IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 326
3262379

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	FRIENDS CUISINE OF INDIA LIMITED Respondent

Member of Authority:	Natasha Szeto
Representatives:	John Hilario, counsel for the Applicant Arunjeev Singh, counsel for the Respondent
Investigation Meeting:	11 to 12 December 2024 and 10 February 2025 in Hamilton
Submissions and further information received:	28 February 2025 from the Applicant 17 March 2025 from the Respondent
Date of Determination:	12 June 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Friends Cuisine of India Limited (FCI) owns and operates several restaurants in the Hamilton area. Following complaints by former employees of FCI, a Labour Inspector commenced an investigation in October 2021 regarding compliance with minimum employment standards. The investigation related to workers identified to have been employed by FCI between 22 September 2016 and 22 September 2022.

[2] On 22 September 2022 the Labour Inspector issued an Improvement Notice (IN) to FCI highlighting failures and requiring FCI to take certain steps to comply with employment legislation, starting with undertaking an audit.

[3] FCI did not file an objection to the IN.[1] It failed to comply with the IN by the required date of 22 October 2022. The Labour Inspector subsequently granted extensions but says FCI failed to comply with the IN by the last due date which was 22 September 2023. The Labour Inspector now asks the Authority to order compliance, penalties, and costs.

[4] FCI says issuing the IN was not reasonable in the first place. FCI disagrees that it failed to comply and says it did take steps to comply and there has been partial compliance. To the extent that FCI has not complied, it says it was impossible for it to comply.

[5] This determination resolves the issue of whether FCI has complied with the IN, and whether compliance should be ordered. It also considers the imposition of a penalty.

The Authority's Investigation

[6] A written witness statement was lodged by the Labour Inspector, Lin (Stella) Gong. The Labour Inspector obtained a summons for a former employee Narinder Singh, but did not invoke it. For FCI, written statements were lodged by the two directors (also owner/operators), Manjinder Singh Turna and Ram Avtar. Current employees Kalam Baghal, Makan Singh and Suman Parmer / Avtar gave evidence in support. A further witness statement provided by FCI was withdrawn at the investigation meeting as the witness was unable to attend to be questioned. All other witnesses attended the Authority's investigation meeting in person and answered questions under oath or affirmation, most with the assistance of interpreters. On 11 February 2025, FCI filed further information as evidence of enquiries it had undertaken to show compliance with the IN. The Labour Inspector says this information does not demonstrate compliance.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been carefully considered.

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[1] Section 223G of the Employment Relations Act 2000.

Issues

[8] The Labour Inspector says FCI has not complied with the IN because not all the essential steps for the self-audit have been finalised. In particular, the Labour Inspector says FCI has not complied with the following aspects of the IN:

(a) Provide, in respect of all affected employees (whether they have made a money claim or not against the respondent), a document showing the calculation or re-calculation of each and every employee's:

(i) minimum wage entitlements;

(ii) annual holiday pay entitlements;

(iii) sick leave entitlements;

(iv) public holiday pay entitlements; and

(v) alternative holiday entitlements.

(b) Provide, in respect of all affected employees (whether they have made a money claim or not against the respondent), copies of the respondent's communication with each and every employee advising them about:

(i) the purpose of the audit;

(ii) the respondent's record-keeping issues;

(iii) the possibility that the employee might have wage / pay arrears owing to them; and

(iv) asking the employee to confirm whether they had paid any premiums, or have been asked to pay premiums, in respect of their employment with the respondent.

(c) Provide, in regard to all affected employees who are unable to be contacted, evidence of the respondent's attempts to contact them.

(d) In regard to subparagraphs (b) and (c) above, for the avoidance of doubt, the relevant communication or attempt at communication with the affected employees should not pre-date the issuance of the IN.

(e) Provide, in cases where arrears have been identified as being owed to an affected employee (as per the calculation or re-calculation exercise), a copy of:

(i) the respondent's communication to the affected employee advising the employee how much they are owed, when they will be paid, and asking the employee to confirm their bank account details; and

(ii) a bank statement or similar bank record, identifying the arrears payment made to the affected employee.

(f) Provide, in the case of Narinder Singh, a copy of:

(i) The re-calculation of Narinder Singh's annual holiday pay entitlements;

(ii) Communications with Narinder Singh (not dated earlier than the date of issuance of the IN), advising him of the amount of any arrears owing, when he will be paid, and asking him to confirm his bank account details; and

(iii) a bank statement or similar bank record, identifying the arrears payment made to Narinder Singh.

