

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 68  
5449003

BETWEEN

LABOUR INSPECTOR  
(RODERICK BROWN)  
Applicant

AND

WEIWEN SU T/A KIPPERS  
EAST TAKEAWAYS  
Respondent

Member of Authority: Trish MacKinnon

Representatives: Andrew Gane, counsel for Applicant  
No appearance by or for Respondent

Investigation Meeting: 4 June 2014 at Hastings

Determination: 2 July 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Labour Inspector Roderick Brown, says Weiwen Su trading as Kippers East Takeaways (Mr Su) in Hastings failed to comply with an Improvement Notice served under s. 223D of the Employment Relations Act 2000 (the Act).

[2] He seeks a penalty against Mr Su for failure to produce all the wage and time, and holiday and leave records he had required. He seeks a further penalty against Mr Su for his failure to produce copies of employment agreements for all employees as required.

[3] Mr Su did not file a response or participate in the investigation meeting.

**Background and evidence**

[4] Labour Inspector Brown made a workplace assessment visit to Kippers East Takeaways on 13 August 2013. This was a combined initiative with the Immigration New Zealand Compliance Unit (INZ). Mr Brown described the visit in an Investigation Report, which formed part of his evidence. As the INZ staff and Labour Inspector approached the takeaway premises they observed a young Caucasian female behind the counter serving customers. There were also two Chinese males cooking food behind the counter who ran out of the shop when they saw the INZ staff.

[5] Minutes later Mr Su arrived and, according to Mr Brown, was uncooperative and evasive. After being cautioned, he admitted employing one of the men who had run away. He claimed to have no knowledge of the other man, but gave the names of both men to INZ and Mr Brown. He said his employees did not have employment agreements.

[6] The Labour Inspector made another unannounced visit three days later, with an INZ official and an interpreter. He observed three people working in the shop in addition to Mr Su. Mr Su said the workers were volunteers and did not have employment agreements. The workers were reluctant to talk to Mr Brown and his effort to engage with them was unsuccessful.

[7] Mr Su's response to Mr Brown's request for employment agreements and time and wage records for staff he had employed was that he was not sure if he had any, and that he was unwilling to talk further as he intended engaging a lawyer. Mr Brown wrote to Mr Su on 19 August 2013 requesting the production of employment agreements and wage and time records for all staff from the date Mr Su had commenced operating the takeaway business. The Labour Inspector's letter, which he delivered by hand, noted that Mr Su was required to comply by 30 August 2013.

[8] Correspondence ensued between the parties over the next two and a half months, only some of which I will highlight. On 30 August Mr Brown received a communication from a solicitor I will refer to as Mr A, who said he had been instructed by Mr Su the previous day. He requested an extension to 13 September 2013 for providing the required documentation. Mr Brown received some employment agreements for current employees over the following weeks. On 20 September 2013 he again requested records for all employees from the commencement of the business. He also sought copies of Mr Su's audited financial

statements for the years the business had been in operation. These records were required within seven days.

[9] The documentation was not provided in that time frame. On 8 October 2013 the Labour Inspector received a letter from Mr A enclosing copies of current wage book entries and some employment agreements. Financial records were also received. These revealed that wages had been paid over several of the years since Mr Su had commenced the business.

[10] Six employment agreements were provided to the Labour Inspector covering five employees (two related to the same employee over two different years). Five of the agreements related to employment commencing in 2013, and one related to employment from 2012. The respondent supplied time and wage records for four employees which, the Labour Inspector noted in his investigation, “*only cover for a maximum of thirteen weeks past or less duration per individual*”.

[11] It was the Labour Inspector’s evidence that on a number of un-announced visits it had been observed that there were never less than three people in addition to the employer working in the takeaway, which also operates as a restaurant. It was Mr Brown’s view that it would not be possible for Mr Su to operate the business as a sole operator.

[12] The Labour Inspector issued, and personally served, an Improvement Notice against the respondent, under s. 223D of the Act, on 30 October 2013. This stated Mr Brown’s reasonable belief that the respondent was failing, or had failed to comply with ss. 64 and 130 of the Act regarding, respectively, the retention of employment agreements and keeping of wage and time records, and s. 81 of the Holidays Act, regarding holiday and leave records, for all employees since the respondent commenced business in May 2008.

[13] The Improvement Notice specified the requirement for the respondent to take action to ensure compliance with those statutory provisions. It identified the documentation that had been requested from the employer, and that which had been provided. It noted the failure to comply with employment law requirements, and the concern that the continued breach of these requirements would contribute to an erosion of fair and reasonable employment standards in New Zealand.

[14] The Improvement Notice referred to the unknown numbers of the respondent's employees whose individual employment rights may have been compromised as a result of the employer's failure to comply with the provisions of employment and holidays legislation. The Notice required all the specified documentation that had been requested to be provided by 27 November 2013.

[15] The Labour Inspector also wrote to the respondent on 31 October 2013 explaining the Improvement Notice and advising that failure to comply could result in proceedings being commenced in the Employment Relations Authority.

[16] There was no compliance with the Improvement Notice by the respondent and no further documentation was received.

### **The Authority's investigation**

[17] The Labour Inspector filed a statement of problem in the Authority on 17 February 2014 seeking the penalties referred to above. This was delivered to Kippers East Takeaways (Kippers) by courier post and signed for by "Nicole". An Authority support office spoke with Mr Su by telephone about the statement of problem after the date for filing a statement in reply had passed. Mr Su referred the support officer to Mr A as the solicitor acting on his behalf.

