

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 32
5426043

BETWEEN LABOUR INSPECTOR
 (LAURENCE NORTON)
 Applicant

A N D T P MANU LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Laurie Norton, Representative of Applicant
 Fakatouola (Willy) Pulukamu, Director of Respondent

Investigation meeting: 22 October 2013 at Blenheim
 23 December 2013 by teleconference

Submissions Received: Orally at the meeting and at the teleconference

Date of Determination: 24 February 2014

DETERMINATION OF THE AUTHORITY

- A. TP Manu Limited is to pay the Employment Relations Authority a penalty of \$3,000¹ for failing to comply with an improvement notice issued by a Labour Inspector. The penalty is to be paid within 28 days of this determination.**
- B. TP Manu Limited is to pay Laurence Norton, Labour Inspector, \$71.56 for the filing fee paid to the Authority. The fee is to be paid within 28 days of this determination.**

¹ For payment into a Crown Bank Account in line with s.136 of the Employment Relations Act 2000.

Employment relationship problem

[1] The applicant Labour Inspector Laurence Norton (Mr Norton) visited TP Manu (TP Manu) Limited's work site at the Grove Mill 17 Valley Vineyard on 27 May 2013. He was accompanied by an Immigration Officer. Mr Pulukamu, a director of TP Manu, was present at the work site that day². A number of workers were spoken to, some of whom said they did not have written employment agreements.

[2] On 10 June 2013 Mr Norton issued an improvement notice requiring TP Manu to provide proof that all employees employed on, 27 May 2013 *have been supplied with and signed employment agreements.*

[3] On 12 June 2013 the improvement notice was served on the (then) registered office of TP Manu at K & J Consultants Ltd, 52 Grove Road, Blenheim and also left at the address for service of TP Manu at 4 Meachen Place, Blenheim. Mr Norton observed when he left the improvement notice at 4 Meachen Place that the premises appeared to be unoccupied.

[4] Mr Norton also wrote a letter to TP Manu which was left at 4 Meachen Place with the improvement notice on 12 June 2013. It says:

During my visit I was unable to identify any timesheets for the workers at the site. The purpose of my visit was to ensure that you are meeting the minimum standards of employment. Accordingly, I am requiring you to provide me with timesheets, wage records and employment agreements for all employees who worked for you between the dates of 20th May and Sunday 9th June 2013. I will require the records within two calendar weeks of the end of the last pay week. The records should reach me by Monday the 24th June. You will note that this period includes Queens Birthday public holiday.

[5] The improvement notice was not complied with by 24 June 2013 and time sheets and wage records were not provided to Mr Norton by 24 June 2013 either.

[6] On 24 June 2013 Mr Norton attempted to talk to Mr Pulukamu by telephone but could only leave a message. On 26 June 2013 Mr Norton sent a further copy of

² I accept that the other director of TP Manu, Tevita Pulukamu Manu (Mr Pulukamu's brother) was out of the country for the time relevant to this determination.

the improvement notice and the letter requesting time and wage records to Mr Pulukamu's current home at 12 Alabama Road, Blenheim.³

[7] On 28 June 2013 Mr Pulukamu telephoned Mr Norton but had to leave a message. On 16 July 2013 Mr Norton called Mr Pulukamu again and left a message for him to call urgently.

[8] On 17 July 2013 the Labour Inspector lodged a statement of problem with the Employment Relations Authority. There were problems with serving the statement of problem on TP Manu. However, it was adequately served in time for the investigation meeting.

[9] TP Manu did not lodge a statement in reply and Mr Pulukamu did not participate in a telephone case conference held on 6 September 2013. However, he attended the investigation meetings on 22 October and 23 December 2013. He gave oral and documentary evidence.

Issues and what happened at the 22 October investigation meeting

[10] The statement of problem asked the Authority to:

- issue a compliance order to ensure TP Manu complied with the improvement notice by supplying proof of written employment agreements for all employees; and
- to consider a penalty for failure to comply with the improvement notice by failing to provide proof it had supplied employment agreements to all employees; and
- issue a compliance order to ensure TP Manu complied with the written demand for copies of all time sheets, wage records and employment agreements for all employees who worked for TP Manu between 20 May and 9 June 2013; and
- to consider a penalty in the event that TP Manu failed to comply with the Authority's compliance order/s.

³ The address for service and TP Manu's registered office address changed to 12 Alabama Road, Blenheim on 5 September 2013.

