

s.130 of the Act and s.81 of the Holidays Act respectively. He also seeks penalties against the respondents for their failure to produce copies of employment agreements for all employees as requested by him, pursuant to s.64(4) of the Act. Additionally Labour Inspector Brown seeks reimbursement of the filing fees of \$71.56 in respect of each of the applicants.

[3] Gautam Kapur, known as "GK", is the sole director of Positive Force 2014 Limited (Positive Force). He was the sole director of Kiwi Labour Solutions (2013) Limited (Kiwi) from 14 January to 18 April 2014. Before 14 January 2014 Mr Kapur's mother, Vijay Rajan Kapur, was the sole director of Kiwi. Mrs Kapur has been the sole director of Kiwi since 22 April 2014. She is also the sole director of OOMDA Limited.

[4] Mr Kapur represented all three respondents in the investigation meeting. He said he was his mother's representative and acknowledged that he managed the business affairs of the three respondent companies. Mr Kapur denied that any of the respondents had employed any workers at Wake's Orchards.

Service of documents and telephone conference of parties

[5] In the course of the investigation meeting Mr Kapur claimed he had not received statements of problem in respect of any of the three respondents. He further claimed he had not been given an opportunity to take part in a telephone conference convened by the Authority and had not had the opportunity of mediating the matters.

[6] The statements of problem were received from the applicant Labour Inspector in respect of Kiwi, Positive Force and OOMDA on 31 October 2014. An Authority Officer sent copies of them in one package to the registered address of Kiwi at 105 Renata Street, Frimley, Hastings, which is also the registered address of Positive Force. This address is also noted on the Companies register as the address for service of those two companies.

[7] The documents were accompanied by standard letters from the Authority Officer in respect of each respondent company, informing the respective respondents that a statement in reply was required within 14 days after receipt of the letter. The documents were addressed to the "*The Director*" and were sent by signature-required CourierPost on 5 November 2014. Confirmation was received from CourierPost on

12 November 2014 that the package had been delivered at 3.13 pm on 6 November 2014 and had been signed for by "*v kapur*".

[8] As noted above, Mrs Vijay Kapur is the sole director of OOMDA and of Kiwi. OOMDA has a different registered address and address for service from the other two respondents. However, when other documents were couriered to OOMDA's registered address in Camberley, Hastings, the occupant of the address contacted the Authority to report he had no connection with OOMDA. Those documents were returned to the Authority in their unopened envelope.

[9] Labour Inspector Brown had informed the Authority Officer that Mr Kapur was his mother's representative, and had provided a signed statement from Mr Kapur to that effect. The officer contacted Mr Kapur by email on 1 December 2014 bringing to his attention that no statements in reply had been filed in respect of the three respondents. She informed Mr Kapur that the Authority was ready to proceed with the investigation process and asked him to contact her urgently to advise if he intended to participate in the process. She noted this may include a telephone conference with the Authority.

[10] Mr Kapur responded to the Authority Officer's email on 7 December, also by email, apologising for the delay in replying which he attributed to a health issue. He referred to documents required by Labour Inspector Brown but made no mention of not having received the statements of problem. He did not file statements in reply in respect of any of the three respondents.

[11] On 10 December 2014 the Authority Officer emailed both Mr Kapur and the Labour Inspector informing them a telephone conference was to be held with the Authority on 15 December at 11.30 am for the purpose of discussing the three applications. She received no response from Mr Kapur. Nor did he answer his phone on 15 December at the time scheduled for the telephone conference. A voicemail message was left for him asking him to contact the Authority Officer urgently. He did not respond to that message.

[12] I am satisfied the statements of problem for Positive Force and Kiwi were correctly delivered to the registered address/address for service for each of those respondents. I am also satisfied that, despite that address not being the registered address or address for service of OOMDA, the statement of problem for that company

was received and signed for by Mrs Vijay Kapur. As she is the sole director of OOMDA, I consider that service was effected.

[13] Mr Kapur claims he and his parents had been living at the Frimley address which is cited as the registered address and address for service for Positive Force and Kiwi. He says they had relocated several weeks before the courier delivered documents to that address. He disputed that his mother had signed for the documents on 6 November 2014.

