

Employment relationship problem

[1] Labour Inspector, Mike Heyward, says that Best Health Products Limited (Best Health) did not comply with his notice of 26 May 2015 requiring it to supply time, wages and holiday and leave records for all its employees for the period from 1 January 2014 until 25 May 2015. He claimed a penalty for Best Health's failure to comply with all the requirements of his notice.

[2] Mr Heyward is a warranted Labour Inspector of the Ministry of Business, Innovation and Employment.

[3] The directors of Best Health are Mr Gu and Alice Yali Li. The company produces milk powder products.

Factual background

[4] On 13 April 2015, Mr Heyward and Labour Inspector Ingrid Kim visited Beachlife's motel premises. They were hoping to speak with Mr Gu. However, they were unable to and spoke to two other people who appeared to be working there. One of those people said that Mr Gu ran another business, Best Health, and was likely to be there.

[5] The Labour Inspectors visited the Best Health premises and met Mr Gu.

[6] The Labour Inspectors then asked questions about Best Health but Mr Gu said that he would not answer their questions because his answers would be commercially sensitive. He asked them to leave.

[7] Mr Heyward says that as they were leaving, he verbally requested employment records for Best Health. Mr Gu denies he was asked for these.

[8] On 15 May 2015, Mr Heyward went to Best Health's premises hoping to meet Mr Gu. Neither he nor Ms Li were there. An employee advised Mr Heyward that they were in China.

[9] Mr Heyward spoke to Brent Thornton who introduced himself as the General Manager.

[10] On 26 May 2015, Mr Heyward sent¹ a notice to Best Health issued under s 229(c) of the Act. The notice required production of wages, time and holiday records:

I, Mike Heyward, a Labour Inspector, holding a warrant pursuant to Section 223(1) of the Employment Relations Act 2000, hereby require the production for my inspection, of all wages, time and holiday records and any other documentation which records the remuneration of:

All employees

Who are/were employed by:

Best Health Products Limited

Failure to produce these records within 7 working days of the date of this notice may result in a penalty action being taken, which in the case of a company may result in a penalty being awarded of an amount not exceeding \$20,000 and in the case of an individual an amount not exceeding \$10,000 (Employment Relations Act 2000 Section 135(2)).

This notice is made pursuant to section 229(c) of the Employment Relations Act 2000.

[11] The notice was accompanied by a covering letter which read:

Investigation by Labour Inspectorate

Best Health Products Limited has been selected as a business to be investigated by the labour inspectorate due to a complaint made by a former employee about employment standards.

A visit was recently made to the business of Nuztri on the 15th May 2015.

The purpose of this visit in terms of the Labour Inspectorate was to ensure the minimum employment standards are being met. During the course of this visit the opportunity was taken to interview person(s) at the premises, in accordance with a Labour Inspector's authority to do so under section 229(1) of the Employment Relations Act 2000.

To review Best Health Products Limited's employment practices, I require copies of the following documents for **all** of the company's employees by **Friday 5 June 2015**:

- Time and wage records for the period covering 1 January 2014 to 25 May 2015.
- Holiday and leave records for the period covering 1 January 2014 to 25 May 2015.
- Employment agreements.
- Any documentation relating to non-statutory deductions.
- Final holiday payment for three employees who left your employment in the last three months.

¹ By post and by email.

A Notice naming the relevant employees and formally requiring you to provide the above records is attached. ...

These records should be provided by **Friday, 5 June 2015** at the latest. To help you compile all of the records we require I attach a checklist and a sample of the types of records we require.

Please contact me on ... if you would like to discuss this matter.

[12] The attached checklist stated that:

Dates for the records should be from 1 January 2014 until the date of the audit.

- Time and wage records*
- Annual leave records*
- Public holiday records*
- Alternative holidays (days in lieu) report*
- Sick leave records*
- Payslips
- Time-sheets
- Signed employment agreements
- Final holiday pay for three employees.

Please ensure you arrange a time when we can interview the selected employees at your premises if they weren't available at the time of the visit.

* If these reports can be extracted from your payroll system as a CSV file (spreadsheet format) that would speed up our processes.

Please contact your payroll person to see if this option is available for your payroll system.

[13] The notice attached sample reports. They had been created as guidance for employers. The sample reports were in spreadsheet form under the headings time and wages record, annual leave report, public holidays report and sick leave report.

