

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 135
3101612

BETWEEN A LABOUR INSPECTOR
Applicant

AND TINCAN COWS LIMITED
First Respondent

AND NICHOLAS DALE CANDY
Second Respondent

Member of Authority: Helen Doyle

Representatives: Claire English, counsel for the Applicant
Nicholas Candy, advocate for the First Respondent, and
the Second Respondent

Investigation Meeting: On the papers and telephone conference 3 March 2021.

Agreed Statement of Facts
and Submissions 18 November, 8 December 2020, 18 January, 16 and 19
March 2021.

Received:

Date of Determination: 8 April 2021

DETERMINATION OF THE AUTHORITY

- A I order that Tincan Cows Limited pay a penalty of \$3,000 to the Labour Inspector for payment to the Crown account within 28 days of the date of this determination.**
- B I order that Nicholas Dale Candy pay a penalty of \$2,000 to the Labour inspector for payment to the Crown account within 28 days of the date of this determination.**

C Costs have been reserved and failing agreement a timetable for an exchange of submissions has been set.

Employment Relationship Problem

[1] The Labour Inspector has asked that the Authority assess penalties for the failure of Tincan Cows Limited (Tincan) to comply with an improvement notice pursuant to s 223D of the Employment Relations Act 2000 (the Act) within the time for compliance of 24 December 2019.

[2] The Labour Inspector says that Nicholas Candy was a person involved in the breaches as director of Tincan as defined in ss 142W(2) and 142W(3)(a) of the Act.

[3] The Authority has received an agreed statement of facts.

[4] Mr Candy was unable to sign the agreed statement of facts on his device and advised that he typed his name and accepted that way. Mr Candy confirmed agreement with the statement of facts during the telephone conference with the Authority in March 2021.

Agreed statement of facts

The Parties

[5] The Labour Inspector is a duly warranted Labour Inspector appointed under the Employment Relations Act 2000 (the Act).

[6] Tincan Cows Limited (Tincan) is the employer and is a limited liability company, operating a wine growing and sales business incorporated on 26 June 2015 and trading as “Tincan Wines”.

[7] Nicholas Candy is the sole director and 100% shareholder of Tincan. He is the sole permanent employee and manager of Tincan and responsible for all aspects of the running of Tincan’s business.

Key Facts

[8] On 25 November 2019, the Labour Inspector issued an improvement notice to Tincan. It covered the following matters:

- (a) Failures to provide written employment agreements, under s 65 of the Act;
- (b) Failure to keep wage and time records for 36 employees, under s 130 of the Act;
- (c) Failure to keep holiday and leave records for 36 employees, under s 81 of the Holidays Act 2003 (HA);
- (d) Incorrectly paying holiday pay on a pay-as-you-go basis without agreement for 36 employees, under s 28 of the HA;
- (e) Making unreasonable deductions from wages, under s 5A of the Wages Protection Act 1983;
- (f) Failing to pay minimum wages for 5 employees, under s 6 of the Minimum Wage Act 1983.

Breaches Agreed Between the Parties

[9] Tincan and Mr Candy accept that there have been the following breaches:

- (a) Tincan and Mr Candy were issued with an improvement notice dated Monday 25 November 2019.
- (b) Tincan and Mr Candy did not comply with the improvement notice by the due date of 24 December 2019.

Persons involved

- (c) Mr Candy acknowledges he was the person individually responsible for all aspects of Tincan's business, including the breaches identified in the improvement notice, and that he failed to resolve matters when the employees tried to contact him in 2019.

Current situation

[10] Tincan and Mr Candy have, since the filing of the statement of problem, provided evidence of payment of wage arrears by bank transfer between 2 September and 7 September 2020 as follows:

- (a) A Wilson \$391
- (b) A Curry \$372
- (c) W Johnston \$892.50
- (d) R Walker \$391
- (e) M Robinson \$391

[11] Tincan accepts deducting a total of \$6,760.43 in PAYE payments and \$1,137.75 in Student Loan deductions from 28 employees for the period of the records supplied.

[12] Tincan and Mr Candy accept that these deductions had not been passed on to the Inland Revenue Department (IRD) as required, resulting in the deductions becoming a breach of s 5A of the Wages Protection Act 1983 as an unreasonable deduction.

[13] Tincan and Mr Candy have since provided evidence from a chartered accountant that the deducted PAYE payments have now been transferred to IRD for the corresponding period.

