

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 234
3300060

BETWEEN A LABOUR INSPECTOR
Applicant

AND SOLAR ENERGY PACIFIC
LIMITED previously named
ELDERCARE SERVICES 2013
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Rebecca Denmead and Owen Zheng counsel for the
Applicant
Ross Lowry, for the Respondent

Investigation: On the papers

Submissions and Other
Information Received: 3 March and 3 April 2025 from the Applicant
No information from the Respondent

Date of Determination: 30 April 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector applied for a compliance order be made against, and a penalty be imposed on, the respondent for its failure to comply with the Improvement Notice dated 16 November 2023 that the Labour Inspector issued to it.

[2] Mr Ross Lowry is the respondent's sole director and shareholder, so he was the person who has communicated with the Labour Inspector, its counsel and the Authority about this matter.

[3] In various emails to the Authority the respondent claimed it had objected to the Improvement Notice and it also claimed it had complied with it.

[4] However, the Authority had previously determined that no objection had been lodged.¹ The respondent also failed to lodge any affidavit evidence or submissions in support of its position that it had complied with the Improvement Notice, even though the Authority had informed the respondent that the emails it had sent were insufficient to defend the Labour Inspector's claims.

The respondent's name changes

[5] These proceedings were lodged on 29 May 2024 against the respondent who at that time was named Eldercare Services 2013 Limited.

[6] On 4 April 2025 the Companies Register recorded Eldercare Services 2013 Limited had changed its name to Solar Energy Pacific Limited. Mr Ross Lowry remained the sole director and shareholder and its address for service was unchanged.

[7] The respondent has had a number of different names. Since 4 April 2025 it has been named Solar Energy Pacific Ltd. From 18 January 2013 to 4 April 2025 it was named Eldercare Services 2013 Ltd. From 15 November 2006 to 18 January 2013 it was named Solar Pacific Energy Limited. From its date of incorporation on 16 October 2002 to 15 November 2006 it was named Hisense Pacific Limited. Mr Lowry has remained the sole director and shareholder of the respondent during its various name changes.

[8] Eldercare Services Limited, which has a registered address for service in Whakatane, was incorporated on 5 March 2024. Mr Lowry is the sole director and shareholder of this company, which is not involved in these proceedings.

¹ See the Authority's Minute dated 5 July 2024.

Naming of the respondent in this determination

[9] Because all of the communications in this matter to date have involved Eldercare Services 2013 Ltd, the respondent shall be referred to in this determination as “ESL” instead of its current name of Solar Energy Pacific Ltd. The purpose of this is to avoid confusion regarding the Directions and Minutes that have been issued by the Authority and regarding the evidence and submissions that have been lodged, which refer to the respondent as ESL.

The Authority’s investigation

[10] The statement of problem (SoP) was lodged on 29 May 2024. It was served on ESL at its registered address for service in Hamilton, as recorded on the Companies Register, by track and trace courier on 6 June 2024.

[11] A second copy of the SoP was also served on ESL at the address its sole director and shareholder, Mr Ross Lowry, at the Whakatane address he gave the Authority on 4 June 2024. Service occurred by track and trace courier on 7 June 2024.

[12] ESL’s statement in reply (SiR) was due on 21 June 2024, and as per the Employment Relations Authority Regulations 2000 (the Regulations) it had to be lodged in Form 3, which was attached to the SoP that was served on ESL. No SiR was received.

[13] Because ESL failed to lodge a SiR within 14 days of service of the SoP on it, in accordance with regulation 8(3) of the Regulations, ESL was only entitled to respond to the Labour Inspector’s claims “with the leave of the Authority”.

[14] Section 223E(1) of the Employment Relations Act 2000 Act (the Act) permits an employer to lodge an objection to an Improvement Notice within 28 days of it being issued.

[15] In an email to the Authority dated 14 June 2024, ESL claimed for the first time that on 15 December 2023 it had lodged an objection to the Improvement Notice. However, the Authority did not have a record of having received an objection.