[14] Mrs Kapur did not give evidence and I do not accept Mr Kapur's claim not to have received any of the statements of problem. This is for two reasons. The first is that the Authority Officer had asserted in her email to him of 1 December 2014 that "*you were in receipt of the Statements of Problem on 6 November*". In his emailed response Mr Kapur did not deny receiving the documents. I find it improbable he would not have done so if he had not received them. The second reason is that the registered address and address for service for Kiwi and Positive Force (the Frimley, Hastings address) has remained unchanged in the Companies register to this day.

[15] I also reject Mr Kapur's claim to have had no opportunity to take part in the telephone conference with the Authority. As I have noted above, he had advance notification of the date and time of the telephone conference. Attempts were made to contact him but he did not answer his telephone or respond to the voice mail message left for him.

[16] In view of the failure of Mr Kapur to file statements in reply, or participate in the scheduled telephone conference, or respond to the voice mail message left for him, I decided there was little to be gained by directing the parties to mediation. I find no merit to Mr Kapur's belated claim to have been denied an opportunity to mediate the matters given his failures to be responsive as noted above.

Statutory requirements

The Act places a number of requirements on employers with respect to their employees. These include retaining copies of their signed employment agreements¹;

¹ s.64 of the Act.

keeping a wages and time record in respect of each employee²; and producing such documentation upon request by a Labour Inspector³.

[17] The Holidays Act also provides certain obligations on employers including that of keeping a holiday and leave record in respect of each employee⁴. There is an obligation to produce the record, or information from it, or allow access to it, when requested by the employee, their authorised representative, or a Labour Inspector.⁵

Background facts and evidence of the parties

[18] On 27 March 2014 Labour Inspector Brown and a small group of officials visited Wake's Orchard on the corner of Norton Road and Algernon Road, Hastings. The group included Grant Mudgway, who is also a Labour Inspector, James Ludlam from Immigration New Zealand (INZ), and Peter Carradus from Inland Revenue Department (IRD). The officials were acting on information received by INZ regarding potential illegal employees.

[19] Mr Brown gave evidence of his involvement in the orchard visit and subsequent events. He wrote up a report on his visit immediately after returning to his office. That report was included in evidence provided to the Authority.

[20] In response to questions the Labour Inspector had asked, the orchard supervisor told him there were nine workers in the orchard, eight of whom were of Chinese extraction and one a NZ European. When they were approached for questioning, five of the workers ran off and left the orchard. Mr Brown spoke with the remaining four workers, all of whom named their employer as "GK". All said they had no employment agreement and that they were paid in cash without a payslip.

[21] At Labour Inspector Brown's request the orchard supervisor contacted the orchard owner, Garry Wake, who arrived shortly afterwards and was introduced to individual members of the visiting group. Mr Wake informed the Labour Inspector that the workers at the orchard were employed through Positive Force. He identified Gautam Kapur, known as "GK", as their employer. Mr Wake said he had contracts with several companies which he directly associated with Mr Kapur.

² s.130.

³ s.229.

⁴ s. 81 Holidays Act.

⁵ s. 82 Holidays Act.

[22] Mr Wake contacted Mr Kapur who arrived at the orchard some 25 minutes later. An orchard worker identified Mr Kapur as his employer. Mr Brown questioned Mr Kapur in relation to the employees working at the orchard. Mr Brown made contemporaneous notes of his questions and the answers provided by Mr Kapur. He included these in his report on the orchard visit.

[23] Mr Brown's report notes that he asked Mr Kapur whether all his employees had employment agreements. He recorded Mr Kapur answering initially that he did not know. When questioned further, he said Mr Kapur refused to answer that question or to provide the information. He asked the Labour Inspector to write to him with his questions. Mr Brown told Mr Kapur he had the right to ask these questions and expected him to answer them truthfully.

[24] Mr Brown again asked Mr Kapur whether the workers were his employees and again Mr Kapur told him he did not know and refused to answer. Mr Kapur, whom Mr Brown's report describes as being "*quite anxious*" added that he was unwell and having difficulty remembering. The Labour Inspector's report notes he warned Mr Kapur he was obstructing a Labour Inspector carrying out his lawful duties by refusing to answer legitimate questions.

