

[4] In the business week immediately preceding the investigation meeting, the accountant who acts for NZX3 (Mr Susheel Dutt) advised the Authority that he had just been instructed to deal with the matter by his client and he required for the matter to be adjourned. I declined that request; I am satisfied that NZX3 has had ample opportunity to engage and has simply not prioritised the matter as it should have. This file was opened in the Authority on 16 March 2015 and as a consequence, is already more than three months old. Any adjournment would simply extend that time unreasonably.

[5] Because of the personal service of the notice of hearing on NZX3 and the engagement of Mr Dutt and his demand that the Authority's investigation meeting be adjourned, I am persuaded that NZX3 knew perfectly well when the Authority's investigation meeting was to take place.

[6] At the appointed time for the investigation meeting to commence, Mr Norton was present with his counsel, but there was no attendance by NZX3. I waited fully 20 minutes past the appointed start time to see if NZX3 would attend; they did not.

[7] I am satisfied that NZX3 knew full well that the investigation meeting was taking place on the date and time appointed, but simply chose not to attend. I am satisfied that it would be an affront to justice for the matter to be further delayed and accordingly I commenced the investigation meeting by taking Mr Norton's evidence and then considering the submissions that were helpfully provided by counsel in respect to the question of penalty.

[8] NZX3 is a vineyard labour contracting business in Marlborough which hires seasonal workers to provide labour to winegrowers and typically provides a supervisor and the labour required to attend to the particular job.

[9] On 22 July 2014, the Inspector met a director of NZX3, Mr George Tiueti, in a vineyard in the Awatere Valley. The two men had a conversation about whether NZX3 needed to pay the statutory minimum wage when workers were working on a piece-rate basis; Mr Norton confirmed that was the law and that wage and time records were also required to be kept. Mr Norton also provided Mr Tiueti with information about the trial period.

[10] On 11 August 2014, an employee of NZX3 contacted the Ministry of Business Innovation and Employment to complain that he had been employed for two months but was not receiving the minimum wage.

[11] On 12 August 2014, Mr Norton visited a vineyard just outside Blenheim, met six employees of NZX3 at that vineyard and subsequently established that four of those employees had not been provided with employment agreements, one employee complained that his hours of work were not being properly recorded, one complained that he had not been paid and one claimed to be a sickness beneficiary whose wages were being paid to his stepson who was also an employee of NZX3.

[12] Mr Norton also interviewed Jaswinder Paul who, on inquiry, satisfied Mr Norton that he was in fact a supervisor for NZX3. Mr Norton gave evidence of the curious way in which Mr Paul was being paid for his work.

[13] Later the same day, Mr Norton spoke to the director of NZX3, Mr Tiueti and told him what he had discovered. Mr Norton indicated to Mr Tiueti that an Improvement Notice would be served on NZX3. Mr Tiueti told Mr Norton that he had followed up on Mr Paul's allegations about how he was being paid and that Mr Paul had told Mr Tiueti that there were no problems with the employees.

[14] On 26 August 2014 Mr Norton delivered a written request for records to the registered office of NZX3 and there were attempts (unsuccessful) to contact Mr Tiueti on two occasions between that date and the delivery of the Improvement Notice dated 16 December 2014.

[15] The Improvement Notice specifies breaches of s.65 of the Employment Relations Act 2000 (the Act) for failing to provide employees with a written employment agreement, s.130 of the Act for failing to keep time and wage records, and s.6 of the Minimum Wage Act for failing to provide all employees with a minimum wage.

[16] There was no response to the Improvement Notice from NZX3 and no contact was made by NZX3 to the Labour Inspector up until the notice of the investigation meeting was served by Mr Norton on NZX3 on 8 May 2015.

[17] Since that day, as I have noted, in the week immediately preceding the Authority's investigation meeting, Mr Dutt for NZX3 has sought to have the investigation meeting adjourned. That request has been refused.

[18] Having had Mr Norton confirm his detailed brief of evidence by affirmation and having had the benefit of discussing his evidence with him at the investigation meeting, I invited counsel for Mr Norton to address me on the quantum of penalty which I was also able to discuss, helpfully, with counsel.

