

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 268  
3046152

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              BOMBAY GYMKHANA  
LIMITED  
Respondent

Member of Authority:      Robin Arthur

Representatives:           Sarah Blick, counsel for the Applicant  
Sanjay Sharma, counsel for the Respondent

Investigation Meeting:     3 May 2019

Determination:              6 May 2019

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**DETERMINATION OF THE AUTHORITY**

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[1] This determination concerns whether Bombay Gymkhana Limited had complied sufficiently with the requirements of an Improvement Notice issued by Labour Inspector George Shorrocks and, if it had not, whether BGL should pay a penalty for failing to comply with the notice.

[2] The notice, issued on 12 October 2017, was varied by determination of the Authority issued on 24 May 2018.<sup>1</sup> The requirements of the varied notice related to providing accurate pay and leave records and identifying what payments were still due to some former employees for public holidays and alternative leave days. The former employees had worked in a restaurant BGL had operated in Botany and sold in April 2017.

[3] The Authority's 2018 determination set a deadline of 24 July 2018 for BGL to comply with the varied notice. The Inspector subsequently agreed to extensions of

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<sup>1</sup> *Bombay Gymkhana v A Labour Inspector* [2018] NZERA Auckland 168.

time through to October 2018 for BGL to provide updated records. The Inspector's analysis of those records, once supplied, led him to conclude BGL had still not satisfied three aspects needed to comply with the varied notice.

[4] Firstly, BGL was required to audit payments made for public holidays worked by all former employees and to pay any shortfalls identified. The Inspector's analysis identified that timesheets showed one worker, referred to in this determination by the initials SSK, worked on 11 public holidays and was paid for 11 alternative holidays but the pay records did not show he was paid time-and-a-half for his work on all those 11 public holidays. Based on that example, the Inspector was not satisfied BGL has accurately audited its records of public holiday payments.

[5] Secondly, BGL was required to audit payments made for alternative holidays to employees who had worked on public holidays. The Inspector's analysis identified a discrepancy between records showing another worker, referred to in this determination by the initials SS, had worked six public holidays but was not paid for the six alternative holidays earned. Based on that example, the Inspector was not satisfied BGL had accurately audited its records on payments for alternative holiday entitlements.

[6] Thirdly, based on the examples concerning SSK and SS, the Inspector was not satisfied BGL had met the notice's requirement for the company to update its holiday and leave records and to provide evidence it had done so.

[7] The Inspector sought orders requiring BGL to do more to comply with the notice and to pay a penalty for its failure to comply with the notice in what it had done and provided him so far. He also sought costs and reimbursement of the fee paid to lodge his application.

[8] In its statement in reply BGL denied it had failed to comply fully with the varied improvement notice and also disagreed it was liable to any penalty as a result.

### **The Authority's investigation**

[9] The Inspector and BGL's director Ravi Singh provided gave written and oral evidence for the Authority's investigation of the Inspector's application. Mr Singh gave his oral evidence during the investigation meeting by audio visual link from

India, using FaceTime. Counsel for both parties asked questions of the Inspector and Mr Singh and gave oral closing submissions on the issues for resolution.

[10] As permitted by s 174E of the Employment Relations Act (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[11] The issues for determination were:

- (i) Had BGL complied with the terms of the varied notice and, if not, should a compliance order be issued?
- (ii) If BGL had not complied with the notice, and was thereby liable to a penalty, what penalty should be imposed?
- (iii) Should any order for costs and expenses be made?

#### **Failure to comply with the improvement notice**

[12] The Inspector's evidence established, to the necessary evidential standard of the balance of probabilities, that BGL's actions were not sufficient to comply with the requirements of the improvement notice as varied in May 2018.