[25] Labour Inspector Brown recorded in his report that, when he showed Mr Kapur documentation provided to him by Mr Wake relating to Mr Kapur's employees, Mr Kapur became "*more agitated*". The report notes that Mr Kapur informed Mr Brown that his business, Positive Force, held the contract for Wake's Orchard. He did not deny he had a contract with Mr Wake and that he had employees working for Positive Force, but he refused to acknowledge or name any employees to the Inspector.

[26] Mr Kapur gave evidence to the Authority that he was not forthcoming to the Labour Inspector at that time because Mr Wake did not know he had engaged a subcontractor to supply labour. He said "*it was a secret*" and he did not wish to disclose it in front of Mr Wake. Mr Kapur acknowledged the contract between Wake's and Positive Force clearly envisaged, by the language it used, an employment relationship between Positive Force and the workers it supplied for orchard duties. These obligations related to the health and safety of the employees and to terms and conditions in regard to the movement of employees from one orchard to another.

[27] Labour Inspector Brown provided evidence that on 9 April 2014 he wrote separate letters to the directors of Kiwi, OOMDA and Positive Force informing them that the Ministry of Business, Innovation and Employment (MBIE) intended to investigate the three companies' respective compliance with relevant employment standards legislation. Mr Brown stated his opinion in the letters that each company had been employing workers, in particular in relation to contracts with Wake's Fruit Company Limited.

[28] The Labour Inspector referred to contracts he had sighted between each of the respondents and Wake's, together with invoices he had sighted that each respondent company had submitted to Wake's for payment of work completed. Mr Brown informed each of the respondent companies he required names of their employees; copies of those employees' signed employment agreements; copies of all their time and wage records; and copies of all their holidays and special leave records. Those documents were required no later than 4.30pm Wednesday 30 April 2014.

[29] When he received no response to his letters, Mr Brown wrote to the three respondent companies again, by letter dated 5 May 2014, noting the lack of response and extending the deadline for receipt of the documents to 4pm on 12 May 2014. He noted that failure to provide the requested information by that date would leave him with no other option than to commence enforcement action in the Employment Relations Authority. That action could include penalties and interest on any money owed.

[30] Mr Kapur responded by email of 12 May 2014 in respect of Kiwi and Positive Force. He noted he could only speak for himself with regard to Kiwi, specifically for the period when he was the sole director and sole shareholder of the business, which he cited as being since 14 January 2014. He was also speaking for Positive Force.

[31] Mr Kapur stated in his email that Kiwi had had no employees on its payroll since 14 January 2014. He said a company, which he did not name, was sub-contracted for the supply of labour. Mr Kapur said he was the only person employed by Positive Force and that a company, again unnamed, was used for the supply of labour. He cited the Privacy Act as reason for not supplying the name of the sub-contractor.

[32] Labour Inspector Brown subsequently formally requested from Mr Kapur the names and contact details of any sub-contractors engaged by Kiwi and by Positive Force to supply labour to Wake's. Despite further correspondence and requests from Mr Brown, no information was received until 25 August 2014. On that date Mr Kapur attended a formal interview with Labour Inspectors Brown and Mudgway. Mr Mudgway took notes of the questions and answers at the meeting. A tape recording of the interview was also made and a copy supplied to Mr Kapur.

[33] In the course of the interview, for which the Labour Inspector provided notes to the Authority, Mr Kapur stated that none of the respondent businesses had had employees since 2008. He said he sub-contracted out work and gave the name of a company called *The Contractors Limited*.

[34] He told the Labour Inspectors he used that company for supplying labour to Wake's for Kiwi, Positive Force and OOMDA. Mr Kapur said there was a series of people working as contractors and gave the Labour Inspectors the name of *Dong*. He could not remember Dong's full name but said he would send details to Labour Inspector Brown when he got back to his office.

[35] Mr Kapur told the Labour Inspector he had a written legal binding contract with the sub-contractors. He stated he paid the sub-contractors by cash and gave the money personally to Dong and others whose names he could not remember. He said he was not aware of how Dong paid his employees. He paid Dong and other contractors either at his house or on the orchard blocks.