[9] In order to resolve this matter, the Authority is required to determine the following:

(a) Did the Labour Inspector have reasonable grounds under s 223D(1) of the Act to issue the IN?

(b) If so, was the IN worded in accordance with s 223D(2) and (3) of the Act and in such a way as to be capable of compliance?

(c) If so, did FCI fail to comply?

(d) If so, should the Authority exercise its discretion to order FCI to comply with the IN and / or order it to pay a penalty under s 223F of the Act?

Relevant background

[10] The Ministry of Business, Innovation and Employment (MBIE) was first contacted by a former employee of FCI on 1 October 2021 alleging breaches of employment standards. The matter was allocated to a Labour Inspector who commenced an investigation.

[11] Manjinder Singh Turna and Ram Avtar, the two directors and owner / operators of FCI were interviewed by the Labour Inspectorate on 22 June 2022. On 2 August

2022, the directors filed a Police report in relation to alleged theft of FCI records by a one of its former restaurant managers. On 25 August 2022, the Labour Inspector issued a draft investigation report. She found breaches of employment standards including systemic errors in FCI's record-keeping which impacted the accuracy of its records. She found breaches of minimum entitlements, premium payments, unlawful deductions, and incorrect payment of holiday pay as well as arrears owing to two specific employees. The Labour Inspector asked FCI for comments on the report but when she did not receive any comments, it was assumed FCI had accepted the content of the investigation report and there were no corrections.

[12] During the investigation, a further former employee joined the Labour Inspector's investigation as the third complainant. FCI asked the Labour Inspector to liaise with its accountant, and from the end of August 2022 the Labour Inspector sent all email and voice messages to FCI's accountant and copied in both directors. One of FCI's directors indicated the company wanted to resolve the problem quickly. The Labour Inspector made it clear in writing that a quick resolution to the three complaints would be possible but only on the basis the Labour Inspectorate would not seek penalties in the Authority or Court for those employees. On 12 September 2022 FCI paid arrears in relation to the three employees.

[13] On 22 September 2022 the Labour Inspector issued an IN to FCI under s 223D of the Act, in relation to failures to comply with employment legislation dating back to September 2016. FCI was emailed a copy of the IN along with a fact sheet about improvement notices. The IN required compliance by 22 October 2022.

[14] At the end of September 2022, Police confirmed it would not be investigating FCI's alleged theft complaint further. Around this time, FCI's accountant asked the Labour Inspector for an extension of the compliance date for the IN because the long list of identified employees would take a lot of time to contact. The Labour Inspector granted an extension of a further month to 22 November 2022.

[15] On 6 December 2022 the Labour Inspector asked FCI to provide a list of its employees between 1 September 2016 to the date of the IN. FCI sent the Labour Inspector documents called "employee file" and "employee movement" covering the relevant period. From these two documents, the Labour Inspector extracted employee names into an excel spreadsheet and identified 242 employees and former employees in the relevant period. The Labour Inspector asked FCI's accountant to confirm this

number, again copying in the two directors. The Labour Inspector also asked for specific confirmation that three individuals mentioned during the investigation had been contacted by FCI. There was no response to this email. The Labour Inspector invited FCI and its accountant to a meeting on 15 December 2022 to answer any questions the company may have.

[16] Following the meeting, the Labour Inspector extended the final deadline for the IN to the end of August 2023 with three-monthly review meetings to check progress with compliance.

[17] The first review meeting in February 2023 did not go ahead because FCI did not send the Labour Inspector a spreadsheet report as it said it would. On 28 February 2023, the restaurant manager (Mr Avtar's wife) sent the Labour Inspector an excel spreadsheet on 16 employees listing whether a payment was required, but without attaching any supporting information. The Labour Inspector expressed concern about delays. On 6 March 2023, the Labour Inspector advised FCI that there was no justification for the company's failure to complete the first step under the IN. She asked FCI to confirm how many employees it had contacted and why it had not provided evidence of communication with them. FCI did not respond to this email.

[18] The Labour Inspector followed up with FCI again on 23 June 2023. In response to this email, Mr A Singh contacted the Labour Inspector to say he was now instructed to act for FCI. There was no further communication throughout June and July. On 31 August 2023, Mr A Singh provided a letter to the Labour Inspector on behalf of FCI outlining the steps FCI had taken to comply with the IN. This letter included a statement that FCI had contacted around 23 employees to find out if there was any money owing to them. FCI also provided some details of the responses from those employees and some documents in support.