[18] Two emails were subsequently sent to Mr A without response. As noted earlier, no statement in reply was filed. However, Mr A attended a telephone conference with the Applicant and the Authority on 1 April 2014, noting he had received further instructions from Mr Su the previous day. He had also received a number of documents from the respondent which he needed to study, following which he said he would talk with Mr Su and file a memorandum in the Authority. Mr A expressed confidence this would be done within one week.

[19] Nothing further has been heard from Mr A or Mr Su. The Authority has not received a memorandum from either the lawyer or his client, and nor has it received any further documents. A notice of the investigation meeting was sent to Mr A on 15 April 2014, and a reminder sent on 26 May 2014.

[20] I was satisfied all reasonable attempts had been made to make the respondent aware of the investigation meeting. After waiting several minutes I invoked the Authority's power, under clause 12 of Schedule 2 to the Employment Relations Act

2000 (the Act), to proceed where a party fails to attend or be represented, with no good cause shown.

### **Identity of respondent**

[21] In his statement of problem the Labour Inspector identified the respondent as Kippers East Takeaways. The address for service was given as the street address of Kippers East Takeaways, followed by “*Owner/Employer; Weiwen Su*” with Mr Su’s address recorded as the same street address as that of the takeaway.

[22] A question was raised at the investigation meeting regarding the correct citing of the respondent. The applicant proposed amending the respondent’s name to Weiwen Su trading as Kippers East Takeaways. Following the investigation meeting I arranged for emails to be sent to both parties proposing that change and inviting their comments by 16 June 2014.

[23] Labour Inspector Brown responded positively and noted that Mr Su was in no doubt that he, as the owner/employer of the business trading as Kippers East Takeaways, was the subject of the Improvement Notice and the current action. No comment was received from Mr Su. Accordingly the citation was changed to reflect more accurately the identity of the respondent.

### **Issue**

[24] The issue for determination is whether a penalty, or penalties, should be imposed on Weiwen Su trading as Kippers East Takeaways.

### **Discussion**

[25] Section 130 of the Act states the requirement for employers to keep a wages and time record showing, for each employee employed by that employer, specified information. The information includes, amongst other particulars, the employee’s name, age (if under 20), postal address; the kind of work they usually do; whether they are employed under an individual employment agreement or a collective agreement; and wages paid for each pay period.

[26] When requested by an employee or authorised representative of an employee, an employer must immediately provide access to, or a copy of, wage and time records relating to the employee’s employment any time in the preceding six years.

Employers who do not comply with any of the provisions of s. 130 are liable to a penalty imposed by the Authority.

[27] The Holidays Act, at s. 81, imposes obligations on employers to keep a holiday and leave record for each employee. This requires detailed information regarding each employee's employment and their holiday and other leave entitlements. The required information includes, amongst many other particulars, current holiday entitlement, days taken as annual holidays, sick and bereavement leave, payments made for those days, hours worked on any public holiday and dates and payments for days taken as alternatives to that public holiday. The holiday and leave record may be kept so as to form part of the wages and time records required by s. 130 of the Act.

[28] The Act also provides a clear requirement for employers to have written employment agreements with their employees, and to retain copies of those agreements. Failure to comply renders an employer liable in an action, brought by a Labour Inspector, to a penalty imposed by the Authority<sup>1</sup>.

[29] It is a function of the Labour Inspectorate to determine whether there is compliance with the provisions of the Act, and other employment-related legislation and to take all reasonable steps to ensure compliance with that legislation<sup>2</sup>. In this instance Labour Inspector Brown identified the respondent employer's failure to comply fully with the legislation and gave ample notification, initially by talking and corresponding with the employer, and then by way of the Improvement Notice he issued, and served, on 30 October 2013.

### **Determination**

[30] I am satisfied from the evidence that the respondent has not complied with the requirements of the Improvement Notice by providing the specified documentation.

[31] Labour Inspector Brown submits this was a case in which the employer was given every opportunity to provide the information sought before the Improvement Notice was issued. While Mr Su provided limited documentation relating to 2013 and even more limited documentation relating to 2012, he failed to provide all the information required. This left Mr Brown with a real concern there was no evidence

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<sup>1</sup> Section 64 (4) of the Act

<sup>2</sup> Section 223(A) of the Act

the employment rights of Mr Su's employees were being upheld or respected. He seeks penalties at the high end of the scale.

[32] Mr Su has operated Kippers East Takeaways for more than five years and should realise it is mandatory, not optional, to comply fully with employment and holidays legislation. His compliance has been limited and inadequate, and he has made no attempt to comply with the requirements of the Improvement Notice. That is not acceptable and a penalty is warranted to make that clear to the employer, and to deter other employers from acting similarly.

[33] In the circumstances I find it appropriate to impose one penalty of \$5,000 for the respondent's failure to comply with the Improvement Notice of 30 October 2013.

### **Orders of the Authority**

[34] Weiwen Su trading as Kippers East Takeaways in Hastings is ordered to pay to the Crown a penalty of \$5,000 under s. 223F of the Employment Relations Act 2000.

### **Costs**

[35] The Labour Inspector seeks the reimbursement of the Authority's filing fee. I order Mr Su to pay costs to the applicant in the sum of \$71.56.

Trish MacKinnon  
Member of the Employment Relations Authority