[13] The evidence about what the time, wage and leave records showed was not straightforward. For example, answers from the Inspector to questions from BGL's counsel confirmed that pay records appeared to show that SSK was paid for some of the public holidays at issue, specifically the Christmas ones. However this did not erase the significant doubt about whether all the necessary payments had been made for the remainder of public holidays at issue, for SSK or other workers. This was at the heart of the concern addressed by the improvement notice – whether BGL's updated documents accurately recorded both what time was actually worked and what should properly have been paid for. Mr Singh's evidence of extensive efforts he had made, with the assistance of a former member of BGL's account staff, to review and update those records could not adequately explain remaining inconsistencies or inadequacies between what appeared to have been worked and paid.

[14] The difficult question was whether that situation could or should, as a matter of practicality, be addressed by a compliance order requiring BGL to make further

efforts to investigate and reconcile shortcomings in its records and further possible shortfalls in the payments due to SSK, SS or other employees.

[15] The discretion to make such an order, as broadly accepted in the Inspector's closing submissions, must balance the public interest in ensuring compliance with employment standards with a related public interest in effective use of the Inspector's time and resources for enforcement purposes. As noted in the earlier determination in this matter, exercise of such discretion may weigh whether requiring an employer to do more may be unduly onerous, in respect of a business no longer owned and operated, against the probability of any benefits that might result for former workers from any required improvement measures.<sup>2</sup>

[16] The obligation on an employer to carry out such remedial action is not lightly foregone because the need to make and keep accurate records arises, in part, from the statutory right of former workers to seek wage arrears up to six years after the end of their employment.<sup>3</sup> Employers have a corresponding obligation to keep "at all times" accurate records of wages, time, holiday and leave.<sup>4</sup>

[17] BGL had not fully met those statutory obligations during the time it was running the now-sold restaurant. It was responsible for whatever inconvenience to itself and others that later resulted in attempting to rectify its earlier failures. However, assessed practically in the circumstances of this case, there was likely little potential benefit to former workers if further compliance steps were required now. And it was unlikely to be an effective use of the Inspector's time and resources to then have to review further revised records that, if still inadequate, might then lead to further applications for compliance. The public interest favoured the Inspector being free to attend to other inquiries about other employers' compliance with statutory requirements. A remedy by way of penalty was a more suitable means of addressing shortcomings in what BGL had or had not done so far.

[18] For those reasons, the Inspector's application for a compliance order has been declined.

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<sup>2</sup> *Bombay*, above n 1, at [28].

<sup>3</sup> Employment Relations Act 2000, s 142.

<sup>4</sup> Employment Relations Act 2000, s 130 and Holiday Act 2003, s 81.

## **A penalty for failing to comply with an improvement notice**

[19] Because BGL has, by this determination, been found to have failed to comply with an improvement notice, the company was liable to a penalty under s 223F of the Act.

[20] An appropriate penalty is determined by considering relevant matters identified in s 133A of the Act, guided by the methodology developed and applied by the Employment Court in *Boorsboom v Preet PVT Limited*.<sup>5</sup> The Court has summarised the applicable framework in this way:<sup>6</sup>

Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):

1. The object stated in s 3 of the Act (mandatory statutory consideration 1);
2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);
7. previous conduct (mandatory statutory consideration 7);
8. deterrence, both particular and general (*Preet* additional mandatory consideration 1);
9. culpability (*Preet* additional mandatory consideration 2);
10. consistency of penalty awards in similar cases (*Preet* additional mandatory consideration 3);
11. ability to pay (*Preet* additional mandatory consideration 4); and
12. proportionality of outcome to breach (*Preet* additional mandatory consideration 5).

### *Object of the Act*

[21] The object of the Act includes promoting effective enforcement of employment standards, particularly through powers conferred on Labour Inspectors.

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<sup>5</sup> *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151].

<sup>6</sup> *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

Issuing an improvement notice is an exercise of one of those enforcement powers.<sup>7</sup> BGL's failure to comply sufficiently with the notice issued to it thereby undermined effective enforcement of employment standards.

*Nature and extent of the breach*

[22] BGL's failure to comply with the notice is treated as a single breach of the Act so the company was liable to a provisional penalty of \$20,000.

