

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 479
5422462, 5422471, 5422488,
5422490, 5422498, 5422503,
5422509, 5422510, 5424388,
5424393, 5424419

BETWEEN	TASNEEM BEGUM (LABOUR INSPECTOR) Applicant
AND	BUCKLANDS BEACH LIMITED (in Liquidation) 5422462
AND	AK GROUP 2006 LIMITED (formally known as PKS Hospitality Limited (in Liquidation)) 5422471
AND	STANMORE BAY LIMITED 5422488
AND	TAKAPUNA HOSPITALITY LIMITED 5422490
AND	TOBYS LIMITED 5422498
AND	GOLDLINK ENTERPRISES LIMITED 5422503
AND	CK HOSPITALITY LIMITED 5422509
AND	CK INVESTMENTS 2013 LIMITED 5422510
AND	HOSPITALITY COMPANY LIMITED 5424388

AND BIRKENHEAD
HOSPITALITY LIMITED
5424393

AND CHK HOSPITALITY
LIMITED (in Liquidation)
5424419

Respondents

Member of Authority: Vicki Campbell
Representatives: R Denmead for Applicant
J Burley for Respondents
Investigation Meeting: On the papers
Submissions Received: 4 September 2014 from Applicant
11 September 2014 from Respondents
Determination: 20 November 2014

DETERMINATION OF THE AUTHORITY

- A. Each of the 11 named respondents is separately ordered to pay a penalty of \$6,000 to the Crown within 28 days of the date of this determination.**
- B. Each of the 11 named respondents is separately ordered to pay to the Labour Inspector, the filing fee of \$71.56 within 28 days of the date of this determination.**

Employment Relationship Problem

[1] The Labour Inspector (the Inspector) says that, following the receipt of Notices pursuant to s 229(1) of the Employment Relations Act 2000 (“the Act”), requiring the production to the Inspector of certain records, each of the respondent companies failed to produce by the specified date:

- a) Wage and time records;
- b) Holiday and leave records; and

c) Employment agreements

[2] Orders for compliance with the Notices were sought, but that matter has been resolved and all applications for compliance orders were withdrawn.

[3] Claims for penalties against individually named respondents who were, variously, directors of the respondent companies at relevant times were also withdrawn.

[4] Claims for penalties against each of the respondent companies remain. The Inspector seeks penalties under s 229(3) of the Act for the companies' failure to comply with the Notices without reasonable cause.

[5] The Inspector also claims penalties under s 75 of the Holidays Act 2003 for failure to keep or provide access to a holiday and leave record.

[6] Because the circumstances of the failures were common to all of the companies, all claims for penalties have been heard together.

[7] Although three of the companies are now in liquidation, the liquidator has consented to the continuation of the proceedings against those companies.

Issues

[8] The issues for the Authority are:

- a) Was there reasonable cause for the failures to comply with the Notices within the specific periods?
- b) Do the circumstances warrant orders for the payment of penalties; and
- c) If so, what amount?

Background

[9] On 16 May 2013 Inspectors visited eight of the restaurants in what is known as the Masala group and issued Notices for the production of the wage and time records, holiday and leave records, and employment agreements ("the 16 May Notices"). The records were required in respect of all current employees and some named previous employees.

[10] The Notices were issued to:

- a) Bucklands Beach Limited
- b) AK Group (2006) Limited
- c) Stanmore Bay Limited
- d) Takapuna Hospitality Limited
- e) Toby's Limited
- f) Goldlink Enterprises Limited
- g) CK Hospitality Limited; and
- h) CK Investments Limited

as the respective employers. The Notices required production of the specified records by 5.00pm on 30 May 2013.

[11] On 6 June 2013 similar Notices were issued to Birkenhead Hospitality Limited and CHK Hospitality Limited ("the 6 June Notices"). The employers were given until 5pm on 20 June 2013 to produce the specified records.

[12] A further and similar Notice was issued to Hospitality Company Limited on 7 June 2013. The employer was given until 21 June 2013 to produce the specified records.

[13] None of the records were provided by the specified dates.

[14] On 20 June and 3 July 2013 the Inspector lodged statements of problem in the Authority in respect of the failures to comply with the 16 May Notices and the 6 and 7 June Notices respectively.

[15] Some records were produced by the respondents with the respective statements in reply. The Inspector says these records did not comply with the statutory requirements for record keeping. Further records were provided in August 2013.

[16] Ms Joti Jain provided affidavits on behalf of the respondent companies. She deposed that the delay was occasioned by the fact that all of the records of all of the companies were temporarily located at her residential address, pending a move to a

newly constructed administration office. Also the records had been prepared manually, and were being prepared for transfer to a centralized electronic system. When Ms Jain received the notices she began gathering the required records.

