

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 113
5613660

BETWEEN LABOUR INSPECTOR,
 SUMMER LIU
 Applicant

A N D KEN YAKITORI HOWICK
 (2004) LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Annabelle Skadiang, Counsel for the Applicant
 Gary Pollak, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 30 March 2016 from Applicant
 08 April 2016 from Respondent

Date of Determination: 13 April 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] As a result of the Labour Inspector's inquiries, Ken Yakitori Howick (2004) Limited (Ken Yakatori) has admitted breaching –

- (a) s.65(4) of the Employment Relations Act 2000 (the Act) by failing to provide all employees with written individual employment agreements;
- (b) s.75(2)(e) of the Holidays Act 2003 (HA03) by failing to keep holiday and leave records for three employees;
- (c) s.75(2)(a) HA03 by failing to pay two employees holiday pay;

- (d) s.10 of the Minimum Wage Act 1983 (MWA) by failing to pay three casual employees minimum wage rates;
- (e) s.10 MWA for failing to keep wage and time records for three casual employees.

[2] The employees who are the subject of these breaches are Wengi Fan, Grace Li and Richard (surname unknown) (referred to as the named employees) who were all casual employees of Ken Yakitori. Two of these employees no longer work for Ken Yakitori.

[3] The Labour Inspector seeks that penalties be imposed on a global basis on Ken Yakitori for all of its breaches of the minimum employment legislation. Each breach is subject to a penalty not exceeding \$20,000 and the Labour Inspector has identified that the breaches fall into four categories:

- (a) failure to provide wage and time records;
- (b) failure to keep holiday and leave records;
- (c) failure to have written employment agreements; and
- (d) failure to pay minimum wages.

[4] The Labour Inspector acknowledges that Ken Yakitori paid the named employees the amounts outstanding once the breaches had been brought to its attention.

[5] Ken Yakitori acknowledges its breaches but says that no penalties should be imposed because the imposition of a penalty is out of proportion with the offending due to the Respondent's director, Mr Won Hong Jo, being an immigrant to New Zealand who apparently has "*very limited English skills*".

[6] Ken Yakitori's position is that it misplaced some records, but that some records were kept (which have been produced to the Authority). It submits that its failure to meet its employment law obligations is only a partial failure.

[7] Ken Yakitori acknowledges that for its casual employees it did not have written employment agreements and it underpaid some of these casual employees their wages and holiday pay.

The issues

[8] The following issues are to be determined by the Authority:

- (a) Should penalties be imposed for Ken Yakatori's breaches of employment legislation?
- (b) If so, what level of penalty should be imposed?
- (c) If a penalty is imposed should an instalment order also be made?
- (d) What, if any, costs should be awarded?

Should a penalty be imposed?

[9] The Labour Inspector submits that this is a matter in which the Authority should "*impose meaningful penalties*", and that a global approach to quantification of penalties under the four separate headings (failure to provide wage and time records; failure to keep holiday and leave records; failure to have written individual employment agreements; and failure to pay minimum wages) should be taken.

[10] The imposition of penalties is discretionary with the discretion to be exercised on a judicial basis.

[11] The Employment Court in *Tan v. Yang & Zhang*¹ set out a number of factors to be considered when the Authority is deciding how to exercise that discretion. A non-exhaustive list of the relevant factors to be considered by the Authority includes the following factors:

- (a) the seriousness of the breach;
- (b) whether the breach is a one-off occurrence or involves repeated breaches;
- (c) the impact on the employee/prospective employee;
- (d) the vulnerability of the employee/prospective employee;
- (e) the need for deterrence;

¹ [2014] NZEmpC 65

- (f) remorse shown by the party in breach;
- (g) a range of penalties imposed in other comparable cases.

[12] I have taken all of these factors into account when considering how to exercise the Authority's penalty discretion.

[13] There is no dispute that Ken Yakitori breached the requirement in s.81 HA03 to keep holiday and leave records for its employees. It also breached s.130(1) of the Act by failing to keep wage and time records for all employees.

[14] Section 65 of the Act requires an employer to have a written individual employment agreement for each employee who is not covered by a collective agreement.

[15] At least three employees were not given a written employment agreement. That resulted in the Labour Inspector being unable to identify one of the affected employees who is known only as Richard. That is obviously a serious situation especially where this employee had also been underpaid their minimum entitlements.

[16] In addition, all employees are entitled to receive payment for the work done as per s.6 of MWA at not less than the applicable minimum wage rate at the time the work was undertaken. At least three casual employees were paid less than the minimum wage rate.