*Intentional breach?*

[23] The improvement notice addressed the failures of BGL to operate its business in a manner than complied with its statutory obligation to keep certain records and to observe requirements for the payment of holidays, public holidays and alternative leave. While Mr Singh, with assistance from his former accounts staff, may have diligently sought to address those shortcomings, the apparent remaining inadequacies in the resulting records and payments were the result of what must be taken to have been deliberate, earlier business decisions not to meet the long-standing and well-known statutory employment standards.

*Loss or damage suffered or gains made or losses avoided?*

[24] The inadequacies of BGL's records meant the extent of loss caused to its workers could not be precisely identified. The example of SSK showed he may have lost the benefit of payment at the rate of time-and-a-half for most, if not all, the 11 public holidays he was identified as having worked. Because the subsequent audit BGL conducted, under the notice requirements, had not sufficiently confirmed the situation of all other workers was adequately reassessed, the extent of loss may have been greater. On the other side of the ledger BGL's business had gained the benefit of not paying all its workers all their entitlements when they were due.

*Any steps taken to mitigate adverse effects?*

[25] As acknowledged in the Inspector's closing submissions, BGL had taken some steps to comply with other requirements of the improvement notice. This included addressing shortfalls in the payment of annual holidays to former staff. Mr Singh had also made efforts, after the Authority varied the extent of the improvement notice, to review all BGL records and made some adjustments as a result, such as paying for the

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<sup>7</sup> Employment Relations Act 2000, s 223A and s 223D.

alternative leave days to SSK that had showed up as unpaid on its pay system. While the extent of adjustments made was ultimately inadequate to fully comply with the notice requirements, the efforts made warranted a 50 per cent adjustment of the provisional penalty for the breach, from \$20,000 to \$10,000.

*Circumstances of the breach, including vulnerability of employees?*

[26] In closing submissions BGL accepted its former workers, who were employed under work visas, were vulnerable employees. The initial failures to meet employment standards and then, subsequently, not completing all requirements of the improvement notice had occurred over an extended period of time. No reduction of the provisional penalty was warranted as a result of considering the circumstances of the breach.

*Any previous breaches or penalties?*

[27] BGL had not been involved in previous proceedings relating to observance of employment standards. As a first offender a further 50 per cent reduction of the provisional penalty was warranted, from \$10,000 to \$5,000.

*Deterrence*

[28] The amount of penalty to be imposed has regard to the deterrent effect on the particular person, including a corporate entity, and on the wider community of employers. In this case BGL was no longer operating as an employer. Its director, Mr Singh, through another company, was involved in the operation of another restaurant elsewhere in Auckland. Potential deterrent effect on him personally was not a factor appropriately applied to maintain or increase the provisional level of penalty on BGL but neither was it a reason to reduce that amount. Rather, a penalty of at least \$5,000 was appropriate to deter other employers from failing to comply with the requirements of improvement notices issued to them by Labour Inspectors.

*Culpability*

[29] As already noted BGL was entirely responsible for its business decisions that had led to the Inspector's initial inquiry about compliance with employment standards and for the extent to which BGL addressed those concerns in response to the improvement notice. No reduction of the provisional level of the penalty was warranted for that factor.

### *Consistency*

[30] The penalties imposed on employers in other cases for failure to comply with an improvement notice had to be considered to ensure no significant inconsistency with the provisional result for BGL.

[31] In 2015 an Authority determination accepted as accurate a submission that the range of penalties for breach of improvement notices, in recent cases at that time, was between \$6,500 to \$8,500.<sup>8</sup> A penalty of \$7,500 was imposed in that case.