[11] At the investigation meeting Mr Pulukamu gave sworn evidence that the first day of the pruning season for which the employees were engaged was 27 May 2013, the date of the visit. Mr Pulukamu provided copies of employment agreements for the following workers who had been working on 27 May 2013:

- Kanitiola Ofa Ki Pahalu (known as Niti)
- Loleni Pahulu
- Soakai Kaumatule
- Moala Kolomalulu

[12] Mr Pulukamu was also listed on the employee timesheet as working that day. I do not consider the improvement notice made it necessary to see an employment agreement for Mr Pulukamu who I am satisfied was working in his capacity as an owner of the business.

[13] However, Mr Pulukamu did not have written employment agreements with the following employees who also worked on 27 May 2013:

- Siosifa Falekaona
- Tofa Fuaivaa
- Toakase Gibbons was the name given to Mr Pulukamu by the worker on 27 May 2013 but she was later discovered to be Minovelo Otuafi

[14] At the meeting Mr Pulukamu provided a field sheet listing the names of the workers on 27 May 2013 and the hours they worked. He recorded the hours of the workers as being from 8am until 3pm in the afternoon.

[15] However, the three workers for whom there were no employment agreements actually left when the Labour Inspector and the Immigration Officer visited the site, which was before 3pm. Of those three workers Siosifa Falekaona was a New Zealand resident and the other two did not have the correct immigration status to be legally working in New Zealand.⁴ However, having done some work for the respondent, all

⁴ This raises other issues outside the Authority's jurisdiction and the scope of this determination.

three should have been paid for the work that they did that day. They had not been paid as at 22 October 2013.

[16] I reminded Mr Pulukamu of TP Manu's obligation to pay those three workers. Mr Pulukamu acknowledged that he was likely to be able to find those three workers in order that TP Manu could pay them for the hours they had worked that day. I trust that he has done so.

[17] Mr Pulukamu also supplied some time sheets and wages records.

[18] Mr Norton was satisfied with the employment agreements and records provided by Mr Pulukamu at the investigation meeting and confirmed that he no longer required compliance orders for the improvement notice or the letter requesting timesheets and wage records.

[19] Given that the Authority is not making any compliance orders there is no need to consider imposing any penalties for failing to comply with the compliance orders.

[20] However, Mr Norton asks that the Authority consider imposing penalties on TP Manu for failing to comply with the improvement notice⁵.

[21] The issues the Authority now needs to determine:

- Should TP Manu pay a penalty for failure to supply three workers with written employment agreements?
- Whether to impose a penalty on TP Manu for failing to comply with the improvement notice which includes a consideration of whether TP Manu was sufficiently informed about the improvement notice requirements in time to comply by 24 June 2013.

Should TP Manu pay a penalty for failure to supply written employment agreements to three workers?

[22] TP Manu's employees are not covered by a collective agreement and are on individual employment agreements. Section 63A(2) of the Act requires the employer to provide an employee with a copy of an intended individual employment agreement.

⁵ Section 223F of the Act makes an employer who fails to comply with an improvement notice liable to a penalty imposed by the Authority after an action brought by a labour inspector.

A failure to comply with s.63A(2) makes an employer liable to a penalty imposed by the Authority⁶.

[23] Section 64(1) provides that an employer of an employee on an individual employment agreement must retain a signed copy of the individual employment agreement.

[24] Section 65(1)(a) provides that an individual employment agreement of an employee who is not covered by a collective agreement must be in writing. Section 65(4) makes an employer who fails to comply with s.65 liable to a penalty imposed by the Authority in an action brought by a labour inspector.

[25] TP Manu had written signed individual employment agreements for four⁷ out of the seven employees working on 27 May 2013 which was the first day of work for the season.

[26] There were no written employment agreements for the other three workers, not even intended agreements as envisaged under s.63A(2). That was in breach of TP Manu's obligations.

[27] At the 22 October investigation meeting Mr Pulukamu said that he now understood the importance of making sure all employees had written employment agreements before they started work. I trust that is so and that TP Manu's procedure for engaging new workers now includes making sure all employees have written employment agreements.

[28] I do not consider that the failure to supply written employment agreements to the three employees by the middle of the first day of the work season was a breach of the Act so egregious that a penalty should be ordered against TP Manu. That breach could have been remedied relatively quickly by TP Manu. However, the three workers left work and did not return.

[29] The fact that no penalty has been imposed for these breaches does not mean that no penalty will be imposed in the future if there are similar breaches.

⁶ Section 63A(3) of the Act.

⁷ Moala Kolomaku, Soakai Kaumatule, Loleni Pahulu and Kanitiola Pahulu.

Should TP Manu pay a penalty for failing to comply with the improvement notice?