[14] Mr Gu replied by email the same day saying that he was just back from an overseas business trip and had a huge amount of work on, including an IRD audit. He wrote:

... will be definitely struggling to get all paper ready by the requested date. We ... has [sic] stopped using payroll software last year for Best Health Products. So there will be a huge amount of work for me to get all the info you wanted. Therefore, please consider to extend the deadline to four weeks from today.

[15] Mr Heyward responded:

No I won't extend for four weeks.

I am happy to give you a further week until 12 June 2015.

We have companies who employ in excess of 100 people who can company [sic] so I am sure you can provide the information requested in the required time.

You do not have a minimal amount of employees² at both companies according to the information we have received so far.

There is a requirement for an employer to have records available for an employee if they ask so you must have them available.

If you have no records then you needed to advise me of that.

[16] Mr Gu responded:

We are not big companies which have accountant and HR people dedicated to deal with employment issues ...

Regarding to the meeting we had, I remember that you said that you will ask me to provide further information. Otherwise, you would provide me with a list of what you wanted at that time. I received nothing since the meeting until today. ...

It's really not good timing at this difficult time for us. I am struggling to turn the loss making business around. ...

I urge you to consider the circumstances and extend the deadline.

[17] Mr Heyward responded:

I have given an extension.

You either have the records or you don't.

We have received an allegation which is why we are investigating. But despite this the reality is all employers must keep records. So you either have these records and can pass them on or you don't.

It shouldn't be difficult to provide the requested information in 20 minutes if you have it.

The timeframes are meant to take into account you have a business to run.

If you don't have the records then of course that will take lots of time.

² I assume that Mr Heyward meant " you only have a minimal amount of employees".

The timeframes remain unchanged. ...

[18] On 12 June 2015, Mr Gu sent payslips for Best Health.

[19] On 18 June 2015, Labour Inspector Eva Belley wrote to Mr Gu that she was the person who would be going through the payroll records. She wrote:

I understand that you have recently been busy but you must also appreciate that Mike needs to progress with his investigation which we are unable to do without these documents.

I thought to ease the process I will list you the things that you have provided so far and the things that we still require.

[20] Ms Belley set out a table of what was still required for Best Health. She stated that, as at 1 June 2015, Mr Gu needed to supply the annual leave balance, the sick leave balance and the alternative holiday balance. I assume she meant that to be for every employee. She did not state that specifically.

[21] Ms Belley also said she required a record, from 1 January 2014 to 1 June 2015, of how much annual leave or sick leave had been taken and whether any alternative holidays were taken. Again, I assume that that was for all employees. She also required what public holidays had been worked or not worked, for every employee. She wrote:

These reports should not be hard to print from your payroll system – you may wish to ask your payroll person or accountant to help you with that. I would also need you to provide me a list of employees with their:

1. Start date.
2. Anniversary date (when they become entitled to annual leave).
3. When they became entitled to sick leave.

You also need to supply employment agreements. If they are all the same then you need to confirm that and then provide three random signed agreements. Also please confirm whether there is any deductions (money that you deduct from anyone's wages)?

Please provide me with these documents by 24 June 2015.

[22] On 24 June 2015, Mr Gu emailed Ms Belley further payslips and holiday information for Best Health. He wrote:

They should contain all info you required.

Bear in mind, some records are inaccurate by the data entry error or system limitation. MYOB can't handle changes made to previous pay periods. One on-call staff was treated as permanent staff.

I'll try to get other info as soon as possible. It took many hours to get so far. Definitely not a 20 minute job as Mike said.

[23] Ms Belley wrote:

Thanks for these documents. How about we meet up and I print out or save it on a USB stick the reports we need to look at when I am there? Is it possible to do that?

[24] On 13 July 2015, Mr Gu replied that he was sorry for the late response but was travelling and would not be back until early August 2015. He wrote, "I may be able to do something remotely in the meantime. I'll try".

[25] On 6 August 2015, Ms Belley emailed:

Could you please advise when you are available to collect the documents or sort these please?

[26] No reply was received from Mr Gu and on 13 August 2015, Mr Heyward emailed Mr Gu that he had decided to take the matter to the Employment Relations Authority because he was unable to investigate the complaint. He wrote:

You have been requested several times to provide records for us to check compliance with employment legislation and to respond to the complaint we had regarding employment matters.

We met with you on 24 April 2015 to discuss a complaint we had received about one of your employees.

