

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 120
3071652

BETWEEN A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESS
 INNOVATION AND
 EMPLOYMENT
 Applicant

AND CHAIT & BISH HOSPITALITY
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Rebecca Denmead & Shivani Pragji, Counsel for the
 Applicant
 No appearance for the Respondent

Investigation Meeting: 12 March 2020 at Auckland

Submissions [and further 12 March from the Applicant
Information] Received: None from the Respondent

Date of Determination: 16 March 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, a Labour Inspector, claims that the Respondent, Chait & Bish Hospitality Limited (Chait & Bish), failed to comply with an Improvement Notice and now seeks an order that Chait & Bish comply with the Improvement Notice.

[2] The Labour Inspector is also seeking a penalty for the failure by Chait & Bish to comply with the Improvement Notice.

[3] No response has been received from the Respondent.

Issues

[4] The issues requiring investigation are:

- (a) Whether or not the Labour Inspector had reasonable grounds pursuant to s 223D of the Employment Relations Act 2000 (the Act) to issue the Improvement Notice dated 13 December 2018;
- (b) If so, should the Authority exercise its discretion and issue a compliance order requiring Chait & Bish to comply with the Improvement Notice?
- (c) Should the Authority exercise its discretion and order Chait & Bish to pay a penalty pursuant to s 223F of the Act?

Failure to adhere to the scheduled timetables and Non-Attendance by Chait & Bish

[5] Chait & Bish was represented at a case management conference held on 23 September 2019. No Statement in Reply was filed by Chait & Bish as discussed at that case management conference, despite reminders from the Authority.

[6] The date of the Investigation Meeting and a timetable for witness statements was advised to the parties in writing both in Minute of the Authority, and in a Notice of Investigation, both dated 24 September 2019. Accompanying them was a practice note of the Authority.

[7] A reminder email was sent to the parties on 17 January 2020 reminding them that the matter was set down for an investigation on 12 March 2020.

[8] No representative of Chait & Bish attended the Investigation Meeting on 12 March 2020 and an Authority Support Officer was unable to contact Chait & Bish on the day of the Investigation Meeting.

[9] Given the difficulties encountered in progressing this case, I was satisfied that no good cause had been shown for Chait & Bish's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

Background Facts

[10] Chait & Bish is a limited liability company incorporated on 2 November 2015 which operated an Indian pizza, fast food, takeaway and café trading as Bombay Post at 6-1 Greenwich Way, Unsworth Heights, Albany, Auckland. The directors were Bishwanth Singh Kunwar and Chait Singh.

[11] Chait & Bish has ceased trading from its previous premises, but is still on the Companies Office Register, now being known as International Education Consultancy Services Limited.

[12] Chait & Bish came to the attention of the Labour Inspectorate following an anonymous complaint from a member of the public on 21 September 2017. As a result the Labour Inspector

commenced a proactive investigation to carry out an audit of the company to determine whether or not it was complying with minimum employment standards.

[13] Three Labour Inspectors visited the address where Chait & Bish was trading in Birkenhead, Auckland on 19 December 2017. The business was closed at the time of the visit and the Labour Inspectors left at the premises a letter and attached written request for records under s 229 of the Act and s 82 of the Holidays Act 2003 (the HA).

[14] A Labour Inspector followed up the written notice by sending an email to Chait & Bish on 20 December 2017 advising of the visit by the three Labour Inspectors and stating that a letter had been left under the front door requesting records. The email requested that Chait & Bish complete an attached list of employees form and return this to the Labour Inspectorate by 5.00 p.m. on 5 January 2018.

[15] The Labour Inspector received an email response from Mr Kunwar attaching the list of employees form on 5 January 2018. The list showed five employees, including both directors of the Respondent, one current employee and two former employees.

[16] The Labour Inspector emailed Mr Kunwar on 17 January 2018 with a further written request for records for three selected employees under s 229 of the Act and s 82 of the HA by 5.00 p.m. on 25 January 2018.

[17] In the period between 7 February 2018 and 19 February 2018 the Labour Inspector and Chait & Bish had email communication in regards to the providing of the requested records.

[18] The Labour Inspector received no response to the email communications and on 26 February 2018 made a telephone call to Mr Kunwar requesting the records. Mr Kunwar agreed that he would provide the requested information prior to 5.00 p.m. on the following day, 27 February 2018. The Labour Inspector emailed confirmation of this conversation to Chait & Bish on 26 February 2018.

[19] An email was sent by the Labour Inspector to Chait & Bish on 28 February 2018 advising that the requested records had still not been received and that the Labour Inspector intended to proceed with action in the Employment Relations Authority in regard to the non-production of employment agreements and records as per s 229 of the Act and s 82 of the HA.