[17] The legislation which governs employment relationships accords minimum statutory protections to all employees. This is a way of protecting vulnerable workers and of ensuring a level playing field for employers in the same industry because every employer conducting business in New Zealand (who is subject to New Zealand law) is expected to comply with the applicable employment legislation.

[18] Ken Yakitori submits that no penalty is appropriate because this is a situation without any aggravating features. It submits that the breaches arise from its Director's misunderstanding about the legal requirements governing casual employment so no penalty should be imposed. I do not accept that submission.

[19] I consider that the failure to impose a penalty for multiple breaches of minimum code legislation would send the wrong message about the seriousness with which such breaches are viewed. I view it as a serious matter that Ken Yakitori's

failure to comply with minimum wages allowed it to obtain an unfair commercial advantage over other businesses operating in the same or similar area. This is a situation that must be strongly discouraged by the Authority.

[20] I am therefore satisfied that this is an appropriate matter in which to award penalties.

What penalties should be imposed on Ken Yakitori?

[21] The Labour Inspector has suggested a penalty in the range of \$3,000-\$6000 while Ken Yakitori says the penalty (if one is to be imposed) should be less than \$1,000.

[22] The Labour Inspector submits that the breaches are serious. Whilst Ken Yakitori says that they were at the lower end of the scale because they related to casual and intermittent employees only who were students, two of whom were no longer employed. I consider that an aggravating factor because casual employees are likely to be more vulnerable than full time permanent employees which may impact on their decision making about whether or not to pursue their concerns about not being paid minimum entitlements for fear it may affect the amount of work they are offered in future.

[23] Ken Yakitori says that it had written employment agreements for its part-time employees and was complying with all relevant legal obligations in respect of those employees. That establishes that the breaches were not throughout the entire business.

[24] I consider that this case involved repeated on-going breaches because there are three name employees for whom Ken Yakitori admits it did not keep the appropriate wage and time records, holiday and leave records or provide written employment agreements or pay the minimum wage.

[25] I consider there is an important need in this case for deterrence. The penalty must be imposed at a level that not only punishes Ken Yakitori, but also sets such an example that it will deter other employers from engaging in breaches of minimum employments protections and requirements. A nominal penalty will not achieve that.

[26] I also note that an employer's failure to keep proper wage and time records and holiday and leave records, makes it very difficult if not impossible for Labour

Inspectors to exercise their statutory functions of ensuring that employees are paid in accordance with minimum code legislation which is obviously contrary to public interest. The penalty should reflect that.

Mitigating factors

[27] I consider it a mitigating factor that Ken Yakitori has taken responsibility for its breaches. The fact that Ken Yakitori cooperated with the Labour Inspector's investigation and has expressed remorse is also to its credit.

[28] I consider that the breaches involved are at the lower end of the spectrum of seriousness in terms of the level and extent of breaches of minimum code the Authority usually sees. The fact that the employees affected have also been reimbursed their wage arrears is also in Ken Yakitori's favour.

[29] I acknowledge the affidavit filed by Mr Won Hong Jo in which he deposes about Ken Yakitori's challenging financial situation. Mr Won Hong Jo says that he has been supporting Ken Yakitori's overdraft by contributing personal funds and that he also personally pays some of Ken Yakitori's operating expenses out of his own pocket to enable it to continue trading.

Outcome

[30] Mr Won Hong Jo provided a bank statement to the Authority (attached to his sworn affidavit) that shows that Ken Yakitori's overdraft is currently in excess of \$2,500. Given the mitigating factors identified above and Ken Yakitori's limited ability to pay, I set the amount of the global penalty at \$4,500.

[31] This level of penalty should be taken to be reflective of the particular circumstances of this case and had Ken Yakitori been in a stronger financial position, the penalty would have been in excess of the amount imposed.

Should an instalment order be made?

[32] Prior to the Authority making an instalment order I consider the Labour Inspector and Ken Yakitori should be encouraged to come to an agreeable arrangement regarding the payment of this penalty by instalments.

[33] If agreement of a satisfactory instalment plan is not reached within 30 days of the date of this determination then either party may apply to the Authority to set the instalment arrangements in accordance with s.135(4A) of the Act.

Costs

[34] The Labour Inspector does not seek costs or interest. The Labour Inspector is, however, entitled to be reimbursed \$71.56 for the filing fee. Accordingly, Ken Yakitori is order to pay the Labour Inspector that amount.

Rachel Larmer
Member of the Employment Relations Authority