

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 681
3175282

BETWEEN	A LABOUR INSPECTOR Applicants
AND	BRICK & BLOCK SLAYERS LIMITED Respondent

Member of Authority: Peter Fuiava

Representatives: Benjamin Ropati and Tim Gray, counsel for the Applicant
No appearance by the Respondent

Investigation Meeting: 8 September 2023 in Auckland

Determination: 17 November 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] This is an application for a compliance order and for a penalty against Brick & Block Slayers Limited (BBS or the company) for failing to comply with an improvement notice issued by the Labour Inspector on 18 June 2021. BBS was a family run horticulture business that provided labourers for a vegetable grower in Waiuku.

[2] The improvement notice stated that BBS had failed to provide four of its employees with compliant individual employment agreements, did not maintain a compliant holiday and leave record, failed to pay one employee time and a half for working a public holiday, and that staff were not provided with an alternative holiday for working on public holidays that were otherwise working days for them. The notice also stated that BBS could lodge an objection to it within 28 days but no objection was ever lodged and the notice was never withdrawn by the inspectorate.¹

¹ Employment Relations Act 2000, s 223G.

How did the Authority investigate?

[3] The Inspector's Statement of Problem was lodged with the Authority on 16 June 2022. No Statement in Reply was lodged. When the matter was referred to me in February 2023 for investigation and determination, I instructed the Authority Officer to courier a copy of the proceedings to BBS's registered office address, its sole shareholder's address and its sole director's address as recorded by the New Zealand Companies Office. Those efforts appear to have resulted in Ivanya Sakisi's engagement as the company's representative. Ms Sakisi is the daughter of Manu Sakisi and they both had dealings with the inspectorate leading up to the improvement notice being issued.

[4] On 24 May I held a case management teleconference with counsel for the Inspector, Mr Ropati, and Ms Sakisi. By agreement, the issues for investigation were identified, timetabling directions made for the filing of written witness statements, and the matter set down for an investigation meeting on 8 September 2023. A minute was issued which Ms Sakisi was emailed a copy using the contact email address she provided during the teleconference.

[5] As directed, a witness statement from Labour Inspector Lin Gong and a bundle of documents was provided. However, no witness statements from BBS were received. I had the Authority Officer email Ms Sakisi a reminder about the witness statements. There was no response. On 24 August, I had the Authority Officer email Ms Sakisi a second time to remind her of the upcoming investigation meeting and to invite her to provide something for the Authority to consider. On 7 September, curious about BBS's lack of engagement, I checked the Companies Office Register and discovered that the company had been removed which is usually due to a company's failure to file an annual return. Mr Ropati was subsequently advised of this discovery and by the morning of the investigation meeting, the Companies Office had restored BBS to the register which enabled the investigation to proceed as scheduled.

[6] The investigation meeting was held in person and Mr Gray appeared on that occasion together with Ms Gong who gave evidence under oath. There was no appearance by BBS or its representative Ms Sakisi. Given the Authority's efforts to bring the proceedings to the company's attention as well as Ms Sakisi's involvement at the earlier case management conference, I was satisfied that the company was aware of

the date and time of the investigation meeting. Out of an abundance of caution, the investigation meeting was adjourned for 15 minutes. When no one appeared for BBS, I proceeded with my investigation in the company's absence pursuant to cl 12 sch 2 of the Employment Relations Act 2000 (the Act).

[7] 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 has not recorded all evidence and submissions received.

What are the issues?

[8] The issues requiring investigation and determination were:

- (a) Should a compliance order be made against BBS?
- (b) Should a penalty be imposed against the company?
- (c) Should BBS contribute to the Inspector's costs of representation?

Should a compliance order be made against BBS?

[9] BBS has failed to lodge a Statement in Reply or written witness statements in response to the inspector's Statement of Problem and witness statement which have gone unchallenged. Ms Gong's witness statement to the Authority (28 June 2023) records that the improvement notice was emailed to Ms Sakisi on 18 June 2021 and that the deadline for the company to satisfy its requirements, which remain unmet, was 19 July 2021.

[10] It was Ms Gong's evidence that while Ms Sakisi did initially engage with the Inspector from the start by providing employment agreements for the four affected employees and asking questions about payroll systems and holiday and sick leave, it appears the arrears the company owed its staff was what stopped it from complying with the improvement notice.

[11] I note also from Ms Gong's written witness statement that, on 12 November 2021, an accountant for BBS claimed in a letter (undated) that the four affected workers were not employees of the company but contractors. However, no significance can be attached to this bald assertion given that no objection was made to the inspector's improvement notice, issued some five months prior. Further, the four affected workers each completed a written questionnaire as part of the inspectorate's investigation which recorded Manu Sakisi, Ms Sakisi's father, as their employer. I note also that throughout

the Inspector's investigation, not once did Ms Sakisi or her father suggest that the affected workers were not employees but contractors. The accountant's assertion is not supported by anyone from the company notably Ms Sakisi or her father.

[12] It is further noted that in a subsequent email (18 November 2021) the accountant alleged that English was Mr Sakisi's second language, that he did not know the difference between an employee and a contractor, and that Ms Gong was aware of his limited English. The criticism is unwarranted when the Inspector's bundle of documents show that Mr Sakisi had telephoned Ms Gong on 28 February 2021 and that she had offered him an interpreter which he declined. Ms Gong took contemporaneous notes of the information Mr Sakisi provided during their conversation and to ensure the accuracy of her notes, emailed a copy to Mr Sakisi which he verified by email of 1 March 2021 as accurate. There is no merit to the accountant's assertion that the inspector has obtained information unfairly.

