IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 198
5552105

	BETWEEN	NICOLA ROWE (LABOUR INSPECTOR) Applicant
	A N D	YONG'S FOOD COMPANY LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Ella Tait, Counsel for the Applicant Jeff Goldstein, Counsel for the Respondent
Investigation Meeting:	On the papers and oral submissions via teleconference
Date of Determination:	17 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector (Ms Rowe or the Labour Inspector) seeks penalties against the respondent (Yong's) for breaches of the Holidays Act 2003 (the 2003 Act). The application is resisted by Yong's.

[2] Yong's operates a Japanese restaurant in Queenstown employing workers who are often migrants on Working Holiday Visas, undertaking short term engagements. There is a very high turnover of the employees as a consequence.

[3] A visit by officials including the Labour Inspectorate on 29 July 2014 disclosed a failure by Yong's to keep wage, time, holiday and leave records which prevented the Labour Inspector from discerning if minimum standards had been met, but on the evidence available, it seemed likely there had been breaches of minimum

standards but because of the failure to keep records, the Inspector was unable to file a proper claim for arrears.

[4] The failure to keep proper records pursuant to s.81 of the 2003 Act is acknowledged by Yong's although it maintains that its employees were always paid the correct amount of wages and statutory entitlements.

[5] Put simply, it is suggested for Yong's that the reason for the failure to observe the law was the fact that English was not the first language of the proprietors of the business and there were other cultural barriers which precluded the appropriate focus on the legislative regime.

[6] Moreover, Yong's maintains that the Authority has no jurisdiction to award a penalty because the Labour Inspector has not made out a claim pursuant to s.83 of the 2003 Act.

[7] The claim by the Labour Inspector quoting directly from the statement of problem is in the following terms:

> *A claim against the respondents for penalties pursuant to s.75 of the Holidays Act 2003 for the breach of s.81 of the Holidays Act 2003.*

[8] Section 75 of the 2003 Act has the heading *"Penalty for non-compliance"* and provides generally for the quantum of a penalty and the various sections of the statute which create liability for a penalty. One such section is s.83 of the 2003 Act which relates to the failure to keep or provide access to a holiday and leave record.

[9] But of course the statement of problem does not refer to s.83 at all and refers rather to s.81 which is simply the section of the statute which requires the employer to keep a holiday and leave record that complies with the requirements of that section. Section 81 has no enforcement provision within it or any reference to enforcement or the application of penalties.

[10] It follows that the failure to refer to s.83 (the penalty section) is, according to Yong's, fatal to the Inspector's application.

The issues

[11] The issues for determination in the present matter are as follows:

(a) Can Ms Rowe obtain the relief she seeks without reference to s.83; and

(b) If yes, what penalty should apply?

Does the Authority have jurisdiction?

[12] As already noted earlier in this determination, Yong's says that by failing to make out a claim in terms of s.83, the Authority is unable to award a penalty as claimed.

[13] It seems to be common ground that this particular aspect has not been considered before, either by the Employment Court or indeed by the Authority.

[14] The Inspector proceeds from a basis of considering s.5 of the Interpretation Act 1999 which provides that the meaning of a statutory provision must be ascertained from its text and in the light of its purpose.

[15] The Inspector claims that a plain reading of s.75 conveys the meaning that it is intended to provide for a penalty and that is true as far as it goes but for the avoidance of doubt I also record that s.75 specifically refers to s.83 where the penalty sought relates to the failure to keep or provide access to a holiday and leave record. And just to underline the point, in the present proceeding, the Labour Inspector did not refer to s.83.

[16] Moreover, Ms Rowe refers to a number of decisions of the Authority which it is contended are *"linked to the failure to keep or provide records without reference to s.83"*.

[17] Moreover, there are a smaller number of cases where the Authority appears to have awarded a penalty under s.75 but has not also claimed arrears. Section 75(2)(e) is in the following terms:

> *(2) The provisions are …*
> *(e) Section 83 (which relates to the failure to keep or provide access to a holiday and leave record).*

[18] It is suggested for the applicant Labour Inspector that Yong's is advocating a narrow interpretation of the law the effect of which is that only where a claim is made both for arrears of wages and for penalties can there be any legitimate jurisdiction.

This is because s.83 very clearly contemplates the **effect** of the failure to keep and provide proper records on the ability of a claimant Labour Inspector to mount an arrears of holiday pay claim. It is suggested for the Inspector that it follows from that contention that no claim can be made at all where, as in the present case, penalties only are sought because of the inability to calculate arrears on account of there not being proper records retained or presented. And so the argument goes, that cannot be the intention of the legislature, therefore we must assume the wider interpretation of s.75 and be able to proceed in respect of penalties only without reference to s.83 at all.

[19] I deal with that aspect first. I accept the Inspector's characterisation of the argument advanced by Yong's but do not accept that argument at all. Section 83 clearly contemplates a situation where the Authority has a discretion to make a finding that the employer's failure to keep proper records prevented the employee, or that person's agent, from lodging a proper claim, but it cannot be right that unless a claim is made for arrears, the section is inoperative, which is the effect of what Yong's is saying.

[20] I reach this conclusion because the only way the Authority can get to the point of concluding that it should, or should not exercise its discretion to find that the employer's failure to keep records stopped the employee bringing a proper claim, is by way of an earlier conclusion that there has been a failure by the employer to comply with s. 81 or s. 82. To put the same point more simply, the Authority must make an initial finding that there has been a breach of one or other of those sections before it can consider if the employer's failure to keep records has prevented the employee making a proper claim.