[16] Any such objection was covered by regulation 5(b) of the Regulations. Regulation 5(2) required the commencement of proceedings by “lodging an application that complies with the regulations”. Regulation 5(3) required the application to be in Form 1 (which is the SoP template document), and regulation 27 required it to be accompanied by the \$71.55 filing fee.

[17] No SoP was lodged. The information in the objection ESL relied on did not meet the requirements of Form 1. ESL did not attach a copy of the Improvement Notice it was objecting to with the “objection to notice” it claimed to have lodged with the Authority on 15 December 2023. Nor did it explain what it objected to or why it objected. No filing fee had been paid, which is a pre-requisite for the Authority accepting lodgement of an application. ESL also failed to take any steps to follow up on the document it claimed to have lodged, but which the Authority had no record of having received.

[18] ESL did not inform the Labour Inspector it had lodged with the Authority an objection to the Improvement Notice, as per s 223E of the Employment Relations Act 2000 (the Act). On 21 June 2024 ESL emailed the Labour Inspector a copy of the “objection to notice”. This was an unsigned one page Word document consisting of one sentence that said “[ESL] (“the employer”) lodges an objection to the improvement notice issued in relation to the case number LS 42567 dated 16 November 2023.” Mr Houlihan saw it when he returned to work on 24 June 2024.

[19] ESL claimed it had sent the Authority an unsigned unstamped “objection to notice” document dated 14 December 2023, which it claimed had been emailed to the Authority on 15 December 2023, and also sent by tracked post to the Authority.

[20] However, these alleged documents were not received by the Authority, they were not in the required form and no filing fee was received or paid by ESL. No tracking records have been provided, nor has ESL provided any evidence from the courier that the alleged “objection to notice” document was delivered to the Authority.

[21] A case management conference (CMC) was held on 27 June 2024. The parties were informed that the purpose of the CMC would be to discuss ESL’s alleged objection and what the next steps would be, including whether an extension of time should be granted to ESL to lodge a SiR out of time.²

[22] The Labour Inspector’s counsel attended the CMC but ESL did not. Therefore another CMC was scheduled for 5 July 2024 to discuss the same issues, due to ESL’s non-attendance

² Duty Member Fuiava.

on 27 June 2024. Counsel for the Labour Inspector attended the CMC on 5 July 2024, but once again ESL did not.

[23] The Authority issued a Minute dated 5 July 2024 which (among other things) recorded the Authority's view that "no objection to the Improvement Notice was ever lodged by Eldercare". This was a determination by the Authority of the issue about whether or not ESL had lodged an objection to the Improvement Notice within 28 days, as required by s 223E of the Act.³

[24] On 5 July 2024, the Authority (on its own initiative) also granted ESL leave to lodge a SiR out of time, and directed it to do so by close of business on 19 July 2024. This was recorded in the Authority's Minute dated 5 July 2025 that was sent to the parties after the CMC.

[25] ESL did not lodge a SiR by the extended date of 19 July 2024.

[26] The Authority held a CMC on 26 September 2024. Counsel for the Labour Inspector attended the CMC but ESL did not.⁴ The Authority issued DoA dated 26 September 2024, asking the parties for their views on the method of investigation and for a timetable for the parties to lodge their evidence.

[27] On 18 October 2024 the Authority informed the parties that the matter would be set down for an in-person investigation meeting (IM) in Hamilton, on a date to be advised. An extension to the timetable for the parties to lodge their evidence was also issued, with the Labour Inspector's evidence being due on 6 November 2024 and ESL's evidence being due on 6 December 2024.

[28] On 6 November 2024 the Labour Inspector lodged a memorandum with the Authority that sought another CMC to discuss extending time for ESL to lodge an objection to the Improvement Notice.

[29] The Authority held a CMC on 9 December 2024. Counsel for the Labour Inspector attended the CMC but ESL did not. No application was made to extend the time for ESL to

³ Ibid, above n2.

⁴ Member Kennedy-Martin.

lodge an Objection Notice, so no extension of time was issued by the Authority for ESL to lodge an Objection Notice.⁵

[30] The Authority sent an email to the parties dated 16 December 2024 which set out the outcome of the CMC held on 9 December 2024. This email informed the parties that an in-person IM would be held on 14 April 2025 in Hamilton, without prejudice to the Labour Inspector's dispute that ELS had lodged an Objection Notice.

