

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 296
5628483

BETWEEN A LABOUR INSPECTOR
Applicant

AND A & J ZAKNIC & SONS
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Shona Carr, Counsel for the Applicant
Dail Jones, Counsel for the Respondent

Investigation: On the papers

Submissions: 1 August 2016 from the Applicant and 17 August 2016
from the Respondent

Determination: 31 August 2016

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination A & J Zaknic & Sons Limited (AJZSL) must pay to the Authority, for transfer to the Crown account, a penalty of \$6000 for:**
- (i) failure to provide written employment agreements to five workers; and**
 - (ii) failure to keep holiday and leave records for two workers.**
- B. AJZSL must also pay \$71.56 to the Labour Inspector to reimburse the fee paid to lodge an application in the Authority.**

Employment Relationship Problem

[1] Labour Inspector Summer Liu sought orders for penalties against A & J Zaknic & Sons Limited (AJZSL) for its failure to meet statutory obligations to

provide workers with a written employment agreement and to keep complete holiday and leave records.¹

The Authority's investigation

[2] By consent the penalty application was determined 'on the papers' as the essential facts were not in dispute.

[3] At issue, and addressed in written submissions lodged by counsel for the Labour Inspector and AJZSL, was whether penalties should be imposed and, if so, at what level. As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has expressed conclusions on relevant issues and specified orders made.

[4] The company runs a strawberry farm in Kumeu. In December 2013 AJZSL had entered an enforceable undertaking with a Labour Inspector to comply with the law on providing written employment agreements, keeping accurate wage and holiday pay records, and properly paying its seasonal workers their holiday pay. In February 2014 a Labour Inspector reported AJZSL had complied with the undertaking requirements.

[5] In November 2015 an employee of AJZSL contacted a call centre operated by the Ministry of Business to complain that she was not provided with an employment agreement and was not paid at least the minimum wage. Labour Inspectors visited the farm five times from November 2015 to February 2016, speaking to workers and interviewing AJZSL's director Ante Zaknic.

[6] Mr Zaknic told the inspectors that the farm's workforce, sometimes numbering up to 30 workers, was now largely provided through two contracting businesses but AJZSL had directly employed four workers in recent months. He admitted two of those employees were not provided with employment agreements and there were no holiday or leave records for two employees.

[7] In her investigation report Labour Inspector Summer Liu concluded AJZSL had not kept those records for two employees and there was no evidence of four workers receiving written employment agreements. In her application to the

¹ Employment Relations Act 2000, s 65 and Holidays Act 2003, s 81.

Authority a fifth worker was also identified as not having a written agreement. The information about that worker appeared to be based on notes taken during an interview of Mr Zaknic by the Labour Inspector on 10 February 2016. Those notes included a statement signed by Mr Zaknic that he had answered all questions truthfully and fully.

[8] AJZSL's statement in reply accepted it failed to provide four workers with employment agreements and to keep leave records for two workers. It said one worker "refused to put anything in writing" and did not want any records kept that might affect her benefit entitlements. It also said those workers were each paid all the money to which they were entitled to for their work and the tax due on those payments was paid for all but one of them. The exception was the worker who did not want any records kept and had not provided an IRD number.

The issues

- [9] Four issues required determination after considering the parties' submissions:
- (i) Do the wishes of employees make any difference to the obligation on the employer to comply with the statutory requirements?
 - (ii) Should a penalty be imposed in the circumstances of this case?
 - (iii) What is appropriate level for any penalty ordered?
 - (iv) Should any part of a penalty imposed on AJZSL be paid to the workers?

The wishes of the employees

[10] Parliament has placed the responsibility on employers to provide a written employment agreement and keep pay and holiday records. The responsibility is absolute. It protects workers who may need to enforce their rights. It protects employers who may need to prove they have met their statutory obligations to pay at least the minimum wage and to provide holiday leave or holiday pay.

[11] There are sound reasons those obligations could not be overlooked in respect of the one worker who was said to have wanted to stay 'off the books'.

[12] Firstly, the claim that a worker was the instigator of such an arrangement is difficult to establish as correct during the course of any subsequent dispute. It may be true or it may be an excuse easily offered by an employer for what was a truly

exploitative situation. The very absence of the required documentation makes proof for either party very difficult.

[13] Secondly, other employers are unfairly disadvantaged if one employer ‘cuts corners’ to avoid incurring the time and expense of providing written agreements and keeping proper records. Those who properly observe the expected community standards expressed in the legislation enacted by Parliament should not be disadvantaged by what is, in effect, anti-competitive behaviour.

