

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 371
3133596

BETWEEN A LABOUR INSPECTOR
Applicant

AND BF7 TRADING LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Tim Gray, counsel for the Applicant
Roy Bishop for the Respondent

Investigation: On the papers

Determination: 24 August 2021

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination BF7 Trading Ltd must pay \$10,000 into the Authority as a penalty for failure to comply with an improvement notice. On recovery of the penalty the Authority must pay that amount to a Crown Bank Account.**
- B. BF7 Trading Ltd must also, within 28 days of the date of this determination, pay the Labour Inspector \$2,071.56 for costs of representation and expenses.**

Employment Relationship Problem

[1] By determination on 28 June 2021 the Authority ordered BF7 Trading Ltd (BF7) to comply with an improvement notice issued by a Labour Inspector on 3 March 2020 under s 223D of the Employment Relations Act 2000 (the Act).¹

¹ *A Labour Inspector v BF7 Trading Limited* [2021] NZERA 275.

[2] The Inspector also asked for a penalty to be awarded against BF7 for failing to meet the requirements of the improvement notice earlier. As agreed with the parties in a case management conference on 25 June 2021 the penalty issue was reserved to be determined on the papers once they had an opportunity to lodge written submissions. Timetable directions for lodging those submissions were agreed.

[3] The Inspector, through counsel, lodged submissions by the agreed time. BF7 did not use its opportunity to lodge any submissions or respond to Authority queries after the time set for its submissions had passed.

[4] The penalty issue has been determined on the following papers: the Inspector's statement of problem lodged on 2 March 2021, the Inspector's submissions lodged on 6 July 2021 and memorandum of Inspector's counsel lodged on 30 July 2021. The memorandum advised the Authority that the Inspector had received no evidence from BF7 of the company taking any of the steps required by the Authority's compliance order. The date set for compliance in that order was 26 July 2021. This information was a further factor relevant to assessing any penalty.

[5] There was no statement in reply or submissions from BF7 to consider. The company's participation in responding to the Inspector's application for a compliance order and penalties has been limited to its representative Roy Bishop attending the case management conference by telephone. In that call he had consented to issue of the compliance order and agreed to the timetable directions for lodging submissions on the penalty issue.

The improvement notice

[6] BF7 operates a recruitment agency trading as Filled Roles. Its business focuses on the construction and engineering sectors and its services include providing labour only contracts for some trades.

[7] The improvement notice issued by the Inspector in March 2020 identified failings by BF7 to comply with minimum employment standards. A review of a sample of the company's records and employment agreements had shown BF7's records for wages, time, holidays and leave lacked some mandatory elements; its employment agreement used a deductions clause that was contrary to law; and a new employment agreement lacked a necessary clause about payment of time and a half for work on a

public holiday. The notice set out steps the company was required to complete by 24 April 2020 to meet minimum employment standards.

[8] Despite the Inspector agreeing several extensions of time for compliance over the following months BF7 failed to provide any evidence of having completed those steps. While company representatives said they were preparing documentation to show they had done what the notice required, no documentation was sent to the Inspector. The Inspector's application to the Authority for a compliance order and a penalty was lodged the day before a full year had passed since the notice was issued.

Liability to a penalty for failure to comply with an improvement notice

[9] The Inspector asked the Authority to impose the penalty available under s 223F of the Act for an employer who fails to comply with an improvement notice.² This particular penalty can only be sought if the Inspector is not also seeking penalties under other relevant legislation for the same matters addressed in the improvement notice.³ The maximum penalty available against a company for each breach is \$20,000.⁴

[10] An appropriate penalty is determined by considering relevant matters and criteria specified in s 133A of the Act and developed in the case law, as summarised in the following 12 steps:⁵

1. The object stated in s 3 of the Act (statutory consideration 1);
2. the nature and extent of the breach or involvement in the breach (statutory consideration 2);
3. whether the breach was intentional, inadvertent or negligent (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 (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 (statutory consideration 5);
6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6);
7. previous conduct (statutory consideration 7);
8. deterrence, both particular and general (additional consideration 1);
9. culpability (additional consideration 2);
10. consistency of penalty awards in similar cases (additional consideration 3);

² Employment Relations Act 2000, s 223F.

³ Section 223F(2).

⁴ Section 135(2).

⁵ See *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151]; *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

11. ability to pay (additional consideration 4); and
12. proportionality of outcome to breach (additional consideration 5).

The object of the Act

[11] Effective enforcement of employment standards is one of the objects promoted by the Act. Improvement notices are a tool available to Labour Inspectors as a means of advancing that object. BF7's failure to comply with the notice issued to it undermined effective enforcement of employment standards.

