

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 126
5537006

BETWEEN RICHARD LEWIS, LABOUR
 INSPECTOR
 Applicant

A N D WALLACE PAINTING &
 CONTRACTORS LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Rebecca Denmead, Counsel for Applicant
 No appearance by or for Respondent

Investigation Meeting: 10 July 2017 at Hamilton

Date of Oral Determination: 10 July 2017

Written Record of Oral
Determination: 13 July 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector (the Inspector) seeks orders requiring compliance by the respondent employer (Wallace Painting) with an Improvement Notice dated 4 November 2014. In addition to the order for compliance with the Improvement Notice, the Inspector seeks an order for the payment of arrears of wages, an order in respect of the failure to comply with the Improvement Notice, an order for the recovery of the filing fee, and the payment of interest (if any) in respect of the unpaid wages.

[2] This matter has had a slow progress to hearing. The statement of problem was filed in the Authority on 14 January 2015 and the initial difficulty in progressing the matter was occasioned by the inability to find and serve Wallace Painting.

[3] Eventually, Wallace Painting was served with the statement of problem by the Inspector on 27 February 2015 but no engagement from Wallace Painting followed.

[4] A subsequent move by Wallace Painting meant that I was unable to be satisfied that the notice of investigation meeting had actually been received and accordingly the investigation meeting was vacated.

[5] Another lengthy delay followed and the governing director of Wallace Painting was then discovered some six months after the aborted investigation meeting, residing in Hamilton.

[6] Another investigation meeting was set down for 28 February 2017 at Hamilton but this investigation meeting was adjourned by consent because on 23 February 2017, the Labour Inspector now responsible for the matter, Ms Melissa MacRury, met with the governing director of Wallace Painting, obtained from him a part-payment of the wages outstanding together with a commitment to deal with the other outstanding matters.

[7] On that footing, an adjournment to the investigation meeting was granted.

[8] Then by email dated 3 May 2017, the Inspector's counsel advised the Authority that notwithstanding the part-payment of the outstanding arrears, the balance of the moneys due and owing remained outstanding and Wallace Painting had failed to comply with the rest of the Improvement Notice's requirements as well. On that basis, the Inspector asked for the matter to be brought on for hearing again.

[9] The matter was set down again for hearing on 10 July 2017 and I am satisfied from the information on my file that Wallace Painting knew about the investigation meeting because service was effected of a formal notice of the investigation meeting in person and via email.

[10] Accordingly, I am satisfied that I can proceed to determine the matter and I now do so.

The issues

[11] Two issues arise, namely:

- (a) Has Wallace Painting complied with the Improvement Notice issued by the Inspector; and
- (b) If the answer to that is in the negative, what penalty should apply?

Has the Improvement Notice been complied with?

[12] An Improvement Notice dated 4 November 2014 was issued to Wallace Painting identifying failures in terms of the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000.

[13] The power to issue an Improvement Notice is conveyed on an inspector by s.223D of the Employment Relations Act 2000 (the Act), where an inspector believes on reasonable grounds that an employer has failed to comply with provisions of the employment statutes.

[14] I observe for the sake of completeness that this matter proceeds on the basis of the law prior to the Employment Relations Amendment Act 2016.

[15] The Improvement Notice makes clear that it may be enforced by compliance and in terms of the Act, the Authority has that power. No objection was filed to the Notice and while, as I have already noted, there was partial compliance (the payment of \$400 on 23 February 2017), the balance of the obligations set out in the Improvement Notice remain outstanding.

[16] I heard evidence from Labour Inspector Melissa Ann MacRury on the efforts that she had made to obtain full compliance with the Improvement Notice and she provided to me a copy of her file notes, written in her own hand and made contemporaneously, the truth of which she swore to.

[17] It is very clear to me from the evidence provided to me by the Inspector that every effort was made to obtain compliance but notwithstanding those efforts, a significant sum of wages remains outstanding together with all the other machinery obligations set out in the Improvement Notice.

