IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 108
3021991

BETWEEN	A LABOUR INSPECTOR Applicant
AND	ADVOCATES FOR EMPLOYERS NZ LIMITED First Respondent
AND	FSB NAPIER LIMITED Second Respondent

Member of Authority:	M B Loftus
Representatives:	Claire English, Counsel for Applicant Gary Tayler, Advocate for Respondent
Investigation Meeting:	12 April 2018 at Napier
Submissions Received:	At the investigation
Determination:	3 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The application, as lodged, raised an alleged failure on the part of second respondent, FSB, to provide employment records including wage and time records requested by a Labour Inspector pursuant to s 229 of the Employment Relations Act 2000. It is a failure the first respondent, AENZ, is said to have been a party to. Indeed is alleged AENZ is essentially responsible for the failure.

[2] FSB was liquidated the day before the investigation meeting. Given s 248(1)() of the Companies Act 1993 the Inspector is no longer pursing the claim against FSB but wishes to continue with respect to AENZ.

Background

[3] On 1 May 2017 the Labour Inspectorate was told some of FSB's employees were not receiving their minimum employment entitlements. After some initial inquiries which included a meeting with Farrukh Hashmi, one of FSB's two directors, an Inspector wrote seeking copies of various employment records pursuant to s 229 of the Employment Relations Act 2000 (the Act). The request covered all employees engaged over the preceding six years.

[4] Mr McAleer, the sole director of AENZ, replied on 8 June advising it was representing FSB. The letter also asked why records were being sought in respect of employees who had not made a complaint.

[5] That was followed by a meeting between the Inspector and Mr McAleer which was, at Mr McAleer's request, conducted on a without prejudice basis. Mr McAleer followed that with another letter to which some, but not all, of the requested documents were attached. The letter included an indication one employee had been engaged contrary to the conditions of her visa and as a result her wages were paid to her husband. The letter ended by stating:

> We are seriously unsure as to why the Labour Inspectorate with finite resources is pursuing a complaint based on evidence which we have not been provided with and the complainant is no longer living in the country.[1]

[6] The response was a reminder the records were still required.

[7] On 29 June 2017 the Inspector phoned Mr McAleer. The file note records Mr McAleer as stating he saw no reason for the Inspector to interview staff who had not laid a complaint before saying he was not prepared to give the information sought until the Inspector had forwarded all evidence he might have against FSB. Mr McAleer was cautioned his approach was unwise and is recorded as replying he would put his view in writing within two days.

[8] That took a bit longer with Mr McAleer's letter coming on 10 July and then only after a reminder from the Inspector four days earlier. The letter demanded the Inspector provide all statements in respect to two named employees. It also expressed offence at the Inspector having suggested Mr McAleer was obstructing the process

and stated FSH's approach was vindicated by the Authority's determination in *A Labour Inspector v Pars Auto Ltd* and in particular paragraphs [27] and [28] thereof.[2]

[9] The Inspector replied on 2 August reiterating his request and the sections of the Act upon which he relied. He also expressed a view the situation canvassed in *Pars* was not analogous as the Inspector was yet to make a determination in respect to FSB and its actions. It needed to the documents to inform a decision as to whether or not action would follow and it was only then *Pars* would apply.

[10] It was then the Inspector was contacted by Mr McAleer's colleague, Mr Tayler who advised Mr McAleer was away and he (Tayler) would respond. Nothing, however, come of this as it appears Mr McAleer instructed the file remain with him.

[11] On 22 August the Inspector again asked Mr McAleer and his client provide the relevant documents. The response followed on 14 September. Mr McAleer advised he accepted the *Pars* situation differed from the present but again took issue with the Inspectors alleged failure to disclose the documents sought. The letter goes on to ask *... why a lot of taxpayer funded time is being spent on an meaningless complaint from someone who now lives in India and doesn't care less anymore.*

[12] The letter then advises the business had been sold and the owner had moved to Wellington. As a result *it would appear* the records had been misplaced. The final shot is advice *... the company is to be wound up shortly.*

[13] In closing the Inspector notes that since Mr Tayler commenced representing the respondents the records were quickly found and forwarded but that has proven to be of little assistance given FSB's demise.