The nature and extent of the breach

[12] Failure to comply with the improvement notice amounted, in the circumstances of this case, to a single breach of s 223F of the Act, resulting in a provisional liability to a penalty of up to \$20,000. The failures identified in the notice concerned short comings in record keeping and documentation rather than specific instances of loss to identified workers. However, the breach of not complying with the notice extended over a protracted period. During that time BF7 had indicated measures to provide the information were underway and the Inspector had agreed to four extensions of time. The reality was that BF7 spun the Inspector along for a full year without providing the required, and promised, responses.

Whether the breach was intentional, inadvertent or negligent

[13] The protracted nature of the delay and BF7's responses when prompted by the Inspector for updates on progress invited the inference that the breach became intentional rather than something inadvertently overlooked for other reasons. For instance, Mr Bishop emailed the Inspector on 14 July 2020 to say he was "snowed with everything that has been going on with Covid" and would call the following morning. Two months later the Inspector had yet to hear from him. Similarly, by email to the Inspector on 27 October 2020, Mr Bishop said he expected to have "most of it" completed and sent to the Inspector by the end of the week. The Inspector was still waiting for that information by the time, some four months later, he lodged his application to the Authority.

[14] BF7's apparent subsequent failure to provide the information, despite a compliance order issued on 28 June 2021, strengthened the grounds for inferring its

inaction was deliberate. Mr Bishop had, on behalf of BF7, agreed the making of the order was reasonable but the company appears not to have done what it required.⁶

[15] The breach was therefore, by its nature and protracted period, sufficiently serious to warrant a penalty. Assessing the relative seriousness of the breach, a provisional penalty of \$8,000, that is 40 per cent of the maximum liability, was an appropriate starting point, to be adjusted once other relevant factors were weighed.

The nature and extent of losses suffered or gains made

[16] No specific loss to any former or current employee of BF7 was identified as attributable to its failure to take the steps required by the improvement notice. An element of ‘gain’ for BF7 can be inferred on the basis that it had avoided the time and expense other employers are put to in making the effort to prepare and keep compliant records and employment agreements.

Any steps taken to avoid, mitigate or compensate for effects of the breach

[17] No steps to mitigate the effects of the breach have been identified. On several occasions BF7 told the Inspector the company was preparing the required information but, even after extensions of time were granted, did not provide it.

Circumstances of the breach, including vulnerability of employees

[18] No specific information about particular vulnerability of any employees affected or potentially affected by the breach was provided.

Previous conduct

[19] This is a factor of particular importance in this case. In five previous cases the Authority has found BF7 liable to pay wage arrears.⁷ The failure to pay those wages were breaches of employment standards. In two of those cases, the Authority also imposed penalties – one of \$2,000 for breaching the Wages Protection Act 1983 by failing to pay wages when due and one of \$2,000 for breaching s 130(2) of the Act by failing to provide an employee with wage and time records when requested.

⁶ *A Labour Inspector v BF7 Trading Limited*, above n 1, at [8]-[9].

⁷ *Do v BF7 Trading Ltd* [2018] NZERA Auckland 268 and [2018] NZERA Auckland 294; *Senice v BF7 Trading Ltd* [2018] NZERA Auckland 255; *Jenkins v BF7 Trading Ltd* [2018] NZERA Auckland 251; *Brough v BF7 Trading Ltd* [2018] NZERA Wellington 69 and *De Vries v BF7 Trading Ltd* [2017] NZERA Wellington 128.

[20] In *Do v BF7 Trading Ltd* the determination noted the number of Authority determinations concerning former employees of BF7 might indicate wider problems in the company's compliance with employment standards. It advised that a copy of that determination was to be sent to the Labour Inspectorate for consideration as to whether further inquiries might be warranted.⁸

[21] There are three other instances where BF7 Trading Ltd's failure to comply with legislative requirements have also resulted in the Authority imposing a penalty on the company. Each involved failure to make payments due under a record of settlement. In *Isidro v BF7 Trading Ltd* [2020] NZERA 43 and *Jolin v BF7 Trading Ltd* [2020] NZERA 42 a penalty of \$3,000 was imposed in each matter. In *Stewart v BF7 Trading Ltd* [2019] NZERA 362 the penalty set was \$2,000.

[22] This pattern of repeated failure to observe employment standards, and other shortcomings in observing obligations as an employer, resulting in prior penalties, was an aggravating factor in assessing the appropriate penalty in the present matter. An uplift in the provisional penalty from \$8,000 to \$10,000 was justified to reflect the seriousness of the breach in that context.