[14] Thirdly, on AJZSL’s account of what the particular worker in this case wanted, the request was so the worker could keep getting a benefit to which she was probably no longer entitled and so she did not pay tax on any earnings made. The interests of wider society are undermined by such unlawful activity.

[15] As the Inspector submitted: “An employee’s desire to have no records of employment in relation to them must at the very least have alerted the employer to the lawfulness of the employment.”

[16] The appropriate response to the request that AJZSL said was made of it was: “No signed agreement, no IRD number, no work”. Failing to give that response in this case has resulted in a liability to a penalty.

Should a penalty be imposed?

[17] AJZSL submitted the breaches committed were minor and should be dealt with by way of a minimal fine.

[18] The breaches occurred prior to the enactment on 1 April 2016 of express criteria for determining the amount of a penalty, now found at s 133A of the Act. Relevant factors for assessment in the present matter, about breaches that occurred in 2015, were:²

- How much harm was caused (considering the seriousness of the breach and the impact on the employee affected, including any aspect of vulnerability); and
- The nature of the breaches – whether they were one-off or repeated and whether they were technical and inadvertent or flagrant and deliberate; and

² *Xu v McIntosh* [2004] 2 ERNZ 448 (EC) at [47]-[48] and *Tan v Yang* [2014] NZEmpC 65 at [31]

- The need for deterrence; and
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

Harm?

[19] AJZSL submitted none of the workers affected by the admitted breaches was vulnerable. One was a friend of Mr Zaknic and two were backpackers who stayed in the employer's residence during their stay in the area. AJZSL's submission said the 'backpackers' were accommodated free of charge but notes of an interview by a Labour Inspector recorded they were on working holiday visas and said they paid \$15 a night for a room, with the cost deducted from their wages.

[20] Vulnerability, in the employment context, refers to the risk of harm. It concerns the ability of a worker to seek a remedy for a wrong if she or he is not treated fairly by an employer, including by being denied statutory rights. In this case the transient nature of the two backpackers made them vulnerable to not being able to pursue any shortfalls in their entitlements.

[21] The harm in the situation was not solely to workers who were not provided with a written agreement or could not access written records about their holiday entitlements if needed later for some purpose. The harm in relation to the failure to maintain proper records was also to the ability of a Labour Inspector to effectively carry out her or his statutory role of ensuring workers were paid in accordance with the law.³

Nature of the breaches?

[22] The nature of the breaches was more serious in light of AJZSL's earlier experience of having entered an enforceable undertaking in late 2013 to provide it workers with written employment agreements and to keep accurate wage and holiday pay records. AJZSL must be taken to have been aware of its obligations in respect of workers who were directly employed. The failure to provide an employment agreement was common to all five workers. The failure to keep wage and leave records for two of the workers was ongoing. In that sense the breaches must be taken

³ *Zonneveld (Labour Inspector) v Maudarra Limited* [2015] NZERA Christchurch 99 at [51].

to have been deliberate rather than technical or inadvertent. They happened because AJZSL thought it would get away with it rather than by a mistake or unintended oversight.

The need for deterrence?

[23] A penalty is intended to punish a wrongdoer and to deter others from engaging in the same conduct.

[24] In this case the provision of written employment agreements and the maintenance of proper wage and holiday pay records are long standing and standard obligations on all employers. Strong public interests support substantial penalties to deter other employers from committing the same breaches as AJZSL – both to protect workers’ rights and to prevent anti-competitive behaviour by employers who do not meet those obligations.

Remorse?

[25] AJZSL submitted it was remorseful for its actions and had co-operated fully with the Labour Inspector’s inquiries. It submitted that it had “learnt a lesson from its previous experience” and arranged for contractors to provide most of its workforce. However, as already noted, the admitted failures for which the Labour Inspector sought a penalty suggested any lessons learnt earlier were not fully applied.

Range of penalties imposed in comparable cases?

[26] Contrary to AJZSL’s submission that only “a minimal fine” was warranted, the Labour Inspector pointed to a 2015 determination, made by the Chief of the Authority, that suggested \$10,000 was the appropriate “starting figure” for the assessment of a penalty to punish an employer for failing to keep proper wage and holiday pay records.⁴ In that particular determination the suggested penalty was not imposed immediately, on the condition that the employer took certain remedial actions, including establishing proper wage and holiday records for its workers. However that employer then failed to pay agreed wage arrears so a global penalty of \$15,000 was later imposed on the grounds that the employer had not paid minimum wages and holiday pay.⁵

⁴ *Zonneveld (Labour Inspector) v Maudarra Limited* [2015] NZERA Christchurch 99 at [51].