Comments by the Respondents

[14] Tincan and Mr Candy have stated that Tincan has downsized from 12 hectares to 1.5 hectares and no longer requires employees and has downloaded employee agreements should the company require employees in the future.

[15] In addition, Tincan and Mr Candy note that although two other notices have been issued against the company by the Labour Inspector, these have been paid in a timely way demonstrating willing compliance.

[16] There are now no outstanding arrears owing to IRD and the five employees.

Service of the improvement notice

[17] The Authority held a telephone conference with the Labour Inspector and Mr Candy following the provision of the agreed statement of facts and submissions as to penalties. This provided an opportunity for both parties to talk to their submissions.

[18] Mr Candy maintained he had not been served with the improvement notice so as to comply within the time to do so.

[19] A New Zealand Couriers track and trace results is attached to the statement of problem as exhibit N. It confirms a pickup of the improvement notice at 3.52pm on 26 November 2019 and delivery to the registered office of Tincan which is the same as its address for service at 12.32pm on 27 November 2019. It shows that the document was signed for by a person called "Katie."

[20] It was sufficient for the Labour Inspector to serve Tincan at its registered office. The improvement notice was signed for by a person called Katie. Tincan acts through human agents. Mr Candy was its sole director. A failure by Katie to alert Mr Candy to the improvement notice cannot be ruled out. That does not mean that the improvement notice was not correctly served on Tincan. I have found it was.

[21] Furthermore there is an email from Mr Candy to the Labour Inspector dated 16 January 2020 which seems to address some of the matters about required payments in the improvement notice. I refer in that respect to the reference to PAYE and Mr Candy's statement in the email that he has "not paid the girls yet" as he was waiting for money from overseas. Mr Candy says that he was referring to other compliance issues and an infringement notice.

[22] Even if that is the case then the Labour Inspector's response by email on the same date alerted Mr Candy to the fact that there was an improvement notice and that compliance has been due by 24 December 2020. The Labour Inspector gave Mr Candy an opportunity at that point to formally extend the time for compliance provided he gave specific dates. The Labour Inspector noted that otherwise he would have to start formal proceedings seeking a penalty and compliance in the Authority.

[23] There was no application for an extension by Mr Candy and a statement of problem was lodged with the Authority on 23 April 2020 by the Labour Inspector. Owing to Covid-19 delays there was some delay until May 2020 in serving the proceedings.

[24] I am satisfied that Tincan was properly served with the improvement notice on 27 November 2019. Furthermore Mr Candy was given an opportunity to apply for a formal extension for compliance with the matters in the improvement notice in January 2020 but he did not do so.

[25] The wage arrears based on minimum wage were not paid until September 2020.

Penalty Analysis

Purpose of penalties

[26] Penalties are imposed for breaches of employment standards to punish and deter employment breaches, compensate those who are the victims of such breaches and eliminate unfair competition.¹

The approach to take in a penalty assessment

[27] The Labour Inspector has asked in this case that a penalty be imposed for the failure by Tincan to comply with the improvement notice and because Mr Candy as sole director was a person involved in the breach.

[28] Ms English has addressed in her submission the seven factors set out in s 133A of the Employment Relations Act 2000 that the Authority must have regard to in determining penalties and the additional considerations that are set out by the full Court of the Employment Court in *Labour Inspector v Preet*.² Mr Candy has also addressed these matters in his submissions. That is the approach the Authority will take in this matter in assessing penalties.

[29] Where there is an employer and a person involved, culpability and involvement should be considered separately.³

Nature and extent of the breach of the improvement notice

[30] I want to start before turning to the other considerations with an assessment of the nature and the extent of the breach. The only breach alleged is that of a failure to comply with the improvement notice. The components of the improvement notice and the extent of the breaches require some further consideration. In assessing a breach of an improvement notice the Authority needs to have particular regard to steps an employer needs to take to comply and any failure to do that.

Failure to provide employment agreements under s 65 of the Act

¹ *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 [61-63].

² Above n 1.

³ *Labour Inspector v Sampan Restaurant Limited* [2018] NZEmpC 69.

[31] One of the breaches in the improvement notice is that pursuant to s 65 of the Act, Tincan failed to provide written employment agreements to all staff.

[32] It was noted in the Labour Inspector's investigation report sent in draft to Tincan on 25 October 2019 and not responded to that an infringement notice had been issued for the failure to provide employment agreements. A final copy of that investigation report was attached to the improvement notice. I understand that the infringement fee was paid. A person is not required to pay an infringement fee and a penalty for the same conduct under s 235G of the Act.