[36] Mr Kapur said he had copies of invoices that had been submitted by the sub-contractors. He also said that Wake's Orchard was not aware that sub-contractors were being employed.

[37] Mr Brown followed up the interview by email on 26 August 2014 noting Mr Kapur's agreement to provide him with information regarding the sub-contractors he had contracted to work for the respondent companies at Wake's Orchards. Mr Brown listed the information he required regarding those sub-contractors and the contracts they had signed with the respondent companies.

[38] A further interview with Mr Kapur was held on 29 August 2014 with Labour Inspectors Brown and Mudgway in attendance as well as Mr Ludlam from Immigration New Zealand. In answer to Mr Brown's question whether Mr Kapur had

brought all the information he had agreed to provide, Mr Kapur produced a single document purporting to be an agreement between Positive Force and The Contractors Limited dated 20 March 2014 and valid until 31 March 2015.

[39] The document set out a list of duties and responsibilities to be completed by The Contractors Limited with a hand written *list of agreed activities and tasks to be undertaken on instructions from "the employer" by the "contractor"*. These were:

1. *To keep all documents in line with the MBIE requirements;*
2. *To do the job assigned correctly.*

[40] The contract contained an indecipherable signature, which had been scribbled over, and a signature identified by Mr Kapur as his own in the space for the *"employer to sign"*. The document was signed by a Lee Zhang as the *"contractor"*.

[41] Mr Kapur also produced some invoices for Positive Force to Wake's Fruit Company. He said he had forgotten to bring invoices for Kiwi. Asked for full details of the sub-contractors' addresses and contact details, Mr Kapur said he only ever used The Contractors Limited for Kiwi, Positive Force, OOMDA and his other companies. When asked why he had only supplied a contract for Positive Force, Mr Kapur said he thought he only had to give the one he had already produced.

[42] Mr Brown showed Mr Kapur a copy of his email of 26 August 2014, and again asked why he had not supplied all the information that he acknowledged he would supply. Mr Kapur's response was that he *"just forgot"*. During the interview Labour Inspector Brown asked Mr Kapur about *"Dong"* whom Mr Kapur had identified during the 25 August 2014 interview as the employer of the Wake's workers.

[43] Mr Brown showed Mr Kapur a photograph of a Qingtao Dong. Mr Kapur identified the person in the photograph as Dong but then changed his mind and said that Dong was not the employer : he was an employee at Wake's Orchard. Mr Kapur said the real employer was Lee Zhang as per the written contract with Positive Force that he had provided. Mr Kapur also provided a cell phone number for Mr Zhang.

[44] Mr Brown gave evidence of his subsequent inquiries which established that Qingtao Dong had left New Zealand on 3 July 2013, approximately seven months before the Labour Inspector's visit to the Wake's Orchard on Norton Road. His

inquiries also showed that the cell phone number provided by Mr Kapur was neither current nor active.

[45] His search of the Companies register revealed that The Contractors Limited last filed an annual return on 7 November 2012 and that there was a note to the effect action had been initiated by the Registrar to remove the company from the register.

[46] Evidence was given to the Authority under summons by Mr Wei Sun, on the application of Labour Inspector Brown. Mr Sun also submitted a signed statement to the Authority. He said he had been employed by Mr Kapur, whom he referred to as GK, over the last 6 or 7 apple picking seasons. He had worked for GK in 2014 as a supervisor at Wake's orchard. He said GK employed a lot of Chinese workers and that, as well as picking fruit, he acted as an interpreter when required. For this he received a bonus over and above the rate he was paid per bin of picked fruit.

[47] Mr Sun said he was always happy to work for GK and he had always been an employee during the periods when he worked for him. In his written evidence Mr Sun said he had never been offered an employment agreement by GK. In his oral evidence he said that latterly he had been offered a contract but it was not at the beginning of the 2014 season. I note it was Mr Kapur's evidence he had signed a contract with Mr Sun in May or June 2014. Mr Sun did not know the name of the company that employed him but confirmed that it was GK who employed him and that he was not engaged to work under a subcontractor.