Deterrence

[23] A penalty was necessary to deter this particular employer, and employers generally, from delaying or failing to follow the steps required by an improvement notice issued by a Labour Inspector. This reflects the parliamentary intention apparent in the statutory provision for a penalty in such circumstances. It also accords with increasing community and commercial attention on ethical conduct throughout the chain of production and distribution of goods and services, including by adherence to employment standards for the workers providing them. A penalty marks disapproval of failure to comply with a measure specifically designed to assist with effectively enforcing those standards.

Degree of culpability

[24] On the information available to the Authority BF7 was entirely responsible for the situation in which it failed to comply, despite generous extensions, to relatively straightforward obligations to provide information required by the notice.

⁸ *Do v BF7 Trading Ltd* [2018] NZERA Auckland 294 at [17].

Consistency of penalty awards

[25] Penalties awarded in cases concerning failure to comply with an improvement notice should be broadly consistent with one another, allowing for a wide range of circumstances, including the number of workers directly or indirectly affected and the severity or extent of the failure.

[26] In *Labour Inspector v IT-Guys NZ Ltd* the Employment Court imposed a penalty of \$7,000 for failure to comply with an improvement notice used to identify payments of wage arrears due to three workers.⁹ However, in that case, there was no evidence of prior penalties being imposed on the employer and its business had ceased to employ workers by the time that improvement notice was issued. Neither factor applied to BF7.

[27] An Authority determination in 2015 referred to penalties for failing to comply with improvement notices, in cases at that time, as ranging from \$6,500 to \$8,500.¹⁰ In similar cases in 2016 and 2017 penalties of between \$4,500 and \$7,000 were imposed.¹¹ In more recent examples penalties have ranged from \$5,000 to \$12,600.¹²

[28] Within that range, and taking account of the circumstances described in each determination, a penalty at the higher end in BF7's case is consistent for the situation of an employer demonstrating no real steps to comply with the notice. Other cases also did not have the aggravating factor of the employer previously being penalised for failures to meet employment standards or other obligations to former employees.

Ability to pay

[29] There was no information to indicate BF7 would not be able to pay a penalty at the provisional level described.

Proportionality

[30] This final factor assesses and, if necessary, adjusts the provisional penalty so the outcome is proportionate to the severity of the breach. In this case there was no

⁹ *A Labour Inspector v IT-Guys NZ Ltd* [2019] NZEmpC 115.

¹⁰ *Norton, a Labour Inspector v KRSVP Limited* [2015] NZERA Christchurch 176 at [32].

¹¹ *A Labour Inspector v Wallace Painting & Contractors Limited* [2017] NZERA Christchurch 126 (\$4,500); *A Labour Inspector v Hua Star Homes Limited* [2017] NZERA Auckland 74 (\$5,000) and *A Labour Inspector v Lotus Body Clinic Limited* [2016] NZERA Auckland 292 (\$7,000).

¹² *A Labour Inspector v Chait & Bish Hospitality Ltd* [2020] NZERA 120 (\$12,600); *A Labour Inspector v Healthhop Ltd* [2019] NZERA 268 (\$7,000), *A Labour Inspector v Nukuvai Ltd* [2021] NZERA 126 (\$5,000) and *A Labour Inspector v Bombay Gymkhana Ltd* [2019] NZERA 268 (\$5,000).

direct, identified harm to individual employees. The protracted nature of the breach could, however, bluntly be described as BF7 ‘thumbing its nose’ at the Inspector. The Inspector’s evidence, and the accounts of BF7’s participation in other Authority matters, revealed a pattern of business practice where commitments to sort out problems were made, followed by long delays with little or nothing done. In that context, the breach in this case, which put the Inspector to the repeated task of pursuing compliance over an extended period, was a sufficiently serious breach to make the provisional penalty proportionate to its severity.

Order

[31] For the reasons given BF7 must pay a penalty of \$10,000 for failing to comply with an improvement notice issued by a Labour Inspector under s 223D of the Act. The penalty must be paid to the Authority within 28 days of the date of this determination. On recovery of the penalty, the Authority must transfer that amount to a Crown Bank Account.

Costs

[32] The Inspector’s application also sought an order for costs. As the matter was dealt with on the papers, an appropriate starting point for assessing costs was one third of the Authority’s usual daily tariff, that is \$1,500. An uplift to \$2,000 was warranted for additional time required for attendance at a case management conference and preparing an additional memorandum to the Authority. That is the amount BF7 must pay as costs to the Labour Inspector within 28 days of the date of this determination. BF7 must also reimburse the Inspector for the expense of the fee of \$71.56 paid to lodge the application in the Authority.¹³

Robin Arthur
Member of the Employment Relations Authority

¹³ Employment Relations Act 2000, Schedule 2 clause 15.