Discussion

[14] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[15] As already said the Inspector is seeking the imposition of penalties for a failure to provide requested documents in a timely manner. While penalties were

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[1] Letter McAleer to Inspector dated 20 June 2017

initially sought against both respondents the claim against FSB has now been withdrawn. That against AENZ proceeds on the basis it was, as FSB's agent, standing in the shoes of the employer and by its actions a party to the alleged breach.

[16] AENZ's response is the relevant statutory provisions preclude a claim against it.

[17] The Inspector's initial request for was made pursuant to s 229(1) of the Act.

[18] Once such a request is made the Act requires production *forthwith*. That according to the Collins English dictionary means *at once* or *immediately*. It would be fair to conclude the delay that occurred here meant a failure to comply with that requirement.

[19] It is clear the failure to provide the requested documents was deliberate and it was Mr McAleer who made the decision to withhold information until the Inspector complied with his (Mr McAleer's) request. That is confirmed by both the documents and Mr McAleer's evidence.

[20] I note paragraphs 4 and 5 of Mr McAleer's brief of evidence and his acknowledgment the situation developed into a stand-off. I also note his statement he thought the Inspector should confine the investigation to employees about whom complaints had been lodged and postpone further investigation concerning others FSB had employed until that was complete.

[21] In the letter of 10 July there is reference to this being *the writers position* (ie: Mr McAleer's) and no reference to instruction from his client. This was confirmed during cross examination when Mr McAleer accepted the proposition it *...was [his] view [he] would not produce the balance of the documents till Sunil's claim was resolved.* He also said he chose to maintain his position as he was getting frustrated with the Inspector's insistence. Mr McAleer then expressly accepted it was he who made the call.

[22] The problem this approach faces is the Inspector's power to request documents is not limited to matters about which he has a formal complaint. It is a general power designed to allow the Inspector to carry out his/her function of ensuring various legislative criteria are complied with and it is not fettered in the way Mr McAleer

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[2] *A Labour Inspector v Pars Auto Ltd* [2017] NZERA Auckland 157

tried to assert. As he himself conceded his argument *Pars* could be applied was inaccurate – that is something that may only become an issue further down the track.

[23] The short answer is Mr McAleer gave advice or, more properly I suspect, adopted of his own volition a course of action which meant his client failed to comply with a legitimate request which would, had FSB remained extant, have rendered it liable for a considerable penalty.[3]

[24] The question is whether or not Mr McAleer should incur personal liability for his actions.

[25] The answer I conclude is no. The Authority is creature of statute and its powers are limited to those conferred by statute.

[26] Section 229(3) provides for the imposition of a penalty for failing to comply with a request under ss 229(1)(c) and(d) [which these were] upon an employer. Mr McAleer was not the employer and s 229(4) appears to limit the remedy in a respect to a failure by a person (ie: someone other than the employer) to an order he or she comply with a request under s 229(1) at least as far as the Authority is concerned.

[27] That that is so, at least in a situation such as this, is in my view confirmed by s 235 of the Act. Given the eventual production of the information the Inspector sought I have to conclude Mr McAleer's actions ultimately resulted in nothing other than delay.

[28] Section 235 states that a person, as opposed to an employer, who without reasonable cause delays an Inspectors attempts to lawfully exercise his or her powers commits an offence for which the penalty is a fine of up to $10,000 upon conviction by the Court. The Authority is not the Court which is the body to which, I conclude, the power to financially penalise in circumstances such as this is expressly limited.

Conclusion and costs

[29] While I am of the view Mr McAleer's response to the Inspector's approaches was both unacceptable and undoubtedly warrants censure I have to conclude, for the reasons expressed above, it is not within the jurisdiction of the Authority to impose

[3] Section 229(3) of the Employment Relations Act 2000

penalties as sought. The jurisdiction is the Court's and as a result I must dismiss the residual portion of this claim I was asked to address.

[30] Costs are reserved though I express a preliminary view they should lie where they fall. Mr McAleer's conduct warranted censure and he should consider himself lucky he avoided penalty by virtue of a technicality.

M B Loftus
Member of the Employment Relations Authority