

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 490
5432079

BETWEEN JO INGHAM, LABOUR
 INSPECTOR
 Applicant

AND KINGSTON & LATRAS
 AUTOS LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 No appearance for Respondent

Investigation Meeting: 24 October 2013

Determination: 24 October 2013

DETERMINATION OF THE AUTHORITY

- A. Under s137 of the Employment Relations Act 2000 (the Act) Kingston & Latras Autos Limited (K&LAL) must comply with the requirements of the Improvement Notice issued to it on 5 July 2013 under s223D of the Act by, no later than 14 days from the date of this determination, either:**
- (i) providing evidence to the Labour Inspector that it has correctly calculated and paid final holiday pay to its former employees; or**
 - (ii) if it has not already done so, to calculate and pay the correct net entitlements under the Holidays Act 2003 to those employees.**
- B. Under ss 135 and 223F of the Act K&LAL must pay a penalty of \$1500 for failing to comply with the Improvement Notice.**

- C. K&LAL must pay the Ministry of Business, Innovation and Employment the sum of \$71.56 in reimbursement of the amount paid by the Ministry on the Inspector's behalf to lodge her application in the Authority.**

The application

[1] By statement of problem lodged on 12 September 2013 Labour Inspector Jo Ingham (the Inspector) alleged Kingston & Latras Autos Limited (K&LAL) had failed to comply with an Improvement Notice issued to it on 5 July 2013 under s223D of the Employment Relations Act 2000 (the Act).

[2] The Inspector sought orders from the Authority (under s137 of the Act) requiring K&LAL to comply with the improvement notice and (under s135) to pay a penalty. Section 223F of the Act allows the Inspector to ask the Authority to impose a penalty on an employer who fails to comply with an Improvement Notice.

[3] Assuming the Authority issued the compliance order sought, the Inspector also proposed that the penalty only be payable by K&LAL if the company failed to comply with the order.

The Authority's investigation

[4] From the papers lodged with the Inspector's application it appeared K&LAL had not formally engaged with or responded to the Inspector at any stage of her inquiries. For that reason, and because of the potentially punitive nature of the orders sought in this application, I directed the Inspector to serve K&LAL's director Fiaalii Mariner with a copy of the Authority's Notice of Investigation Meeting and an Authority Minute. I am satisfied from an affidavit of service lodged by the Inspector that she did serve Mr Mariner and that, from the documents served, K&LAL would be aware of the matters to be addressed at the investigation meeting and the potential consequences of not attending or being represented.

[5] No representative of K&LAL attended the notified investigation meeting and I exercised the Authority's power to proceed if a party fails, with no good cause shown, to attend or be represented.¹

The Inspector's evidence

[6] The Inspector's affirmed evidence, in answer to questions asked of her at the Investigation Meeting, and a report of her actions attached to the statement of problem established that she made inquiries of K&LAL from April 2013 in response to a complaint from a former employee, Mua Savaiinaea, that the company had not paid his final annual holiday pay. After talking with Mr Savaiiaea's representative (his wife), with a receptionist at the business premises and with Mr Mariner, the Inspector believed other employees were also probably not paid final holiday pay due to them. She also understood that the business – a mechanical workshop in Otara – was now owned and operated by a different company, K& K Automotive Limited, and that the director of that company was the wife of Mr Mariner. Mr Mariner also told the Inspector that his company owed a substantial amount of money to IRD and that he had paid Mr Savaiinaea's annual leave entitlements by giving him several payments and a car. Mr Savaiinaea confirmed he had received \$500 but said that the gift of a car was unrelated to his holiday pay entitlements.

[7] The Inspector was unable to determine if Mr Savaiinaea or other employees had received their full holiday pay entitlements because K&LAL failed to comply with both earlier notices to produce records and the subsequent Improvement Notice.

Compliance order

[8] I was satisfied from the Inspector's evidence that K&LAL had failed to meet its statutory obligation to comply with the Improvement Notice and she was entitled to have the requirements of that notice enforced by way of a compliance order issued by the Authority.

[9] The compliance order is made on the terms set out at the head of this determination.

¹ Clause 12 of Schedule 2 of the Employment Relations Act 2000.

The penalty

[10] I was also satisfied that the Inspector had made out the grounds for a penalty to be imposed on K&LAL for its failure to comply with the Improvement Notice.

[11] While I understood the practical purpose of the Inspector's proposal that any penalty awarded be payable only if any compliance order made by the Authority was not obeyed, I do not understand the policy intention of the relevant provision at s223F of the Act to provide for that option. The penalty is for failure to comply with the Improvement Notice, not a subsequent failure to obey a compliance order of the Authority. The Act provides further and different potential penalties for such on-going non-compliance.

[12] In circumstances – such as here with K&LAL – where a business appears to have failed to make payments owed under the Holidays Act, has been given an opportunity to demonstrate that is not the case or to correct it if it is, and has given no reason for its failure to observe the Improvement Notice, the Act allows for a penalty. To let K&LAL avoid a penalty for its failures to date would be an affront to the many thousands of other businesses who make the effort to keep proper wage and holiday records, who stand ready to provide those records when asked to do so by a Labour Inspector, and who, when asked to take certain steps under an Improvement Notice, either do so or properly show why that is not necessary.

[13] Failure to make payments due under the Holidays Act, or to prove proper payments have been made, is a serious matter. Failure to respond properly to an Improvement Notice, which has the purpose of correcting matters without resort to legal proceedings, makes matters worse.² In the present case the Inspector's evidence and the apparent lack of any real effort by K&LAL to engage and explain its position supported a conclusion that its actions (or rather, omissions) are deliberate and not inadvertent.³ The harm caused is that at least one employee is left short of his statutory entitlements, others may be in the same position, the Inspector is unable to establish and act on the true position, and other employers are given a bad example of non-compliance if no significant consequences of ignoring an Improvement Notice are imposed.

² *Erin Spence, Labour Inspector v Oakridge Masonry Limited* [2012] NZERA Auckland 414 at [23].

³ *Xu v McIntosh* [2004] 2 ERNZ 448.

[14] A penalty under s223F is appropriate. The only question is the appropriate level of such a penalty in a range that, since April 2011, may go up to \$20,000 for a company.⁴ On that scale I consider that a penalty of \$1500 – being only 7.5 per cent of the maximum – is a modest but significant amount to bring home to K&LAL that such behaviour is not acceptable and to deter other employers from acting in the same manner.

[15] Under s136 of the Act K&LAL must pay the penalty to the Authority for transfer to a Crown bank account.

Costs

[16] The Inspector is also entitled to reimbursement by K&LAL of the fee of \$71.56 paid by the Ministry of Business, Innovation and Employment to lodge her successful application in the Authority.

Robin Arthur
Member of the Employment Relations Authority

⁴ Section 135(2) of the Act.