[20] The Labour Inspector sent an email to Chait & Bish on 5 March 2018 attaching an investigation report outlining the outcome and intention of the Labour Inspector in regard to the possible action in the Employment Relations Authority and giving it an opportunity to respond. However, Chait & Bish did not respond to the investigation report.

[21] After a phone discussion with Mr Kunwar on 17 August 2018, the Labour Inspector sent an email outlining the discussion and asking Chait & Bish to provide the requested records by 24 August 2018.

[22] Chait & Bish communicated with the Labour Inspector by emails providing the requested records on 24 August 2018 and 12 September 2018.

[23] The Labour Inspector's investigation included a review of the employment agreements, wage and time records and holiday and leave records provided for three named employees. A copy of the outcome of the investigation and review of records was outlined in a further investigation report which was provided to Chait & Bish in an email on 23 October 2018. Chait & Bish was given until 7 November 2018 to respond to the report.

[24] Chait & Bish did not respond to the above investigation report and the Labour Inspector proceeded with enforcement action and served an Improvement Notice on Chait & Bish pursuant to s 223D of the Act.

[25] The Improvement Notice was served on 13 December 2018 on Mr Chait Singh at the trading premises for Chait & Bish which was at that time at Greenwich Way, Unsworth Heights, Albany, Auckland. A copy of the Improvement Notice was also emailed to Chait & Bish.

[26] The due date for compliance with the Improvement Notice was at 5.00 p.m. on Monday 21 January 2019.

[27] The Labour Inspector emailed Chait & Bish at its website address, chaitbish@gmail.com on 31 January 2019, 21 February 2019, 6 March 2019 and 14 March 2019 to advise the compliance date for the Improvement Notice had passed and providing a further opportunity for Chait & Bish to comply.

[28] Chait & Bish failed to respond or to comply with the Improvement Notice.

Improvement notice

[29] The Improvement Notice issued on 13 December 2018 set out the belief that the employer, Chait & Bish, was failing to comply with provisions of minimum employment standards, including those of the Act and the HA. The Improvement Notice set out the steps that Chait & Bish needed to take to comply with it.

[30] The steps to be taken in order for Chait & Bish to comply included:

- (a) identifying current employees whose written employment agreements did not include all the mandatory elements outlined in s 65 of the Act;

- (b) to implement a wage and times record for all current employees that contained all the mandatory elements outlined in s 130 of the Act;
- (c) to implement holiday and leave records for all current employees that contained all the mandatory elements outlined in s 81 of the HA;
- (d) to review all former employees going back six years from 17 January 2018 and ensure that annual holiday pay had been calculated and paid at the end of their employment in accordance with s 23 of the HA;
- (e) to review all current employees going back six years from 17 January 2018 who worked on any public holiday and ensure they were paid time-and-a-half for any hours worked in accordance with s 50 of the HA;
- (f) to review all current and former employees going back six years from 17 January 2018 who worked on public holidays which fell on an otherwise working day for the employee and ensure that they were provided for an alternative holiday in accordance with s 56 of the HA.

[31] Chait & Bish was informed in the Improvement Notice that it was required to comply with the steps outlined in the Improvement Notice and provide the information requested before 5.00 p.m. on Monday 21 January 2019. The Improvement Notice set out information for Chait & Bish on how it could lodge an objection to the Improvement Notice.

[32] Chait & Bish failed to comply with the Improvement Notice as required.

[33] No objection to the Improvement Notice was filed by or on behalf of Chait & Bish.

[34] The Labour Inspector gave evidence to the Authority and provided the Authority with full information and file notes documenting all efforts taken to obtain compliance with the Improvement Notice by Chait & Bish.

Did the Labour Inspector have reasonable grounds pursuant to s 223D of the Act to issue the Improvement Notice dated 13 December 2018?

[35] Pursuant to s 223D of the Act, a Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts “may issue the employee with an Improvement Notice that requires the employer to comply with the provision”. The HA is included in relevant Acts.

[36] The Labour Inspector said that following the review of the records provided by Chait & Bish via emails on 24 August 2018 and 12 September 2018, she had identified the following breaches in regard to three employees:

Section 65 of the Act

[37] The employment agreements did not contain a description of the work to be performed.

Section 130 of the Act

[38] Wages and time records did not contain the employees' postal address or whether the employee is employed under an individual employment agreement or a collective agreement.

