IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 485
3145083

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	CAISTEAL AN IME LIMITED Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Alistair Miller, counsel for the Applicant Darren Angus for the Respondent	
Investigation Meeting:	23 September 2022 at Christchurch	
Date of Determination:	29 September 2022	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Caisteal An Ime Limited (CAIL) operates a business called Akaroa Village Inn and employs staff. A Labour Inspector (LI) required CAIL to supply her with copies of wages and time records, holiday and leave records and employment agreements for all employees from its first day of business to 28 March 2021.

[2] CAIL declined to produce this information.

[3] The LI seeks a compliance order to require CAIL to produce the information. A penalty is sought for the failure to comply with the request to produce the information. Costs are sought.

[4] CAIL opposes these remedies. It says that the LI's request has no legal basis and is unreasonable, disproportionate, replicative of work already undertaken and is an abuse of power and harassment. The company seeks to have the claim dismissed and to have the Authority take appropriate action against the LI for her breaches of the Employment Relations Act 2000.

The Authority's investigation

[5] The parties had not participated in mediation. CAIL proposed mediation but counsel for the LI opposed that as the matters in issue concerned compliance with employment standards. It appeared to me that mediation was unlikely to contribute constructively to resolving the matter. Additionally, none of the grounds set out in s 159AA of the Employment Relations Act 2000 operated to permit me to direct mediation.

[6] A substantial amount of material was annexed to the statement of problem and the statement in reply, so the respective positions were mostly apparent. The LI sought a determination on the papers but CAIL opposed that. Given the potential for serious consequences if a compliance order was made against CAIL, but it did not comply with the order because of its view that an investigation on the papers was not a fair opportunity to be heard, I set an in-person investigation meeting. The LI also seeks the imposition of a penalty. That reinforced my view that the matter should not be determined without an investigation meeting.

[7] I heard evidence from the LI and from Mr Angus. Counsel for the LI and Mr Angus also made submissions in support of the respective cases.

Did CAIL breach s 229 of the Employment Relations Act 2000?

[8] The LI is warranted under s 223 of the Employment Relations Act 2000.

[9] Darren Angus is a director of and an equal shareholder in CAIL.

[10] On 30 March 2021 the LI provided Mr Angus a notice requiring CAIL to produce wages and time records, holiday and leave records and employment agreements for all employees from its first day of business until 28 March 2021. The LI required records to be provided to her by Friday 30 April 2021.

[11] For that action, the LI was relying on s 229(1)(d) of the Employment Relations Act 2000. The provision empowered the Labour Inspector, for the purpose of performing her functions and duties under the Act, to require any employer to supply to her a copy of the wages and time record, or the holiday and leave record and any employment agreement of any employee of that employer.

[12] CAIL by email to the LI objected to the 30 March 2021 notice for the reasons there set out. In her email on 30 April 2021 to Mr Angus, the LI extended time by two weeks for CAIL to produce the required records. Before that time elapsed, Mr Angus confirmed CAIL would not provide the required records. CAIL has still not provided the records.

[13] Under s 229(2) of the Employment Relations Act 2000, where a Labour Inspector makes a requirement under s 229(1)(d), the employer must forthwith comply with the requirement.

[14] The LI's 30 March 2021 requirement followed earlier interactions between her and CAIL. It is not necessary to comprehensively detail the interactions but I will give a broad outline of them to give some context to why CAIL has not provided the records required by the 30 March 2021 notice.

[15] Complaints were received by the LI. The complaints gave rise to concerns about whether CAIL had complied with employment standards. Other matters were involved but were answered by CAIL. The LI obtained CAIL's wage and time records for a 12-month period. The LI drafted an investigation report and provided it to CAIL. Following CAIL's

comment, the LI completed her investigation report in October 2020. The LI considered that CAIL had breached "minimum employment standards" and sought to negotiate an enforceable undertaking. The LI and CAIL agreed to an enforceable undertaking in November 2020. CAIL acknowledged breaches, agreed to rectify breaches, and provide evidence to establish that it had remedied the breaches by 1 March 2021.

[16] There was an exchange of emails between Mr Angus and the LI in relation to several points canvassed by the undertaking. The LI expressed her view that the undertaking had not been fully complied with. Several specific points were mentioned. She suggested that CAIL either itself or through a representative conduct another analysis, or send employment records to her so she could conduct an analysis to be shared with CAIL. Mr Angus repeated his view that CAIL had fully complied with the undertaking. Mr Angus observed that the undertaking did not require CAIL to agree with the LI for it to be complied with. This led the LI to provide the 30 March 2021 notice to CAIL.

