

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 421
3121974

BETWEEN	A LABOUR INSPECTOR Applicant
AND	K CONTRACTING LIMITED First Respondent
AND	KASHAF ALI RIZWAN CHOUDHRY Second Respondent

Member of Authority:	Michael Loftus
Representatives:	Toli Sagaga, counsel for the Applicant No appearance for the Respondents
Investigation Meeting:	21 September 2021 at Napier
Submissions Received:	At the investigation meeting with further information from the Applicant on 27 September 2021
Date of Determination:	1 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A Labour Inspector (the Inspector) claims the first respondent, K Contracting, failed to keep both time and wage records and holiday and leave records for its employees and that it failed to produce same when required to do so pursuant to s 229(1)(d) of the Employment Relations Act 2000 (the Act).

[2] The Inspector sought penalties and an order K Contracting comply with the s 229 request. Also sought are penalties against Mr Choudhry on the grounds he is a person involved (s 142X of the Act).

[3] K Contracting's position is unclear as its participation in both the Inspector's process and that of the Authority has been less than fulsome. Substantive participation is limited to a statement in reply to the Authority though it fails to address the claims raised by the Inspector, instead suggesting Mr Choudhry is, himself, the victim of dishonest and unlawful behaviour by a third party, JNR.

The investigation process

[4] K Contracting is a company supplying labour to Hawkes Bay horticulturists. Mr Choudhry is its sole director and shareholder. Neither was represented at the investigation meeting, which raised the question of whether or not I should proceed.

[5] As already said, the respondent's participation in the process has been inadequate. That said there was a statement in reply, albeit one that did not address the claims, and Mr Choudhry participated in a telephone conference during which the investigation meeting was scheduled.

[6] During the telephone conference Mr Choudhry undertook to provide the records sought by the Inspector and to produce a written brief prior to the investigation. Despite reminders from both the Inspector and the Authority, neither has been produced. Indeed, there was nothing from Mr Choudhry until he sent an email to the Authority at 3:45pm the afternoon before the scheduled investigation meeting.

[7] The email's content confirms Mr Choudhry was aware of the investigation meeting but advised he would not attend as *I am not in the country I am stuck overseas*. There was no supporting evidence and no advice of where Mr Choudhry was or why. The email simply advises *I will be back but I can't say when exactly i can travel* before again promising to provide the information sought by the Inspector.

[8] Subsequent enquiries have established Mr Choudhry left New Zealand for Kuala Lumpur on 4 September 2021.

[9] In the circumstances I believe it appropriate to continue. I do so as there is no explanation as to why Mr Choudhry left and whether or not his departure was necessary. It is also clear from the information provided, that Mr Choudhry made no arrangements to return such as booking an MIQ slot despite being aware of the scheduled investigation. He failed to raise his absence till the last minute despite having plenty of time to do so. He also rejected a suggestion he participate via electronic means. To that I add advice in the Notice of

Investigation Meeting that the Authority may continue and issue a determination in favour of the applicant should the respondent not attend.¹ Respondent's should not be allowed to avoid claims such as these by simply running away without adequate, indeed any, explanation.

Background

[10] On 25 February 2020 the Inspector visited an orchard in Twyford as part of a pre-planned compliance operation with Immigration New Zealand. Amidst those working there they found five Indonesian nationals who claimed they were working for K Contracting. Checks revealed the five were on visitors' visas, which meant they were precluded from working. That they knew they should not have been working was acknowledged by at least one of the group.

[11] Their presence piqued the interest of the Inspector who subsequently met the orchard's foreman on 28 February 2020. Having been shown photos of the five Indonesian workers, the foreman confirmed their statement they were employees of K Contracting. He advised they had commenced at the orchard on 24 February and that had been organised with K Contracting through JNR.

[12] The Inspector then spoke to the orchard's owner who advised he had started using workers provided by K Contracting in October 2019. He provided a copy of an invoice from that time and JNR's phone number.

[13] JNR was contacted on 4 March with the Inspector describing his response as evasive. The Inspector also said JNR advised that he, himself, was not an employee of K Contracting.

