

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 129
3145441

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

AND JASMINE CATERING
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Joshua Barlow, counsel for the applicant
Ray Parmenter, counsel for the respondent

Investigation Meeting: On the papers

Submissions received: 28 January 2022 from the applicant
1 February 2022 from the respondent

Date of Determination: 6 April 2022

DETERMINATION OF THE AUTHORITY

- A. Jasmine Catering Limited failed to comply with an improvement notice issued by a Labour Inspector.**
- B. Jasmine Catering Limited is to pay a penalty of \$5,000 to the Labour Inspector within 28 days of the date of this determination.**
- C. Costs are reserved and a timetable set if the parties are unable to reach agreement.**

What is the Employment Relationship Problem?

[1] A Labour Inspector of the Ministry of Business Innovation and Employment, Natasha Georgieva, brings a claim against Jasmine Catering Limited (Jasmine or the company).

[2] Jasmine operates the Chong Qing Cuisine restaurant in central Auckland.

[3] Originally the Labour Inspector sought compliance with an improvement notice issued to Jasmine. However, Jasmine is now in compliance and what remains is a claim for a penalty for non-compliance with the notice.

[4] Jasmine accepts that it did not provide proof of compliance within the time specified in the improvement notice.

What was the Authority's process?

[5] The parties agreed that this was a matter which could be dealt with on the papers. Affidavits from Ms Georgieva and Jasmine's sole director Jessie Bo were provided. Submissions from both parties were also received.

[6] This determination does not record everything received but states findings, expresses conclusions and specifies orders made as a result.¹

What led to the improvement notice being issued?

[7] In mid-2020 the Labour Inspectorate received an anonymous complaint about wages and holiday entitlements for international students employed by Jasmine.

[8] The Labour Inspectorate visited the restaurant. The restaurant's manager provided the names and details of current and previous employees. A notice requiring the supply of employment records was issued. Records including employment agreements were provided. No reply was initially received to an invitation for an interview but a phone call led to Ms Bo being interviewed. As Ms Bo was unable to completely answer all the Inspectorate's questions a request for written answers was made. Jasmine provided information and additional records in response.

¹ Employment Relations Act 2000, section 174E.

[9] After a prompt, Jasmine requested an extension of time to respond to a question about whether all relevant records had been provided. More time was given. Jasmine provided more information in November 2020.

[10] Members of the Inspectorate interviewed two Jasmine employees. A 25 November 2020 Investigation Report concluded that there were breaches of requirements regarding the content of employment agreements, wages and time and holiday and leave records. There were no breaches established of wage payment obligations nor regarding holiday and leave entitlements. Jasmine did not comment on the report.

What happened with the improvement notice?

[11] The Inspectorate issued an improvement notice to Jasmine on 8 December 2020. The notice identified breaches of the Employment Relations Act 2000 and the Holidays Act 2003. It also specified the actions which Jasmine was required to take and evidence the company was to provide in order to comply with the notice.

[12] Jasmine was to include the employee protection provision in employment agreements, as well as incorporate additional information in the wages and time and holiday and leave records.²

[13] Initially the due date for compliance with those requirements and provision of evidence of the amended documents was 25 January 2021. Without request, an extension of time was allowed to 15 February 2021.

[14] The Inspectorate received no communication before the claim was lodged in the Authority in July 2021.

How did Jasmine respond?

[15] The notice was sent by courier post to Jasmine's registered office on 10 December 2020. It was signed for by "bo". The Labour Inspector also sent Ms Bo the improvement notice and a fact sheet by email, using the same email address that the two had been corresponding though for a couple of months.

² Employee protection provision as per the requirements of s 69OJ of the Employment Relations Act.

[16] On 5 August 2021 in an email to the Labour Inspector, Ms Bo apologised for the late response. She said that having received the Investigation Report in November 2020, she required the business to make improvements. Ms Bo states that she did not receive the email requiring evidence of improvement to be sent by 15 January 2021. No explanation was offered as to why that might have occurred. She goes on to say that she missed the following email granting the extension and had no idea until August 2021 of the requirement to submit improvement evidence.