[17] An object of the Employment Relations Act 2000 is to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on the Labour Inspector. Employment standards include minimum entitlements and payment for those under the Holidays Act 2003, and the Act's record keeping requirements.

[18] At the heart of the present employment relationship problem is the LI's concern that CAIL may not have complied with the minimum entitlements and payments for those entitlements under the Holidays Act 2003 with regard to its employees. Much of the LI's concern is whether CAIL correctly applied the law about "otherwise working days" in the circumstances of its employees' employment and whether it was able to pay holiday pay on a regular basis.

[19] I should not be taken as indicating any view about whether CAIL did or did not comply with the Holidays Act 2003. However, I note that a Labour Inspector may determine whether

a day is an "otherwise working day", if an employer and an employee cannot agree.[1] The Holidays Act 2003 expressly allows a Labour Inspector to enforce the provisions of that Act.[2] A Labour Inspector may initiate proceedings to claim penalties and arrears.[3] For the purposes of that Act, the Labour Inspector has all the powers under the Employment Relations Act 2000.[4] Under that last mentioned Act, a Labour Inspector's functions include determining whether the provisions of relevant Acts have been complied with, taking all reasonable steps to ensure compliance with relevant Acts and monitoring and enforcing compliance with employment standards.[5]

[20] CAIL says in its statement in reply that this is a purely contractual issue, being the definition of the term "normally work" in relation to alternative holidays. CAIL says the matter is "not within the remit" of the Labour Inspector.

[21] Entitlement to an alternative holiday arises if an employee works in accordance with their employment agreement on a public holiday that falls on a day that otherwise be a working day for the employee.[6] The employment agreement is a factor that must be taken into account in determining an entitlement to an alternative holiday, as must other aspects of the employment relationship in practice.[7] But it is squarely within the "remit" of a Labour Inspector to assess whether an employer has complied with the minimum entitlement to alternative holidays for some or all of the employer's employees. The LI in this case did no more than exercise her powers to obtain records for the purpose of her investigation into that issue.

[22] CAIL says that the LI "violated" its rights under the Employment Relations Act 2000 and "compromised" the legality of "this" process. CAIL's view arises from its interactions with the LI from August 2020 and is not only with respect to the 30 March 2021 requirement.

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[1] Holidays Act 2003 s 13.
[2] Holidays Act 2003 s 74(1).
[3] Holidays Act 2003 s 76 and s 77.
[4] Holidays Act 2003 s 78.
[5] Employment Relations Act 3 223A.
[6] Holidays Act 2003 s 56.
[7] Holidays Act 2003 s 12(3).

It is common ground that the LI did not refer CAIL to the provisions of s 229(5) and (5A) of the Employment Relations Act 2000 during her exchanges with the company. However, the LI in her exchanges from August 2020 with the CAIL, had not required it to answer any questions that tended to incriminate the company. While the LI did not mention the provision, it does not affect these proceedings.

[23] CAIL says that no employee has lodged a complaint with it or the Authority on the matters being "pursued" by the LI. The powers of the LI under s 229 of the Employment Relations Act 2000 were not dependent on employees having first complained to the employer, having commenced action in the Authority or having complained to the LI.

[24] CAIL says that the LI's "pursuit" of trying to find something wrong "appears to be personally driven to satisfy her own sense of self". I do not accept that assertion. The motivation of the LI is clear from the documentation. The LI was concerned that CAIL had still not correctly applied the Holidays Act 2003, despite the enforceable undertaking.

[25] CAIL says that there is evidence to indicate that the Labour Inspectorate has been "Coaching and Guiding" employees regarding "Legal Processes", contrary to s 233A of the Employment Relations Act 2000. I am referred to email exchanges concerning proceedings between CAIL and an employee. The exchange that CAIL points to is dated 12 July 2021. It could not be relevant to CAIL's failure to comply with the 30 March 2021 requirement. I also accept the LI's evidence to the effect that she did not breach s 133A of the Act, in any dealings with respect to the other proceedings.

[26] In summary, the LI exercised her powers under s 229 of the Employment Relations Act 2000, for a lawful purpose.

Should compliance be ordered?

[27] CAIL has not provided the information required under the 30 March 2021 notice. I find CAIL has not complied with s 229(2) of the Employment Relations Act 2000. The LI is empowered by s 229(4) of the Act to commence proceedings for an order under s 137 of the Act.

