IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 402
3080774

BETWEEN	CREST COMMERCIAL CLEANING LIMITED Applicant
AND	TOTAL PROPERTY SERVICES (CANTERBURY) LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Charles McGuinness, counsel for the Applicant Paul McBride, counsel for the Respondent
Investigation Meeting:	2 June 2021 in Christchurch
Submissions Received:	11 June 2021 from the applicant 11 June 2021 from the respondent
Date of Determination:	13 September 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter follows on from a second preliminary determination of the Authority that found that Crest Commercial Cleaning Limited (Crest Clean) was able to pursue an application for a penalty against Total Property Services (Canterbury) Limited (Total Property) for an alleged breach of s 69OEA of the Employment Relations Act 2000 (the Act) and compliance under s 140A(2) of the Act.

[2] Crest Clean successfully tendered for a cleaning contract at a Christchurch high school. Total Property had held the contract previously and eleven of Total Property's cleaners opted to transfer to Crest Clean with three subsequently opting out part way through the transfer.

[3] Crest Clean says that a request for individualised employee information for the transferring cleaners under s 69OEA(2) of the Employment Relations Act 2000 ("the Act") was not complied with, that only partial information was provided and on a sporadic basis. Crest Clean says this created difficulties in ensuring those transferred continue on existing terms, conditions and being able to calculate the correct transfer cost with Total Property.

[4] Crest Clean seek a finding that Total Property is in breach of s 69OEA(2), s 69OEA(3)(a) and (b)(i) and s 69OEA(5) of the Act. A penalty is sought for each breach under s 69OEA(6) together with an order for compliance.

[5] Total Property dispute matters about provision of information and what amounts to individualised employee information under s 69OB of the Act. The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[6] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have, likewise, carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[7] Christine Kelliher, Crest Clean's HR and Payroll Manager; Paul Emery, Total Property's Managing Director and Laura McLennan, Total Property's HR and Administration Manager, all gave evidence at the investigation meeting and both parties counsel made oral and later written submissions.

Issues to be determined

[8] Overall, what is the extent of the information an employer must provide on behalf of workers transferring to a new employer pursuant to s 69OB and s 69OEA of the Act?

[9] Did Total Property breach disclosure obligations owed in a sufficient manner to warrant the imposition of penalties under s 69OEA(6) of the Act.

[10] If any or all of the breaches are made out whether a compliance order is appropriate to direct Total Property to provide fuller individualised information.

[11] An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[12] Crest Clean says it is the largest locally owned cleaning company in New Zealand that operates on a franchising basis rather than directly employing cleaners and says it has over 2000 "personnel".

[13] In August 2019 Crest Clean won a contract to provide cleaning services at a Christchurch high school. At the time the outgoing contract holder Total Property directly employed cleaners. Pertinent context to this dispute is Total Property is also a nationwide company, on their website claim:

> We are renowned for being a people-first organisation. In an industry where the market is competing at the cheapest price for labour, we have persisted in paying extra and taking on additional cost to look after our people – and we have been richly rewarded in the loyalty and long-term service of our staff.
>
> Owner Glen Gordon has served more than 10 years with the Building Services Contractors of New Zealand (BSCNZ) council, most recently as vice president and president. A lot of this work has focused on advocacy for fairer employment conditions for cleaning staff and innovations within the industry. [1]

[14] The transfer of the contract for cleaning services triggered the provisions of section 6A of the Act relating to vulnerable workers giving those who chose to transfer to Crest Clean the option of doing so on the same employment terms and conditions in place at the time of the transfer. Once the workers concerned were identified the situation also gave rise to obligations the Act placed upon Total Property to provide information to essentially facilitate a 'seamless' transfer.

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[1] https://www.tps.co.nz

[15] On 3 September 2019 Crest Clean's Training Manager forwarded an "Individualised Employee Information Checklist" (the checklist) of items to be provided to facilitate the transfer of workers. The checklist was comprehensive in scope and included seeking wage, time and holiday/leave records and employment agreements and two 'catch alls' i.e. "All personnel records relating to the employee" and "Any other information that has been kept for employment related purposes (except where protected by statutory or contractual requirement to maintain confidentiality)".

