

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 48
3161441

BETWEEN A LABOUR INSPECTOR
 Applicant

AND S V CONTRACTORS LTD
 Respondent

Member of Authority: Robin Arthur

Representatives: Mathew Hall, counsel for the Applicant
 Sione Fa'anunu, director of the Respondent

Investigation: On the papers

Determination: 31 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Labour Inspector Stella Gong applied for orders requiring SV Contractors Limited (SVCL) to comply with an improvement notice and to pay a penalty for failure to comply with that notice.

[2] SVCL operates a horticultural business.

[3] The improvement notice, dated 19 February 2021, was issued under s 223D of the Employment Relations Act 2000 (the Act). The notice was delivered to SVCL's registered office on 1 March 2021. It said SVCL had breached employment standards by not keeping copies of employment agreements for all workers, by not including all mandatory categories of information in its wage and holiday records and by failing to provide sick leave to one worker. The notice required SVCL to provide all current workers with compliant employment agreements, to include full information in the company's wage and holiday records and to identify any shortfalls in providing sick leave entitlements by carrying out an audit of its records for all current employees.

[4] Through the following months the Inspector liaised with SVCL about how to meet the requirements of the notice. She spoke with SVCL's director Sione Fa'anunu and Ngaluafe Fale, who provides accounting services to the company. In July 2021 Ms Fale submitted a 'wage report' which the Inspector found did not include all the required information.

[5] The Inspector accepted SVCL had complied with one requirement of the notice. The company had provided a sample copy of a compliant employment agreement for current employees. However, the Inspector said SVCL had failed to comply with other requirements regarding wage and time records, holiday and leave records and an audit of sick leave entitlements.

The Authority's investigation

[6] SVCL did not lodge a statement in reply after the Inspector lodged her application to the Authority in January 2022 seeking orders for compliance, a penalty and costs. This matter has now been determined on the papers. Those papers comprise the Inspector's statement of problem and attached documents and submissions from the Inspector's counsel. SVCL has not used the opportunities provided to lodge its own reply and submissions.

[7] Authority records show that, in addition to the statement of problem being posted to SVCL's registered office, a copy of that statement was personally served on Mr Fa'anunu in July 2022. An Authority Officer also made subsequent efforts by email and telephone contact with Ms Fale to encourage the company to lodge a statement in reply.

[8] In November 2022 the Authority sought to convene a case management conference with the parties, advising SVCL by sending a notice to its registered office, speaking with Ms Fale and by trying to contact Mr Fa'anunu on a telephone number confirmed as his number by Ms Fale. Mr Fa'anunu did not respond to voice mail messages or answer the call at the appointed time for the telephone conference.

[9] In those circumstances I considered the Inspector's application had to be dealt with 'on the papers' after allowing time for written submissions on behalf of the Inspector and the company. Directions sent to the parties, including to SVCL's

registered office address and to the email address for Ms Fale, set a timetable for lodging submissions and an opportunity for SVCL to respond in writing.

[10] The Inspector's submissions, lodged on 19 December 2022, were sent by post to SVCL's registered office twice and, on the second time, signed for. No submissions from or for the company were received by the timetabled date of 27 January 2023.

[11] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It does not set out all evidence and submissions received.

Issues

[12] The issues for determination were:

- (a) Did SVCL fail to comply with the requirements of the improvement notice and, if so, should an order for compliance be made?
- (b) Is SVCL liable to a penalty for failure to comply with a notice and, if so, what amount should be set as a penalty?
- (c) Should either party contribute any the costs of representation of the other party.

Compliance orders are appropriate

[13] There was no challenge to the Inspector's evidence, set out in her statement of problem, of making extended efforts to enable SVCL to provide required information about its pay and holiday records and an audit of sick leave entitlements.

[14] It is not clear, in the absence of any direct evidence from SVCL, whether the company is still trading. SVCL remains registered on the Companies Office register. Its most recent annual return was filed in June 2022. Despite whatever doubt there may be about whether its business is still operating, there is potential utility in having SVCL complete full pay and holiday records, including for the purposes of wage arrears claims that the Inspector or former employees might wish to pursue. The limitation period for such claims is six years.¹

[15] In those circumstances, a compliance order was appropriate. Under s 137 and s 223D(d) of the Act, SVCL is ordered to comply with the improvement notice by:

¹ Employment Relations Act 2000, s 142.

- (i) providing all the information in its wages and time record required by paragraph 6.1.2 of the notice; and
- (ii) providing all the information in its holiday and leave record required by paragraph 6.1.3 of the notice; and
- (iii) providing sick leave entitlements identified in paragraph 6.1.4 of the notice.

[16] This order must be complied with by no later than 30 days from the date of this determination.

A penalty is warranted

[17] For failure to comply with an improvement notice SVCL is liable to a penalty of up to \$20,000.²

[18] The uncontested breach of the improvement notice warrants a penalty.

[19] Proper records are the foundation for maintaining employment standards. Parliament has set clear and express requirements about the detailed information employers must keep in those records. SVCL's failure to keep and provide that information hampered the Inspector's ability to effectively pursue her statutorily mandated inquiries and created a risk that SVCL's workers received less than their correct entitlements. A penalty was also in the public interest to discourage other employers from similar failures if notified of the need for improvements in their record keeping and payments.

[20] The sum of \$4,000 is an appropriate penalty after considering the matters identified in s 133A of the Act and in case law for determining a penalty. It is an amount proportionate to the seriousness of the breach, the harm done and an absence of any information from SVCL about whether any adjustment was needed to account for its financial circumstances. It is a sum adjusted to allow for one small element of partial compliance and no previous instances of such breaches being identified by the Inspector.

[21] SVCL must pay the penalty of \$4,000 into the Authority by no later than 30 days from the date of this determination. On recovery of the penalty, the Authority

² Section 135 and 223F.

must then pay that amount into a Crown Bank Account. In the event that SVCL failed to pay, the Inspector may recover the penalty by action in the District Court.³

Costs

[22] The Inspector's request for an order for costs has been dealt with as part of this determination as SVCL has not engaged with the Authority investigation.

[23] The Authority usually set costs by using its daily tariff, unless particular circumstances or factors require an upward or downward adjustment of that tariff.

[24] For this matter, determined on the papers, \$1,500, that is one third of the daily tariff, is a reasonable and modest amount to order SVCL to pay to the Inspector for costs incurred in seeking the compliance and penalty orders now made. SVCL must pay this amount to the Inspector within 30 days of the date of this determination.

Summary of orders

[25] For the reasons given, the following orders have been made. By not later than 30 days from the date of this determination:

- (i) SVCL must comply with all the requirements of the improvement notice;
and
- (ii) SVCL must pay a penalty of \$4,000 to the Authority; and
- (iii) SVCL must pay costs of \$1,500 to the Inspector.

Robin Arthur
Member of the Employment Relations Authority

³ Employment Relations Act 2000, s 135A.