

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 19
3184080 and 3184079

BETWEEN	A LABOUR INSPECTOR Applicant in 3184079 and 3184080
AND	BRAK BURNS LIMITED (FORMERLY BURGERED RESTAURANTS AUCKLAND LIMITED) Respondent in 3184080
AND	F & B REMUERA LIMITED Respondent in 3184079

Member of Authority: Robin Arthur

Representatives: Joshua Barlow, counsel for the Inspector
Ray Harris, advocate for F&B Remuera Limited
Murray Osmond, advocate for BRAK Burns Limited

Date: 17 January 2023

DETERMINATION OF THE AUTHORITY

[1] Labour Inspector Sanne-Eileen Berkman applied to the Authority for orders requiring BRAK Burns Limited (BRAKBL) and F&B Remuera Limited (FBRL) to comply with her requests for both companies to provide her with copies of wage and holiday records and employment agreements for certain employees. She also sought orders for a penalty to be imposed on each company for failing to promptly provide the requested records.

[2] The Inspector's two separate applications, one for each company, have been investigated together as BRAKBL and FBRL are part of a group of companies ultimately owned or controlled by Delta Private Equity Limited (DPEL). The latter company, in turn, had a single shareholder, Deltrust Limited, in which Murray Osmond is registered as sole director and shareholder.

[3] Initially neither company had used the opportunity they were given to lodge a statement in reply to the Inspector's applications. In a case management conference called by the Authority, a timetable was set giving both companies a further opportunity to lodge a statement in reply and to also make submissions about the Inspector's claims. Timetable directions issued on 30 November 2022 confirmed the Authority would determine the Inspector's application 'on the papers'. Those papers were to comprise the Inspector's statement of problem (with attached documents), submissions by the Inspector's counsel, and the companies' statements in reply and submissions.

[4] In accordance with that timetable BRAKBL and FBRL each lodged a statement in reply (6 December 2022), the Inspector's counsel lodged submissions (13 December 2022) and each company lodged submissions (20 December 2022). On 13 December the companies also lodged memoranda objecting to some additional documents and information provided with the Inspector's submissions. By directions issued on 20 December the parties were advised that additional material would not be considered in the Authority's 'on the papers' investigation of the Inspector's application for compliance orders and penalties.

[5] The last remaining step in the timetable was for the Inspector's counsel to lodge reply submissions by 23 December 2022. This was done on 22 December but, on the same day, the representatives of BRAKBL and FBRL each sought to lodge applications seeking removal of the Inspector's applications to the Employment Court to hear and decide. Both said the matter involved important questions of law about whether the Authority could jointly investigate the Inspector's applications, the extent of disclosure required of Inspectors pursuing this sort of case and what caution the Inspector should have to give to interviewees she talked to her in her inquiries. BRAKBL's removal application also sought "an interim non-publication order" but gave no reasons for doing so.

[6] Neither removal application was accompanied by the prescribed fee.¹ The companies' representatives were advised they would need to pay the fee and to provide proof of having done so if they wished to have those removal applications considered. This advice was provided to them by email on 23 December. As of the date of issue of this determination, some 24 days later, Authority staff have told me that they have

¹ Employment Relations Authority Regulations 2000, r 12.

checked the relevant records and there has been no payment of or further correspondence from the companies' representatives about payment of the prescribed fee for either removal application. In those circumstances there are no such applications properly before the Authority which might otherwise require consideration before determination of the Inspector's applications. Accordingly, determination of these two matters had proceeded on the basis advised to the parties by the directions issued after the case management conference on 30 November 2022. Those directions provided the companies with additional opportunities to lodge statements in reply and submissions, which both used. As a result, both companies have had an opportunity to be heard and to provide information rather than the Authority proceeding, given their earlier failures to respond, in the absence of their input.²

The Inspector's applications

BRAKBL

[7] Acting on information from 15 former employees of BRAKBL the Inspector exercised her statutory power in June 2022 to issue its director, Mr Osmond, with a notice requiring supply of records for seven complainants.³ Those records were required because those workers alleged they were not paid their wages in some weeks, other payments were delayed and they were not correctly paid holiday pay. Documents lodged by the Inspector showed her attempts during the following weeks to contact Mr Osmond were not successful and she had not secured the required records by the time she applied to the Authority, in August 2022, for a compliance order and a penalty for not providing records.