[16] By way of an email of 9 September 2019 Paul Emery, Total Property's managing director communicated transferring employee information to Crest Clean including individual employment agreements. Christine Kelliher, Crest Clean's payroll manager responded on the same day and politely acknowledged the information forwarded but indicated more was needed "particularly the wage and time records, and the holiday and leave records for each employee for the duration of their employment" and said: "If it would be easier for you, we would also accept payroll summaries accompanied with matching time and attendance records". Ms Kelliher then noted the information sought was required as the provided employment agreements did not "include hours worked etc." Ms Kelliher then posed three questions based on information already disclosed. These in summary were:

- Did the employees work for 52 weeks at the high school in question?
- Were 'alternative' days owed to two employees earned because they worked on public holidays?
- Was there an office manual and company policies as indicated in the employment agreements?

[17] The email concluded by suggesting that if any other documents, as per the checklist, existed they should be forwarded to Ms Kelliher.

[18] The initial response of 10 September from Laura McLennan, Total Property's HR and Admin Manager, attached holiday and leave records; a summary of earnings of the identified employees for the "previous twelve months" and time sheets for the previous two pays (with pay slips). Ms McLennan then indicated "we do not deem it necessary to go any further back". The three queries were then answered in summary:

- No, the employees only worked 48 weeks at the school in question.

- The alternative days owed did not arise from working at the school in question but they should transfer over regardless of what site the employee worked on.

- The only non-contractual document was an already disclosed employment handbook.

[19] Ms Kelliher responded on the same day reiterating a request for "complete records for each employee – not just a 12 months' summary data and a couple of recent time sheets". After emphasising the need for "sufficient information that will provide the same level as a wage and time record etc", Ms Kelliher drew attention to s 69LA(7)(a) of the Act that specifies when only part of an employee's work is effected when they transfer to another employer an "apportionment of costs described" must only relate to the work being affected.[2] Essentially, Ms Kelliher was pointing out that any work undertaken for Total Property on another client's site did not count and thus the alternative holidays gained were not transferable. The email ended "Please send the additional records as soon as possible".

[20] A further response from Ms McLennan conceded the issue of the alternative holidays allegedly owed but asked the question: "Please advise exactly what you deem complete records" and then expressed a view that timesheets/payslips dating back two years were not relevant as "they are transferring under their current terms and conditions of employment". Ms Kelliher's next response was blunt – reference was made to the attached checklist noting it had already been provided and "This request is for the total duration of employment as they relate to this site". The email ended "Any further questions please don't hesitate to contact me".

[21] Whilst I observe the request for information was well set out and fulsome (whilst arguably lacking clear contextual reasons) the immediate email response of 10 September from Ms McLennan, somewhat escalated the dispute that has ensued:

> Hi Christina,
>
> I have been advised by our Managing Director that what you are asking is outside the scope of part 6a and we will be seeking legal advice.
>
> Regards

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[2] Section 69(7) Employment Relations Act 2000.

[22] Ms Kelliher responded on the same day bluntly drawing attention to s 69OB of the Act and provided a page reference and web link to such.

[23] A further exchange did however, occur and in an email of 12 September Ms McLennan indicated a belief that personal records "including disciplinary letters" and seven weeks prior wage and time records was sufficient. Ms Kelliher acknowledged the receipt of "additional records" but reiterated that "complete wage and time records" were still being sought as: "Agreement on the final transfer costs cannot be reached without them".

[24] By 13 September the emails got more insistent with Ms Kelliher claiming "This is getting a bit ridiculous" and that records had not been provided in a timely manner and "You do not need to understand why, or how I will use them to verify terms and conditions". On 16 September Ms Kelliher emailed asking for priority to be afforded to wage and time records for a named individual employee.

[25] Ms McLennan responded promptly by email of 16 September attaching time sheets "for the employees who work across multiple sites". This elicited another blunt response from Ms Kelliher that: "These records are not sufficient, again. Please produce the requested records without delay".

[26] By 20 September Crest Clean says issues remained unresolved and Ms Kelliher emailed again claiming her request for wage and time records was "now very urgent" and she placed Total Property on notice that non-compliance could lead to a penalty being "imposed by the Authority".