[30] A penalty is imposed to punish, in this case the employer, for wrongdoing that is considered blameworthy. If TP Manu did not know it was obliged to comply with the improvement notice by 24 June 2013 it would not be just to impose a penalty on it for failure to comply.

[31] At the investigation meeting on 22 October 2013 Mr Pulukamu said that he did not get a copy of the improvement notice until it was served on him in person in Blenheim by Baycorp on 17 September 2013, along with the Notice of Investigation Meeting. He said that was because he was absent from New Zealand and in Tonga from sometime before the end June 2013 and did not return until approximately a fortnight before the investigation meeting so did not know about it.

[32] That evidence is inconsistent. If Mr Pulukamu was in Tonga until about a fortnight before the 22 October investigation meeting he could not have been served in person in Blenheim on 17 September 2013.

[33] Mr Pulukamu also says that his wife⁸ received the letter requesting wages and timesheets in time to comply, while he was in Tonga, but that she did not let him know about the letter.

[34] Mr Pulukamu argued that he was not able to comply with the improvement notice to provide employment agreements, or to comply with the letter of request for wages and time records, until he got back to New Zealand which was after 24 June 2013.

[35] On 22 October 2013 Mr Pulukamu submitted that TP Manu should not be penalised for what were his personal failings and mistakes. He told me that he could not provide his passport to the Authority as proof of his dates of travel because it was currently with the authorities, by which I understood him to mean he was applying for a renewed or different kind of visa or having his passport renewed. In light of subsequent evidence provided I now doubt whether that was an accurate statement made by Mr Pulukamu.

⁸ Mrs Pulukamu is not a director, a shareholder or an employee of TP Manu.

What is the purpose of an improvement notice?

[36] Section 223A sets out Labour Inspectors' functions as including:

- Determining whether provisions of the relevant Acts (which include the Employment Relations Act 2000) have been complied with; and
- Taking all reasonable steps to ensure that the relevant Acts are complied with.

[37] Section 223D of the Act allows a Labour Inspector to issue an improvement notice if the Labour Inspector believes an employer is failing to comply with any provision of the relevant Acts. It is a cost effective and low key way of ensuring employers comply with legislation providing minimum standards of protection for employees.

What law governs service of improvement notices?

[38] There is a question about whether the improvement notice was issued in line with s.223D(4) of the Act which says:

An improvement notice may be issued –

(a) by giving it to the employer concerned; or

(b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.

[39] TP Manu is a company; it is not a natural, or human, person. Neither Mr Pulukamu nor the other director, nor either of the shareholders⁹, is the employer. The company, TP Manu, is the employer.

[40] Section 223D(4)(a) by the use of the word "giving" appears to contemplate a Labour Inspector personally handing an improvement notice to the employer who is a natural person. Section 223D(4) should be read in the context of the whole of s.223D. The purpose of s.223D is to assist an employer to remedy any failure to comply with the relevant legislation. Therefore, it must be possible to adequately serve an employer who is not a natural person but a company, or other kind of incorporated body, such as an incorporated society. Section 223D must mean that all employers, not just those who are natural persons, can be issued with improvement notices.

⁹ Section 15, Companies Act 1993

[41] Section 86 of the Companies Act 1993 obliges a company to always have a registered office in New Zealand. The registered office of a company at a particular time is the place that is described as its registered office in the New Zealand companies register.

[42] Section 192 of the Companies Act 1993 obliges a company to always have an address for service in New Zealand. The company's address for service at any particular time is the address that is described as its address for service in the New Zealand companies register at that time.

[43] Section 388 of the Companies Act 1993 deals with service on a company of any documents, other than a document in a legal proceeding. It includes a number of modes of service set out in s.387, which deals with service on a company of any documents in a legal proceeding:

387 Service of documents on companies in legal proceedings

(1) A document, including a writ, summons, notice, or order, in any legal proceedings may be served on a company as follows:

(a) by delivery to a person named as a director of the company on the New Zealand register; or

(b) by delivery to an employee of the company at the company's head office or principal place of business; or

(c) by leaving it at the company's registered office or address for service; or

(d) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or

(e) in accordance with an agreement made with the company; or

(f) by serving it at an address for service given in accordance with the rules of the court having jurisdiction in the proceedings or by such means as a solicitor has, in accordance with those rules, stated that the solicitor will accept service.

(2) The methods of service specified in subsection (1) are the only methods by which a document in legal proceedings may be served on a company in New Zealand. [emphasis added]

388 Service of other documents on companies

(1) A document, other than a document in any legal proceedings, may be served on a company as follows:

(a) by any of the methods set out in paragraph (a) or paragraph (b) or paragraph (c) or paragraph (e) of subsection (1) of [section 387](#); or

(b) by posting it to the company's registered office or address for service or delivering it to a box at a document exchange which the company is using at the time; or

(c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company's

registered office or address for service or its head office or principal place of business.