[31] The Labour Inspector lodged his evidence on 6 November 2024. ESL failed to meet the timetable recorded in the Directions of the Authority (DoA) dated 26 September 2025, or the extended timetable which was advised to the parties in an email dated 18 October 2024, or the further extended timetable recorded in the DoA dated 18 February 2025. ESL has therefore failed to lodge any evidence.

[32] There was a change in Member in February 2025. At this time the Authority indicated in a Minute to the parties dated 5 February 2025 that the new Member proposed to vacate the IM in Hamilton and instead conduct an 'on the papers' investigation, as that was considered to be a timely and cost effective way of addressing the claims.

[33] The parties were given an opportunity to provide their views before a decision was made about that. They were also invited to provide their views on a suitable timetable and on the proposed issues that needed to be determined.

[34] The Authority also recorded its view that the disputed Objection issues had been determined on 5 July 2025, no challenge to that had been lodged, nor had ESL applied for leave to extend the time for it to lodge an Objection Notice. On that basis the Authority considered that it was no longer a 'live issue', so would not form part of the current investigation.

[35] The Labour Inspector agreed his claims should be determined 'on the papers'. Mr Lowry sent an email to the Authority on 17 February 2025, but it did not address any of the matters he had been invited to comment on.

⁵ Ibid, above n4.

[36] The DoA dated 18 February 2025 vacated the IM in Hamilton on 14 April 2025 and issued a timetable for the parties to lodge affidavit evidence and submissions for an ‘on the papers’ investigation and determination of the compliance order and penalty applications.

[37] The respondent was given until 28 February 2025 to lodge its SiR. The parties were also permitted to lodge a Joint Bundle of relevant documents (JB) instead of attaching all relevant documents to their affidavits, due to the large volume of documents involved.

[38] The respondent lodged its SiR on 28 February 2025, almost ten months after the SoP had been lodged.

[39] The Labour Inspector lodged his affidavit evidence and the JB, which was 210 pages long, on 3 March 2025 and his submissions on 3 April 2025. ELS did not lodge any affidavit evidence or submissions.

Relevant background

[40] ESL currently employs approximately 92 healthcare, cleaning and operational staff who work at Golden Pond Private Hospital (Golden Pond), an aged care private hospital located in Whakatane. When the Improvement Notice was issued ESL had 85 employees.

[41] One of ESL’s employees, who is referred to as referred to as “J” in this determination, made an initial complaint to the Labour Inspectorate on 18 April 2023 that he had not been paid for the two public holidays during Easter 2023, which were otherwise working days for him.

[42] J was a cleaner who had been rostered to work on 7 April 2023 (Good Friday) and 10 April 2023 (Easter Monday). However, J did not actually work because he was sick. J had contracted Covid-19 so could not attend work on his rostered Easter days. ESL failed to pay J, saying he had no paid sick leave entitlement owing to him.

[43] J’s complaint was investigated by the Labour Inspector, Mr Brendon Houlihan, who was tasked with determining whether ESL was acting in compliance with minimum employment standards. The Labour Inspector interviewed J by telephone on 22 May 2023 and Mr Lowry by telephone on 20 June 2023. On 23 June 2023 the Labour Inspector requested a list of ESL’s current employees and previous employees going back six years.

[44] Based on a random sample of selected employees, the Labour Inspector identified that there had been breaches of the Holidays Act 2003 (the HA03) that had affected three of ESL's randomly selected employees plus J (four employees in total). The Labour Inspector noted the problems he had identified were indicative of the approach ESL applied to all employees.

[45] The Labour Inspector therefore anticipated the breaches for the three randomly selected employee plus J were also likely to have occurred for other employees. If so, then it was likely other employees would be entitled to recover wage arrears from ESL.

[46] On 7 July 2023 the Labour Inspector issued a formal notice to ESL pursuant to s 229 of the Act for wage and time records, holiday and leave records and individual employment agreements for the four sampled employees, including J. These records were received on 19 July 2023.

[47] The Labour Inspector identified that the employment records ESL had provided did not record the actual days and hours worked by the sampled employees. He therefore asked ESL for further records which showed that information during the identified pay periods for the randomly sampled employees.

[48] On 28 July 2023 ESL provided records containing manual employee timesheets showing the actual dates and hours worked for the sampled employees. On 31 July 2023 the Labour Inspector requested payslips for the sampled employees, which were provided on 7 August 2023.

[49] The Labour Inspector interviewed Mr Lowry by telephone on 15 August 2023 to clarify the information ESL had provided. Mr Lowry said that no "alternative holidays" (the entitlement under s 56 of the HA03) were saved as they were paid out to employees in the pay period they fell in, although he acknowledged that was not what the HA03 required. Mr Lowry also told the Labour Inspector that staff were able to 'cash up' their annual leave by writing the request on their timesheet, although Mr Lowry also acknowledged he knew that cashing up more than one week of annual leave per entitlement year breached the HA03.

[50] On 8 September 2023 Mr Lowry was emailed a copy of the Labour Inspector's draft report dated 6 September 2023 and given ten days to comment on it. Mr Lowry replied on 22 September 2023 stating that Golden Pond was a 24 hour a day, 7 day a week operation that

required ESL to be flexible with how it provided for its employees. The Labour Inspector viewed that as ESL's explanation for the identified breaches of minimum code obligations.

[51] The Labour Inspector met with Mr Lowry on 29 September 2023 to discuss the draft Investigation Report findings and ESL's response. Labour Inspector Mr Alan Reid also attended this meeting. Mr Lowry again explained that ESL needed to "be flexible" so it went "beyond the rules to operate". Mr Lowry reiterated his view that J was not entitled to be paid for the Easter 2023 public holidays that he had been rostered to work, but which he had not actually worked due to illness, because he had no paid sick leave entitlement owing to him.

[52] Mr Houlihan interpreted Mr Lowry's responses as confirmation that ESL offered its employees the opportunity to cash up more than one week of annual holiday per year, allowed them to be paid time in lieu instead of receiving an alternative day holiday for working on a public holiday that fell on otherwise working days and that this was done in the knowledge it did not meet the HA03 requirements.

[53] Mr Houlihan also established that Mr Lowry did not understand s 49 of the HA03. Section 49 of the HA03 provided that an employee who was required, or who had agreed, to work on a public holiday but did not do so due to sickness was to be paid for the public holiday. Accordingly, that day was to be treated as a public holiday that would otherwise be a working day, not as paid or unpaid sick leave.

[54] Mr Lowry was asked to provide a fuller response in writing to the draft Investigation Report by 29 October 2023. No response was received. The Labour Inspector extended the deadline to 3 November 2023.

[55] On 1 November 2023 Mr Lowry provided some information and asked for a further meeting with the Labour Inspector. Mr Houlihan proposed a meeting date of 9 November 2023, but Mr Lowry asked to meet on 30 November 2023 instead. The Labour Inspector informed Mr Lowry 30 November 2023 was not acceptable, because he had been given almost nine weeks from receipt of the draft Investigation Report to respond to it.

[56] Mr Houlihan did however offer to discuss the draft report by telephone with Mr Lowry. Mr Houlihan also offered to travel to Golden Pond in Whakatane, with the Principal Labour Inspector, to discuss the draft report in person with Mr Lowry on 14 November 2023. No response was received to these proposals.

[57] On 16 November 2023 the Labour Inspector issued his final Investigation Report and a copy of it and the Improvement Notice was sent to ESL. On 17 November 2023 the Investigation Report and Improvement Notice were delivered to ESL at its registered address for service, as recorded on the Companies Register.

The disputed objection

[58] The issue of whether or not ESL had lodged a valid objection to the Labour Inspector's Improvement Notice within the 28 days required by s 223E of the Act was determined by the Authority on 5 July 2024.⁶ No challenge was made to that determination, so it stands as the Authority's finding on that dispute.

[59] The Authority held a case management conference on 9 December 2024 to consider whether there should be an extension of time for the respondent to lodge an objection to the Improvement Notice.⁷ However, the respondent did not attend that CMC, so no application for an extension of time was made by ESL, or was granted by the Authority. Accordingly, whether or not an objection to the Improvement Notice was lodged was not an issue that required determination, as that had already been determined on 5 July 2024.

Issues to be determined

[60] The following issues are to be determined:

- (a) Did the Labour Inspector believe on reasonable grounds ESL had breached its obligations under the Holidays Act 2003 (the HA03)?
- (b) If so, did the Labour Inspector issue an Improvement Notice that met the requirements of s 223D(2) and (3) of the Act?
- (c) Did the Labour Inspector issue ESL with the Improvement Notice in accordance with s 223D(4) and (5) of the Act?
- (d) Did ESL comply with the Improvement Notice by the required date of 1 February 2024?
- (e) If not, should a compliance order be issued?

⁶ Above n2.

⁷ Above n4.

- (f) Should a penalty be imposed on ESL under s 223F of the Act?
- (g) If so, how should the penalty factors be applied?
- (h) What costs and disbursements should be awarded?

Did the Labour Inspector believe on reasonable grounds that ESL had breached its obligations under the HA03?

[61] Section 223D(1) of the Act provides that a Labour Inspector who believes on reasonable grounds that any employer is failing to comply with any provision of the relevant minimum code legislation may issue the employer with an Improvement Notice that requires the employer to comply with the minimum code obligations that have been breached.

[62] Paragraph 3 of the Improvement Notice recorded the “reasonable grounds” it had been based on.

[63] Based on the information provided by Mr Lowry, the Labour Inspector established that ESL had breached several employment standards. These included failing to provide at least four paid weeks of annual holiday due to paying out more than one week of annual holiday per entitlement year, not paying for public holidays that fell on otherwise working days and paying out alternative holidays in the pay period in which they were earned.

[64] Systematic failures by ESL were identified by the Labour Inspector that suggested the identified breaches in a random sample of three employee plus J could affect a broader range of past and current employees, rather than just being isolated to J’s complaint about not being paid for the Easter 2023 public holidays.

[65] The Labour Inspector had reasonable grounds for considering that ESL had breached its obligations under sections 16, 27A, 49 and 61 of the HA03. There was evidence that ESL had failed to comply with the following HA03 obligations:

- (a) Section 16 that required an employer to provide an employee with at least four weeks paid annual holiday per entitlement year;
- (b) Section 28A that prevented an employer from paying out (i.e. ‘cashing up’) more than one week of an employee’s annual holidays in any entitlement year;

- (c) Section 49 that required an employer to pay an employee for not working on a public holiday where that day would otherwise be a working day for the employee; and
- (d) Section 61 provides that an employer must only exchange an alternative holiday for a payment 12 months after the entitlement to it arose.

Did the Labour Inspector issue an Improvement Notice that met the requirements of s 223D(2) and (3) of the Act?

[66] The Labour Inspector's Improvement Notice was issued under ss 223D(2) and (3) of the Act. Subsections 223D(2) and (3) of the Act provide that the Improvement Notice must list the Labour Inspector's reasons, the nature and extent of the failure, steps to comply, and a compliance deadline.

[67] The Improvement Notice identified breaches of sections 16, 28A, 49 and 61 of the HA03. These breaches related to insufficient annual leave provision, excessive annual leave payout (cashing up), unpaid public holidays, and inappropriate alternative holiday payments.

[68] The Improvement Notice required ESL to review the records of current and past employees from the preceding six years, identify any overpayments or underpayments, reinstate entitlements, and update holiday records by 1 February 2024.

[69] Paragraphs 3, 4 and 5 of the Improvement Notice recorded why the Labour Inspector considered breaches had occurred, and what the nature and extent of the failure and/or loss was for each breached he had identified. Paragraph 6.3 of the of the Improvement Notice recorded that ESL was to complete the steps identified in the Improvement Notice (as listed in paragraph 6.1) and provide the information (as listed in paragraph 6.2) by 5.00pm on 1 February 2024.

[70] The Labour Inspector also set out what steps ESL needed to take to comply with sections 16, 28A, 49 and 61 of the HA03 and the information ELS had to provide in order to establish it had complied with the Improvement Notice.

[71] Accordingly, the requirements of s 223D(2) and (3) of the Act have been met.

Did the Labour Inspector issue ESL with the Improvement Notice in accordance with s 223D(4) and (5) of the Act?

[72] Section 223D(4) of the Act sets out when an Improvement Notice may be issued. Section 223D(5) of the Act provides that an Improvement Notice cannot be issued in the period from 17 December to 8 January the following year.

[73] On 17 November 2023 the Labour Inspector couriered the finalised Investigation Report and Improvement Notice to ESL at the address for service it had listed on the Companies Register. Proof of delivery to ESL's registered address for service at 07.43am on Friday 17 November 2023 by New Zealand Couriers was provided to the Authority.

[74] Copies were also emailed to ESL at Golden Pond on 27 November 2023. Another email was sent on 2 February 2024 which stated the deadline for compliance with the Improvement Notice had passed and noted there had been no contact from ESL. This email was acknowledged by Ms Anna Foley, the Golden Pond Facility Manager, who advised the Labour Inspector that she would forward his email to Mr Lowry.

[75] The Improvement Notice issued by the Labour Inspector met the requirements of s 223D(4) and (5) of the Act.

Did ESL comply with the Improvement Notice by 1 February 2024?

[76] Paragraph 7 required ESL to comply with paragraphs 6.1 and 6.2 of the Improvement Notice by 1 February 2024.

[77] There was no evidence ESL has complied with paragraph 6.1 of the Improvement Notice, that set out the steps it needed to take to ensure compliance with its minimum code obligations. Nor did ESL provide any of the information set out in paragraph 6.2 of the Improvement Notice, which required it to provide the Labour Inspector with specific evidence to establish it had taken the steps required of it by paragraph 6.1 of the Improvement Notice.

[78] Between 17 November 2023 and 1 February 2024 ESL did not contact the Labour Inspector about the Improvement Notice. Nor did ESL provide any compliance evidence regarding the actions and information required by paragraph 6 of the Improvement Notice.

[79] On 27 February 2024 the Labour Inspector spoke to Mr Lowry by telephone. Mr Lowry confirmed ESL had not complied with the Improvement Notice and he had engaged a lawyer

who was challenging it. He did not advise the Labour Inspector of who that lawyer was and that person has not engaged with the Authority. Mr Lowry did not inform the Labour Inspector on what basis the Improvement Notice would be challenged.

[80] Following this telephone call with Mr Lowry, the Labour Inspector checked with the Authority to see if an objection had been lodged to the Improvement Notice. The Authority advised it had no record of ESL lodging an objection to the Improvement Notice. ESL had also not served an objection to the Improvement Notice on the Labor Inspectorate.

[81] The Labour Inspector confirmed in his affidavit that paragraphs 6.1 and 6.2 of the Improvement Notice had not been complied with. ESL did not lodge any evidence that contradicted the Labour Inspector's evidence about that. Although ESL was required to have complied with the Improvement Notice by 1 February 2024, over a year later it had still not done so.

[82] The various emails Mr Lowry sent the Labour Inspector, and then the Authority, about ESL's response to the Improvement Notice were not relevant to any of the matters required of it by paragraphs 6.1 and 6.2 of the Improvement Notice.

[83] ESL breached the Improvement Notice dated 16 November 2023. These breaches are continuing, because ESL has still not provided the required information.

Should a compliance order be issued?

[84] Section 137(1)(a)(iiib) of the Act empowers the Authority to issue a compliance order if an Improvement Notice has not been complied with. Paragraph 7 of the Improvement Notice also put ESL on notice that it could be enforced by a compliance order.

[85] More than 17 months have elapsed since the Improvement Notice was issued and it has still not been complied with. ESL is unlikely to comply with the Improvement Notice unless a compliance order was issued.

[86] The Improvement Notice requirements addressed minimum standards and minimum statutory obligations in respect of sections 16, 28A, 49 and 61 of the HA03, which are intended to protect employees. Compliance with the HA03 requirements is mandatory for all employers.

[87] ESL employed 85 employees at the time the Improvement Notice was issued. It now apparently employs around 92 employees. The Labour Inspector identified that ELS's normal

practice was in breach of the HA03 requirements. Accordingly, the breaches identified in the sample of three employees plus J indicated ESL's breaches were likely systematic.

[88] More than two years has elapsed and J has still not been paid his public holiday entitlements from Easter 2023. There has been no undertaking from ESL that it will pay J what he is still owed. Quite the contrary. ESL has maintained J was not entitled to be paid, when he clearly was.

[89] A compliance order is necessary to compel ESL's adherence to employment standards.

The compliance order

[90] Within 30 days of the date of this determination, ESL is ordered to comply with:

- (a) All of the steps listed in paragraph 6.1 of the Improvement Notice dated 16 November 2023; and
- (b) Paragraph 6.2 of the Improvement Notice dated 16 November 2023 by providing the Labour Inspector with all of the information listed in that paragraph.

[91] Failure by ESL to comply with the Authority's compliance order may result in the Labour Inspector applying to the Employment Court for the exercise of its powers under s 140(6) of the Act.

[92] Section 140(6) of the Act empowers the Employment Court to (among other things) order imprisonment for a term not exceeding three months; impose a fine not exceeding \$40,000.00 and/or order that property be sequestered.

Should a penalty be imposed on ESL under s 223F of the Act?

[93] Section 223F of the Act provides that a penalty may be imposed on an employer that fails to comply with an Improvement Notice issued under s 223D of the Act.

[94] It is appropriate to impose a penalty on ESL for failing to comply with the Improvement Notice, because the breaches appeared to be systemic and involved employment standards and minimum code protections.

Penalty assessment

[95] Section 133A of the Act sets out the factors the Authority must have regard to when assessing penalties. The Employment Court has also provided guidance in *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd*⁸, which was summarised in the subsequent Employment Court cases of *Nicholson v Ford* and *A Labour Inspector v Daleson Investments Ltd*.⁹

[96] The Authority has therefore considered the following factors when assessing the penalty to be imposed on ESL:

- (a) Objects of the Act;
- (b) Nature and extent of the breach;
- (c) Nature and extent of loss or damage the breach caused;
- (d) Aggravating and/or mitigating factors;
- (e) Circumstances of the breach;
- (f) ESL's previous conduct;
- (g) The need for deterrence;
- (h) The degree of culpability;
- (i) Consistency with penalties imposed in other cases;
- (j) ESL's ability to pay; and
- (k) Achieving proportionality with the level of penalty and the extent of the breach.

[97] The s 3 objects in the Act include (among other things):

- (a) Recognising the implied mutual obligations of trust and confidence in the employment relationship and the requirement for good faith behaviour;
- (b) Promoting the effective enforcement of employment standards, in particular by Labour Inspectors;

⁸ *Borsboom (LI) v Preet PVT Ltd and Anor* [2016] NZEmpC 143.

⁹ *Nicholson v Ford* [2018] NZEmpC 132; and *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

- (c) Acknowledging and addressing the inherent inequality of power in employment relationships; and
- (d) The need to reduce judicial intervention.

[98] The issuing of an Improvement Notice is an important tool available to the Labour Inspectorate to require an employer who is failing, or has failed, to comply with minimum employment standards to rectify those failures without the need for judicial intervention.

[99] Where an employer fails to comply with an Improvement Notice the Act's objective of reducing judicial intervention is frustrated, as an application to the employment institutions may be necessary in order to compel the employer to meet its minimum code obligations.

[100] Failure to comply with an Improvement Notice also falls short of the good faith behaviour expected of employers, and may enable an employer to take advantage of the inherent inequality of power in the employment relationship with its employees, thereby undermining employment standards.

[101] The nature of the breaches identified in the Improvement Notice meant that failure to comply with it has compromised the ability of the Labour Inspector to assess the extent of any other failures by ESL to meet employment standards that affect/affected other current and/or former employees.

[102] There has been one breach of the Improvement Notice that attracted a penalty. The maximum potential penalty that could be imposed on ESL was \$20,000.00. The breaches relate to the maintenance of minimum employment standards, as outlined in paragraph 5 of the Improvement Notice.

[103] These breaches related to HA03 requirements and/or entitlements, so they impacted on an employees' rights to adequate paid holiday time, proper compensation for public holidays and they undermined the Labour Inspector's ability to accurately assess ESL's compliance with its holiday pay obligations. That had a flow on effect to gross earnings when calculating payments for annual holidays, bereavement leave, unworked public holidays, alternative day holidays and sick leave.

[104] In terms of seriousness the breach in this matter was at the moderate end of the scale. ESL did not communicate with the Labour Inspector after receiving the Improvement Notice.

It waited until 27 February 2024 to do so and that occurred as a result of the Labour Inspector's multiple attempts to contact ESL.

[105] The breach was deliberate and intentional. ESL was aware of the Improvement Notice but took no steps to comply with it. No reasons were given for non-compliance by the due date of 1 February 2024. The breach is ongoing and has not been remedied. ESL has not taken any steps to mitigate the breach.

[106] The extent of the loss or damage suffered was unclear, due to the Improvement Notice not having been complied with. Mr Lowry acknowledged ESL's leave practices did not align with the HA03 requirements, and that paying out employees for their alternative holiday in the pay period it occurred was also contrary to the HA03. There has been no remorse for ESL's breach.

[107] One of the purposes of the HA03 is to promote rest and recreation, so incorrectly cashing up annual leave and improperly applying public holiday entitlements undermined the HA03 objectives.

[108] J and two other employees did not receive appropriate rest and recreation provided or by the HA03, due to them being paid annual holidays and/or alternative holidays in breach of the HA03. J is still owed wage arrears of \$360.00 from Easter 2023, which was more than two years ago. Failing to pay an employee correctly or on time is harmful.

[109] ESL has not previously had a penalty imposed on it by the employment institutions. There was no evidence presented about any inability by ESL to pay a penalty.

[110] There was a need for deterrence of future breaches of Improvements Notices, particularly by ESL and more generally by other employers who may be inclined to ignore an Improvement Notice. Non-compliance with an Improvement Notice undermines and hinders the Labour Inspectorate's ability to carry out its core functions of ensuring compliance with minimum entitlements.

[111] After considering the need for consistency with other penalties imposed for a breach of an Improvement Notice and the need for the level of the penalty imposed to be proportionate to the gravity of the breach, a penalty of \$5,000.00 is imposed on ESL for its breach of the Improvement Notice dated 16 November 2023.

Orders

[112] Within 30 days of the date of this determination, ESL is ordered to:

- (a) Comply with paragraphs 6.1 and 6.2 of the Improvement Notice dated 16 November 2023; and
- (b) Pay the \$5000.00 penalty imposed under s 223F of the Act to the Crown bank account for its breach of the Improvement Notice dated 16 November 2023.

What costs and disbursements should be awarded?

[113] The Labour Inspector as the successful party is entitled to an award of costs and reimbursement of his filing fee. The parties are encouraged to resolve costs by agreement. If that is not possible, then costs will be determined by an exchange of costs submissions.

[114] This matter will be treated as having involved a half-day investigation meeting. The Authority is likely to adopt its usual notional daily tariff approach to costs, which is currently \$4,500.00 for the first day of an investigation meeting. The notional starting tariff in this matter will therefore be \$2,250.00.

[115] This notional starting tariff may then be adjusted to reflect the particular circumstances of this case. The parties are therefore invited to identify any factors they say should result in the notional starting tariff being adjusted, in order to reflect the particular circumstances of this case.

[116] Costs will be dealt with on the papers in accordance with the following timetable directions. The Labour Inspector has 28 days within which to lodge costs submissions. ESL will have 14 days from receipt of the Labour Inspector's costs submissions within which to lodge its costs submissions.

Rachel Larmer
Member of the Employment Relations Authority