[19] The Labour Inspector considered that this information did not demonstrate compliance with the IN because information was only provided for 23 out of 242 identified employees and former employees. Some of the correspondence pre-dated the issue of the IN. There was no evidence that FCI had written to the three individuals specifically identified by the Labour Inspector to confirm their entitlements.

[20] To progress the investigation, the Labour Inspector randomly selected an employee from the list of 242 employees to check their entitlements and see whether

any issues still remained. This employee was Narinder Singh. Mr N Singh had worked for FCI from 2017 to 2018 and, according to FCI's files, had worked for less than 12 months. The Labour Inspector thought Mr N Singh would be a good example to check whether annual holidays were paid at the end of employment. The Labour Inspector did not take steps to verify any information or correspondence that pre-dated the IN being issued because she did not consider it relevant.

[21] On 29 August the Labour Inspectorate agreed to accept arrears payments for three employees to avoid escalation to the Authority. The Labour Inspector finalised the arrears calculations, having not received any calculations from FCI.

[22] On 12 September, the Labour Inspector emailed FCI's accountant, copying in the two directors. The email stated:

> As part of the agreement between MBIE, Friends Cuisine Limited, Ram Avtar and Simran Turna, it was agreed that the Labour Inspectorate would not pursue penalties within the Employment Relations Authority (ERA) / Employment Court (EC) provided payment of arrears to all three complainants is made to MBIE by a specified date…When payment was offered to all three complainants by the employer, we considered that and agreed to not take enforcement action for penalties should those payments occur.

[23] The same day, FCI confirmed it had completed the calculations for the three complainants and would be making the payments that day.

[24] On 22 September 2022, the Labour Inspector issued an IN to FCI stating in the covering email:

> As we had discussed, after the payments, an enforcement tool will be used to ensure the employer rectifies breaches of employment standards and ensure they have compliant practices in place to avoid the breaches repeatedly occurring.
> We chose the Improvement Notice as the enforcement tool and I am attaching the fact sheet for your reference.

[25] From 13 September 2023 to 6 October 2023, the Labour Inspector gave FCI two extensions to submit Mr N Singh's records to her. FCI did not do so.

[26] On 13 November 2023, the Labour Inspector lodged a statement of problem in the Authority. The parties continued to try to resolve the total number of affected employees. This was raised in March 2024 during mediation and in the same month, FCI provided the Labour Inspector an updated list of employees through its lawyer Mr A Singh. Ultimately, the parties were able to agree that there were 137 employees in the relevant period covered by the audit.

Analysis

Did the Labour Inspector have reasonable grounds to issue the IN?

[27] FCI says the Labour Inspector did not have reasonable grounds to issue the IN, and the way the Labour Inspector conducted the investigation means it was unfair for the IN to be issued.

[28] In support of this submission, FCI says:

(a) The Labour Inspector had no reason to believe that other breaches had occurred and no basis for requiring FCI to recalculate the entitlements of all employees. The investigation report reached unfair conclusions including that there were "affected employees" who potentially had monetary claims against FCI.

(b) The process followed was unfair including the interview process.

(c) FCI received and relied on poor advice from its accountant including believing that its issues and responses had been raised with the Labour Inspector when they had not.

(d) FCI paid sums to three employees in full and final settlement of all matters and the Labour Inspector should not be allowed to issue an IN to it as this amounts to a breach of undertaking.

[29] The Labour Inspector says the investigation report fully apprised FCI of the findings and alleged employment breaches. The Labour Inspector denies that payment of arrears to three employees was in full and final settlement of all claims relating to FCI. She says issuing an IN was reasonable. The IN is designed as a tool for the employer to check to ensure no other employees have issues with minimum entitlements across the entire workplace. The purpose of issuing the IN was to gain compliance through a high-trust model of self-audit.

Did the Labour Inspector have reason to believe that other breaches had occurred?

[30] FCI says there were no affected employees. Therefore, the Labour Inspector has failed to prove on the balance of probabilities there was any strong basis for holding that employment breaches had occurred with respect to other employees and she was not justified in requiring FCI to provide evidence of an audit containing a full re-calculation check for compliance. Consequently, there was no basis for the IN to be issued. FCI says the changing number of potentially affected employees is a factor that makes it clear the Labour Inspector was biased and unfair. FCI also says it disputed the correctness of the IN and denied the conduct, and issuing the IN was a ploy to close down its business and obtain penalties.