[48] He said he was always paid in cash by either GK or GK's father and he never received payslips. He said his holiday pay was included in the pay he received per bin of apples. Mr Sun said this was common in orchard work in his experience. He said tax would be deducted from his wages before he received them.

[49] Mr Sun confirmed in his written evidence that GK asked him to be the supervisor of the other eight workers, whom he named, who picked fruit at Wake's from March 2014. He also confirmed that, to his knowledge, all the people he supervised were employees of GK and they were not engaged to work under any subcontractor. In oral evidence he said he did not know who employed the other workers at the orchard but that GK, or GK's father, would give him cash to hand out to those workers. There were never any payslips for them.

[50] Mr Kapur had the opportunity, as representative of the three respondents, to ask questions of Mr Wei Sun but elected not to. He said he agreed with the evidence given by Mr Sun. However, when Mr Kapur gave evidence on behalf of the three respondent companies, he said Mr Wei Sun was his only employee and the other orchard workers were employed by his subcontractor. He said Dong had been the supervisor for the subcontractor OOMDA had engaged in 2013. During his interview with the Labour Inspectorate in August 2014 he changed his mind and said Lee Zhang had replaced Dong as supervisor.

[51] Mr Wake also gave evidence under summons at the investigation meeting as well as submitting a written statement. Mr Wake said he had contracted four businesses to provide labour to his company. The companies he named were the three respondents and a fourth company, Kiwi Fruit Exports Limited, which has since been struck off the Companies register. Vijay Kapur was the sole director for that company. Mr Wake said that Mr Kapur was the person he dealt with directly in relation to the four companies. He also said Mr Kapur had advised him he acted on behalf of all four companies.

[52] It was Mr Wake's evidence that he negotiated all contractual obligations, and maintained communication, with Mr Kapur during the contract period. He had received invoices for services from each of the companies during the respective contract periods and had paid each company on the rendered invoices.

[53] Mr Wake provided details of the dates he had contracts with each of the three respondent companies to provide services as follows:

- | | |
|---------------------|--------------------------|
| i. OOMDA | 20/11/2012 to 19/11/2013 |
| ii. Kiwi | 20/04/2013 to 31/03/2014 |
| iii. Positive Force | 01/04/2014 to 15/08/2014 |

[54] He said that as part of the contract agreement the contractor was required to notify him of the number and names of employees on site on a daily basis. Mr Wake said he was not informed of any subcontractors supplying labour for the contractor of any of the four companies he had contracted on any of the designated Wake's orchards. In oral evidence Mr Wake said he had never heard of The Contractors Limited.

{55} Mr Wake provided Labour Inspector Brown with copies of the contracts between Wake's and each of the three respondents for various contract periods. The dates for those contracts match the dates given by Mr Wake above. Mr Brown noted that Mr Wake had signed the Kiwi contract on 2 April 2013 but Mr Kapur had signed it as "*General Manager*" on 1 April 2014.

{56} Both Mr Wake and Mr Kapur had signed the contract between Wake's and Positive Force on 1 April 2014, while the OOMDA contract had been signed by both parties on 6 December 2012.

{57} Invoices from each company to Wake's were also supplied to the Labour Inspector by Mr Wake and included in evidence provided to the Authority.

{58} For OOMDA, four invoices were produced by the Labour Inspector, the first of which was dated 2 April 2013 and the last of which was dated 22 April 2013. The total amount of the four invoices was in excess of \$47,000 (including GST).

{59} Labour Inspector Brown produced two invoices from Positive Force, the first of which was dated 21 March 2014 and the second dated 1 April 2014. The total amount of the invoices was in excess of \$21,000 (including GST).

{60} He produced fifteen invoices in respect of Kiwi, the first of which was dated 6 May 2013 and the last of which was dated 3 March 2014. The total amount invoiced over that period was in excess of \$68,000 (including GST).

{61} Records listing "*Picking Wages*" accompanied many of the invoices. These recorded the names of the persons who had picked fruit, the block, numbers of bins picked by each person and the price per bin.

Discussion

{62} Labour Inspector Brown presented his evidence in a consistent and considered manner. He presented the facts methodically without embellishing or dissembling.