(2) Subsection (1) is subject to [section 391\(3A\) to \(3C\)](#).

[44] An improvement notice issued by a Labour Inspector is not a document *in any legal proceedings*. Therefore, the service of an improvement notice must be governed by s.388¹⁰.

[45] Whatever mode of service prescribed by s.388 is chosen the Labour Inspector will be required to give evidence to the Authority that service was effected in one of those modes. The modes set out in s.387(a), s.387(c) and s.388(b) referring to information that must be held on the Companies Office register are the more straightforward options. Sufficient evidence of service would likely be a copy of the then-current Companies Office registered address for service and director details along with the Inspector's evidence that he or she, or a professional process server (provided through an affidavit of service), had:

- personally served a director of the company; or
- left the improvement notice at the registered address or address for service of the company; or
- posted the improvement notice to the registered address or address for service of the company and the notice was delivered. Proof of delivery would comprise a copy of the registered mail or courier delivery records.

[46] The other options of carrying out service *in accordance with an arrangement with the company, delivery to an employee of the company at the company's head office or principal place of business, delivering it to a box at a document exchange which the company is using at the time and sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company's registered office or address for service or its head office or principal place of business* require the Inspector to establish in her or his evidence more details about the information relied on to serve the notice in that way:

¹⁰ However, if a Labour Inspector makes an application to the Authority for compliance with the improvement notice and/or penalties for non-compliance the service on the respondent employer would need to be effected under s.387 of the Companies Act because the application is a document in legal proceedings.

- (i) Who an agreement about service was made with and why the Inspector believed that could be relied on (s387(1)(e)); or
- (ii) the place was the 'head office' or principal place of business and the person given the notice was an employee of the company (s387(1)(b)); or
- (iii) the document exchange box was being used by the company at the time (s388(1)(b)); or
- (iv) the facsimile number was used by the company's registered office or address for service or its head office or principal place of business (s388(1)(c)).

[47] Evidence relied on might include the Inspector's previous dealings with the company's directors or managers, correspondence with the company, company letterhead, contact details given on websites shown to be up-to-date and used, and other business records the Inspector has seen in her or his dealings with the company. Copies of such material relied on by the Inspector should be provided with her or his application to the Authority.

Was TP Manu Ltd adequately served with the improvement notice?

[48] It is sufficient to serve a company at its address for service or registered office listed at the relevant time with the Companies Office. TP Manu was served with the Improvement Notice at its address for service and at its registered office on 12 June 2013. It was reasonable for Mr Norton to rely on the companies register to establish both the address for service and the registered office of TP Manu at the time and to issue the improvement notice at those addresses, despite noticing that the address for service premises appeared unoccupied.

[49] In addition, it is reasonable for a Labour Inspector to expect that an employer would make arrangements to ensure any mail is forwarded to the correct address and/or the correct person if for some reason the address for service or registered address of the company has changed and the companies register has not yet been updated.

[50] Also if the managing director of the company is out of the country, as Mr Pulukamu asserts that he was, he or she can reasonably be expected to make arrangements for mail to be dealt with by an employee or agent of the company or to

be forwarded to him to deal with. A director's obligations do not stop because he is temporarily out of the country.

[51] TP Manu was adequately served with the improvement notice in time to comply with it.

Other considerations about imposing a penalty

[52] The improvement notice complied with s.223D of the Employment Relations Act 2000 (the Act). The improvement notice gave TP Manu until 5pm on Monday 24 June 2013 to supply proof of the employment agreements to Mr Norton.

[53] The improvement notice also adequately notified TP Manu of its right under s.223E of the Act to lodge an objection to the improvement notice with the Authority. In addition the notice explained the enforcement procedures available to the Labour Inspector, including the possibility of an application for a compliance order and of the liability to a penalty.

[54] At the in-person investigation meeting on 22 October I indicated that I was satisfied that no penalty would be necessary because of Mr Pulukamu's extended period outside New Zealand in reliance on his sworn evidence that neither he nor the other director actually knew about the improvement notice in time to comply with it.

[55] I also relied on Mr Pulukamu's assurances on 22 October that he had improved TP Manu's paperwork and record keeping and now knew what was required by way of employment agreements and was now making sure all employees were supplied with written employment agreements. Mr Pulukamu also undertook to work with Mr Norton to ensure compliance with TP Manu's obligations as an employer.