[32] In other similar cases in 2016 and 2017 penalties of \$7,000, \$5,000, and \$4,000 were imposed.<sup>9</sup> In *Labour Inspector v Alps Travel Company Limited*, a determination issued in 2018, a penalty of \$5,000 for failure to comply with an improvement notice was part of total penalties of \$75,000 imposed for extensive breaches of employment standards.<sup>10</sup>

[33] The result in some other cases sit outside that general range. In *Labour Inspector v Antara AG Farms GP Limited* a failure to comply with an improvement notice resulted, in the particular circumstances of that case, in a penalty of \$500 for a first offence.<sup>11</sup> In *Labour Inspector v Rattu & Lalli Developments Limited*, referred to in BGL's oral closing submissions, the Authority imposed a penalty of only \$200. However that latter determination had not applied the factors from the *Preet* analysis that recent decisions of the Court have reconfirmed should form part of the assessment.<sup>12</sup> In respect of BGL's failure to fully comply with the improvement notice, a penalty so far below the general range imposed in other similar cases would be manifestly inadequate.

[34] Imposing a penalty on BGL at the provisional level of \$5,000 was consistent with the range of penalties imposed in other similar cases.

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<sup>8</sup> *Norton, a Labour Inspector v KRSVP Limited* [2015] NZERA Christchurch 176 at [32].

<sup>9</sup> *Labour Inspector v Wallace Painting & Contractors Limited* [2017] NZERA Christchurch 126 (\$4,500); *Labour Inspector v Hua Star Homes Limited* [2017] NZERA Auckland 74 (\$5,000) and *Labour Inspector v Lotus Body Clinic Limited* [2016] NZERA Auckland 292 (\$7,000).

<sup>10</sup> [2018] NZERA Christchurch 22.

<sup>11</sup> [2018] NZERA Christchurch 199.

<sup>12</sup> See *Nicholson and Daleson*, above n 6.

### *Ability to pay*

[35] Mr Singh gave oral evidence that BGL lacked funds or assets to pay any penalty. There was no documentary evidence to confirm or negate that assertion or the prospect that enforcement or liquidation processes might disclose some funds or assets to meet the value of a penalty. However, as the Court has recently confirmed in the *Daleson* decision, mere financial incapacity alone is unlikely to warrant reducing a penalty to “next to nil” given the relevant statutory scheme and its underlying objectives. A company’s fortunes may ebb and flow and liability to pay a penalty is different from subsequent enforcement.<sup>13</sup>

[36] A check of Companies Office online records, made on the day of the investigation meeting, showed that the Registrar had given notice of intention to remove BGL from the register. Asked about this prospect the Inspector said he was aware of that notice and had contacted the Registrar about objecting to the removal while proceedings in the Authority were underway. The Inspector said a Companies Office representative had advised him that an objection from a different party had already resulted in a pause to the removal proposal.

[37] In that light, and considering the substantial discounts on the provisional level of the penalty already made in earlier steps of the assessment, no further reduction was warranted on the grounds of ability to pay.

### *Proportionality*

[38] A last cross-check considers whether the amount of \$5,000 reached as the provisional level of penalty in this case is proportionate to the seriousness of the breach and harm occasioned by it. This sum is 25 per cent of the maximum permitted for a single breach and consistent with the range of penalties in other similar cases. It was also the amount that the Inspector, in closing submissions, sought as a penalty in this case.

[39] Given the important purpose of an improvement notice and the need to deter employers from not complying with one, the amount of \$5,000 is a proportionate penalty to impose.

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<sup>13</sup> *Daleson*, above n 6, at [44] and [45].

### **Costs and expenses**

[40] The Inspector is entitled to a contribution to his costs of representation in bringing a successful application. Applying the Authority's usual daily tariff for an investigation meeting that lasted a little over two hours, the sum of \$1,000 was the appropriate level of such an award of costs BGL must pay the Inspector. BGL must also reimburse the Inspector \$71.56 for the fee paid to lodge his application in the Authority.

### **Summary and orders**

[41] The Inspector's application for a compliance order is declined.

[42] BGL must pay a penalty of \$5,000 to the Authority for failing to comply with an improvement notice.

[43] BGL must also pay \$1,071.56 to the Inspector for costs and expenses.

[44] The amounts BGL has been ordered to pay must be paid by no later than 28 days from the date of this determination. On payment to the Authority, the penalty of \$5,000 is to be transferred to the Crown Account.

Robin Arthur  
Member of the Employment Relations Authority