[18] As I have already indicated, despite the Authority's efforts to engage with Wallace Painting, there was no appearance and I am satisfied on the evidence before me that it is safe for me to proceed and make a determination in this matter.

[19] Accordingly, I conclude on the balance of probabilities that Wallace Painting has failed to comply with the Improvement Notice and that in consequence, the Inspector is entitled to an order for compliance.

What penalty should apply?

[20] Given my finding that the Improvement Notice has not been complied with and that the Inspector is entitled to a compliance order requiring the undertaking of the obligations in the Improvement Notice, the question of penalties arises: s.223F of the Act.

[21] Because the respondent is a limited liability company the maximum penalty is \$20,000: s.135(2)(b) of the Act.

[22] In accordance with my obligations, I apply the leading case on the incidence of penalties in this jurisdiction, *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd* [2016] NZEmpC 143.

[23] In *Preet*, the Employment Court adopted a multi-step process for determining the quantum of penalties. The first step involves identifying the nature and number of breaches, considering the maximum penalty available in respect of each breach and then determining whether global penalties are appropriate.

[24] The second step involves an assessment of the severity of the breaches to determine a provisional starting point from which are to be taken any mitigating factors and to which are to be added any aggravating factors.

[25] The third step involves a consideration of the financial circumstances of the respondent which necessitates assessing the means of the entity to pay any provisional penalty arrived at and finally in step four the question for the Authority is to ascertain whether the final penalty to be levied is just in all the circumstances.

[26] Applying those provisions then, there is one breach only in this case so the total penalty that might be levied is \$20,000.

[27] The severity of the breach is, I am satisfied, significant. The work in question was performed in 2014 and the Inspector cannot be criticised for the failure to try to get the outstanding moneys paid. There has been extensive involvement by the Inspectorate in a number of different locations around the country to endeavour to get compliance with the Improvement Notice.

[28] There has never been any denial by Wallace Painting that the money is owed nor has there ever been any resistance to the way in which the sum was calculated by the Inspector. While that may go to mitigation, it is also relevant in the context of considering that for fully two years there has been knowledge by the respondent that the money is owed and save for the part-payment received on 23 February 2017, a complete failure to meet the basic employer obligation to pay wages when they are due.

[29] I agree then with the Inspector's submission that an appropriate starting point for the penalty calculation would be 80% of the maximum being \$16,000.

[30] Turning to the financial circumstances of Wallace Painting, the information available both to the Inspector and to this Authority is, to say the least, sketchy but I accept the gracious concessions made by the Inspector that the governing director is not well and has nine children to support.

[31] Taking those matters into account, the Inspector proposes a reduction in the region of 70% which would bring the penalty levied down to \$4,800.

[32] Turning finally to the justice of the penalty when measured against the conduct complained of, I accept the submissions for the Inspector that a final figure of \$4,500 is appropriate in the particular circumstances of this case.

Determination

[33] The Inspector has proved the case against Wallace Painting & Contractors Limited and is entitled to the relief sought.

[34] The Authority now makes the following orders:

- (a) An order for compliance with the Improvement Notice dated 4 November 2014 including a payment of arrears of wages in the sum of \$873.61 to be paid within 7 days of the date of this determination

and compliance with the other terms of the Improvement Notice within 30 days of the date of this determination;

- (b) Payment of a penalty under s.223F of the Employment Relations Act 2000 for the failure to comply with the Improvement Notice, such penalty to be in the sum of \$4,500 and to be paid within 30 days of the date of this determination;
- (c) Payment of \$71.56 to reimburse the Inspector's filing fee; and
- (d) Interest on the arrears of wages sum at the rate of 4% per annum from 13 November 2014 down to the date the arrears of wages are finally paid in full.

[35] I encourage the Inspector to engage with Wallace Painting to confirm the details of the amounts owing and when those sums are due to be paid.

Costs

[36] There is no issue as to costs in the present matter.

James Crichton
Chief of the Employment Relations Authority