Section 81 of the HA

[39] Holiday and leave records did not include all of the required information namely:

- a) The date of termination of employment for two employees;
- b) The current entitlement to annual holidays for one employee;
- c) The date on which that employee became entitled to annual holidays; the current entitlement to leave for that employee;
- d) The date on which that employee became entitled to sick leave.

Section 23 and 27 of the HA

[40] Failing to calculate and pay annual holiday pay on termination of employment to two employees.

Section 50 of the HA

[41] Failing to pay time and a half for hours worked on a public holiday by one employee.

Section 55 of the HA

[42] Failing to pay one employee for work on a public holiday in the pay that related to the pay period in which the public holiday occurred.

Section 56 of the HA

[43] Failing to provide an alternative holiday to one employee for work on a public holiday that was otherwise a working day.

[44] The Labour Inspector said that they had sent the investigation report outlining the outcome of their investigation and the breaches identified to Chait & Bish by email on 23 October 2018, giving Chait & Bish until 7 November 2018 to respond to the report. However, Chait & Bish did not respond.

[45] Due to the non-response from Chait & Bish the Labour Inspector said she served an Improvement Notice on the Respondent on 13 December 2018.

[46] Having examined the investigation report I concur with the findings of the Labour Inspector in respect of the breaches of minimum employment legislation identified in respect of certain employees.

[47] I determine it was reasonable for the Labour Inspector to issue an Improvement Notice.

Should the Authority exercise its discretion and issue a compliance order requiring Chait & Bish to comply with the Improvement Notice?

[48] In the situation in which a person has not observed or complied with an Improvement Notice, s 137(1)(iia) of the Act states “*an enforceable undertaking that section 223C(1) provides may be enforced by compliance order*”.

[49] I have found that the Labour Inspector had reasonable grounds to believe that Chait & Bish had failed to comply with the HA and the Act and accordingly issued the Improvement Notice requiring compliance.

[50] I observed that the Labour Inspector engaged fully with Chait & Bish before serving the Improvement Notice. They had communicated by email, by telephone and by serving on them the investigation report. It was only after these steps had been taken that the Labour Inspector issued the Improvement Notice which I have found they had reasonable grounds to do.

[51] I order Chait & Bish to comply with the Improvement Notice dated 13 December 2018 within 14 days of the date of this determination.

Penalties

[52] In *Boorsboom v Preet Pvt Limited*¹ the Employment Court set out a methodology which it developed and was applied by it in determining an appropriate penalty. The Court set out the relevant matters which are to be identified. The applicable framework has been summarised by the Court in a recent decision of a *Labour Inspector v Daleson Investment Limited* as:

The considerations follow (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case): the object stated in s 3 of the Act (statutory consideration 1); the nature and extent of the breach or involvement in the breach (statutory consideration 2); whether the breach was intentional, inadvertent or negligent (statutory consideration 3); 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 (statutory consideration 4); whether the person in

¹ [2016] NZEmpC 143 at [138]- [151].

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 (statutory consideration 5); the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6); previous conduct (statutory consideration 7); deterrence, both particular and general (*Preet* additional consideration); culpability (*Preet* additional consideration); consistency of penalty awards in similar cases (*Preet* additional consideration); ability to pay (*Preet* additional consideration); and proportionality of outcome to breach (*Preet* additional consideration).

Globalisation

[53] There is no issue as to globalisation as only a single penalty is being sought.

Statutory consideration 1 – object stated in s 3 of the Act

[54] Chait & Bish is now known as International Education Consultancy Services Limited. There is no evidence before the Authority that the employer no longer trades or does not employ employees. I find that this is a significant factor.

[55] The object of the Act includes promoting effective enforcement of employment standards, particular through powers conferred on Labour Inspectors. One of the enforcement powers of Labour Inspectors is an Improvement Notice.

[56] I find that Chait & Bish's failure to comply with an Improvement Notice issued to it has undermined effective enforcement of employment standards and not complied with the object of the Act.

[57] There is no evidence that Chait & Bish has taken any steps to comply with the Improvement Notice despite the repeated opportunities provided to it to do so.

Statutory consideration 2 – nature and extent of the breach

[58] Failure to comply with the Improvement Notice by Chait & Bish is a single breach of the Act for which the maximum penalty available under the Act is \$20,000.00.

Statutory consideration 3 – was the breach intentional, inadvertent or negligent

[59] Chait & Bish had been served with the investigation report prior to receiving the Improvement Notice. Chait & Bish lodged no objection to the Improvement Notice and did not comply with it.

[60] I find that the breach was intentional.

Statutory consideration 4 – the nature and extent of any loss or damage

[61] Chait & Bish operated a takeaway business. Whilst no information as to the nature of its business has been provided by Chait & Bish, such businesses commonly have short term, low paid employees. There is a degree of vulnerability associated with this category of employees.