[8] The Employment Relations Act 2000 (the Act) states an employer required by an Inspector to provide records must comply "forthwith" and an employer who, without reasonable cause, fails to do so is liable to a penalty imposed by the Authority.⁴

FBRL

[9] Acting on complaints from three former employees of FBRL the Inspector also issued the same form of notice to FBRL, seeking the same range of records. Documents lodged by the Inspector showed she sent the notice in June 2022 to FBRL's registered

² Employment Relations Act 2000, s 173(2) and (3) and s 174D and Employment Relations Authority Regulations 2000 r 8(3) and (4).

³ Section 229(1)(c).

⁴ Section 229(2) and (3).

office, at an address in Cambridge, where courier documentation showed it was signed for with the name “Osmond”. Follow up correspondence went unanswered and, by the time of her application to the Authority in August 2022, FBRL had provided no records.

The companies’ replies

[10] The statements in reply lodged by each company were largely identical and to the same effect. They said neither company nor their directors had wilfully withheld time and employment records or had those records in their possession at any time. Both companies were said to have contracted out their “human resource and wage processing function to a third party”. This “third party” was identified as Delta Shared Services Limited (DSSL), a company placed in liquidation on 27 May 2022, with a recall application said to have been declined by the High Court in October 2022.

[11] The third party was said to have kept accurate records and provided payslips, time records and employment agreements to employees of BRAKBL and FBRL. This was said to be evident from copies of those documents provided by the complainant employees to the Inspector.

[12] Both companies said they had asked the liquidators of the third party for records but none were provided so that BRAKBL and FBRL were each “in no position, at no fault of its own” to be able to provide requested records. FBRL’s advocate, Mr Harris, provided a copy of his request to the liquidators of DSSL (in liquidation). His request asked for documents described as being held in a filing cabinet or stored on a server at FBRL’s former offices in Queen Street, Auckland. He also provided a reply email from one liquidator stating “we confirm we hold no information that is relevant to your request”.

Compliance orders are appropriate

[13] BRAKBL and FBRL both submitted they had “reasonable cause” for not providing records requested by the Inspector as they did not “have the power, possession or control” of those records which were in the hands of DSSL (in liquidation), a third party. They submitted a compliance order would serve no useful purpose or have no practical effect.

[14] In replying to those submissions counsel for the Inspector referred to the description given in the statement of problem of a visit by the Inspector to BRAKBL’s

premises on 13 July 2022. The Inspector referred to a senior staff member showing her a sample of time records for various employees kept on the work computer as well as the time recording system. Attachments to the statement included a photo she took of the computer screen showing the names of those employees. While BRAKBL's statement in reply denied that the company and its director had "at any time" possessed time or employment records, the Inspector submitted her evidence showed both companies were able to access employment records after the liquidation of DSSL in May 2022 and after the date of 21 June 2022 when she had issued the notice to supply records.

[15] Two further points supported the Inspector's submission that a compliance order was still warranted.

[16] Firstly, there was no evidence lodged by BRAKBL and FBRL to corroborate their assertion that DSSL had been contracted to manage its employment records. The correspondence with the liquidators lodged by FBRL, stating DSSL (in liquidation) did not hold records, did not answer the question of whether that company held such records or carried out the functions described in the submissions of FBRL and BRAKBL.

[17] Secondly, DSSL was not really a detached "third party" in the sense suggested in the submissions of FBRL and BRAKBL. It was, in fact, part of the network of companies which Companies Office records show was ultimately held by Delta Private Equity Limited, the company in turn owned by Deltrust Limited, in which Mr Osmond was registered as the sole director and shareholder. As the Inspector submitted, DSSL had been an entity effectively under the ultimate control of Mr Osmond, not a "third party".

[18] As a result of that analysis and as a matter of likelihood, it was clear FBRL and BRAKBL did have possession of relevant records or the means of accessing them at the time that the Inspector had issued them with notices to supply records. While the matter of location and access to such records may subsequently have become more complex, it was also likely that personnel involved with both companies had information about the nature, content and means of accessing those documents. It is for that reason I have concluded neither company had "reasonable cause" for not doing more to facilitate the Inspector's access to those records and there remains some utility in making the compliance order she seeks to compel the co-operation of those

companies, including Mr Osmond as director of BRAKBL, in doing more to provide that access. Compliance in this sense means providing full co-operation by making best endeavours to assist the Inspector in gaining that access, whether it is to physical or digital forms of such records. Such co-operation may, for example, include liaising with the liquidators of DSSL, if records were truly held by that company, about gaining access to them. This might include providing more detailed and specific information about physical location of records and accessing electronic records, including by providing relevant passwords. Or, if such records were, in fact, held elsewhere, providing access to them wherever they now are.