[33] An email from Mr Candy to the Labour Inspector on 20 September 2019 confirmed that there had been no employees since 19 June 2019 and that because of a "brutal failure at harvest" Tincan had downsized from 12 hectares to 1.5 hectares. This was the same advice Mr Candy gave in his email of 16 January 2020 in which he stated that his requirement for any casual staff had stopped.

[34] In the improvement notice, Tincan was required to draft and offer to all current employees a compliant employment agreement by 24 December 2019. Tincan was required to provide to the Labour Inspector as evidence of compliance a copy of a drafted compliant employment agreement and copies offered to all current employees.

[35] I could not be satisfied that Tincan had current employees at that time so as to be able to comply. Further I could not be satisfied that this was different conduct to that for which an infringement fee had been paid. Mr Candy did confirm that he had downloaded employment agreements if any should be required in the future.

[36] I do not find a breach of the improvement notice in that respect for which a penalty can be assessed and awarded.

Failure to keep a sufficient and complete wages and time record under s 130 of the Act

[37] Tincan was required to comply with the improvement notice to implement and maintain a wages and time record compliant with s 130 of the Act including recording daily hours of work and day of work for to demonstrate calculations of pay compliant with minimum standards of employment. Tincan was required to provide as evidence of

compliance copies of wage and time records including evidence showing a time recording system for hours and days of work.

[38] I cannot be satisfied that Tincan had employees at that time between 25 November and 24 December 2019 for whom to implement and maintain a wage and time record compliant with s 130 of the Act and provide copies. Tincan could not comply with that requirement in the circumstances or provide evidence of compliance. I do not find a breach established for which a penalty could be assessed and awarded.

Failure to pay holiday pay correctly under s 28 of the Holidays Act 2003 and failure to keep a holiday and leave record under s 81 of the Holidays Act 2003.

[39] Tincan was required to ensure payments of holiday pay consistent with the requirement of the Holidays Act 2003 including where the 8% holiday pay is paid to current employees. It was required to provide to the Labour Inspector as evidence of compliance copies of holiday and leave records that meet the requirements under s 81 of the Holidays Act 2003.

[40] I cannot be satisfied that Tincan had employees at that time between 25 November and 24 December 2019 to pay holiday pay consistent with the provision of the Holidays Act 2003 and ensure that the payments and records complied with the Holidays Act 2003. It could not in those circumstances provide the necessary documentation prepared for current employees to demonstrate compliance. I do not find a breach for which a penalty could be assessed and awarded.

Breach of s 5A of the Wages Protection Act 1983 in that employer made unreasonable deductions from the wages of employees.

[41] The Labour Inspector found a breach of s 5A of the Wages Protection Act 1983 (WPA).

[42] Section 5A of the WPA provides as follows

5A Unreasonable deductions

An employer must not make a deduction under section 5 from wages payable to a worker if the deduction is unreasonable.

[43] The Labour Inspector identified from his investigation that Tincan had deducted PAYE tax and Student Loan deductions from the gross wages of workers but had not passed that on to IRD. The Labour Inspector found by unlawfully keeping the deduction and not passing it onto IRD Tincan had made unreasonable deductions from the wages of employees under s 5A of the WPA.

[44] The step to comply was to identify all amounts of PAYE and student loan deductions taken from the employees' wages and transfer those payments to the IRD to the credit of each employee. A record of payments was to be kept. As evidence of compliance Tincan was to show that the deferred PAYE payments have been made to IRD in the employees name and in accordance with their IRD number.

[45] The Authority raised some issues about its jurisdiction in respect of matters of taxation and s 5A of the WPA and asked Ms English and Mr Candy if they wished to make any submission.

[46] Submissions were received from both Ms English and Mr Candy.

[47] Ms English accepts that there is no breach of s 5 of the WPA as deductions for the purpose of tax are deemed to be done with the consent of the employee with reference to s 157(7) of the Tax Administration Act 1994. She noted s 175(8) of the Tax Administration Act 1994 and the potential continued liability for the employee until tax is paid. Ms English submits the deductions were not for tax purposes because they were not passed onto IRD. Rather she submits they were for the use of Tincan and therefore not a reasonable or lawful deduction and in that way breached s 5A of the WPA.

[48] Mr Candy in his submissions about this issue refers to "a complex situation" with his accountant dealing with IRD. He refers to an understanding that he could use an amount of provisional tax retained to offset outstanding PAYE. He sets out a payment to IRD of \$10,000 in September 2019 and says that he was advised that would cover PAYE and late payment fees. The overdraft of \$50,000 is shown as almost overdrawn from the screenshot that shows payment at that time to IRD of \$10,000. Mr Candy denies "malicious or criminal intention" in the withholding of money.

