

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 10
5459385

BETWEEN INGRID KIM (LABOUR
INSPECTOR)
Applicant

A N D HURUNUI HOTEL (2004)
LIMITED trading as HURUNUI
HOTEL
Respondent

Member of Authority: Helen Doyle

Submissions received: 16 January 2015 on behalf of the Applicant

Determination: On the papers

Date of Determination: 29 January 2015

DETERMINATION OF THE AUTHORITY (No.2)

A. The Authority does not have jurisdiction to award a penalty in this case.

Employment Relationship Problem

[1] In my determination dated 18 December 2014,¹ I ordered that the Hurunui Hotel (2004) Limited trading as Hurunui Hotel comply with orders made in the consent determination of the Authority dated 22 July 2014.² The consent orders made in the determination were for payment of holiday pay and a filing fee. Payment of these amounts was never made by the Hurunui Hotel. A compliance order was then

¹ [2014] NZERA Christchurch 214

² [2014] NZERA Christchurch 109

made by the Authority for payment of both amounts together with interest on the holiday pay amount by 5 January 2015 and reimbursement of the further filing fee.

[2] The Labour Inspector, Ingrid Kim, claimed a penalty in the application seeking compliance. The issue of penalty was adjourned by the Authority in its 18 December 2014 determination to give the Hurunui Hotel an opportunity to comply with the orders made by the Authority by 5 January 2015.

[3] Paragraph [14] of the determination provided as follows:

There is some doubt as to whether a penalty is payable when there has been a failure to comply with a determination of the Authority. Ms Kim took a pragmatic approach and agreed that the best approach is to adjourn the issue of penalty to enable the compliance order to be complied with by the Hurunui Hotel under s.138(5) of the Act. If there is compliance by the time ordered then there will be no penalty issue to consider.

[4] Ms Kim advised the Authority that there has been no compliance as ordered by 5 January 2015 and she now wants the Authority to consider the issue of penalty.

[5] On 9 January 2015 I issued a Minute in which, amongst other matters, I gave the parties ten days from 9 January 2015 to make any submissions about penalties. I stated that the Authority would need to determine whether it has power to award a penalty where there was a failure to comply with an Authority determination and, if it does, whether there should be a penalty awarded.

[6] I am satisfied that the Minute was emailed to the sole director of Hurunui Hotel, Travis Cooper, and posted to the Hurunui Hotel at its address for service which is the same as its registered office, on 9 January 2015. There has been no submission received or any other communication from the Hurunui Hotel or Mr Cooper.

[7] Submissions have been received from Ms Kim.

Submissions from applicant

[8] Ms Kim submits that the Labour Inspector is seeking penalties for a breach of s.223F of the Employment Relations Act 2000 (the Act). Section 223F provides for a penalty where there has been a failure to comply with an Improvement Notice issued under s.223D of the Act.

[9] Ms Kim submits that the applicant issued an Improvement Notice after taking a number of earlier steps to try to achieve compliance with payment of the holiday pay. At an investigation meeting held on 22 July 2014 Mr Cooper attended on behalf of Hurunui Hotel and agreed to pay holiday pay. This agreement was formalised by the Authority member in the consent determination dated 22 July 2014.

[10] Following that determination there was non-compliance notwithstanding reminders sent to Hurunui Hotel on a number of occasions by the Labour Inspector.

[11] Ms Kim submits that Hurunui Hotel has failed to comply after a compliance order was made in the determination dated 18 December 2014 and that there should be a penalty awarded as Hurunui Hotel has shown disrespect by entering into negotiations taken in good faith but not complying with an agreement which was entered into and recorded by way of consent determination by the Authority. This in turn has deprived the employee of her holiday pay and that a strong deterrent is needed to send a message that non-compliance with minimum standards is serious.

Jurisdiction of the Authority to deal with penalties

[12] It is very unsatisfactory that Mr Cooper on behalf of Hurunui Hotel agreed to make payments to his employee of holiday pay with Ms Kim but the payments were not made. It is then even more remarkable and unsatisfactory that orders for compliance made by the Authority in December 2014 were further not complied with by the required date of 5 January 2015.

[13] As Ms Kim has indicated in her submission non-compliance with minimum standards is serious and breaches of the minimum standards should not be tolerated. As noted in my determination of 18 December 2014 the Employment Court has jurisdiction where there is further non-compliance with Authority orders to order a prison term up to three months or a fine up to \$40,000.

[14] The Authority in this matter however is concerned solely with the issue as to whether it has the power to award a penalty and if so whether it should.

[15] Section 133 of the Act provides that the Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under the Act for any breaches of an employment agreement or a breach of any provision of the Act for which a penalty is provided in the particular provision.

[16] As Ms Kim submits an employer who fails to comply with an Improvement Notice is liable under the Act for a penalty under s.223F of the Act.

[17] In this case the Labour Inspector initially set out in the statement of problem that the Hurunui Hotel had failed to comply with an Improvement Notice for payment of holiday pay. The employment relationship problem was then the subject of an investigation meeting and consent orders in a determination dated 22 July 2014.

[18] The employment relationship problem about the Improvement Notice was clearly determined and orders made in this case by consent. I do not find that I can look behind that determination to the events that gave rise to it, the failure to comply with an Improvement Notice, and consider an action for the recovery of a penalty on that basis. Equally had the determination of 22 July 2014 dealt with the issue of penalty and there had been non-compliance the Authority would not have had the jurisdiction to award another penalty.

[19] The jurisdiction of the Authority to award a penalty must therefore be focused on the failure to comply with the determination of the Authority dated 22 July 2014.

[20] I am not satisfied that under the Act that the Authority has the power or jurisdiction to award a penalty in this case. I cannot therefore award a penalty.

Helen Doyle
Member of the Employment Relations Authority