[19] Accordingly, under s 137(1) and s 229(4) of the Act, FBRL and BRAKBL are each ordered to comply by no later than 30 calendar days from the date of this determination with the notice to supply records issued to it under s 229(1)(d) of the Act.

[20] If the companies fail to comply with the compliance order, the Inspector may apply to the Employment Court to exercise its powers to sequester property, impose fines and sentence a person in default to imprisonment.⁵

Penalties are warranted

[21] FBRL and BRAKBL submitted that they could not be subject to a penalty as they had established they had “reasonable cause” for not having complied earlier with the Inspector’s notice to supply records. For reasons already given in relation to the compliance order, that submission has not been accepted. Rather, as the Inspector submitted, both companies’ explanations for the failure were not adequate and both were liable to a penalty.

[22] Determining an appropriate penalty in these circumstances does not anticipate any future claim that might later be made by the Inspector about breaches of employment standards such as failure to pay wages in full and on time or failing to pay all holiday leave entitlements. Such matters, if they came to pass, would be for another day. Rather, the penalty is to be assessed, primarily, on the extent to which failure to comply “forthwith” with the request to provide records caused harm. The Inspector submitted that the failure of FBRL and BRAKBL to comply with her request had

⁵ Employment Relations Act 2000, s 138(6) and s 140(6).

hindered and delayed her inquiries and frustrated her ability to effectively perform her statutory obligations.

[23] As FBRL and BRAKBL submitted, this was not a case where the evidence, to the extent it could be evaluated at this stage, established that no records were kept or that there was any absolute failure to pay wages and leave. Rather, they pointed to payslips and employment agreements provided by the complainants to the Inspector as evidence that there was a pay and records system. However, the real issue is that the legislation protecting employment standards, such as the Employment Relations Act 2000 and the Holidays Act 2003, requires employers to maintain comprehensive pay and leave records and to provide ready and prompt access to those records on request, including by Labour Inspectors. Adherence to those requirements is fundamental to promoting compliance with and enforcement of the employment standards legislation.⁶

[24] The failure of FBRL and BRAKBL to maintain that ready access to records, whenever called upon within the six-year statutory period to provide them, has harmed the ability of the Inspector to carry out her duties. If that is the result of FBRL and BRAKBL having made arrangements for those functions to be carried out by a separate legal personality, each company must bear the consequences of whatever failure results. Because those arrangements were said to have been made as part of their respective business arrangements, the breach did not result from inadvertence or negligent.

[25] A penalty is warranted for the nature and extent of what effectively amounted to a breach resulting from deliberate business decisions, being significant harm to the Inspector's ability to effectively pursue her statutorily mandated inquiries. Having regard to the range of penalties in similar cases, and without any adjustment being necessary for any other relevant matter listed in s 133A of the Act, an appropriate and proportionate penalty to impose on each company was \$5,000.

[26] FBRL and BRAKBL must each pay a penalty of \$5,000 into the Authority by no later than 30 days from the date of this determination. On recovery of the penalty, the Authority must pay that amount into a Crown Bank Account. In the event that either company failed to pay, the Inspector may recover the penalty by action in the District Court.⁷

⁶ Employment Relations Act 2000, s 222(b) and s 223A.

⁷ Section 135A.

Summary of orders

[27] For the reasons given in this determination, the following orders have been made:

- (i) FBRL and BRAKBL must each comply by no later than 30 calendar days from the date of this determination with the notice to supply records issued to it under s 229(1)(d) of the Act; and
- (ii) FBRL and BRAKBL must each pay a penalty of \$5,000 into the Authority by no later than 30 days from the date of this determination.

Costs

[28] Costs are reserved. If any issue as to costs cannot be resolved between the parties and an Authority determination is necessary, the Inspector may lodge a memorandum within 28 days of the date of this determination. Each company would then have 14 days to lodge a reply memorandum.

[29] The parties could expect the Authority to determine costs, if asked to do so, on its usual tariff rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸ For this matter, determined on the papers, the starting point would likely be one third of the daily tariff, that is \$1,500, subject to submissions about adjustment.

Robin Arthur
Member of the Employment Relations Authority

⁸ See www.era.govt.nz/determinations/awarding-costs-remedies.