a telephone call from Mr Patel stating that the wage and time records would be provided. The records were received by Ms Quinn on 1 May 2015.

[14] Having examined the wages and time records Ms Quinn noticed a number of irregularities. Ms Quinn said she identified the following:

- Employees not being paid time and a half when working on a public holiday;
- Employment agreements omitted a mandatory clause relating to the payment of public holidays as required by S 50 of the Holidays Act 2003;
- The wage, time and holiday leave records failed to record whether an employee worked on a public holiday or denoted if any payment was received by the employee for the public holiday as per s 81 of the Holidays Act 2003; and
- Whether or not the employee received an alternative day for working on the public holiday, or whether the alternative day was taken by the employee or paid out to the employee as required by the Holidays Act 2003.

[15] Ms Quinn said she had made a number of attempts to set up a meeting with Mr Patel. These attempts were not productive and accordingly Ms Quinn served Indique with a further Improvement Notice on 30 March 2015.

[16] I held a case management conference call was held on 7 August 2015 with Ms Quinn and Mr Patel. Despite Mr Patel agreeing during that call to the date of 14 August 2015 for the investigation meeting, and the Notice of Investigation Meeting having been issued to the parties, he subsequently advised by email dated 7 August 2015 that he would be leaving New Zealand on 11 August 2015.

[17] Mr Patel in that email made submissions in the nature of a statement in reply. He claimed that Indique had tried to be cooperative with the Labour Inspectorate, in particular that he had supplied all available information to Ms Quinn in mid-January 2015 and on 16 February 2015.

[18] Mr Patel submitted that he had been overseas from 3 March to 10 April 2015 and from 3 June to 22 July 2015. He would also be overseas from 11 August to 27 September 2015.

[19] As a result of the last period of intended absence, Mr Patel requested that Ms Quinn withdraw the application for a compliance order and provide Indique with a further 3 month period in which to provide the required information.

[20] On the basis that the matter of non-compliance was identified some time ago, with the first contact being on 20 June 2014, the Labour Inspector believed Indique has been given sufficient time to comply.

Determination

[21] I am satisfied that the Improvement Notice was properly served on Indique at the registered office address by a Labour Inspector on 30 March 2015.

[22] Indique has not complied with the Improvement Notice issued by the Labour Inspector on 30 March 2015 by failing to comply with s.50, s.49, s.81 and s.50 of the Holidays Act 2003.

Compliance Order

[23] I make an order for compliance with the Improvement Notice issued on 30 March 2015 pursuant to s. 137 (1) (a)(iii) of the Act.

[24] Indique is ordered to comply with the Improvement Notice by:

- i. Accurately assessing and paying any arrears that might be owed to both current and past employees who worked on a public holiday but did not receive time and a half for working that day, in accordance with s 50 of the Holidays Act 2003;
- ii. Ensuring that all current and past employees have received an alternative day for working on a public holiday, where appropriate;

- iii. Accurately assessing and paying any arrears that might be owed to both current and past employees who did not work on the public holiday but would have worked on that day had it not been a public holiday in accordance with s 49 of the Holidays Act 2003;
- iv. Updating all employment agreements with the mandatory clause as set out in s. 52 of the Holidays Act 2003; and
- v. Updating all employees' holiday and leave records in accordance with s. 81 of the Holidays Act 2003. This to include all the public holidays the employees worked and all the public holidays they did not work, and the payment each employee received for the public holidays.

[25] Compliance is to take place within a period of 14 days of the date of this determination.

Penalty

[26] In circumstances in which there has been non-compliance with an Improvement Notice issued under s 223D of the Act, a penalty may be imposed by the Authority pursuant to s 223F of the Act.

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[27] Indique had been served with an Improvement Notice and provided with oral and written information regarding its relevant legal obligations. It had been given a reasonable amount of time to ensure the correct procedures were put in place.

[28] It failed to comply with the provisions of the Holidays Act 2003 as required. I consider that public policy considerations require employers to act responsibly in adhering to statutory imperatives. Indique employs overseas predominantly Indian employees who are in a position in which their employment is frequently dependent on visa requirements, and it is important that the employer adheres to the statutory minimum holiday requirements in order to avoid any suspicion of exploitation.

[29] I am satisfied that the breaches and failure to comply with the Improvement Notice issued on 30 March 2014 are serious.

[30] I observe that the purpose of a penalty is to punish and deter other employers from such non-adherence to the statutory minima.¹

[31] I order Indique to pay a penalty of \$6,000.00 to the Crown.

Filing Fee

[32] I further order that Indique reimburse Ms Quinn, the Labour Inspector, the filing fee in the sum of \$71.56.

Costs

[33] Ms Quinn is seeking costs. The investigation meeting took approximately 30 minutes; accordingly a minimal amount is appropriate in recognition of the costs incurred by the Labour Inspector.

[34] Indique is ordered to pay a sum in the amount of \$300.00 as costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[35] The penalty amount, filing fee and costs are to be paid within 28 days of the date of this determination.

Eleanor Robinson
Member of the Employment Relations Authority

¹ Cf. *Tan v Yang and Zhang* [2014] 2 ERNZ 448 at [35]