[31] The Labour Inspector denies that she was biased or treated FCI unfairly. She acknowledges the initial number of employees may have been incorrect but says she asked FCI multiple times to confirm. The Labour Inspector says the scope of the investigation always included all employees in the relevant period, even if some were raised or added late. She says it would have been a failed investigation if the IN had been closed and then other employees had come forward with missed entitlements.

[32] Based on the evidence before the Authority, I find the Labour Inspector had a reasonable basis to consider other breaches had or could have occurred to the "affected employees" – being the employees employed by FCI in the relevant period. The Inspectorate's investigation began in response to employee complaints about minimum entitlements. The overriding concern was systemic poor record-keeping and there were specific examples that showed this was an issue for FCI. After the Labour Inspector's investigation began, and for a number of months, FCI was unable to even confirm the number of employees and former employees it had in the relevant six-year period. The number of employees on the list, which FCI has categorised as an "over-inflation" by the Labour Inspectorate, was actually symptomatic of gaps in FCI's record-keeping practices. The list was compiled from records FCI itself had provided to the Labour Inspector and FCI was given multiple opportunities to correct the number of employees on the list. To the extent that there were duplicate or triplicate names on the list, FCI was not only best placed to correct the list, it was responsible for doing so.

[33] The process step required by the IN was to conduct an audit of current and former employees. There is no merit in the suggestion that the Labour Inspector acted unfairly by requesting the list of employees from FCI, because the Labour Inspector did

not pre-determine what the outcome of the audit might be. The Labour Inspector did not conclude there had been further breaches, simply that given the systemic issues with FCI's record-keeping there may be. The IN itself records multiple times that the identified failures are likely to affect current and previous employees and I find that FCI was on notice that the systemic issues the Labour Inspector had identified may have more wide-ranging implications. Given the large number of employees identified, the Labour Inspector was also entitled to "sample" the list to determine compliance. That is not evidence of bias or being treated unfairly.

[34] For all of these reasons, the Labour Inspector did have a reasonable basis to require FCI to conduct a self-audit as a first step towards identifying any issues of non-compliance with minimum entitlements.

Was the process unfair?

[35] The directors both gave evidence that the Labour Inspector's process was unfair. They allege they were denied natural justice in the interview process, and denied the chance to adequately respond to the Labour Inspector's findings.

[36] Based on the documentary evidence before the Authority which includes emailed invitations to interview and transcripts of the interviews, I am satisfied the directors were fairly advised of the nature and purpose of the interviews. They were given the opportunity to obtain appropriate support and representation. The Labour Inspector told the directors that the interview would be a number of hours and they should keep the whole day free. The Labour Inspector also asked the directors on several occasions whether they required an interpreter, and the directors declined, instead requesting to have a support person present. At the interview, the Labour Inspector asked the directors to confirm whether there was any reason they may not be able to be interviewed, outlined the role of the support person and advised the directors about access to the bathroom during the interview process.

[37] There was no reasonable basis for the directors to have believed the interview would only be 10 to 30 minutes long, or that they were not permitted to access an interpreter or take breaks. The directors were afforded natural justice and had ample opportunity to respond to the Labour Inspector's findings.

Did FCI rely on poor advice from its accountant?

[38] The directors say they did not respond to the investigation report or object to the IN because FCI's accountant said he was handling it. Although the directors gave evidence to the Authority that they had verbally told FCI's accountant about comments and changes to the draft investigation report and asked him to object to the IN, they were not sure if this information was "passed on" to the Labour Inspector. Both directors say they were incapable of understanding the process without a lawyer and it is clear to them in hindsight that FCI's accountant was out of his depth. FCI has not made a formal complaint about its accountant, but now uses a different accountant. FCI instructed Mr A Singh after the objection period for the IN had lapsed.

[39] The Labour Inspector confirmed she finalised her draft investigation report after no comments or changes were requested by FCI. The Labour Inspector says the directors were always included in her emails with FCI's accountant, and were fully aware of and informed about what was happening.

[40] Based on the evidence before the Authority, I am unable to conclude that FCI relied on poor advice from its former accountant, and that this is the reason FCI did not request changes to the draft investigation report or object to the IN. FCI's former accountant did not give evidence at the investigation meeting, and the statements the directors have made about FCI's accountant not acting on their instructions are uncorroborated by any records.