[49] There can be no criticism of the Labour Inspector in raising these concerns about PAYE not having been forwarded to IRD with Tincan and Mr Candy. The failure to make tax

payments reduces the visibility of employment particularly where there are other failings as there were in this case to provide employment agreements and maintain correct record keeping. It makes calculations of amounts that may be owed to employees more challenging. Potentially it could mean employees are liable for tax that has already been deducted. It also reduces confidence for employees in their employer.

[50] I am not satisfied that the Authority has jurisdiction to consider an application for a penalty where there has been a failure by an employer to pay deducted PAYE/ Student Loan money. The consequences for that failure are for IRD to determine. There will be a series of interactions from which IRD will be able to assess what occurred and why. The Authority does not have that information.

[51] Mr Candy has set out in his submission that he was required to pay late filing penalties to IRD. There is a real risk of Tincan being penalised twice for the same failure. That is something that decision makers have to take particular care with.

[52] I do not take the failure to comply with the aspect of the improvement notice about PAYE/Student Loans into account in the assessment of penalties. That failing and consequences that flow from it are a matter for IRD and should not be additionally considered in a penalty setting in the Authority.

Payment of arrears of minimum wage owed to five employees

[53] There was a breach of the improvement notice when there was a failure to pay five employees the wage arrears based on the minimum wage in force at the time by 24 December 2019. The arrears were paid in September 2020.

Conclusion about nature and extent of the breach

[54] In conclusion the nature of the breach is that of an improvement notice. The extent of the breach to be considered in a penalty setting is the failure to pay arrears based on minimum wages to five employees. The total amounts of arrears of wages owing to those five employees are \$2,437.50.

Maximum penalty in respect of each breach

[55] There is one breach. Section 135(2) of the Act provides the maximum penalty for the breach of the improvement notice is \$20,000 for a company and \$10,000 for an individual. Given there is one breach there is no further globalisation.

Should there be an award of a penalty?

[56] The obligation to pay employees at least minimum wage under the Minimum Wage Act 1983 is a fundamental one. I conclude there should be consideration about the imposition of penalties.

Object of the Act

[57] The object of the Act is found in s 3. It is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and relationship. Failure to adhere to the minimum standards for payment of wages does not advance good faith in a relationship. Further it does not address the inherent inequality of power in employment relationship particularly where there are employees with a measure of vulnerability. In this matter four of the five employees who are owed wage arrears calculated on the applicable minimum wage rate were high school students and the other an older student.

[58] Mr Candy was not communicative and responsive with the students when they, their parents or community law approached him directly for payment. That did not accord with good faith behaviour and required the intervention in or about September 2019 of the Labour Inspector.

Was the breach of the improvement notice intentional, inadvertent or negligent?

[59] I conclude an element of intention in the failure to pay the wages. Payment of the arrears to the employees was not prioritised over other creditors including for example the payment of an infringement fee. Whilst not excusing the breach of the improvement notice, I weigh Mr Candy's submission that Tincan had exceeded its overdraft and sensible steps were taken to downsize the operation in May 2019. No more employees were engaged. Mr Candy said that the wages were paid when the business could afford to do so in September 2020.

Severity of the breach and nature and extent of any loss and damage

[60] Employees missed out on payments that they were entitled to at an earlier time. Their direct approaches to Mr Candy for payment were not responded to. The amount of arrears owed was not large but that does not reduce the severity to each employee who missed out on payments that were important to them. They would have viewed that as unfair because they had undertaken work and were not paid in exchange for that.

[61] I do weigh that other workers appear to have been paid correctly.

Steps taken to mitigate the effects of the breaches

[62] The arrears have now been paid.

Circumstances of the breach

[63] The workers who were owed arrears of wages were young and therefore vulnerable. They worked for Tincan for a comparatively brief period. Although Mr Candy denies any competitive advantage, Tincan did not pay for some of the work undertaken by workers.

[64] Mr Candy refers in his submissions to a decision in 2018 to grow what had been a small wine business from 2,000 bottles with 1.2 hectares to 10,000 bottles. During this period his son was born. His son had significant sleeping and feeding issues but was not diagnosed with a serious health issue until he was 22 months old in August 2020. Until then, the sleeping issues impacted the whole family. Mr Candy suffered a series of unfortunate health issues throughout the material time which included a need to recuperate from burnout and from a wrist injury.