[28] The Authority has power under s 137 of the Act to order a person to do any specified thing for the purpose of preventing further non-compliance.

[29] CAIL did not comply with the 30 March 2021 requirement because of its view that it lacked a legal basis and was abusive. Mr Angus confirmed in evidence that the company could comply if required. These circumstances make it appropriate to exercise the discretion given to the Authority by s 137 of the Act to prevent further non-compliance.

[30] The LI asked that CAIL be required to comply within 28 days. Mr Angus confirmed that the company could do this. I will allow that period for compliance.

[31] The LI confirmed that the records supplied as part of the process that led to the enforceable undertaking do not need to be supplied again. The compliance order will include that limit.

Should a penalty be imposed?

[32] Every employer who without reasonable cause fails to comply with a requirement under s 229(1)(d) of the Employment Relations Act 2000 is liable to a penalty under the Act, in an action brought by the Labour Inspector.[8]

[33] In an email on 9 May 2021 Mr Angus stated why CAIL would not provide the documents sought by the LI:

> As previously stated, we do not believe you have lawful grounds to make such a request, nor is it reasonable or proportionate and violates our rights under the Employment Act.

[8] Employment Relations Act 2000 s 229(3).

> We reaffirm that we have fully complied with the EU, that NO employee has ever made a grievance with regard to Holiday Pay or Alternative Holidays and that we consider your ongoing crusade against us as an Abuse of Power and harassment, a matter that if it continues we will be left with no alternative but to raise the matter with the Ombudsman.

[34] I accept that Mr Angus genuinely held these beliefs, however he was mistaken. The LI had lawful grounds for her request, it was reasonable, proportionate and did not violate CAIL's rights. The LI was entitled to act with or without employees' complaints, and whether or not employees had earlier raised such issues with CAIL. The 30 March 2021 requirement was not an "Abuse of Power", nor was it harassment. Mr Angus considered that CAIL had fully complied with the enforceable undertaking, but the LI was entitled to check that by obtaining the documents sought by the 30 March 2021 requirement.

[35] I find that CAIL had no reasonable cause for its failure to comply. CAIL is liable to a penalty for the breach of s 229(1(d) of the Employment Relations Act 2000.

[36] In determining an appropriate penalty, there are statutory factors that must be considered.[9]

[37] An object is the promotion of the effective enforcement of employment standards by conferring enforcement powers on Labour Inspectors. CAIL's failure to produce the records has prevented the LI from assessing whether CAIL's employees have received minimum entitlements.

[38] There is a single breach. CAIL is liable to a penalty of up to $20,000.00.

[39] There is a submission that it can be characterised as "ongoing". That is correct in a sense, but it is the same as saying that CAIL has taken no steps to mitigate the effects of its breach.

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[9] Employment Relations Act 2000 s 133A.

[40] The breach was intentional. I note that the LI was prepared to extend time and cautioned CAIL about the consequences of not complying.

[41] CAIL has not made any gains or avoided any losses by its breach, except not expending the time to provide the material. The breach has prevented the LI from performing her statutory role in a timely manner.

[42] CAIL has not taken steps to mitigate the effects of its breach.

[43] The circumstances of the breach should be outlined. CAIL provided a sample of records following interactions between the LI and Mr Angus from August 2020. That led to the LI's report and the November 2020 enforceable undertaking. The undertaking included acknowledgement of breaches and agreement on a series of steps to rectify them. CAIL agreed to provide to the LI evidence that it had remedied the breaches. These actions were to be completed by 1 March 2021. The LI sought information about CAIL's determination on otherwise working days for employees, and its analysis under s 28 of the Holidays Act 2003. CAIL provided some information, but the LI disagreed with CAIL's analysis on those two points. The LI suggested CAIL conduct a further analysis (itself or through an advisor), or provide her with its employment records for her to conduct an analysis. Mr Angus responded, reaffirming CAIL's view that it had fully complied with the undertaking. The LI then by the notice of 30 March 2021 required CAIL to provide all the records. CAIL refused to provide the records, wrongly thinking the LI had no lawful grounds for the requirement.

[44] Overall, the circumstances show CAIL's initial engagement, followed by its refusal to provide records because it considered it had met all the obligations. Vulnerability of employees is not a factor at present.

[45] CAIL has not been found to have engaged in similar conduct previously in proceedings in the Authority of the Court.