[27] The effective date of the transfer of employees was 30 September 2019 and Clean Crest claim they were unable to accurately calculate transfer costs. Crest Clean says further unsuccessful efforts were made to gain requested information and a 10 October email from Ms McLennan stating: "As per the Employment Relations Act, part 6a please see attached for the employee annual leave liabilities that need to be transferred over to Crest". An invoice and bank account details were sought for Total Property to pay the calculated amount.

[28] At this point in time communication ceased and Crest Clean says insufficient information was provided so that they could accurately calculate transferring employees' entitlements.

The Law

[29] Section 69A of the Act has an object of seeking to protect “categories of employees” detailed in Schedule 1A of the Act including employees who provide: “cleaning services,” when a restructuring results in the same or similar work being undertaken by a new employer.

[30] Section 69A Employment Relations Act 2000 (“the Act”) further indicates that if the employee so protected is deemed to be included in the aforementioned catering category, the protection conferred at s69A(3)(a) gives: “the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment”.[3] There was no dispute that the transferring cleaners between the parties to this dispute are covered by the above provision.

[31] The provision of the Act in dispute for which an alleged breach is claimed is as follows:

Section 69OEA disclosure of individualised employee information

(1) This section applies if an employee elects to transfer under section 69I to a new employer.

(2) The employee’s employer must provide the new employer with individualised employee information about the employee.

(3) <u>The employee's employer must provide the individualised employee information—</u>

(a) <u>*as soon as practicable; but*</u>

(b) <u>no later than—</u>

(i) <u>the date on which the restructuring takes effect; or</u>

(ii) <u>any later date agreed to by the employee's employer and the new employer.</u>

(4) Subsection (5) applies if—

(a) <u>individualised</u> employee information has been provided under subsection (2); and

(b) <u>after</u> the provision of the information, there is a change in the matters or circumstances that the information relates to; and

(c) <u>the</u> change makes the information provided out of date.

[3] Section 69A Object of this subpart – Employment Relations Act 2000.

(5) The employee's employer must, immediately after the change in the matters or circumstances, provide the new employer with the information details, specifying—

(a) *the* information that is out of date; and

(b) *what* the up-to-date information is.

(6) Every employer who fails to comply with subsections (2) to (5) is liable to a penalty imposed by the Authority.

(7) To avoid doubt, the new employer may keep, use, or disclose individualised employee information only in accordance with the **[[**Privacy Act 2020**]].]**

[32] As there is sparse case law guidance around the extent of disclosure obligations as the provisions were introduced into the Act in 2015, [4] I have to consider whether the provisions cited above were complied with. To aid this exercise Crest Clean's counsel correctly pointed to the lack of ambiguity in s 69OEA(3) that says once an employee elects to transfer the employer at the time "must provide the individualised information" and the scope of what has to be provided is set out in s69OB (the interpretation section) as:

individualised employee information—

(a) means information about an employee kept by the employee's employer for employment-related purposes, including—

(i) any personnel records relating to the employee; and

(ii) information about any disciplinary matters relating to the employee; and

(iii) information about any personal grievances raised by the employee against the employer; and

(iv) information about an employee that the employee's employer is required to keep under this Act or any other enactment, for example,—

(A) the employee's individual employment agreement, the current terms and conditions of employment that make up the employee's individual terms and conditions of employment, or the relevant collective agreement (as the case may be); and

(B) a copy of the wages and time record; and

(C) a copy of the holiday and leave record; and

(D) a copy of the employee's tax code declaration; and

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4 Subsection (1) was replaced, as from 6 March 2015, by s 44 Employment Relations Amendment Act 2014 (2014 No 61).

(E) details of any employer contribution (as defined in section 4(1) of the KiwiSaver Act 2006) and any deductions of contributions from the employee's wages for the purposes of the KiwiSaver Act 2006; and

(F) details of any deductions from the employee's wages made under section 36 of the Student Loan Scheme Act 2011; and

(G) details of any deductions from the employee's wages made under Part 10 of the Child Support Act 1991; but

(H) does not include any information about the employee that is subject to a statutory or contractual requirement to maintain confidentiality.

Assessment

[33] On a practical basis I accept Crest Clean's Ms Kelliher was seeking 'information' in good faith and in accord with the statute - the checklist used mirrored the wording in s 69OB above. For Ms Kelliher and consistent with the intent of the legislation, the information sought would allow Ms Kelliher to manage the transition and calculate entitlements and ongoing obligations of transferring workers.

