

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 78
5619114

BETWEEN A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Applicant

AND MD DARA MIAH
 HORTICULTURE LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Chris Mathieson, Counsel for Applicant
 Peter Austin, Counsel for Respondent

Investigation Meeting: 7 July 2016 at Hastings

Submissions Received: 7 July orally and in writing from the Applicant
 7 July orally and in writing from the Respondent

Written Record of Oral
Determination: 8 July 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment (a Labour Inspector) claims penalties against the respondent, MD Dara Miah Horticulture Limited, for failing to keep/ produce individual employment agreements for its employees as required by s.65 of the Employment Relations Act 2000 (the Act); failure to keep/ produce individual time and wage records as required by s.229

of the Act and s.8A of the Minimum Wage Act 1983¹, and failure to keep/produce holiday/leave records as required by s.81 of the Holidays Act.

[2] MD Dara Miah Horticulture Limited (the company) is a duly registered company that has operated a horticultural contracting business in Hastings since February 2014. The company accepts the breaches alleged by the Labour Inspector but says it has remedied all of those matters. It acknowledges its records were insufficient at the time of the Labour Inspector's audit and says it now has systems in place to meet its statutory obligations.

Background

[3] The Labour Inspector initially visited MD Dara Miah Horticulture Limited on 2 December 2015 as part of a regional audit programme. The visit was preceded by a letter sent on 27 November 2015 by the Labour Inspector advising the company of an upcoming audit on its business employment recording practices.

[4] At the time of the audit, the company employed 15 workers whom it described as casual employees. They did not have employment agreements. The company was unable to provide the Labour Inspector wage and time records for its employees. It did produce records it had kept of gross pay received by each employee and the amount of tax paid. No record had been kept of holiday pay and special leave payments.

[5] Following the audit, the company engaged professional assistance to help it meet its statutory obligations.

Evidence

[6] Evidence was provided to the Authority by Labour Inspector Roderick Brown and by Mr Mohammed Dara Miah, the sole director of the company.

[7] Mr Brown is a Labour Inspector designated under s.223 of the Act. Labour Inspectors' functions include determining whether the provisions of relevant employment legislation have been complied with and taking steps to ensure that employers do comply with those provisions. They are also charged with monitoring and enforcing compliance with employment standards.

¹ Repealed but applicable under transitional provisions of Schedule 1AA

[8] In this instance, the Labour Inspector rightly identified a failure on the part of the company to comply with the provisions of the Act, the Minimum Wage Act and the Holidays Act. The Labour Inspector says the company's failure to maintain these records made it impossible to know whether the 15 employees were receiving their minimum entitlements under that legislation. He views the company's breaches as being both serious and sustained non-compliance with minimum standards legislation.

[9] The Labour Inspector acknowledges the company fully cooperated with the audit which he says selected the company at random from a number of horticulture operators in Hawke's Bay. He confirms Mr Miah was friendly and courteous and answered all questions put to him by the Labour Inspectorate. Mr Miah took responsibility for the deficiencies in his recordkeeping once they were highlighted to him.

[10] Mr Miah's evidence is that he is remorseful for his company's failure to keep proper records and he had been unaware of his obligations as an employer. Once made aware, he says he rectified the inadequacies to the best of his abilities.

[11] The company has provided examples of its new employment agreements and other current documentation. It actively seeks a further visit from the Labour Inspectorate to confirm its records and employment agreements are now compliant with the relevant legislation.

Discussion and submissions

[12] In *Xu v. McIntosh*² the Court held that a penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all breaches will result in the imposition of a penalty and, as was noted by the then Chief Judge in *Xu*, the first question should be how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.³

[13] In this instance, the company operated for approximately 20 months without recordkeeping that complied with legislative requirements although evidence from Mr Miah suggests the seasonal nature of the business resulted in the company having employees for only six to eight months of that time.

² [2004] 2 ERNZ 448

³ n2 at 464

[14] I agree with the Labour Inspector that this constituted serious and sustained breaches for which a penalty is appropriate. In assessing the quantum of that penalty, I have considered and applied the factors set out by the Court in *Tan v. Yang & Xhang*⁴:

- (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.

[15] Counsel for the Labour Inspector submits that the serious and sustained breaches of three categories of breach merit penalties of \$6,000 per category or one global penalty of \$18,000. Counsel notes Mr Miah had the ability to access professional advice but failed to do so until audited by the Labour Inspectorate. The impact on employees was unable to be ascertained due to an absence of records. Evidence suggests most of the employees were long term New Zealand residents or citizens and the issue of their vulnerability was not pursued as a pertinent factor.

[16] The need for deterrence was highlighted as a strong factor in seeking a penalty or penalties, with counsel for the Labour Inspector suggesting the penalty needed to send a strong message of denunciation and deterrence, both to the respondent company and to other employers who may not be complying with their obligations under employment standards and who therefore derive an unfair advantage over those who do comply.

[17] Counsel acknowledges the remorse expressed by Mr Miah and his timely efforts to achieve compliance.

[18] Counsel for the company submits that, if a penalty were to be imposed, it should be moderate and take into account the company's cooperation and the alacrity with which it put employment documentation in place to comply with the legislative requirements.

⁴ [2014] NZEmpC 65 at [32]

[19] With regard to the need for deterrence, counsel suggests a public policy argument could be made that an employer who cooperates fully and accepts responsibility as Mr Miah did should not be burdened with an oppressive penalty.

Determination

[20] Having considered all these matters and the submissions of counsel for the parties, I have concluded that an appropriate penalty in this instance is \$6,000.

[21] MD Dara Miah Horticulture Limited is accordingly ordered to pay \$6,000 to the Crown Account.

Costs

[22] The Labour Inspector seeks the reimbursement of the Authority filing fee of \$71.56. He also seeks costs on a pro rata basis of \$3,500 per day which is the Authority's current daily tariff. Expenses of counsel travelling from Wellington to Hastings plus one night's accommodation totalling \$495.86 is also sought.

[23] I am not persuaded it is appropriate to award costs on the basis of the daily tariff to in-house counsel employed by MBIE. I do find it appropriate to award his travel expenses, however, and the reimbursement of the Authority's filing fee.

[24] MD Dara Miah Horticulture Limited is accordingly ordered to pay \$495.86 for travel and accommodation expenses incurred by counsel for the Labour Inspector and \$71.56 being the filing fee.

Trish MacKinnon
Member of the Employment Relations Authority