[62] The relevant employees in this case have been affected by a failure to calculate and pay annual holiday pay on termination of employment, by failing to be paid time and a half for working on a public holiday or being provided with an alternative holiday. Nor have they received an alternative day when working on a public holiday.

[63] I find that there has been a benefit gained by Chait & Bish not paying their employees as they are entitled to be paid.

Statutory consideration 5 – steps to mitigate effects of the breach

[64] Chait & Bish has not taken any steps to mitigate the effects of the breach. It failed to provide the Labour Inspector with the information requested by her, and subsequently failed to comply with the requirements of the Improvement Notice.

[65] Chait & Bish failed to respond to communications from the Authority and did not attend the Investigation Meeting.

[66] There was no evidence of any contrition or remorse on its part, or to take any responsibility for the situation which had developed in respect to ensuring it met the statutory minimum employment requirements for its employees.

[67] Employment law requirements are not a new introduction in New Zealand and I consider that Chait & Bish should have been well aware of the statutory minimum requirements in respect of provisions in employment agreements and holiday pay.

[68] The Labour Inspector submits that the correct starting point is 70% of the maximum penalty. Accordingly, Chait & Bish is liable to a provisional penalty of \$14,000.00.

[69] I accept that this is the correct starting point for assessing a provisional penalty.

Statutory consideration 6 – circumstance of the breach and any vulnerability

[70] I take into consideration not only the fact that the employees affected by the breach of employment minimum standards by Chait & Bish were more likely than not vulnerable employees, but also the costs of enforcement the Labour Inspector has been required to incur to try to obtain Chait & Bish's compliance with its statutory obligations..

[71] I consider that no reduction to the provisional penalty should be made at this stage.

Statutory consideration 7 – any previous breaches or penalties

[72] Chait & Bish has not previously appeared before the Authority. In consideration of this factor I have reduced the amount of penalty by 10 per cent, thereby reducing the penalty from \$14,000.00 to \$12,600.00.

Statutory consideration 8 – deterrence

[73] I consider that there is a need to enforce to employers the employment standards they are required to meet on the basis that minimum entitlements are non-negotiable. There has been no compliance made by Chait & Bish following the Improvement Notice and no engagement with the Labour Inspector in respect of it, and indeed no meaningful engagement with the Authority.

[74] As such I find there is a need for particular deterrence for Chait & Bish.

Additional consideration 10 – consistency

[75] It is important to consider penalties imposed on employers in other cases for failure to comply with an Improvement Notice by means of ensuring consistency with the provisional result for Chait & Bish.

[76] Whilst the provisional penalty sought by the Labour Inspector is rather high in comparison with similar cases, in this case there has been no steps taken to comply with the Improvement Notice and therefore I do not make a reduction to the penalty at this stage.

Additional consideration 11 – ability to pay

[77] There has been no information provided to the Authority by Chait & Bish as to its ability to pay any penalty, nor is the Labour Inspector aware of any particular financial details of Chait & Bish.

Additional consideration 12 – proportionality of outcome

[78] It is necessary that I consider whether the amount of \$12,600.00 reached as a provisional penalty is proportionate to the seriousness of the breach and the harm caused by it.

[79] I note that the total amount of the outstanding sums are unknown at present, because Chait & Bish has not performed the required calculations.

[80] The Labour Inspector submits that any amounts owed to the workers are significant to them, and likely to make a difference to their lives and in their particular circumstances. Accordingly the

Labour Inspector submits that Authority should impose a meaningful and deterrent penalty on Chait & Bish

[81] I have considered carefully all the circumstances and determine that \$12,600.00 is the appropriate penalty in this case.

[82] In reaching this view I have taken into consideration the important purpose that Improvement Notices serve and the need to deter other employers from not complying with them, together with the factors included above and taking into account the vulnerability of the particular employees.

Costs

[83] The Labour Inspector is seeking costs up to the amount incurred, if any, expenses and the filing fee. This matter lasted for just a quarter of a day of investigation meeting and using the usual daily tariff in the Authority of \$4,500 for a full day of hearing I find that the sum of \$1,125.00 is the appropriate level for the award of costs in this matter.

[84] I order Chait & Bish to pay the Labour Inspector costs in the sum of \$1,125.00 within 14 days of the date of this determination.

[85] Chait & Bish is also ordered to pay the Labour Inspector \$71.56 being the fee paid to lodge the application in the Authority within 14 days of the date of this determination.

Eleanor Robinson
Member of the Employment Relations Authority