[34] In evidence Ms Kelliher impressed as being a well organised, experienced and professional payroll administrator. The frustration that is evident from the email exchanges above is that Total Property had a different view of the extent of information to be disclosed and at times failed to clearly articulate why that was so. One example being the suggestion they were seeking legal advice which one would have expected to be followed up with a letter to Crest Clean setting out Total Property's understanding of their legal obligations. On the contrary, Total Property's director, Paul Emery, in giving evidence indicated that he at the time, sought no legal advice and his direction of responses to Crest Clean through Ms McLennan was based on his own views of the law and anecdotal advice he had been privy too as a leading member of an industry wide organisation. Ms McLennan gave evidence of past dealing with employers in the same situation that did not require such extensive information a sought by Crest Clean.

[35] It was also clear from evidence given that Mr Emery had a jaundiced view of Crest Clean's modus operandi and his reticence to being openly cooperative may have been driven by this that included what I perceived as a mixed motive of him having what appeared to be genuine regard to Total Property's departing employees' welfare and a degree of bitterness at losing the cleaning contract.

[36] What I must assess is was the information provided in a timely fashion and was its scope comprehensive enough to meet the object of ensuring a smooth transition or as the Court of Appeal has observed the overall aim of the statute's provision is to ensure preservation of employment that from the employee's perspective is a "seamless" process. [5]

Timeliness

[37] On the first question, based on the documented email evidence I find that Total Property was inexplicably slow in initially providing documentation it was required to disclose. The checklist that was provided to them on 3 September 2019 was arguably not properly addressed item by item until 10 October 2019.

The scope of the information provided

[38] On this question, the key dispute centred on the wage, time and holidays and leave information. I find there is no ambiguity as to the scope of what should be provided – the language of s 69OB is plain it first commences by stating that disclosure is "what the employer is required to keep under this act or any other enactment" it then cites as examples both the wage and time records and holidays and leave records. I find Total Property failed in its obligations to provide such in a timely manner and breached a statutory obligation for which a penalty falls to be considered under s 69OE(6) of the Act.

[39] Aside from the extent of the record keeping, guidance on the period that the records have to kept is found in *Hatcher v Burgess Crowley Civil Ltd* where Judge Holden in examining the issue of the length of time records need to be kept under s 81(50 of the Holidays Act 2003, indicated such records do not have to be retained for the whole period of employment:

> The point is reinforced by s 81(5), which allows employers to keep its holiday and leave record so as to form part of the wage and time record required to be kept under s 130 of the Employment Relations Act. Section 130(2) requires employers to provide employees with the information in the wage and time record relating to their employment for the preceding six years. If the employer was obliged to provide holiday and leave information for more than six years, this would be inconsistent with the employer keeping its holiday and leave record as part of the wage and time record. That too points to the time

[5] *Pacific Flight Catering v LSG Sky Chefs New Zealand Limited* [2013] NZCA 386, [2014] 2 NZLRI at [32].

periods in s 81(4) and in s 130(2) of the Employment Relations Act being the same. [6]

[40] Given the above approach of the Court, I find it was unreasonable of Crest Clean to insist upon records for the entire duration of an employee's employment this is because s 69OB(1)(a)(iv) confines the scope to be "information about an employee that the employee's employer is required to keep under this Act or any other enactment…"

[41] This leaves the question of what format the records that have to be statutorily retained should be in and whether this requires, as was sought by Crest Clean, that individualised time sheets were required to be disclosed.

[42] I find that records disclosed were sufficient to meet the Act's prescriptive approach and that individual time sheets are not envisaged by s 69OB nor necessary for the purpose of calculating entitlements owed.

Penalty

[43] As this is unchartered territory with no case comparisons I have to be guided by how the court has generally approached the question of penalties where statutory breaches occur. The approach I intend to adopt is consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited* [7] and I am also guided by Judge Corkill's decision *A Labour Inspector v Matangi Berry Farm Limited* [8]. *Preet* identified a four-step framework to fixing penalties where multiple breaches of minimum standards are evident:

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
>
> Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
>
> Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
>
> Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances. [9]

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6 *Hatcher v Crowley Civil Ltd* [2019] NZEmpC 117 at [18].
7 *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.
8 *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 40.
9 At [151].