[56] However, the following day Mr Norton notified the Authority by email that he had further evidence about Mr Pulukamu's travel between Tonga and New Zealand in 2013 that cast doubt on Mr Pulukamu's evidence given at the meeting.

[57] Mr Pulukamu was sent Mr Norton's email and given a chance to respond. However, he did not.

[58] On 18 November 2013 Phillip David Platt, Immigration Officer signed a statement, which was witnessed, about Mr Pulukamu's travel to and from Tonga.

[59] On 23 December 2013 I reconvened the investigation meeting by teleconference. Mr Pulukamu and Mr Norton took part. I clearly informed the parties I would be reconsidering my view that a penalty was not appropriate. Mr Pulukamu was given a chance to respond to this and he did so asking that any penalty was not too large as TP Manu is a small business.

[60] I questioned Mr Pulukamu about his travel to and from Tonga in 2013 and he conceded that he may have given incorrect evidence at the investigation meeting. He said that he had been mistaken about his dates of travel and periods of time in Tonga. Mr Norton put further dates of travel to Mr Pulukamu who did not deny them.

[61] Mr Norton's view was that Mr Pulukamu had deliberately given incorrect information to the Authority at the in-person meeting to try and ensure that the Authority did not impose a penalty on TP Manu for failing to comply with the improvement notice.

[62] On 24 December 2013 Richard John Wilson, Immigration Officer, signed a statement, which was witnessed, about other travel between New Zealand and Tonga by Mr Pulukamu during 2013. The dates in that statement and in Mr Platt's statement had been put to Mr Pulukamu by telephone the previous day.

[63] After hearing from Mr Pulukamu again on 23 December 2013 and taking into account the written statements of the two immigration officers I am satisfied that Mr Pulukamu's total departures from and arrivals into New Zealand in 2013 were:

- Arrived into Auckland International Airport on 2 January 2013 from Tongatapu International Airport
- Departed from Auckland International Airport on 23 April 2013 and arrived at Auckland International Airport from Tongatapu International Airport on 16 May 2013; and
- Departed from Auckland International Airport on 6 August 2013 and arrived at Auckland International Airport on 15 August 2013 from Tongatapu International Airport.

[64] None of Mr Pulukamu's departures from or time out of New Zealand coincided with the period of the visit to the work site or the period which TP Manu had to comply with the improvement notice.

[65] I am satisfied that despite having had an opportunity to do so TP Manu has failed to comply with the improvement notice. Mr Pulukamu's evidence about his absence in Tonga is incorrect and there was no other reason advanced for the failure to comply. I am satisfied that the Inspector has made out the grounds for a penalty to be imposed on TP Manu for its failure to comply with the improvement notice. The failure to comply with the provisions of the Employment Relations Act by failing to provide written employment agreements to new employees is a serious matter. A failure to respond properly to an improvement notice, which has the purpose of correcting matters without resort to legal proceedings, makes matters worse.¹¹

[66] In the present case the Inspector's evidence and the inability of TP Manu to accurately and sufficiently explain why it did not comply with the improvement notice support a conclusion that its actions (or rather, omissions) were deliberate and not inadvertent. The harm caused is that at least three employees worked for part of a day without knowledge of their entitlements as employees and that may be part of the reason that at the 22 October 2013 investigation meeting, five months after they started work they have not followed up with TP Manu to be paid for the hours they worked. A penalty under s.223F of the Act is appropriate, in large part to emphasise that compliance with improvement notices is to be encouraged.

How much should the penalty be?

[67] The only question remaining is the appropriate level of such a penalty within a range that may go up to \$20,000 for a company¹². I consider that a penalty of \$3,000 is appropriate. TP Manu has not complied with the improvement notice and its managing director gave misleading evidence to the Authority about its ability to comply suggesting that TP Manu did not take the improvement notice seriously. Such behaviour is not acceptable and the penalty imposed is to deter it and other employers from acting in a similar manner. In setting the penalty I have taken into account that TP Manu is a small employer but every employer, not matter what its size, must

¹¹ *Erin Spence, Labour Inspector v Oakridge Masonry Limited* [2012] NZERA Auckland 414 at [23].

¹² Section 135(2)(b) of the Employment Relations Act 2000.

comply with its responsibilities under the Act. The penalty is to be paid to the Employment Relations Authority for payment into a Crown Bank Account.

Costs

[68] TP Manu Ltd is to pay Laurence Norton, Labour Inspector, by payment to the Ministry of Business Employment and Innovation \$71.56 for the cost of filing the application with the Authority.

Christine Hickey
Member of the Employment Relations Authority