[17] I conclude that the improvement notice was served on Jasmine in December 2020.

[18] In terms of the Authority proceedings there appears to have been a delay in the company receiving the statement of problem, as it no longer used the accountancy firm which was listed as its address for service with the Companies Office. It is the company's obligation to keep its details held with the Companies Office up to date.

[19] Unfortunately, possibly due to a misunderstanding of the process, having sought and gained leave from the Authority to lodge its statement in reply out of time, Jasmine's former legal representative did not lodge a statement in reply. Rather the representative sent material required under the improvement notice to the Labour Inspectorate's legal representative. It appears Jasmine's then representative thought that would be sufficient to resolve the matter.

[20] When current counsel was instructed, another extension was granted in the absence of any objection and a statement in reply lodged in November 2021.

Did Jasmine breach the improvement notice?

[21] Jasmine acknowledges that there were deficiencies in its employment agreements and record keeping, although it has now remedied the deficiencies as a result of the Inspectorate's intervention and assistance.

[22] Jasmine submits that it had complied with the improvement notice but its failure lay in not submitting proof of the improvements. The company apologises to the Labour Inspector and to its affected employees for the inconvenience and expense it has caused.

[23] I conclude that Jasmine failed to comply with the improvement notice. There is no proof that changes were implemented within the time specified and the company did not provide proof of any changes within the time required by the notice.

Should a penalty be imposed on Jasmine?

[24] Employers who fail to comply with improvement notices may have a penalty imposed on them.³

[25] Jasmine accepts that a penalty would be imposed. Although not at the most serious end of the spectrum of breaches which come before the Authority, the use of improvement notices to ensure compliance with the requirements is an important part of the employment standards enforcement system. This is a situation where a penalty should be imposed.

What penalty is appropriate?

[26] I examine the statutory factors in s 133A of the Employment Relations Act, along with the guidance provided by the Employment Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.⁴

Statutory consideration 1 – the object of the Act

[27] The objects of the Act include promoting the effective enforcement of employment standards and reducing the need for judicial intervention.⁵ Improvement notices are an important Labour Inspectorate tool in encouraging compliance with standards, without needing to take cases.

Statutory consideration 2 – the nature and extent of the breach

[28] I look firstly at Jasmine's underlying actions which led to the issuing of the notice. Five employees were identified as samples by the Labour Inspectorate and their documents requested. There are inadequacies identified in the investigation report and the improvement notice relating to all those employees.

[29] Of the five sampled employment agreements, two did not contain employee protection provisions and thus did not comply with s 69 of the Employment Relations Act.

³ Employment Relations Act, s 223F(1).

⁴ *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

⁵ Employment Relations Act, s 3(a)(ii) and (ab).

[30] The inclusion of employment protection provisions may improve an employee's knowledge of their rights in a restructuring situation.

[31] The wages and time records of all five employees did not comply with at least one aspect of the mandatory information required. The inadequacies were employees' postal addresses, reference to whether the employee was in an individual or collective employment agreement along with the number of hours worked each day and the pay for those hours. The requirements of s 130 of the Employment Relations Act were not met.

[32] Similarly, Jasmine's holiday and leave records contained a mixture of inadequacies for all five employees. These included important matters such as the dates annual, sick and other leave were taken, the dates of public holidays worked and details of the dates and payments for public and alternative holidays. Jasmine breached section 81 of the Holidays Act.

[33] As this matter has been pursued as a breach of the obligation to comply with an improvement notice, rather than breaches of the individual obligations which found the improvement notice, there is only one breach. The maximum penalty available against a company for this breach is \$20,000.

Statutory consideration 3 –intentional, inadvertent or negligent

[34] In a 5 August 2021 email Ms Bo describes her situation as unintentional negligence.

[35] In the absence of further evidence I view this breach as negligent.

Statutory consideration 4 – nature and extent of any loss, damage and gain

[36] I now look at the severity of the breach. The deficiencies which led to the notice concern inadequate records and employment agreements. However, as the improvement notice identifies, these failures place the employees at risk of not receiving their full entitlements, for example to wages and holidays and thus suffering financial disadvantage. It is unclear whether there was any such loss to Jasmine's employees.

[37] Jasmine had the relatively modest gain of avoiding the time and expense needed to ensure additional elements were included in their records.

[38] The Labour Inspectorate has been put to extra costs and used its resources to seek compliance with the notice.

Statutory consideration 5 – steps to mitigate effects of the breach

[39] Although Ms Bo indicates that she instructed improvements be made immediately, this was not established to the Labour Inspectorate. The material was not provided until some eight months after the notice was issued. There has now been full mitigation. Although some credit is deserved, it is minor.

Statutory consideration 6 – circumstances of the breach and any vulnerability

[40] The workers here appear to have been international students although the Labour Inspector accepts there is no clear evidence of vulnerability.

Statutory consideration 7 – previous conduct

[41] The Labour Inspectorate had not had any previous contact with Jasmine.

Additional consideration 8 – deterrence

[42] There is a need to bring home to Jasmine, as well as other employers in the hospitality industry, that businesses need to operate with compliant employment agreements and records.

Additional consideration 9 – culpability

[43] I consider the severity of the breaches, along with aggravating and mitigating factors under this head to establish a provisional starting point for the penalty of 40% of the maximum penalty, namely \$8,000.

Additional consideration 10 – consistency

[44] Many of the Authority's penalty decisions involve breaches concerning a large number of employees and so are not directly comparable to this case where the underlying inadequacies relate to a small group of sampled workers.

[45] I have considered comparable cases. There is at least one improvement notice case involving a higher penalty than the provisional total here. In *A Labour Inspector v BF7 Trading Limited* where significant previous conduct was identified and the employer was seen

as thumbing its nose at the Inspector.⁶ A penalty of \$10,000 was imposed. Other recent cases involving improvement notices have resulted in penalties of \$7,000 and \$5,000.⁷ A penalty of \$8,000 appears a little high when considering the range of factors in those decisions compared to the current case.

Additional consideration 11 – ability to pay

[46] Jasmine emphasises that these events occurred during the Covid pandemic with the company's central city business suffering a significant decrease in sales since March 2020. At times the business has been closed for extended periods due to lockdowns, at others operating under restrictions. The company's cash position is described as tense although no financial records were provided.

[47] The Labour Inspector accepts that a modest discount for inability to pay could be applied. I conclude that a deduction of 25% should be made.

Additional consideration 12 – proportionality of outcome

[48] Standing back and looking at all the factors and considering whether the provisional penalty now standing at \$5,000 is right in all the circumstances, I conclude that it is.

[49] Jasmine is ordered to pay a penalty of \$5,000 to the Labour Inspector within 28 days of the date of this determination.

Costs

[50] The Labour Inspector has been successful in this case and seeks costs. Costs are reserved with the parties encouraged to reach resolution. If they are unable to do so the Labour Inspector shall have 14 days from the date of this determination to file a memorandum seeking costs. Jasmine will then have 14 days from receipt to file a memorandum in response.

[51] The Authority operates a notional daily tariff as regards costs which usually provides a starting point, with adjustments being considered upwards or downwards. The tariff for a

⁶ *A Labour Inspector v BF7 Trading Limited* [2021] NZERA 371.

⁷ *Labour Inspector v IT-Guys NZ Limited* [2019] NZEmpC 115, *A Labour Inspector v Healthop Limited* [2019] NZERA 439 and *A Labour Inspector v Nukuvai Limited* [2021] NZERA 176.

one day investigation meeting is \$4,500. The parties can expect the Authority to take into account that this matter was determined on the papers.

Nicola Craig
Member of the Employment Relations Authority