[19] I then issued an oral determination in the matter.

Determination

[20] I have been persuaded on the evidence I heard from Mr Norton that it is appropriate that the Authority issue a compliance order under s.137 of the Act requiring compliance with all the elements of the Improvement Notice issued on 16 December 2014.

[21] Moreover, I am satisfied that NZX3 ought to pay a penalty for its failure to comply with the Improvement Notice issued under s.223D of the Act. As Judge Inglis said in *Tan v. Yang and Zhang* [2014] 2 ERNZ 448 at [35]

*The purpose of a penalty is not to compensate a party for a breach.
Rather it is to punish and deter others from engaging in such conduct.*

[22] The point Mr Norton made to me during the investigation hearing is well made; it is important that employers understand they have obligations to their workforce and that the appropriate payment regime for their employees, when set by statute, is not capable of being abrogated or negotiated around. There are minimum standards in employment relationships which are set by statute and which require to be observed and failure to observe them will result in penalties.

[23] In *Tan*, Judge Inglis set out the matters the Authority ought to consider in reviewing an application for penalties and determining the quantum of any penalty. Using the schema of the judgement, I consider the issues identified now.

[24] I am satisfied that the breaches identified in the Improvement Notice are serious breaches. Without a proper businesslike regime of providing employment agreements to employees and maintaining adequate wage and time records in

accordance with the law, it will be more difficult for employees to satisfy themselves that they are being paid in accordance with the legal requirements and for regulators such as Mr Norton to verify claims made by workers that they have been underpaid. Moreover, the failure to pay the statutory minimum wage impacts directly on the ability of workers to receive their legal entitlement.

[25] Not only are the matters identified in the Improvement Notice serious in themselves, but the complete failure of NZX3 to respond in any way to the issue of the Improvement Notice, let alone remedy the defaults identified in the Improvement Notice left the Inspector with no alternative but to bring this application before the Authority. I am satisfied the breach is serious.

[26] While the breach is “a one off”, it is, I am satisfied, analogous to a repeated breach because the employer knew, or ought to have known, that the matter was on foot because of the extensive contacts made between Mr Norton and NZX3 in the run-up to the issue of the Improvement Notice.

[27] While it cannot be said that the failure to comply with an Improvement Notice directly impacts employees, it is nonetheless the position that breaches of the sort identified in the Improvement Notice are precisely the impacts on employees which the various statutes in play seek to mitigate.

[28] Because many workers affected in this matter are low paid and/or transient, any default in the provision of their legal minima has significant impacts.

[29] It is apparent that there is a need for deterrence. Improvement notices are part of the Labour Inspectorate’s tool kit in addressing compliance with the employment statutes and it is completely unacceptable that statutory officers such as Labour Inspectors have their efforts in support of vulnerable workers ignored by those employers responsible for the offending breaches.

[30] Moreover, as counsel pointed out in her submission, the failure by NZX3 to provide wage and time records makes calculation of Minimum Wage Act entitlements impossible and thus effectively perpetuates a continuing breach.

[31] Finally, there is no evidence of remorse by NZX3; indeed, the employer ceased all contact with the Labour Inspector once an Improvement Notice was in

prospect and once the Authority's proceedings were on foot, NZX3 failed to engage in the Authority's investigation in any way.

[32] The statutory maximum for a limited liability company is now \$20,000. I have carefully studied the recent decisions of the Authority and as a consequence, I conclude that a penalty of \$6,500 is appropriate in the present case.

[33] I order that such a penalty be paid by NZX3 to the Authority (for transfer to the Crown account) for failing to comply with the Improvement Notice issued under s.223D of the Act.

[34] Finally, I direct that NZX3 is to pay to the Labour Inspector reimbursement of the Authority filing fee in the sum of \$71.56.

[35] The orders I have made in this determination are to be satisfied within 14 days of the date of this determination.

James Crichton
Member of the Employment Relations Authority