[44] To ensure consistency I use an approach adopted in a recent Authority determination (*Labour* Inspector *of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd*) that first considered the statutory framework and then assessed the quantum of remedies based on the four steps identified above. [10] I take the following factors into account.

The object of the Act

[45] Section 3(a) of the Act sets out relevant 'aspirational' matters I must consider. These include the need to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment", and the need to acknowledge and address the inherent inequality of power in employment relationships".

The nature and extent of the breaches

[46] I have identified one breach involving Total Property for which a penalty is sought which is that Total Property failed to provide statutorily proscribed employee information in a timely manner.

[47] I however, do not find the breach to be extensive as it was evident over time that sufficient information was provided albeit in a piecemeal manner.

The nature and extent of any loss or damages suffered

[48] No loss or damages were claimed or identified by Crest Clean and I was not convinced on an ancillary basis that any disadvantage of transferring employees was evident.

Was the breach intentional, inadvertent or negligent?

[49] I conclude from the evidence that although motivated by a genuine belief that sufficient information was provided there was an element of intentional obstructiveness on behalf of Total Property in not following items of disclosure plainly set out in s 69OB of the Act.

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[10] *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

What steps have been taken in mitigation?

[50] I am satisfied that Total Property has taken sufficient steps to ensure that Crest Clean has enough information to calculate employee entitlements this included an offer By Total Property in relation to the apportionment of service related entitlements to pay the difference in the respective parties cost calculations (noting this to be less than $150).

[51] I note should this assessment be wrong and individual transferring workers have historic claims relating to entitlements the liability for such would rest with Total Property.

The circumstances of the breach and any vulnerability factors

[52] I do not consider that Crest Clean is in a vulnerable position but do make the observation that the intent of the Act that may be lost sight of in this litigation is to ensure the vulnerable workers involved have a seamless transition between employers.

Previous conduct

[53] There is no suggestion of Total Property having appeared before the Authority facing beach actions that I would consider relevant.

***Preet* step one – nature and number of breaches**

[54] Here I have determined that one overall breach is involved (failure to provide sufficient information in a timely manner and as per s 135 of the Act the Authority can impose a penalty up to $20,000.

***Preet* Step 2 – severity of breaches**

[55] On top of statutory considerations (the aims of the Act) I am obliged, following *Preet,* to examine the extent of Total Property's culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[56] Considering the above and the aggravating feature that the breach was ongoing after Total Property was put on notice of its statutory obligation and that the breach was easily resolvable had Total Property sought appropriate legal advice, I believe deterrence where vulnerable individuals may have become incidental casualties is a key consideration. Taking the later consideration into account I conclude that the breach is reasonably significant and I deem 75% of the maximum accumulated penalty to be a 'starting point' ($15,000).

[57] In mitigation, Total Property has sufficiently rectified the breach by providing additional information and took care to ensure the transferring employees were not disadvantaged. However, Total Property's remorse at the breach was not evident at the investigation meeting which evidenced tension between their starkly opposing views.

[58] In the circumstances, I consider a further reduction of the maximum penalty is warranted of 50% which reduces it to $7,500.

Preet **step 3 – means and ability of the respondent to pay**

[59] I did not have a submission suggesting Total Property would be unable to meet any liability arising from an imposed penalty.

Preet **step 4 - Proportionality**

[60] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such albeit that this is a case of unique circumstances.

[61] Taking into account the totality of factors including Total Property's observation that this was a only a 'technical breach' and that applying proportionality to my analysis should lead to a further reduction, I find it just and equitable in all the circumstances that Total Property Services (Canterbury) Limited should pay a penalty of $1,000 to the Crown for the lack of timeliness in providing information.

Compliance

[62] Given the effluxion of time and my view that nothing further would be realistically achieved by doing so, I decline to issue a compliance order.

Conclusion

[63] Within 28 days of the date of this determination Total Property Services (Canterbury) Limited must pay to a Crown bank account a penalty in the sum of $1,000.

Costs

[64] The parties are encouraged to come to an agreement on costs but if they are unable to do so and I have to determine costs, Crest Commercial Cleaning Limited has a period of 14 days from the date of this determination to make a submission to the Authority and the respondent has 14 days to lodge a reply.

David Beck
Member of the Employment Relations Authority