[41] FCI has run businesses since 2012 and has four branches. The directors are experienced employers. The Labour Inspector copied the directors into all correspondence with FCI's accountant, and there was ample opportunity for the directors to have intervened in the process. At the very least, the directors must take ultimate responsibility for not following up on critical process steps such as lodging an objection to the IN, if that is what it intended to do. Ultimately I am not persuaded I should give any weight to FCI's assertions it relied on poor advice from its former accountant.

Was there a full and final settlement of all matters between the parties?

[42] FCI says the investigation report was sent to it on 22 August 2022 and there was a "without prejudice" proposal that it would pay the amounts claimed on the basis that no further action would be taken by the Labour Inspectorate. FCI says this amounts to

an undertaking. The directors also say there was pressure from the Labour Inspector and FCI's accountant to pay the money and settle even they continued to deny FCI actually owed the three employees any money. Only 10 days after paying the money, the Labour Inspector issued the IN and the directors say they were genuinely surprised to receive the IN. FCI says there was no justification for asking it to provide an audit when an agreement had been reached to settle the complaints.

[43] The Labour Inspector says there was no agreement that payment to the three employees would be in full and final settlement of all matters between the parties, and this is apparent on the face of the correspondence. The Labour Inspector also says not only is it outside the Inspector's power to settle three complainants in settlement of all potential complaints by other employees, but it did not make sense in this case because FCI clearly had systemic issues with its record-keeping that settlement would not resolve. The Labour Inspector denies she misled FCI into making the arrears payment for the three employees.

[44] Based on the correspondence between the parties, I am not persuaded there was any agreement that payment to the three employees would be in full and final settlement of all outstanding issues between the parties. In hindsight, more care could have been exercised on both sides to ensure there was no misunderstanding or miscommunication. However, having considered the email evidence, I am not persuaded there was a reasonable basis for FCI to believe that settlement of the three complainants' claims was in full and final settlement of all other employees' issues with FCI. This was particularly made clear to FCI in the email from the Labour Inspector to FCI on the morning of 12 September 2023 (cited above), which was sent before FCI made the payment to the three employees. If the terms of the payment had not been clear to FCI at that point, it would not have been too late for FCI to seek clarification before making the payment. It did not do so. FCI did not raise any issues when it made the payment on 12 September 2023 and it did not object when the IN was issued on 22 September 2023 ten days after the payment had been made. I am not persuaded that FCI held a genuine belief that the payment for the three employees was in full and final settlement of all matters between the parties.

Conclusion

[45] For all the reasons given above, I find that the Labour Inspector had reasonable grounds under s 223D(1) of the Act to issue the IN to FCI.

[46] I am not persuaded that any of the issues FCI has raised were adequately supported by evidence sufficient to show that issuing the IN was not reasonable in the circumstances.

[47] FCI had the ability to object to the IN. It was advised of its ability to do so, was given the opportunity to do so, and did not do so. I conclude that at the time the IN was issued, the Labour Inspector had reasonable grounds to issue the IN.

Was the IN worded in accordance with s 223D(2) and (3) of the Act, and in such a way as to be capable of compliance?

[48] There is no prescribed form for an IN under the Act. INs should contain only lawful provisions. The terms should be reasonable and not unduly onerous, as well as being proportionate and formulated to ensure breaches will be rectified.

[49] FCI raises two main reasons it says the IN was not capable of compliance:

(a) It was too vague.

(b) It was not reasonable to expect responses from all employees given the changing number of employees and the difficulty or impossibility of contacting them.

[50] FCI says the word "audit" is vague, ambiguous and unclear and the IN overall was too vague to be capable of compliance. There was no guidance about how the audit would be conducted and no mention of what FCI should do in the event of non-communication from employees. Further, FCI says compliance was impossible due to the lack of records. FCI's payroll did not have contact details for all employees, and did not have hard copies of employment agreements because information had been lost or stolen. FCI says it did not mention the theft of records to the Labour Inspector at the time the directors were interviewed, because FCI only made the complaint to Police after it obtained the CCTV footage. FCI says it did not do much work to comply with the IN for six to eight months because it was confused about the 242 employees listed and the number was not clarified until mediation occurred in February 2024.