[21] This conclusion of mine is no more than a straightforward construction of subsection (3) of s. 83 which is conjunctive, that is, first the Authority must make a finding of whether or not there has been a breach of either s. 81 or 83 and then it must decide whether to use the discretionary power to conclude that the employer's failure to keep proper records meant that the employee has been prevented from bringing an accurate claim.

[22] Put shortly then, a claim may be made for penalties only without the need to claim arrears as well because s. 83 requires the Authority to make a finding about whether or not there has been a breach of s. 81 and if there has been such a breach found then there may be the consideration of penalties that flow from that breach.

[23] That leaves the wider issue of whether it is available for the inspector to claim penalties without specifically referring to s. 83. I conclude it is. The plain reading of s. 75 suggests its purpose is to provide for penalties to be available for particular classes of employer and in respect of particular provisions, including s. 83. It is apparent that the Inspector refers to s. 75, which includes the reference to s. 83. Section 75 makes it abundantly plain that an employer who fails to comply with any listed provision including s. 83 is liable to a penalty. That seems to me to allow the Inspector to refer to s. 75 in making a claim for penalties.

[24] As well as interpreting the plain words of the section, the Interpretation Act also directs me to consider the purpose of the enactment. It is apparent that the purpose of s. 75 is to hold employers to account, to adopt the words used in the submission of the Inspector, such that wrongdoing will result in penalty. By concluding that unless there is specific reference to s.83, no application for penalties can proceed seems to me to fail to give effect to the plain words of s. 75, which seeks to impose penalties of certain identified maxima in respect to particular identified civil wrongs, such as are listed in the section. In my opinion, a proper construction of s. 75 allows such an application without reference to s. 83. The alternative view would fail to give effect to the text or the purpose of s. 75.

What penalty should apply?

[25] It is suggested for Yong's that the breach of s. 81 (the failure to keep proper records) while acknowledged, is technical in nature especially as Yong's maintain they always paid their workers correctly. It follows from that submission that no penalty is required or, at worst, a token penalty only.

[26] But that submission is not accepted by the Labour Inspector who says the evidence is that employees were not always paid correctly and in any event, given the failure of Yong's to keep proper records, how would one know if there was substantial compliance or not.

[27] I am bound to say I prefer the Inspector's view of this matter. I have already observed in an earlier decision that the *"…retention and provision of (wage, time and holiday records) …is a requirement of the law and will be strictly enforced …"* and that there was *"…a continuing need for deterrence and for the Authority to speak clearly about the consequences for employers who fail to fulfil their statutory*

obligations.." : *Labour Inspector v. Peniel Construction Ltd* [2015] NZERA Christchurch 122.

[28] It seems to me the evidence of the breaches is clear enough, on the balance of probabilities, and I must now look to decide on the quantum of penalty that ought to apply: *Xu v McIntosh* [2004] 2ERNZ 448 applied.

[29] The evidence before the Authority is that there was, at best patchy compliance with the law with much of the information required by statute being absent. For the avoidance of doubt, I prefer the evidence of Ms Rowe to that tendered by the employer to establish this conclusion.

[30] The factors I need to consider in determining the quantum of penalty are set out by Judge Inglis in *Tan v Yang and Zhang* [2014] NZEmpC 65. The first of those considerations is seriousness and impact. I have already noted that I rejected the conclusion this was a technical breach; indeed, arguably, the very fact the Inspector was unable to apply for arrears is testament to the manifest inadequacy of record keeping.

[31] The second issue is whether the breach was a one off, or a continuing breach. Certainly the evidence of the Inspector suggests a continuing breach. Moreover, I am attracted to the Inspector's submission that if, as Yong's maintained, they were unaware of their statutory obligations to maintain these records, it is not unreasonable to assume that the breaches have continued since the business commenced trading in 2007.

[32] The third issue is the vulnerability of workers. Here the workers were migrant workers and as such, perhaps less likely to know about their rights than workers who grew up in New Zealand. It follows that the category of workers affected does suggest vulnerability.

[33] Deterrence is the next factor and the Inspector urges on me the premise that a strong message needs to be sent to employers generally that ignorance of the law is no excuse.

[34] Remorse is next and while it is acknowledged that Yong's changed their practice and expressed some remorse that, it is suggested is not enough to avoid the force of the law.

[35] Finally, the Court encourages me to review decisions in comparable cases and I have had a range of cases referred to me by the Inspector.

[36] My conclusion is that a penalty ought to be imposed. The breach was serious and sustained and the extent of the deficit made it impracticable for the Inspector to apply for arrears of wages for affected workers. The affected employees were migrant workers who arguably are more vulnerable than New Zealand born workers because of language issues and a lack of knowledge of our law.

[37] Moreover, deterrence is important especially so as to make the point that ignorance of the law is no excuse. Nor is the evident remorse a complete answer; it is true that the employer has now rectified its default but that does not address the earlier failures which, because of those failures, cannot now be addressed to assist the affected workers. As the Labour Inspector's counsel made clear in submissions, penalty applications look backward to earlier wrongdoing and the fact defaults have since been addressed is not a complete defence to a penalty claim, as the decided cases attest.

[38] Having considered all these matters, I consider the proper penalty to impose in this case is one of $6,000 and I direct that Yong's is to pay that amount to the Employment Relations Authority for credit of the Crown Bank Account. In setting this figure, at the bottom of the range I consider appropriate, I have taken account of the submissions for Yong's which emphasise the modest size and scale of the business.

Determination

[39] Yong's Food Company Limited are to pay into the Authority the sum of $6,000 as a penalty for their breaches of the Holidays Act 2003, such sum to be payable to the Crown Bank Account.

Costs

[40] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority