

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 252
3145085

BETWEEN	A LABOUR INSPECTOR Applicant
AND	STAR MOVING LIMITED First Respondent
AND	STAR NELSON HOLDINGS LIMITED Second Respondent
AND	STUART DALE BIGGS Third Respondent

Member of Authority:	Helen Doyle
Representatives:	Alistair Miller, counsel for the Applicant Stuart Biggs, advocate for the Respondents
Investigation Meeting:	24 May 2022 at Nelson
Submissions Received:	On the day
Date of Determination:	16 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Labour Inspector says that Star Moving Limited (Star Moving) and Star Nelson Holdings Limited (Star Nelson) have failed to comply with the request by the Labour Inspector to provide records and employment agreements pursuant to s 229 of the Employment Relations Act 2000 (the Act) for their employees.

[2] Notices under s 229 of the Act were sent to the registered offices of Star Moving and Star Nelson which is the same as the addresses for service.

[3] The notices required the following records for all employees for a period of three years from 10 February 2018 to 10 February 2021:

- (a) A copy of wage and time records.
- (b) A copy of holiday and leave records.
- (c) Employment agreements.

[4] The records were to be provided by 5pm 5 March 2021.

[5] As at the date of the Authority investigation meeting the records had not been provided by either Star Moving or Star Nelson to the Labour Inspector.

[6] Mr Miller made an application to amend the remedies claimed in the statement of problem to include an application for compliance orders pursuant to ss. 229(4) and 137 of the Act for the supply of the records and employment agreements. I was not satisfied that would cause prejudice to Star Moving and Star Nelson. Earlier communications on behalf of Star Moving and Star Nelson did not suggest there were no records in existence. There was advice that the records had been provided to someone else. Mr Biggs at an early stage stated that Star Nelson was the employer but that has not been able to be verified because of the non-compliance with the s229 request for records and employment agreements. The amendment was granted to include an application for compliance orders.

[7] The Labour Inspector additionally seeks penalties against Star Moving and Star Nelson for failing to comply with the Labour Inspector's request for information.

[8] There was an alternative claim that Star Moving and Star Nelson had failed to keep full and accurate wage and time records and full and accurate holiday and leave records as required by s 130 of the Employment Relations Act 2000 and s 81(2) of the Holidays Act 2003. The Labour Inspector could not be satisfied to the required degree that those records had not been kept and submissions were directed therefore to whether there had been a breach of s 229 by Star Moving and Star Nelson.

[9] No penalty is sought against Mr Biggs.

[10] Star Moving and Star Nelson are duly incorporated companies having their registered offices at Nelson and carrying on the business of freight and furniture removal.

[11] Stuart Biggs is the sole director of both Star Moving and Star Nelson. Star Moving and Star Nelson did not participate in the Authority process until very close to the date of the investigation meeting. There was no statement in reply or statements of evidence as timetabled lodged. From communications received closer to the date of the investigation meeting Mr Biggs said he considered that the information required by the Labour Inspector had in fact been provided to another Government department and that the failure to comply with the request to provide documents was due to a belief that the documents had already been provided. Mr Biggs attended at the Authority's investigation meeting and gave evidence.

The Investigation Process

[12] The Authority heard evidence from the Labour Inspector and from Mr Biggs at its investigation meeting held in Nelson. Both parties made closing statements.

The Issues

[13] The Authority needs to determine the following issues:

- (a) What led to the request for records under s 229 being made?
- (b) Was there a failure to comply with the requests for records?
- (c) If so, should there be an order for compliance under s 229(4) and 137 of the Act?
- (d) Should the Authority exercise its discretion and impose a penalty?
- (e) If it does then what should the amount of the penalties be and should there be penalties for each company?

What led to the request for records under s 229 of the Act?

[14] Between April 2020 and February 2021 eight current or former employees of Star Moving and/or Star Nelson made complaints to Employment New Zealand alleging that they had not received the wage subsidy during the Covid-19 lockdown period in March to April 2020. There were also complaints that various minimum employment entitlements had not

been received. Some employees complained that they had not received employment agreements and their correct holiday entitlement.

[15] On 27 November 2020 the Labour Inspector telephoned and emailed Mr Biggs to advise him of the employee concerns about employment agreements and holiday pay. She wrote that some employees said that they worked for Star Moving and some that they worked for Star Nelson. She asked for confirmation that both legal entities have employees. She asked for information about what each company did and how many employees each had. To check that minimum standards were being adhered to she suggested in her email that an employee list be provided as at 27 November 2020 with the employee's name, role, employment status, start date and the legal entity of the employer. To make the process less time consuming the Labour Inspector wrote that she would select five employees from the list and only request records for those five.

[16] Mr Biggs responded by email dated 27 November 2020. He did not provide the employee lists as requested or information about what each company did and how many employees they each had. He stated that Star Nelson is the employer. He attached to his email template individual employment agreements for casual employment and permanent office and administration staff. He also attached two Covid-19 questionnaires and level 3 policy and an individual employment work health and safety policy headed with the names of both Star Moving and Star Nelson.

[17] On 16 December 2020 the Labour Inspector sent an email to Mr Biggs following up on her request for the employee list and information about both companies. He did not reply.

[18] On 10 February 2021 the Labour Inspector couriered to Star Moving and Star Nelson at their registered offices the notices requiring supply of employment records under s 229 of the Act.

[19] On 11 February 2021 the Labour Inspector received a telephone call from a male who identified himself as an employee at the registered address of Star Moving and Star Nelson. The Labour Inspector made a written file note of the conversation. That file note records discussion about the two notices and the background to them including the failure to provide information about the companies and the employee list. The male employee advised the Labour Inspector that he would forward the notices on to Mr Biggs for his attention.

Was there a failure to comply with the notices?

[20] Mr Biggs said in his evidence that he could only recall generally the initial interaction with the Labour Inspector in November 2020.

[21] He said he instructed his accountancy firm at that time to deal with the Labour Inspector because he was working “in the middle of a pandemic” and it was very difficult circumstances. Mr Biggs said that he was confused because he was dealing at the same time with somebody at the Ministry of Social Development (MSD) who I shall refer to as K and he understood that the requested documents had been supplied. Mr Biggs also referred to difficulties that he had had with employees at the time of the lockdown in 2020.

[22] The Authority has considered some email exchanges between the Labour Inspector and Mr Biggs after the s 229 notices were served.

[23] The Labour Inspector followed up with Mr Biggs in a letter dated 11 June and advised that she had not received any of the requested records. She advised that she now intended to apply to the Authority seeking a penalty.

[24] Mr Biggs emailed the Labour Inspector on 11 June advising that he had received the letter from his accountancy firm and asking what it was she was after.

[25] On 14 June the Labour Inspector attached the notices sent to the registered office in February.

[26] On 14 June 2021, Mr Biggs sent an email advising:

This is the first I've seen of this and it is obviously a massive undertaking to produce everything you have requested – what is the reason for this request ...?

[27] The Labour Inspector responded by email dated 14 June 2021 and set out some of the earlier communications that had taken place. She asked again for wage and time, holiday and leave records and employment agreements.

[28] By email dated 15 June 2021 Mr Biggs advised the Labour Inspector that the matter was getting confusing and that the information had been supplied and the investigation had been completed by K. He gave the investigation reference number and referred to a letter dated 11 May 2021.

[29] By email dated 15 June 2021 the Labour Inspector responded to Mr Biggs and explained her role and that she worked for the Ministry of Business Innovation and Employment. She explained that she did not know K, was not familiar with IMS references and that she did not send him a letter on 11 May 2021. The Labour Inspector explained again the background to her involvement and the requirement for records. She attached the s 229 notices to her email and confirmed that she needed the records.

[30] There was no further communication between the parties and proceedings were lodged with the Employment Relations Authority on 6 July 2021.

[31] The Authority advised that it would, in accordance with its powers under s 160(1) to call for information from the parties or any other person, write to K and clarify what records were provided to MSD.

[32] The Authority wrote to K by letter dated 26 May 2022 asking for confirmation of the information that was provided to MSD on behalf of Star Nelson and Star Moving. A copy of that letter was sent to Mr Miller and Mr Biggs.

[33] K responded in a letter received on 1 June 2022 and advised that MSD was supplied with the following documents regarding Star Nelson:

- (a) Employee payroll summary for the period 29 March 2020 to 21 June 2020; and
- (b) Analysis of wages paid by Star Nelson for the period 29 March 2020 to 21 June 2020.
- (c) K confirmed that MSD does not hold any wage information for Star Moving.

[34] The letter from K was provided to the parties.

[35] The information MSD was provided with about the wage subsidy issue was information for a limited period only. It was also of a more limited nature than the information required by the Labour Inspector. The Labour Inspector wanted records and employment agreements from both companies for employees for three years from 10 February 2018 to 10 February 2021.

[36] I accept there may have been some initial confusion during a busy and stressful time with the involvement and requests from two government departments. The Labour Inspector clarified in an email dated 15 June 2021 that she did not work with K and did not know who she worked for and was not familiar with the reference. The s 229 notices requiring provision

of records and employment agreements were attached to the email. After that point confusion could no longer sensibly excuse the non-provision of records to Labour Inspector. That would have been reinforced when proceedings were lodged and served in or about July 2021.

[37] I am satisfied that there has been a continuing failure by both Star Nelson and Star Moving to comply with the s 229 notices issued by the Labour Inspector on 10 February 2021.

Compliance orders

[38] It is appropriate to exercise my discretion and make orders for compliance, under s 229 (4) and 137 of the Act with the s 229 notices.

[39] Mr Biggs stated that Star Moving was not an employer but that is not able to be verified because of the non-compliance by Star Moving and Star Nelson with the request to produce records and employment agreements. The permanent template employment agreement that Mr Biggs supplied to the Labour Inspector has Star Nelson on its title and signature page however clause 1.1 refers to the parties to the agreement being specified in "Schedule A." Schedule A refers to the employer party to the agreement as "Star Moving Ltd." The Labour Inspector was also advised that some of the employees considered they were employed by Star Moving.

[40] I order that Star Nelson comply with the s 229 notice to produce wage and time and holiday and leave records and employment agreements dated 10 February 2021 for all employees for the period of three years from 10 February 2018 to 10 February 2021 within 28 days from the date of this determination.

[41] I order that Star Moving comply with the s 229 notice to produce wage and time and holiday and leave records and employment agreements dated 10 February 2021 for all employees for the period of three years from 10 February 2018 to 10 February 2021 within 28 days from the date of this determination.

Penalties

[42] The Authority has considered whether to exercise its discretion and impose penalties.

[43] Section 229(3) of the Act provides that an employer who, without reasonable cause, fails to comply with a requirement to supply copies of records and employment agreements is liable to a penalty.

[44] The purpose of a penalty under the Act is to punish those who breach statutory obligations and deter companies and individuals from committing employment breaches. The failure to provide records has prevented the Labour Inspectors from carrying out any sort of investigation into whether there has been compliance with minimum employment standards. That is a serious matter. In all the circumstances I am of the view that there should be consideration of the imposition of a penalty.

[45] The Authority is required to consider a number of matters when imposing a penalty. These are set out in s 133A of the Act informed by guidance from the Employment Court.¹

The object to the Act

[46] The failure to provide records and employment agreements has impacted on one of the objects of the Act which is to promote the effective enforcement of employment standards. The Labour Inspector is unable to assess whether there has been compliance with minimum statutory entitlements and if there are breaches, the extent of these.

The nature and the extent of the breach

[47] Star Moving and Star Nelson have each committed one breach of s 229 of the Act in that they have failed to comply with the request for employment records and employment agreements. There is no dispute about that matter.

[48] The maximum penalty available against Star Moving and Star Nelson in respect of a single breach is \$20,000 each under s 135(2)(b) of the Act.

Whether the breach is intentional, inadvertent or negligent

[49] I accept that there may have been some initial confusion with a request from two Government departments for records. It was, however, subsequently clear that the Labour Inspector's request was different and remained unsatisfied. The failure to at least from mid-June 2021 take appropriate steps to produce the records for the Labour Inspector supports that the breaches in this case were intentional.

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

Severity of the breaches – nature and extent of any loss

[50] In this case, the Labour Inspector has been unable to undertake any assessment of whether there has been compliance with minimum employment standards or whether there have been breaches. The prevention of the Labour Inspector from performing statutory functions in assessing compliance with minimum employment standards increases the severity of the breach. It impacts on the next statutory consideration which is the nature and extent of any loss or damage because there is no ability for the Labour Inspector to determine that.

[51] Mr Miller submits that the starting point for penalty setting should be 75% of the maximum penalty. He referred me to an Authority determination which adopted this starting point.² Other less recent determinations adopted a much lower starting point and one 35% of the maximum.³ I consider an appropriate starting point in this matter that reflects the seriousness of failure to produce records is 65% of the maximum. That is the sum of \$13,000.

Steps to mitigate the effects of the breach

[52] Mr Biggs acknowledged in his evidence that the Labour Inspector had been put to some trouble because the records have not been provided. He referred to a desire not to “rip employees off” and said that responsibility for the failure to provide records was with his then accountants. I accept that there was some remorse shown.

[53] Weighed with that there has been a continuing failure even up to the date of the investigation meeting to commit to and provide the records that have been requested by the Labour Inspector.

[54] No further adjustment is made to the starting point.