[14] The Inspector, given growing concerns, followed that up with a formal request K Contracting forward *...a copy of all wages, time and holiday records and any other documentation which records the remuneration of all current and former employees for the period 22/03/2018 to 22/03/2020*. The request, dated 23 March 2020, stated it was made pursuant to s 229 of the Act and s 82 of the Holidays Act 2003. It also advised the potential consequences of non-compliance.

[15] The request elicited a phone call from Mr Choudhry during which the Inspector clarified what was required. Mr Choudhry's response was that there were a lot of documents

¹ Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

to produce, to which the Inspector suggested he could start by sending a list of the employees. Notwithstanding that and a number of follow up attempts nothing was received and nothing further heard which ultimately led to the commencement of these proceedings. It also led to enquiries of the Inland Revenue Department (IRD) which established that during the period in question K Contracting engaged at least 79 employees.

[16] In its statement in reply and as already said, K Contracting failed to address the claims it failed to keep and provide various records though its correspondence suggests the records do exist. Instead, and amidst other things, it refers to JNR and states that in early 2020 he approached Mr Choudhry, advised he was having issues with his own company and asked if he could use K Contracting's name to send invoices to the orchard at which the Indonesians were found. Mr Choudhry says he accepted on condition JNR's workers sign a contract and provide copies of passports and visas. Mr Choudhry says that despite frequently asking JNR for these documents they were never provided and he now labels JNR *a liar and forger*. Mr Choudhry denies any knowledge of either these workers or the orchard on which they were engaged.

Discussion

[17] The problem with K Contracting's defence is it fails to address the issue. The claim is a simple and narrow one. It is that there was a request from a Labour Inspector that K Contracting provide information that the Inspector is entitled, by statute, to demand. K Contracting then failed to provide that information.

[18] The presence of the Indonesian workers has, at least to this point, done nothing other than provide the impetus for the s 229 request which clearly covers many more workers than those five as is evidenced by the IRD records. According to the Inspector K Contracting has not provided the records and done nothing to address that failure.

[19] The Inspector's evidence is uncontested and I accept it. In doing so I find K Contracting's responses, and in particular continuing promises the records will be provided, confirm the Inspector's claim the records have not yet been produced.

[20] It follows that claim is established and there will be both a compliance order and penalties.

Penalties

[21] As already said the Inspector sought penalties against both K Contracting and Mr Choudhry. Dealing with the company first.

[22] Notwithstanding the lack of records might suggest there is validity to the claims regarding a failure to maintain those records the Inspector has chosen not to pursue these at present. That is because the Inspector currently accepts there is evidence in both the statement in reply and correspondence from the respondent to indicate that while the records have not been produced, they may well exist. The inspector has therefore chosen to address this by pursuing the compliance application while limiting the penalty application to the one breach that has clearly been proven – the failure to produce.

[23] As originally indicated and notwithstanding the potential for 79 breaches the inspector has confirmed he is seeking a single globalised penalty, albeit against both K Contracting and Mr Choudhry.

[24] The law in respect to quantification of penalties is well established given s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,² *A Labour Inspector v Prabh*³ and *A Labour Inspector v Daleson Investment*.⁴

[25] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[26] The Court has found the Act's objects include the effective enforcement of employment standards. It adds these are particularly relevant in matters involving migrant employees and both K Contracting's purported requirements of JNR and the IRD records suggest that is a category into which a number of K Contracting's staff might well fall.

² *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

³ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

⁴ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

[27] I turn to intention, which is generally required before a penalty is awarded. The requirement of intention is not necessarily about whether the party in breach was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question⁵, or failed to take reasonable steps to fulfil their legal obligations.⁶ Here the evidence strongly suggests the failure fulfils that requirement. K Contracting was aware of what was required, promised to comply and failed to do so.

[28] With respect to the breaches severity I note no guidance about a starting point with respect to a s 229 breach. That said, in *Preet* the Court stated the starting point for a minimum wage breach is 80% and 70% for a breach of the Holidays Act.⁷ Given this breach covers both I consider 75% appropriate.

[29] There is no information about the extent of any loss given the failure to produce records means there is no information upon which to base such an analysis.