[17] As already set out, the 16 May 2013 Notice required production of the specified records by 30 May 2013. On 29 May 2013 Ms Jain received news that her father was seriously ill in India. She departed on a flight to India the same day.

[18] Ms Jain prepared an email message to an Inspector which was sent on 31 May 2013. The message advised of her father's illness, and that she would not be able to provide the records in the required timeframe. In her email Ms Jain raised, for the first time, concerns about the timeframe being insufficient given the amount of information in question, and advised that she would provide the information on her return. Ms Jain said she hoped to return in the next four weeks.

[19] An Inspector replied by email, also on 31 May 2013, asking Ms Jain if a manager or accountant could provide the information in her absence. Ms Jain deposed that she had no internet access from 31 May to 7 June 2013. She saw the Inspectors message on 7 June, but did not have an opportunity to reply.

[20] Ms Jain further deposed that she did not perceive any unwillingness to await her return, and noted there was no warning of the possibility of legal proceedings unless the information was provided during her absence.

[21] Ms Jain returned to New Zealand on 12 June 2013. Her next contact with the Inspectors was by email message to them dated 20 June 2013. In that message she advised she was back in the country, had compiled most of the required information, and expected that it would be ready the following Friday, 28 June 2013.

[22] Ms Jain met with an Inspector on 28 June 2013 and over the next several months engagement between the parties led to the resolution of several matters including the now-withdrawn claims.

The law

[23] The power of a Labour Inspector to require an employer to supply copies of all employment agreements, holiday and leave records and wages and time records in

relation to the named individual employees is provided for at s 229(1)(d) of the Employment Relations Act 2000 (the ERA) and s 82 of the Holidays Act 2003.

[24] Section 229(1)(d) states:

(1) For the purpose of performing his or her functions and duties under any Act specified in section 223(1), every Labour Inspector has, subject to sections 230 and 233, the following powers:

...

(d) the power to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both of any employee of that employer.

[25] Section 229(3) of the ERA provides for employers who fail without reasonable cause to comply with any requirement of a Labour Inspector, to be liable to a penalty. In the case of a company, the maximum penalty is \$20,000.00. Penalties for a failure to provide holiday records are also set out in s 75 of the Holidays Act 2003.

[26] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*¹ the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

Was there reasonable cause for the failures to comply with the notices within the specific periods

[27] There is no dispute that the respondents have failed to comply with the Notices within the specific periods required in the Notices issued by the Inspectorate.

¹ [2014] NZEmpC 65.

[28] Before the Authority can consider the imposition of a penalty, it must first be satisfied that the respondents have shown no reasonable cause for their failure to comply.

[29] The first Notice was issued on 16 May 2013 with compliance required by 30 May 2013. Ms Jain left New Zealand on 29 May 2013 to visit her seriously ill father and returned on 12 June 2013.

[30] Ms Jain says she was the only person able to collate and deliver all of the records requested by the Labour Inspector. This is because all the records were at her residential address and when she left suddenly to attend her ill father no one else could access the records. Ms Jain says the records were at her residence as they were being put into an electronic system.

[31] That does not properly explain why Ms Jain was not able to copy all the records after 16 May 2013 and deliver them to the Labour Inspector immediately on her return to New Zealand on 12 June 2013.

[32] Ms Jain has not explained why she made no efforts to contact the Inspectorate with any concerns she had regarding either the extensive nature of the requirements or the timeframes imposed prior to receiving the call about her father on 29 May 2013. Ms Jain had been aware from the date of the 16 May Notices that she was required to produce the records on 30 May 2013. Even if the email she says she wrote on 29 May 2013 had been delivered that day and not 31 May 2013, she would have been well aware of the extensive nature of the request and that the time to produce the records was close to expiring.

[33] Additional Notices were issued on 6 and 7 June 2013 requiring compliance by 20 and 21 June 2013 respectively. These Notices were issued while Ms Jain was absent from New Zealand but were issued to the directors of the various companies.

[34] Ms Jain has not explained why she did not contact the Labour Inspector on her return to New Zealand on 12 June 2013. Ms Jain made her first contact with the Inspector on 20 June 2013 with a promise that the documents would be delivered on 28 June 2013.

[35] Ms Jain says she met with Labour Inspector, David Milne, on 28 June 2013 and advised him the documents were ready for delivery that day. Ms Jain has deposed that she agreed with Labour Inspector Milne to deliver them as soon as possible. By the time Ms Jain met with Labour Inspector Milne, the applicant had lodged its first statements of problem in the Authority.