At that meeting we advised we would need employment records. It is part of our power to request that information forthwith. ...

I received no records from you after that meeting so I sent you a formal request in writing.

[27] Mr Heyward also wrote:

On 10 July 2015 Eva emailed again requesting a meet up as you had not provided the extra information and we offered to collect it via a USB given it was too big to send. On 13 July 2015 you advised you were travelling and would return to New Zealand in early August.

On 6 August Eva emailed again requesting the records and you have not responded.

I have therefore decided to take both companies to the Employment Relations Authority.

[28] Mr Gu replied by email on the same day:

You should have sufficient information on your hand to know how we operate. The details requested are quite specific. I suspect its more the software can do. One of the systems we use is ACE payroll. Its old and doesn't provide too much info. I need someone with deep accounting or software knowledge to retrieve it if possible. And I am working over 16 hours a day and really don't have much time to meet your demand at the moment. ...

If it's really important, I'll do it when I'm free.

I am concerned you are fuelled by racism move and going to make hard for migrant owned and run businesses that are under resource. It's not what you should be doing. It's discouraging any business to operate and hire people.

The last thing a public servant will do is helping a criminal to against a good citizen who creates jobs.

I'll try to dig out records or get someone to retrieve more info from the accounting software by end of next month.

Further records and documents supplied

[29] The Labour Inspector received no further records until the day of the investigation meeting on 8 June 2016.

[30] At the investigation meeting, Mr Gu's counsel handed up copies of three signed employment agreements from Best Health.

[31] The following day, Mr Goldstein emailed the Authority and Ms Kelly schedules containing the names of employees of Best Health with their start and finish dates. It is not clear where Mr Gu got that information. However, there was either another source of information about start and finish dates or he has extrapolated from the payroll summary information and/or the payslips already provided.

[32] I received written submissions from Ms Kelly before the investigation meeting on 2 June 2016 and heard oral submissions via teleconference from Mr Goldstein on 9 June 2016. Ms Kelly made written submissions in reply on 13 June 2016.

Issues

[33] Because at and after the investigation meeting Mr Gu supplied some more documents Ms Kelly decided that the Labour Inspector would not seek compliance orders. Therefore, the issues I need to determine are whether:

- (i) Best Health complied with the Labour Inspector's request under s 229 of the Employment Relations Act 2000 (the Act); and
- (ii) If not, should a penalty or penalties be imposed? And
- (iii) If so, in what amount/s?

Determination

Did Best Health comply with the request to supply the documents?

[34] Mr Heyward issued his notice pursuant to s 229 of the Act which outlines labour inspectors' powers:

For the purpose of performing his or her functions and duties under any Act specified in section 223(1), every Labour Inspector has, subject to sections 230 to 233, the following powers:

...

(c) the power to require the production of, and to inspect and take copies from,—

(i) any wages and time record or any holiday and leave record whether kept under this Act or any other Act:

(ii) any other document held which records the remuneration of any employees:

(iii) any other document that the Labour Inspector reasonably believes may assist in determining whether the requirements of the Acts referred to in section 223(1) have been complied with:

(d) the power to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both of any employee of that employer: ...

(2) Where any Labour Inspector makes any requirement of an employer under subsection 1(c) or subsection 1(d) **that employer must forthwith comply with that requirement.**

(3) Every employer who, without reasonable cause, fails to comply with any requirement made under subsection 1(c) or subsection 1(d) is liable in an

action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.

[35] Ms Kelly submits that Best Health did not comply with the Labour Inspector's notice either within the original time (within 7 days expiring on 5 June), the first time extension granted (by 12 June) or after considerable engagement and follow-up by Ms Belley. Ms Belley even offered to come and meet Mr Gu and collect the outstanding information and either print it out or copy it onto a memory stick.

[36] It is clear that Mr Gu failed to engage fully with the Labour Inspectorate to supply the information requested. He was resistant to doing so from the start.

[37] It is possible that initially he did not understand what else was required of him once he supplied documents in mid-June 2015. However, he continued to say that there were more documents to come without saying what those documents were. At the investigation meeting, Mr Goldstein submitted that further information was the employment agreements that were provided at the investigation meeting.

[38] Ms Belley's email to Mr Gu dated 18 June 2015 set out clearly and comprehensively what he had already supplied and what the labour inspector still required.

[39] On 24 June 2015, Mr Gu provided some further payslips and holiday information for Best Health Products. His email includes "they should contain all you required."