[65] In May 2019 the business was operating beyond its overdraft and a decision made to downsize and cancel leases. Mr Candy obtained external work as a contractor and invoiced the company in Tincan's name to put money back into the business to pay creditors. Mr Candy puts it in his submissions as a situation where he had entered into a business with insufficient planning, he was under-resourced and there was insufficient finance. He says he has now repaid all the money owing.

[66] Mr Candy accepted in discussions with the Labour Inspector that he had made mistakes. He considers that his biggest mistake was trying to maintain the leases and in doing so he acknowledges letting down the people who worked for him amongst others. He has already paid a fine for not having employment agreements.

[67] The difficulty was that Mr Candy was not as communicative with the Labour Inspector as he should have been. Even if he had not seen the improvement notice there was direct reference to it by the Labour Inspector in an email to him in January 2020. Mr Candy had knowledge that there were outstanding arrears as well.

[68] Had he been more communicative at that time then these proceedings could have been avoided. The Labour Inspector could have gone to the workers and advised them when they could expect payment. I sense some weariness on Mr Candy's part and a withdrawal from actively participating and communicating with the Labour Inspector to the extent that was required particularly after January 2020. I do take into account in the circumstances the attempts to comply, the payment of an infringement fee and the belated payment of arrears of wages. I also take into account the remorse and ready acknowledgment by Mr Candy of mistakes made and the difficult personal circumstances that he faced at that time.

Previous conduct

[69] Neither Tincan nor Mr Candy have previously appeared before the Authority.

Deterrence and culpability

[70] There is a need to emphasise the need to pay wages in a timely manner to Tincan and Mr Candy. The resources of Labours Inspectors are limited and there needs to be a timely response to issues that arise from their investigations. If there is a lack of understanding about what is required then questions should be asked.

[71] Mr Candy accepts that he was involved in the breach as the sole director of Tincan.

Consistency

[72] There is a need for consistency in the imposition of penalties. I have considered other cases that I have been referred to by the Labour Inspector. In some cases the arrears were of a greater sum and in others the extent of the breaches were more significant. The extent of the breach of the improvement notice was quite limited but nevertheless the failure to pay arrears was serious.

Ability to pay

[73] I accept that the business has been considerably downsized and that accordingly has some impact on financial ability to pay. There is no clear evidence about financial difficulties but as a matter of common sense it is likely Mr Candy through his work efforts as a contractor provides the main source of income for Tincan rather than sales of wine.

Proportionality

[74] A penalty award needs to be proportionate to the seriousness of the breaches and the harm caused.

What penalties should be imposed?

[75] The maximum penalty payable by Tincan is \$20,000. The maximum penalty payable by Mr Candy is \$10,000.

[76] I accept that the starting point for an assessment of a penalty for both Tincan and Mr Candy should be 80% of the maximum penalty for failure to pay arrears of wages at the minimum wage rate.

[77] That brings the provisional total for penalties to \$16,000 for Tincan and \$8000 for Mr Candy.

[78] There are some factors that call for further reduction. There was a measure of co-operation with the Labour Inspector at an earlier stage and payment of an infringement fee. Mr Candy accepted each worker's view about hours they worked which meant they were not required to give evidence or be involved further in the process. Arrears of wages have been now paid in full. I consider a further reduction of 35% for both Tincan and Mr Candy is called for.

[79] That brings the provisional total for Tincan to \$10,400 and for Mr Candy to \$5,200.

[80] I make a further modest reduction for financial circumstances of 10%.

[81] The provisional amounts at the end of this third step are \$9,360 for Tincan and \$4,680 for Mr Candy.

[82] Submissions about penalty on behalf of the Labour Inspector were on the basis that breaches of the improvement notice were more extensive than has been found by the

Authority. I find that imposition of penalties of \$9,360 and \$4,680 would be disproportionate to the amount of arrears and that there should be some further reduction. I have also taken into account that penalties are claimed from both Tincan and Mr Candy.

Orders

[83] I order that Tincan Cows Limited pay a penalty of \$3,000 to the Labour Inspector for payment to the Crown account within 28 days of the date of this determination.

[84] I order that Nicholas Candy pay a penalty of \$2,000 to the Labour Inspector for payment to the Crown account within 28 days of the date of this determination.

Costs

[85] I reserve the issues of costs. If agreement cannot be reached, Ms English has until 23 April 2021 to lodge and serve submissions as to costs and Mr Candy has until 7 May 2021 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority