IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 186
3249299

	BETWEEN	LABOUR INSPECTOR Applicant
	A N D	FLYING DUSTERS LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Petrina Siania, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	On the papers
Submissions received:	8 March 2024 from the Applicant None from the Respondent
Date of Determination:	2 April 2024

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an earlier determination, I ordered Flying Dusters Limited (FDL) to comply with an improvement notice issued to it by the Labour Inspector (LI).[1] I reserved for written submissions the claims against FDL for a penalty and costs.

[2] Submissions for the LI were lodged in the Authority and served on FDL. FDL has not lodged anything in reply.

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[1] *Labour Inspector v Flying Dusters Limited* [2024] NZERA 125.

[3] This determination deals with the claim for a penalty and the claim for costs.

A penalty is appropriate

[4] The LI investigated a complaint and came to the view on reasonable grounds that FDL had not complied with the Employment Relations Act 2000, the Minimum Wage Act 1983 and the Holidays Act 2003 with respect to the complainant (Ms Waddell). FDL's non-compliance related to employment standards and minimum entitlement provisions.

[5] The LI issued an improvement notice to FDL. The notice required FDL to pay wages and holiday pay to Ms Waddell, to discontinue its practice of engaging prospective employees on a trial period, to ensure the provision of rest and meal breaks to its employees, to keep time and wage records and to review records for current and former employees to ensure compliance with standards and entitlements. FDL was also required to provide evidence to the LI to show it had taken the improvement actions set out in the improvement notice.

[6] FDL did not provide the LI with the evidence to establish it had taken steps regarding compliance with breaks, record keeping and compliance with minimum entitlements for current and former employees. FDL did not pay all the wages and holiday pay due to Ms Waddell.

[7] An employer who fails to comply with an improvement notice is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.[2]

[8] An object of the Employment Relations Act 2000 is to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors.[3] Issuing an improvement notice to an employer in circumstances where a Labour Inspector believes on reasonable grounds that the employer has not complied with certain statutory provisions is a means by which a Labour Inspector can promote the enforcement of employment standards.

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[2] Employment Relations Act 2000 s 223F.
[3] Employment Relations Act 2000 s 3(ab).

[9] Imposing a penalty on an employer who does not comply with an improvement and does not lodge an objection to the improvement notice supports the effective enforcement of employment standards.

[10] A penalty should be imposed on FDL.

Determining the amount of penalty

[11] FDL has committed one breach of s 223F of the Employment Relations Act 2000 by not complying with the improvement notice. FDL is liable to a penalty of up to $20,000.00.

[12] FDL's breach was intentional. Paula Cooney is FDL's sole director and shareholder. It is apparent from the correspondence that Ms Cooney disagreed with the LI's view about whether Ms Waddell was entitled to be paid for all her time from arrival at the specified collection point until being returned to the drop-off point at the end of the day.

[13] FDL's response to the improvement notice which included paying Ms Waddell for the unpaid work, was to not take the steps required by the notice. The LI agreed to extend time for compliance to accommodate Ms Cooney's claims about not receiving correspondence and illness. Despite that, FDL chose not to comply or to take any proper steps to object to the improvement notice. I find that FDL's breach was intentional.

[14] Ms Waddell has suffered loss or damage by being deprived of adherence to her minimum entitlements, including not being paid for all her work hours. The action of the LI should have quickly brought an end to that, but FDL's failure to comply with the improvement notice has understandably caused frustration and a sense of powerlessness for Ms Waddell. The amount involved is relatively small but the harm suffered is material.

[15] FDL has not taken steps to ameliorate the harm to Ms Waddell or to satisfy the LI that it is properly complying with minimum standards for its other employees.

[16] The LI submits that an aggravating feature of FDL's failure to mitigate the effect of its breach was the attempt at the very last minute to put off the investigation meeting by Ms Cooney's unsupported claim that she was unwell and not able to attend. I disagree. The investigation meeting proceeded regardless. FDL lost an opportunity to explain its actions or ameliorate the breach by its lack of engagement with the Authority and by not appearing. However, that did not make its breach of the improvement notice worse. The Authority's process continued regardless.

[17] Employees such as Ms Waddell rely on employers to comply with employment standards and minimum entitlements set by the law, by way of addressing the inherent inequality of power in an employment relationship.

[18] While FDL is liable for a single breach, the circumstances of the single breach include a failure to provide a written employment agreement, a failure to keep proper wage and time records, a failure to pay all minimum wages and a failure to pay all holiday pay for one employee.

[19] I fix $10,000.00 (50% of the maximum penalty) as an appropriate starting point, with regard to the above factors.

[20] Ms Cooney claimed in the messages just before the investigation meeting that she had shut down the business. No evidence of that has been provided. Ability to pay has not been established as a factor to support a reduction in the level of a penalty.