Conclusion

[13] Ms Gong provided BBS with multiple extensions to comply with the improvement notice and I find that she has gone about matters fairly and comprehensively. The present application for compliance is one of last resort because BBS has failed to comply with the improvement notice. Although the company was recently removed from the New Zealand register of companies, which may be a sign that it is no longer actively trading, the enforcement of improvement notices is a matter of public interest. I grant the compliance order (see below) and it will be for the inspectorate to decide whether further enforcement is worthwhile to pursue under s 140(6) of the Act.

Should a penalty be imposed against BBS?

[14] The Inspector applies to the Authority for a penalty against BBS under s 223F for its failure as an employer to comply with an improvement notice. No other penalties for the same matter under other relevant legislation has been sought for the exception in s 223F(2) to apply.

[15] In considering whether a penalty is warranted and, if so, at what level, I have taken into consideration the mandatory factors set out in s 133A of the Act and the

Employment Court's decisions in *Nicholson v Ford*², *A Labour Inspector v Daleson Investment Ltd*³ and *Borsboom v Preet Pvt Ltd*.⁴

[16] In *Borsboom*, the full bench of the Employment Court stated that the objective behind the award of penalties was to:⁵

- (a) punish those who breach statutory obligations;
- (b) deter deliberate breaches;
- (c) compensate the victim of the breach;
- (d) eliminate unfair competition and business.

[17] The court also applied a four-step process to the assessment of penalties which I have adopted and applied below.

Step one – nature and number of breaches

[18] An improvement notice is a device an Inspector uses to provide an employer who has not complied with employment standards the opportunity to self-correct. This low-level approach is in keeping with one of the Act's objects which is to reduce the need for judicial intervention.⁶ Should an employer fail to take advantage of the opportunity; the Inspector may approach the employment institutions who play an important role in promoting the effective enforcement of employment standards.⁷

[19] Mr Gray submitted that there was only one breach by BBS which was its failure to comply with the improvement notice and although the notice primarily related to record keeping, without accurate records it is difficult for Labour Inspectors to do their jobs. It was further submitted that BBS failed to provide staff with an alternative holiday for working on a public holiday that was otherwise a working day for them.⁸ Being denied an alternative holiday meant that staff, who were doing physically demanding work, may not have received adequate rest and recreation.

[20] The maximum penalty for a company or corporation is a penalty not exceeding \$20,000 per breach.⁹ The maximum penalty BBS faces is \$20,000.

² *Nicholson v Ford* [2018] NZEmpC 132.

³ *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

⁴ *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

⁵ Above at [61] to [63].

⁶ The Act, s 3(a)(vi).

⁷ The Act, s 3(ab).

⁸ Holidays Act 2003, s 56.

⁹ The Act, s 135(2)(b).

Step 2 – assessment of the severity of the breach in each case to establish provisional penalties starting point and consider both aggravating and mitigating factors

[21] The four affected employees are understood to be members of Mr Sakisi's extended family and I am told that a total of eight employees worked for BBS at the time labour inspectors undertook an unannounced site visit in November 2020. Simply because the affected employees were family members of Mr Sakisi did not mean that BBS did not have to pay them properly. I find that there was a level of vulnerability present.¹⁰

[22] However, the information and evidence before me indicates that BBS was not a sophisticated employer which I take into consideration as a mitigating factor. Its failure to comply with the Inspector's improvement notice was more negligent than intentional.¹¹ Further, Ms Gong acknowledges that BBS did initially engage with the inspectorate but believes that the wage arrears it owed staff may have stopped it from making any further progress with the improvement notice. I note that Mr Sakisi, his daughter, the company's sole director, and its sole shareholder have previously not been found by the Authority to have engaged in any similar conduct.¹² On balance, I consider a reduction of 70 per cent to be appropriate. The adjusted total for the penalty so far amounts to \$6,000.

Step three – means and ability to pay the provisional penalty

[23] There is no financial information before me about BBS's ability to pay a penalty but as noted already, it is an entity that was recently removed from the Companies Office register because it may not have filed its annual returns which might indicate that it is no longer trading. Even so, the message must still be sent that breaching improvement notices have consequences and that minimum employment standards matter.

Step four – proportionality of outcome

[24] The penalty imposed should be in proportion to previous cases with a similar factual scenario. The court in *Preet* observed that the final penalties which are set should not be at such a level that the liable employer has an incentive to avoid paying

¹⁰ The Act, s 133A(f).

¹¹ s 133A(c).

¹² s 133A(g).

them or, alternatively, simply cannot pay them. While there is no evidence of impecuniosity, the penalty should be in all proportion to the breach committed and its effects. Standing back and looking at all matters in the round, I find a fair penalty is \$3,500.

Costs and expenses

[25] The Inspector is entitled to a contribution to the costs of representation and bringing a successful application. Applying the Authority's usual daily tariff for an investigation meeting that lasted less than an hour, the sum of \$800 is an appropriate level of costs for BBS to pay the Inspector. The company must also reimburse the Inspector \$71.56 for the fee paid to lodge the application in the Authority.

Summary and orders

[26] For the reasons given, the Authority makes the following orders against Brick & Block Slayers Limited which are to be met no later than 4 pm Friday 15 December 2023:

- (i) comply with all the requirements of the improvement notice;
- (ii) pay a penalty of \$3,500 to the Authority and on recovery of this amount, the Authority must transfer this into the Crown Bank Account; and
- (iii) pay costs of \$871.56 to the Inspector.

Peter Fuiava
Member of the Employment Relations Authority