{63} In contrast I found Mr Kapur's evidence to be inconsistent and unreliable. Although being identified by an orchard worker as his employer on 27 March 2014, and being identified by name as their employer by three other orchard workers, he refused to confirm that he had employed them. He said at the time he could not remember whether they were employees. At the investigation meeting he denied

employing anyone other than Wei Sun. I find his denials, memory loss and explanations implausible. I do not accept the account he gave in the investigation meeting that he did not wish to divulge the "*secret*" that he had engaged a sub-contractor to supply labour.

[64] I would have been more inclined to give Mr Kapur the benefit of the doubt had that been the only instance in which his credibility was in question. It was not. Another instance was Mr Kapur telling Labour Inspector Brown in his email of 12 May that the only individual employed by Positive Force was himself. Mr Kapur proved that wrong by his own evidence in the investigation meeting when he acknowledged he had employed Mr Wei Sun to act as supervisor at a Wake's orchard for the 2014 fruit picking season.

[65] I do not have confidence in the authenticity of the purported contract between Positive Force ("*the employer*") and The Contractors Limited ("*the contractor*"). This is partly because the document does not describe what work the contractor is to undertake, or give any indication of the nature of that work. That, combined with the scribbling over of the original signature to render it indecipherable and its replacement by Mr Kapur's signature lead me disregard it as a genuine contract between the parties.

[66] It is also significant that it was not until some six weeks after the Labour Inspector's orchard visit that Mr Kapur informed Labour Brown Positive Force had subcontracted labour for Wake's. It was five months after the orchard visit that Mr Kapur produced the document. I find it more likely to be a document made, or adapted, after the event to support Mr Kapur's claim that Positive Force was not the employer of orchard workers. Mr Kapur claimed to have a similar contract in place between Kiwi and "The Contractors Limited". He provided no evidence of that contract to the Labour Inspector despite being asked to do so verbally and in writing, and undertaking to do so.

Findings

[67] I am satisfied from the evidence that Positive Force was the employer of orchard workers at Wake's orchard from March 2014 to August 2014. I am also satisfied that Positive Force has failed to produce wage and time, holiday and leave records requested by Labour Inspector Brown. Additionally, Positive Force has failed

to supply employment agreements for its workers other than, belatedly for Mr Wei Sun.

[68] In respect of OOMDA, I am satisfied from the evidence that it employed workers to provide labour for Wake's at least during April 2013.

[69] In respect of Kiwi I am satisfied from the evidence that it employed workers to provide labour for Wake's from 6 May 2013 to 3 March 2014.

[70] I am also satisfied in respect of both OOMDA and Kiwi that they failed to provide employment agreements for their employees or to produce the wage and time, holiday and leave records requested by Labour Inspector Brown.

Penalties

[71] Mr Gimblett, in his submissions on behalf of Labour Inspector Brown, asked that a global penalty, at the higher end of the range, be awarded in respect of each respondent company. Mr Kapur submitted that all workers had been paid wages in excess of the minimum wage, that he had supplied information to the Labour Inspector as best he could, and that he was the target of a malicious investigation by the applicant.

[72] I have found the respondents to have been the employers of workers and to have failed in their statutory obligations to provide employment agreements, wage and time, and holiday and leave records to the Labour Inspector upon request.

[73] The failures are a serious breach of the employers' duties to abide by relevant employment and holidays legislation. I find it appropriate to award penalties against each of the respondent companies for these breaches.

Determination

[74] I make the following orders for failure to produce employment agreements, wage and time, and holiday and leave records to the applicant Labour Inspector:

- a. OOMDA Limited is to pay a penalty of \$7,500 to the Crown.
- b. Kiwi Labour Solutions (2013) Limited is to pay a penalty of \$7,500 to the Crown.

- c. Positive Force 2014 Limited is to pay a penalty of \$7,500 to the Crown.

Costs

[75] The applicant Labour Inspector seeks reimbursement of the filing fee in respect of each of the proceedings filed against the three respondents. I order each of the three respondents respectively to pay the sum of \$71.56 in costs to the applicant in reimbursement of the respective filing fees.

Trish MacKinnon
Member of the Employment Relations Authority