[21] FDL has not previously been found by the Authority or court in other proceedings to have engaged in similar conduct. I accept that this factor should be recognised by a reduction of 50%, bringing the penalty to $5,000.00 provisionally.

[22] A penalty at that level would deter FDL and other employers and reinforce to them that compliance with an improvement notice is mandatory and not a matter of choice.

[23] I am referred to three other decided cases to assess consistency.[4] The *Collins* determination pre-dated the Employment Court's judgment in *Boorsboom v Preet PVT Limited*,[5] setting the methodology for fixing penalties. It also predated the introduction of s 133A of the Employment Relations Act 2000 specifying matters the Authority (and the court) must have regard to when setting a penalty. The level of penalty at $750.00 in the *Collins* case has little bearing at present.

[24] *Healthrop* concerned failure to comply with an improvement notice regarding public holiday defaults and resulting arrears due to a group of employees over six years. That was reflected in a penalty of $7,000.00. The circumstances as to number of employees, amounts and duration make the default more serious than at present. Similarly, in *IT-Guys*, at least four employees were affected by minimum wages, holiday pay, public holidays and sick pay defaults that were the basis for the improvement notice. That was reflected in the imposition of a penalty of $7,000.00. I consider the present default is less serious than in the *IT-Guys* and *Healthrop* cases.

[25] In another case, the Authority imposed a penalty of $5,000.00 for an employer's failure to comply with an improvement notice.[6] There, the defaults involved a number of employees who were vulnerable employees subject to work visas, factors that make the non-compliance more serious than in the present case. However, the employer had taken steps towards meeting the improvement notice, a mitigating factor not present here.

[26] Considerations of consistency do not merit any further adjustment to the level of a penalty.

[27] The LI submits that a small reduction in the level of penalty is appropriate as a matter of proportionality. FDL is a small business, the breach has affected just one employee and the amount involved is not "objectively substantive". I apply a reduction of 20% to reflect these factors, adjusting the provisional level of a penalty from

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[4] *Boorsboom v Collins* [2013] NZERA Christchurch 241, *Labour Inspector of the Ministry of Business, Innovation and Employment v IT-Guys NZ Ltd* [2019] NZEmpC 115 and *Labour Inspector v Healthrop Ltd* [2019] NZERA 439.
[5] *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143.
[6] *A Labour Inspector v Bombay Gymkhana Limited* [2019] NZERA 268.

$5,000.00 to $4,000.00. Set at that level it remains a meaningful and deterrent-focussed penalty.

[28] I fix $4,000.00 as the amount of penalty to be paid by FDL for its failure to comply with the improvement notice.

[29] The LI submits that a portion of the penalty should be payable to Ms Waddell in recognition of the non-pecuniary harm caused to her.[7] The improvement notice was to enforce Ms Waddell's minimum entitlements but also more generally to enforce statutory obligations. I am satisfied that half of the penalty should be payable to Ms Waddell and the remainder to the Crown.

The Labour Inspector is entitled to costs

[30] The LI is entitled to costs as the successful party.

[31] I am asked to fix costs at the daily tariff rate for a whole day even though the investigation meeting lasted about an hour because the respondent did not appear. Reference is made to the steps taken to lodge the application, attend a case management conference and prepare for the investigation meeting which were required regardless. Counsel also lodged submissions in support of the penalty claim later.

[32] I acknowledge that these steps were required. The daily tariff assumes that preparatory steps would have been taken in any event but also has regard to the principle that costs in the Authority should be modest. I fix costs at half of the first day for an investigation meeting ($2,250.00) given the preparatory steps and submissions but with regard to the brevity of the investigation meeting. A further $71.55 will be added to cover the lodgement fee.

[33] I am asked to order witness expenses of $25.00 and travel expenses of $36.00. The LI relies on clause 6 of Schedule 2 to the Employment Relations Act 2000 and clause 1 of Schedule 2 to the Witnesses and Interpreters Fees Regulations 2023. Ms Waddell appeared to give evidence, having been summonsed. The LI was obliged by

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[7] *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110.

those provisions to pay her a fee of $25.00 and travel expenses of $36.00. I accept that these were necessary disbursements properly recoverable from the unsuccessful party in addition to the daily tariff. A further $61.00 will be added to cover these disbursements.

Summary and orders

[34] I impose a penalty of $4,000.00 on Flying Dusters Limited under s 223F of the Employment Relations Act 2000.

[35] Flying Dusters Limited is to pay to the Labour Inspector, within 28 days of the date of this determination, a penalty of $4,000.00. The Labour Inspector is directed to pay 50% of the penalty recovered to Nikki-Mae Waddell.

[36] Flying Dusters Limited is to pay to the Labour Inspector, within 28 days of the date of this determination, costs totalling $2,382.55.

Philip Cheyne
Member of the Employment Relations Authority