[51] The Labour Inspector says the IN was not vague or ambiguous and the word "audit" is used in a Labour Inspectorate template and is very clear. The Labour Inspector says not only was the IN capable of compliance, but she believes she helped FCI to comply by explaining the need for an audit in a meeting following the issue of the IN in December 2022, emailing FCI, keeping discussions open, and reaching out to seek updates and answer questions. Throughout the investigation process the Labour

Inspector says FCI never raised with her that the IN was vague and ambiguous. The Labour Inspector also says that FCI did not object to the IN and the only reasons FCI gave for its continued non-compliance was that it needed extensions of time due to the large number of employees.

[52] The Labour Inspector says that in order to satisfy the audit requirement, FCI needed to provide a full list of employees and to show how many had no contact details, how many had been sent a text or email with no reply, and how many had replied (irrespective of whether they had an issue or not). The Labour Inspector did not specify the wording to be used in communications between FCI and its employees - that was a matter for FCI, but the communication had to be dated after the IN had been issued. For the calculation aspect of the IN, the Labour Inspector says FCI would have to list annual holiday entitlements for each employee and provide evidence of associated calculations. The Labour Inspector says this is a simple calculation for an employer to do if they have the right records – the commencement date of employment must be correct to calculate holiday entitlements and minimum wage calculations require evidence of days or hours worked. The onus is on the employer, not the employees, to calculate their entitlements.

Analysis

[53] Based on the evidence before the Authority, I conclude the IN was worded in accordance with s 223D(2) and (3) of the Act and in such a way as to be capable of compliance.

[54] Part 6 "Steps to Comply" of the IN outlined the clear steps FCI needed to take for the Labour Inspector to consider it compliant with employment legislation. The Labour Inspector outlined that FCI was required to audit all current and previous employees dating back to September 2016 to ensure that they have been paid the minimum wage, received correct entitlements under the Holidays Act, identify any instances of unlawful deductions, identify any instances where payments have been received for employment and provide evidence of this to the Labour Inspector. I am not persuaded there was anything vague, ambiguous or otherwise unclear about this requirement.

[55] I also do not accept the word "audit" was unclear. The directors had multiple opportunities to advise the Labour Inspector if they did not understand the IN or what

was required, and they did not do so. I accept the Labour Inspector's evidence that she explained the IN process to the directors and FCI's accountant in December 2022. No objection or challenge was raised in relation to the IN until the Authority's proceedings and there was no suggestion at the time that FCI found the wording of the IN vague or difficult.

[56] In terms of whether the IN was capable of compliance, I find it was. It is important to note that the IN required FCI to show it had tried to contact its employees, and if it had not, why it had not. The IN did not require FCI to obtain responses from each one of the 137 employees. It was reasonable for the Labour Inspector to be concerned about the veracity of the claim of alleged theft of records, because FCI did not put forward any credible explanation for why it only raised this issue with the Labour Inspector around 21 months after the IN was issued. FCI also did not explain why it could not access electronic records held by its former accountant, which Mrs Avtar (also a restaurant manager) said she emailed through to the accountants because they were handling FCI's payroll.

Conclusion

[57] For all these reasons, I consider the IN was capable of compliance and FCI did not reasonably and appropriately raise any potential issues with understanding the IN or being able to comply with the IN until after the final deadline for compliance had passed.

Did FCI fail to comply with the IN?

[58] FCI says it complied with the IN and the audit is complete. FCI says that after it understood what it was supposed to give the Labour Inspector, it started looking for records, conducted an audit and tried to contact its former employees. FCI produced a excel spreadsheet at the investigation meeting called "Friends cuisine current employee lists" which it says its accountant sent to the Labour Inspector previously. This excel spreadsheet shows FCI attempted to contact 85 current and former employees – 44 responded, 41 did not respond. A further 52 current and former employees could not be contacted. FCI says this summary and the emails and screenshots of messages prove that there was at least partial compliance with the IN, and it is unjustified to say it has not complied. FCI also says it intended to comply with the IN in spirit. It says it is irrelevant whether it contacted employees before or after the IN was issued, because the purpose was to rectify breaches identified in the investigation report.

[59] The Labour Inspector denies that she was sent the spreadsheet called "Friends cuisine current employee lists". Irrespective, she says FCI has complied with some aspects of the IN, but failed to comply with the large majority of the requirements because overall, FCI did not comply with the requirement to audit past or current employees. The Labour Inspectors says FCI did not provide evidence of attempts to contact all employees employed by FCI in the relevant period and only contacted 23 out of 137 employees without an explanation of why only 23 were contacted. Of those, 6 employees were contacted before the IN was issued and there was no evidence that FCI had communicated with the three employees named in the investigation report after the IN had been issued.

[60] With leave of the Authority, on 11 February 2025, FCI filed further information it says demonstrates compliance with the IN. The Labour Inspector says the further information shows FCI still has not complied because:

(a) Some of this information had already been provided and does not contain new information;[2]

(b) 38 new names have been introduced;

(c) Information is incomplete such as the inclusion of an unidentified cellphone number and inconsistent addressing;

(d) Information provided for two individuals pre-dates the issue of the IN;

(e) Mr N Singh's annual holiday pay remains a disputed issue and there is no evidence to show the matter has been resolved or that FCI is making any attempt to resolve it.

Analysis

[61] Partial compliance is not compliance. FCI has properly conceded that it did not provide evidence it had tried to contact all 137 employees and it says it tried to contact "most" of its past and present employees. The purpose of the audit was for FCI to satisfy the Labour Inspector that none of its employees had any issues including missed or incorrect payments for hours or leave, unlawful deductions or unlawful premiums. The information was required to be current and relevant to the purpose of the audit. While I accept FCI's submission that a pragmatic approach should be taken to meet the

[2] Duplicates of content found in Annexure Q.

requirements of the IN, the records of communications pre-dating the issue of the IN do not address all the issues required to be addressed by the audit, and therefore they are not sufficient to show compliance.

[62] FCI was not open and transparent with the Labour Inspector because it did not provide all the screenshots and supporting information from its employees, and it only provided some information from the employees who had responded. FCI did not disclose the issue of theft of records, it did not pass on emails, screenshots and records to the Labour Inspector at the earliest opportunity. The employee records that were provided had unexplained inconsistencies in employment dates.

[63] It was reasonable for the Labour Inspector to form the view that FCI was being selective about who it contacted and what information it provided. FCI has not complied with the IN because it has not systematically worked through its list of current and former employees and demonstrated that – for each individual – it attempted to contact them or provide reasons for non-contact. Ultimately, FCI's non-compliance has meant the Labour Inspector has been unable to ascertain whether FCI had complied with relevant employment legislation.

Conclusion

[64] FCI failed to comply with the IN because despite the steps it had taken to comply, it has not provided evidence to the Labour Inspector of an audit conducted from September 2016 to September 2022 listing each employee identified, a full re-calculation check for compliance, and arrears owed or entitlements to alternative holidays.

[65] Based on the evidence before the Authority, I conclude that FCI failed to comply with the IN.

Should the Authority order compliance?

[66] Section 137(1)(a)(iiib) of the Act provides that the Authority can order compliance with an improvement notice if a person has not complied with an improvement notice that s 223D(6) of the Act says may be enforced by compliance order.[3] The Authority may require a person to do any specified thing for the purpose

[3] Section 137(1)(iiib) of the Act.

of preventing further non-compliance and must specify a timeframe within which the order is to be obeyed.[4]

[67] The Labour Inspector says that the issues addressed by the IN have not yet been fully addressed by FCI. The business is still a going concern and there is a real and practical utility in requiring compliance with the IN to benefit former and current employees. A compliance order would assist to ensure compliance with the law. The Labour Inspector says if the Authority was to order compliance, a reasonable timeframe for compliance would be three to four months.

[68] FCI says it had a bona fide intention to comply with the audit and IN and even though evidence could not be provided in respect of all employees, its inability to contact employees was a technical, rather than a wilful and deliberate, breach. FCI says the most compelling reason the Authority should not order compliance is that it is not necessary – there is no evidence FCI was making excuses for not contacting its employees and the Labour Inspector now has the contact details for the employees. FCI says compliance should only be ordered if it failed without justification to contact its former employees. If the Authority considers making an order, FCI says it must be capable of compliance or there will be the risk of further non-compliance.

Conclusion

[69] The Authority has discretion to order compliance, and I am satisfied it is appropriate to do so. The present application for compliance is one of last resort because FCI has failed to comply with the IN. Based on the lengthy history in this matter, I consider there is a need for FCI to be subject to a compliance order to ensure that it complies with all requirements of the IN.

[70] FCI is ordered to comply with the Improvement Notice issued by the Labour Inspector on 22 September 2022 by providing the Labour Inspector with information and documentation set out in the orders below. The timeframe for compliance with this order is within three months from the date of this determination.