[36] Some records were delivered as attachments to the statements in reply in mid July 2013. Other records were produced in August 2013. The Inspector says the records delivered as attachments to the statements in reply did not comply with the specific requirements of the Act.

[37] However, as previously set out all matters regarding the compliance issues were resolved on 27 September 2013.

[38] When Ms Jain received the call about her father the records were one day away from being required to be produced. There has been no satisfactory explanation about why Ms Jain did not communicate any concerns she had in meeting the 30 May 2013 deadline earlier than 29 May 2014. In light of that I have concluded that the respondents have shown no good cause as to why it has failed to comply with the Notices to produce records within the timeframes set out in the Notices.

Do the circumstances warrant orders for the payment of penalties

[39] The law requires all employers to keep and maintain wages and time records, holiday and leave records and employment agreements for all employees. These are long standing obligations. The ERA requires employers to comply “forthwith” with any requirement of a Labour Inspector to produce records.

[40] Any breach of these statutory requirements must be viewed seriously. It is important that Labour Inspectors and others with an interest in ensuring employees’ statutory rights are upheld get access to records without delay.

[41] I am satisfied the failure by the respondents to produce the records in accordance with the Notices was not a repetitive breach, but can be classed as a one-off breach.

[42] The Inspector submits that the Authority should consider the impact on the Inspectorate being able to carry out its statutory functions when considering what the impact of the failure has been.

[43] The Inspector became concerned after it commenced an investigation into complaints by seven workers who worked for the Masala group of companies. The complainants did not know which company or individual was their employer at the start of the investigation. The provision of the records was an important first step to identifying the employing entities of complainants.

[44] As a result of receiving the records the Inspector has been able to confirm that the named complainants worked for companies that have been put into liquidation. Two of the three companies went into liquidation after the Inspector commenced her investigation. CHK Hospitality Ltd went into liquidation on 2 September 2013 while AK Group (2006) Ltd went into liquidation on 24 February 2014.

[45] Had the records been available in June 2013 when required by the Labour Inspector it may have been possible to pursue the complaints in a timely manner and against companies that were still solvent at that time.

[46] The Labour Inspector submits that a significant portion of the respondents' employees are recent migrants to New Zealand. The Authority accepts that migrant workers, particularly those recently migrated here, are often in a vulnerable position.

[47] The statutory framework in New Zealand governing employment relationships expressly provides for employers who fail to comply with Notices to produce records without reasonable cause, to be subject to a penalty.

[48] As stated in *Tan v Yang & Zhang* penalties punish and deter others from engaging in such conduct. I find that this case warrants the imposition of a penalty which will also serve as a deterrent message.

[49] The respondents have now resolved the compliance issues with the Inspectorate. I am satisfied the respondents attempted to respond in time but due to circumstances was unable to do so. The respondents also worked with the Inspectorate to resolve matters. By way of example, Ms Jain met with Labour Inspector Milne on 28 June 2013 at which time the records were ready for delivery. Based on his advice

that the records be delivered as soon as possible some were delivered with statements in reply in July while others were delivered in August 2013.

[50] This is not a case of continued wilful non-compliance. The co-operation of the respondents in producing the records should be encouraged. This will be reflected in the level of penalties awarded.

[51] The Inspector has provided a list of cases where penalties have been awarded. As acknowledged by the Inspector these cases are not on all fours with this matter. The majority of cases involve a claim for arrears of wages where penalties have been sought for the failure to pay the monies owing together with a failure to provide wages and time records.

Quantum

[52] The applicant has sought penalties for each failure for each respondent. That is, the failure to produce wages and time records, the failure to produce holiday and leave records and the failure to produce employment agreements.

[53] The respondents submit that penalties should be at the lower end of the scale and on the principle of totality. This principle can be applied where a single course of conduct has resulted in multiple breaches.²

[54] The respondents have provided evidence to the Authority that it has received adverse media coverage of the actions taken by the Inspectors. The respondents say that this adverse publicity has had a direct impact on the financial viability of the Masala businesses. Large penalties will further impact on the financial status of the businesses and may adversely impact on the nearly 200 workers currently employed by the businesses.

[55] I consider total penalties of \$6,000 against each of the 11 respondent to be justifiable. The penalties are to be paid to the Crown. To avoid any doubt, each of the individually named respondents are ordered to pay \$6,000 separately as penalties to the Crown within 28 days of the date of this determination.

²*NZ Timber Industry Employees IUOW v Waimate Timber Co Limited* (1990) 3 NZELC 97,890

Costs

[56] I order each of the named respondents separately to reimburse the filing fee of \$71.56.

Vicki Campbell
Member of the Employment Relations Authority