[30] As already said there has been no attempt to remedy or mitigate the breach. Indeed the respondent(s) have responded to warnings and reminders about the failure but then failed to honour subsequent undertakings. This factor/failure would support an increase.

[31] There is then the fact many of those affected may be migrant workers who are inherently vulnerable, particularly because they were unfamiliar with New Zealand laws and regulations.⁸ That said, it is only an impression and nothing is proven. No change.

[32] There is no evidence of similar previous conduct by K Contracting and that has not been alleged.

[33] Given the absence of the respondents there is no evidence to support a decrease for any reason.

[34] Having weighed these factors I conclude the factors to be considered support an increase above the starting point especially as there is an aggravating factor which is the lack of records impedes the Inspectors ability to properly analyse the extent of the issue and its effect. Here I note the Inspector has taken a reasonable, as opposed to punitive, approach by

⁵ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

⁶ *El-Agez v Comprede Limited*, TT 4121553, at para 18

⁷ See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

⁸ The Court has noted, in *A Labour Inspector v Prabh Limited* at para [10]

seeking one global penalty. This approach was designed to assist an appraisal of the facts and should be lauded but, unfortunately, it has been shunned.

[35] Having weighed these factors I conclude K Contracting should be required to pay a penalty of 85% or \$17,000.

Penalties against Mr Choudhry

[36] The Inspector also asked that Mr Choudhry be found a person involved in the breach (s 142W of the Act) and, as a result, penalised pursuant to s 142X.

[37] Recently this aspect of a claim has had deliberation adjourned pending disposal by the Court of Appeal of an Inspector's appeal against a judgement of the Employment Court about the level of knowledge required for a respondent to be found to be a person involved.⁹

[38] In this instance I do not consider that necessary. It is clear Mr Choudhry is a person involved and meets a number of the criteria of s 142W(1). He is an officer¹⁰ in that he was the sole director of K Contracting.¹¹

[39] The evidence also makes it clear Mr Choudhry is the personification of K Contracting and all actions performed by it are the result of decisions he made and implemented. Indeed all the unfulfilled promises of compliance he personally made. It follows the failure to comply is attributable to Mr Choudhry and actions he took.

[40] It further follows the analysis undertaken in respect to the company applies equally to Mr Choudhry. The applicable penalty is therefore \$8,500.

Non Publication Order

[41] As can be seen above both parties have made negative observations about JNR, particularly Mr Choudhry. JNR did not participate in the investigation and therefore had no opportunity to address these comments/ allegations. Indeed, Mr Choudhry's statement in reply suggests he probably does not even know about this claim or at least its detail. In such

⁹ *A Labour Inspector v Southern Taxis Limited* [2020] NZCA 337 (CA)

¹⁰ Section 142W(2) of the Employment Relations Act 2000

¹¹ Section 142W(3)(a) of the Employment Relations Act 2000

circumstances I believe it appropriate I order a prohibition on the publication of anything which might identify JNR.¹²

Conclusion and Orders

[42] For the above reasons I conclude the First Respondent, K Contracting Limited failed to provide various records when required to do so pursuant to s 229 of the Employment Relations Act. I also conclude Mr Choudhry, as K Contracting's sole director, is also liable to a penalty pursuant to ss 142W and 142X.

[43] As a result I order:

- (a) K Contracting Limited comply with the Inspector s 229 request and provide the required records no later than 4.00pm Friday 22 October 2021; and
- (b) K Contracting Limited pay a penalty of \$17,000.00 (seventeen thousand dollars) to the Crown via the Authority, with payment to again be made no later than 4.00pm Friday 22 October 2021; and
- (c) Mr Choudhry pay a penalty of \$8,500.00 (eight thousand, five hundred dollars) to the Crown via the Authority, with payment to again be made no later than 4.00pm Friday 22 October 2021; and
- (d) There be a prohibition on on the publication of anything which might identify JNR.

[44] Finally the respondents are warned failure to comply, especially with respect to the provision of records, might result in further negative consequences.

[45] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

¹² Clause 10 of schedule 2 of the Employment Relations Act 2000