Previous conduct

[55] Mr Miller referred me to a judgement involving Star Nelson. The Employment Court ordered Star Nelson to pay a fine for failing to comply with a compliance order the Authority had made. It was made in respect of awards in a determination about personal grievances and a penalty for a breach of good faith.⁴ He submitted that a pattern is demonstrated of ongoing non-compliance with orders of the Authority and Court although recognises that it is not a

² *A Labour Inspector v K Contracting Limited and Kashaf Ali Rizwan Choudhry* [2021] NZERA 421.

³ *A Labour Inspector v JES Construction Limited* [2017] NZERA Auckland 320.

⁴ *Cousens v Star Nelson Holdings Limited & Biggs* [2022] NZEmpC 30.

matter of minimum employment standards enforcement. The Authority can take into account if the person in breach has been previously found by the Authority to have engaged in any similar conduct. It would then become an aggravating feature.

[56] The wording in s 133A (g) of the Act is broad but requires similar conduct. The matter in the Employment Court was about failure to comply with awards in a personal grievance case. I am not minded in the exercise of my discretion to take the finding of the Employment Court into account. If there is a further breach involving the enforcement of minimum standards by either Star Moving or Star Nelson or both then the findings in this determination may be weighed. It is appropriate in the meantime to give both companies an opportunity to comply with the enforcement of minimum standards and recognise the importance of the Labour Inspectors role.

Deterrents

[57] It is important for there to be a consequence where records to assess compliance with minimum standards are not provided to the Labour Inspector following request.

Culpability

[58] Whilst Mr Biggs considered his accountants were responsible for the failure to provide the records Mr Biggs was unable to satisfy the Authority of clear instructions to his accountant to provide the records to the Labour Inspector.

Ability to pay

[59] Mr Miller submitted that there was no up to date and accurate information to support that either company was unable to meet a potential penalty award. My questioning of Mr Biggs about the financial position was that things were problematic and there were still some issues with the pandemic although he also referred to things being busy. There is insufficient information to support a reduction on this basis.

Consistency and proportionality of outcome

[60] Consistency is important when it comes to imposition of a penalty. Mr Miller directed the Authority to several cases where there has been a failure to produce wage and time, holiday and leave records and employment agreements under s 229 of the Act. The penalties in these cases ranged from \$6,000 to \$17,000. Mr Miller placed particular emphasis on the

determination of the Authority where there was a penalty imposed of \$17,000 because he said that there were similar aggravating features to the current matter.⁵ The next highest penalty in the determinations was \$7,500 and then two penalties of \$6000.⁶

[61] I have carefully considered the determination where there was a penalty award of \$17,000. The respondents did not participate in that investigation meeting. It appeared that some weight had been placed on the fact that many of the potentially affected employees could have been migrant workers unfamiliar with New Zealand laws although that was stated to be an impression only. Further weight appeared to be placed on the fact that there could have been a potential for 79 breaches because of the number of employees. I consider there are some distinguishing features between that matter and this for those reasons.

[62] I accept that failure to comply with the Labour Inspector's requests for records and employment agreements is a serious and continuing breach. I consider a penalty of \$7,500 to be appropriate, consistent, and proportionate for each company.

[63] I order Star Moving to pay a penalty of \$7,500 to the Labour Inspector for payment to the Crown within 28 days of the date of this determination.

[64] I order Star Nelson to pay a penalty of \$7,500 to the Labour Inspector for payment to the Crown within 28 days of this determination.

Summary of orders made

[65] Star Moving and Star Nelson have been ordered to comply with the s 229 notices and produce wage and time, holiday and leave records and employment agreements for all employees for the period of three years from 10 February 2018 to 10 February 2021 within 28 days of the date of this determination.

[66] Penalties have been awarded for both companies of \$7,500 payable to the Labour Inspector for payment to the Crown within 28 days of this determination.

⁵ Above n 2.

⁶ Above n 3 and *Spence, Labour Inspector v Tamehana Horticulture Service Limited* [2015] NZERA Auckland 303 and *Brown v Kiwi Labour Solution (2013) Limited & Ors* [2015] NZERA Wellington 54.

Costs

[67] I reserve the issue of costs.

[68] If costs cannot be resolved, then Mr Miller may lodge and serve a costs submission within 14 days from the date of this determination. Mr Biggs can then have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs.

[69] Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[70] The Authority usually determines costs on its notional daily rate unless circumstances require an upward or downward adjustment of the tariff.⁷

Helen Doyle
Member of the Employment Relations Authority

⁷ Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>.