⁵ *Zonneveld (Labour Inspector) v Maudarra Ltd* [2015] NZERA Christchurch 185.

[27] Other recent Authority determinations were also useful in considering the range of penalties in comparable cases.

[28] In *Labour Inspector v Marx* the Authority imposed a penalty of \$10,000 for failure to keep proper wage and time and holiday records and a further \$3000 penalty for failure to produce and keep employment agreements for all employees.⁶

[29] In *Labour Inspector v Alpine Motor Inn & Café (2008) Ltd* the Authority imposed a penalty of \$5000 for failure to keep records that was additional to other penalties imposed. It described the failure as serious as it allowed wrongdoing to be hidden.⁷

[30] In *Labour Inspector v Sun 2 Moon Ltd* the Authority imposed a penalty of \$7000 for failure to keep wage and time records in addition to other penalties imposed.⁸

[31] In *Labour Inspector v Discount Food Warehouse Ltd* the Authority imposed a penalty of \$3500 for failures to keep wage and holiday records and described \$5000 as being at the 'high end' of the range of penalties for such breaches.⁹

[32] In *Labour Inspector v MD Dara Miah Horticulture Ltd* the Authority imposed a penalty of \$6000 for failure to keep wage and holiday records and to provide written employment agreements. The employer had been operating a horticultural business for around 20 months, employing around 15 workers seasonally. It had co-operated with the Labour Inspector's investigation and had taken steps to rectify its failure to provide written employment agreements but the Authority found the breaches were serious and sustained and warranted a penalty. The Authority noted the Labour Inspector's evidence that the company's failure to maintain these records made it impossible to know whether the employees got at least their minimum statutory entitlements to wages and holiday pay.¹⁰

⁶ [2016] NZERA Wellington 100 (15 August 2016).

⁷ [2016] NZERA Christchurch 130 (04 August 2016).

⁸ [2016] NZERA Wellington 92 (29 July 2016).

⁹ [2016] NZERA Christchurch 104 (08 July 2016).

¹⁰ [2016] NZERA Wellington 78 (08 July 2016).

[33] In *Labour Inspector v Sharmas & Sons (2009) Ltd* the Authority imposed a penalty of \$4000 each on two employers for failure to provide one worker with a written employment agreement.¹¹

The penalty in this case

[34] The *Dara Miah Horticulture* case had the most similarities with the situation for which the Labour Inspector sought penalties be imposed on AJZSL. The level of penalty imposed in that case, of \$6000, also seemed appropriate for the breaches committed by AJZSL. It marked the seriousness of AJZSL's failures to observe the statutory requirements and was a figure likely to be a significant deterrent for an employer of that size. However the penalty was less than could have been imposed, providing some recognition of AJZSL's co-operation with the Labour Inspector's inquiries and its early acceptance that it was in breach of its obligations.

[35] The penalty of \$6000 AJZSL must pay is imposed on a global basis, for the breaches of the requirement to provide employees with written employment agreements and for the failure to keep holiday and leave records for two employees.¹² The same sum could have reached on the basis of a \$1000 penalty for each of the five employees not provided with an employment agreement and a further \$500 penalty for each of the two employees for whom holiday and leave records were not kept.

Should any portion of the penalty to be paid to the workers?

[36] The Labour Inspector was "neutral" as to whether any part of the penalty awarded should be paid to the five workers affected by AJZSL's breaches, rather than to the Crown.¹³ AJZSL made no submission on the point.

[37] There was no information suggesting such payment was necessary or appropriate. The two backpackers were unlikely to be contactable. It was not appropriate to 'reward' the worker who had asked to be kept off the books. No interest from the other two workers was identified.

¹¹ [2016] NZERA Auckland 169 (30 May 2016)

¹² Employment Relations Act 2000, s 65(4) and Holidays Act 2003, s 75(2)(e) applied.

¹³ Employment Relations Act 2000, s 136.

Costs

[38] The Inspector did not seek an order for her costs of representation in bringing the application. She sought, and was entitled to, reimbursement of the fee paid to lodge the application in the Authority. AJZSL must reimburse the Inspector the sum of \$71.56.

Robin Arthur
Member of the Employment Relations Authority