[40] At the investigation meeting he was adamant he had supplied all the documents the labour inspector required.

[41] Best Health submits that it has complied with the labour inspector's request and I should not impose any penalty. It says that all the information required under s 130 of the Act is in the payroll and pay slip data supplied, although not in the form suggested by the labour inspector's spreadsheet examples. In the alternative, Mr Goldstein submitted that if I decide to impose a penalty, it should be a small one given that no compliance order is now sought.

[42] Although a compliance order is no longer sought that does not mean that Best Health fully complied with the notice within the relevant time. Some records were only supplied at or after the investigation meeting.

[43] I consider that Best Health did not comply fully with the notice issued by the labour inspector forthwith, or within the reasonable time given, or within the extended periods granted. I am certain that the current level of compliance, so far as Best Health was able to comply given the state of its records, would not have been achieved without the investigation meeting.

[44] I do not consider Mr Gu's busy-ness and disorganisation were "reasonable cause" for not complying with the labour inspector's requirement to provide the requested records.

[45] That leads me to consider whether a penalty should be imposed.

Should a penalty be imposed and, if so, how much?

[46] Section 229(7) provides that a labour inspector may recover a penalty in the Authority for a breach of any provisions that provides for the imposition of a penalty and is a provision of any of the acts referred to in section 223(1). Acts listed in s 223(1) include the Act itself, the Holidays Act 2003, the Minimum Wage Act 1983 and the Wages Protection Act 1983.

[47] A penalty is imposed for the joint purposes of punishment and deterrence.³ It is not a compensatory payment. Not all breaches result in the imposition of a penalty. The first questions should be how much harm the breach caused and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from such behaviour.⁴

[48] In *Tan v Yang & Zhang*⁵ Judge Inglis set out a non-exhaustive list of factors to consider in deciding whether impose a penalty, and, if one is to be imposed, what amount it should be. I will consider:

- the seriousness of the breach,
- whether the breach is one-off or repeated,
- the impact if any on the employees, including considering the vulnerability of the employees,

³ *Tan v Yang and Zhang* [2014] NZ EmpC 65

⁴ *Xu v McIntosh* [2004] 2 ERNZ 448 at 464.

⁵ No. 3 above.

- the need for deterrence,
- remorse shown by the party in breach,
- and the range of penalties imposed in other comparable cases.

[49] The purpose of the labour inspector's powers to require copies of written employment agreements, time and wages records and holiday and leave records is to ensure that employers are meeting their obligations to their employees. Mr Heyward considered it would be useful to audit the employment records because he considered Mr Gu did not understand employment legislation.

[50] Failing to supply the requested records is reasonably serious because it obstructs the labour inspector's ability to undertake their work.

[51] Society relies on employers to act in accordance with their obligations to ensure employees' rights to minimum legal entitlements are respected. However, Best Health's failure is not at the worst end of the spectrum, although it was not an inadvertent breach. Mr Gu failed to give compliance with the notice priority. There was an ongoing failure to take compliance seriously until Mr Gu engaged counsel on the eve of the investigation meeting.

[52] Mr Gu knew of his responsibility to ensure his businesses kept and supplied compliant records. Best Health has already been to the Authority and been penalised \$2,500 for failing to supply time and wages records to a former employee.⁶

[53] Despite eventual substantial compliance, I do not consider Mr Gu was remorseful. He continued to insist he had done as much as was required. He also said that he was a very busy person, and that his business records were messy and disorganised.

[54] I consider there is a specific need for Best Health to be deterred from failing to comply with lawful requests by labour inspectors. There is also a need for more general deterrence of other employers.

⁶ *Nee v Best Health Products Limited* [2015] NZERA Christchurch 84

[55] I accept that Best Health may, since engaging Mr Goldstein, have a better idea of its obligations. I hope that it now keeps compliant records, in a well-organised and well-kept system, and that it will comply in future with any requests made by the Labour Inspectorate.

[56] Section 135 of the Act provides that the maximum penalty for an individual is \$10,000.00 and the maximum penalty for a company or corporation is \$20,000.00. That maximum is twice as high as for an individual employer.

[57] Having taken all relevant factors in to account, I consider Best Health Products Limited must pay a penalty of \$3,500.00 to the Authority for transfer to the Crown Account.

Costs

[58] I reserve the issue of costs.

Christine Hickey
Member of the Employment Relations Authority