[46] It is submitted that the appropriate starting point for fixing a penalty is 75% of the maximum. I am referred to *A Labour Inspector v K Contracting Limited & Anor*.[10] In that case, a starting point of 75% was taken, by reference to passages in the Employment Court's judgement in *Borsboom v Preet PVT Limited* that set 80% for Minimum Wage Act 1983 breaches case and 70% for the Holidays Act 2003 breaches.[11] However, in *Preet*, the Court also fixed 50% as an appropriate starting point for the breaches of the Employment Relations Act 2000 obligation to keep wages and time records.[12] *Preet* sets the foregoing proportions of the maximum penalties as the starting point after consideration of some factors, before the consideration of further factors. Those proportions are specific to *Preet*, rather than of general application.

[47] As above, CAIL is liable to a penalty of up to $20,000.00. Having regard to the factors already mentioned, CAIL's failure would warrant a penalty of $8,000.00. That in particular would recognise CAIL's compliance to the point of the undertaking but its intentional breach thereafter, the absence of similar breaches but the significance of powers given to a Labour Inspector.

[48] Regarding deterrence, I am referred to *A Labour Inspector v Daleson Investments Limited* where the Employment Court observed that compliance with minimum standards is non-negotiable, not just for when it suits an employer or when the employer is put under pressure by a Labour Inspector.[13] However, as counsel observed, the present matter is not a case of "minimum entitlement". A penalty of $8,000.00 would adequately reflect the need for both specific and general deterrence.

[49] I am referred to several cases in support of the submission that CAIL is "highly culpable" in this case.[14] Those cases show limited or no engagement by the employers with the

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[10] *A Labour Inspector v K Contracting Limited & Anor* [2021] NZERA 421.
[11] *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 at [167] and [171].
[12] See *Preet* at [173].
[13] *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [39].
[14] *Labour Inspector v Dreamz Global Limited* [2017] NZERA Auckland 13 and *A Labour Inspector v Jes Construction Limited* [2017] NZERA Auckland 320.

Labour Inspector. They offer little assistance here when assessing CAIL's culpability. Counsel submits that consideration of culpability alongside the aggravating features of the breach, in the absence of mitigating features, warrants an increase of 5% to 10% above the "starting point". However, CAIL's level of culpability, the "aggravating features" and the absence of "mitigating features" are reflected in the foregoing finding that the breach was intentional, alongside the earlier description of the circumstances in which the breach occurred. A penalty of $8,000.00 would adequately reflect CAIL's culpability.

[50] CAIL has not raised any issue about its ability to pay.

[51] I am referred to several cases regarding consistency. The most helpful is *A Labour Inspector v Star Moving Limited & Ors*.[15] In that case, the employer supplied some limited information to MSD but did not provide information to a Labour Inspector, despite receiving notice of the Inspector's requirement and an explanation that the response to MSD did not meet the Inspector's requirement. The present case is not dissimilar. The Authority considered some of the same cases that I have been referred to, before setting a penalty for each employer at $7,500.00 having regard to issues of consistency and proportionality of outcome. I agree that consistency is important. On that basis, I will adjust the level of penalty here to $7,500.00.

[52] A penalty at that level is not out of proportion to the gravity of the breach, given the circumstances of this case.

Summary and orders

[53] CAIL has not complied with s 229 of the Employment Relations Act 2000. It is appropriate to order compliance to prevent further non-compliance. CAIL failed, without reasonable cause, to comply with the Labour Inspector's requirement under s 229 of the Act. It is appropriate to impose a penalty on CAIL.

[15] *A Labour Inspector v Star Moving Limited & Ors* [2022] NZERA 252.

[54] Caisteal An Ime Limited is to comply with the notice dated 30 March 2021 by providing to the Labour Inspector the wages and time records, the holidays and leave records and the employment agreements for all employees from its first day of business to 28 March 2021. CAIL is to comply with this order within 28 days of the date of this determination. CAIL is not required by this order to supply a second copy of the wages and time records, the holidays and leave records and the employment agreements it provided before or after it entered into the enforceable undertaking.

[55] Caisteal An Ime Limited is to pay to the Authority for payment to the Crown a penalty of $7,500.00, within 28 days of the date of this determination.

[56] I reserve costs. If need be, an application can be made by lodging and serving a submission within 14 days, with the other party able to lodge and serve a reply within a further 14 days. I will then determine any issue, having regard to the submissions and the Authority's approach to costs.

Philip Cheyne
Member of the Employment Relations Authority