[4] Section 137(2) and (3) of the Act.

Should a penalty be imposed?

[71] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties.[5] The relevant penalty relates to failure to comply with an improvement notice issued under s 223D of the Act, pursuant to s 223F(1) of the Act.

[72] The Labour Inspector submits that irrespective of whether the Authority orders compliance, a penalty should be imposed on FCI because it has not complied with the IN. She says FCI's actions were negligent because the directors left matters to be dealt with by FCI's accountant and branch managers, and they effectively abrogated responsibility. The impacts of the breach are potentially significant if applied to 137 employees.

[73] FCI says a penalty should not be imposed, because it has done everything to comply and it does not have money to pay a penalty given the company is running at a loss in hard economic times.

Analysis

[74] In deciding whether to impose a penalty, and if so how much, I have to be satisfied that the imposition of a penalty would meet the purposes and principles of penalties. I need to consider the factors in s 133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.[6] These principles have been elaborated on and followed since.

[75] The law in respect of quantification of penalties is well established given s 133A of the Act, and requires that I have regard to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations.

Object of the Act

[76] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn the behaviour. The main breach by FCI is inconsistent with two of the objects of the Act:

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[5] Section 133 of the Act.
[6] [2016] NZEmpC 143.

acknowledging the inherent inequality of power in employment relationships, and promoting the effective enforcement of employment standards. Public confidence in Labour Inspectorate practice will be undermined if it is perceived that parties can choose not to comply with INs with impunity. Employers have a duty to comply with the requirements of an IN, and to comply with minimum employment standards. The failure by FCI to comply with the IN has hindered the Labour Inspector's ability to determine whether minimum legislation requirements have been adhered to. I conclude that it would be appropriate to impose a penalty on FCI for this failure. In determining the penalty claim I follow the four-step approach as set out by the Employment Court in *Borsboom*.[7]

Step 1: Identify the nature and number of the breaches and the maximum penalty available

[77] I start with an assessment of the nature and extent of the breaches. There is one main breach alleged, being non-compliance with the IN. A person who fails to comply with an IN is liable to a penalty under s 223D of the Act. The maximum penalty for a single breach by a company is $20,000.00.

Step 2: Assessment of the severity of the breaches

[78] The Labour Inspector submits the relevant objects of the Act are the inherent inequality in employment relationships, and promotion of employment standards. The systemic failure to keep records attracts a starting point of 50% of the maximum available penalty. The Labour Inspector says the impact of the breach is potentially very significant given that more than 130 employees may not have been paid their minimum entitlements. The total quantum of loss is yet to be calculated, but three relatively significant claims have been settled. The Labour Inspector says the breach can be treated as negligent (rather than intentional) because FCI had engaged an accountant to assist. The affected employees were vulnerable in that they were or appear to have been migrant workers.

[79] FCI says it conducted the audit to the best of its abilities, and to the extent there was any breach, it should be considered to be a one-off due to circumstances beyond its control. It was unintentional and inadvertent due to duplication and triplication of

[7] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [137] to [151].

names. Added to this, FCI reiterates that some employee contact details were unavailable and it did not get responses from a number of employees.

[80] In terms of mitigating or ameliorating factors, there is no evidence before the Authority regarding previous conduct by FCI. However, there is need for specific deterrence to ensure FCI appreciates the significance of its obligations to comply, particularly as it continues to operate as an employer. As observed by the Full Court in *Borsboom*[8] it is a matter of common knowledge that minimum holiday entitlements and other statutory minima are applicable to all employment.

[81] The Labour Inspector says the effect of the aggravating and mitigating factors is neutralised, but an adjusted starting point of $8,000.00 is justified to bring this case in line with other cases. She points to the significant number of potentially affected employees, and that there have been no steps to mitigate the consequences of the breach and prevent reoccurrence.

[82] Both Mr Turna and Mr Avtar have been directors of a number of companies currently or formerly registered on the public Companies Register. They should be aware of the importance of complying with INs, and the importance of meeting the requirements of minimum standards employment legislation. In terms of general deterrence, a message should be sent to any like-minded employers who might be tempted to treat full compliance with an IN as optional. While I accept there are a large number of potentially affected employees, based on the evidence before the Authority I consider that FCI did take some steps to comply with the IN and that FCI says it was partially compliant with the IN by the time of the investigation meeting.

[83] I assess the seriousness of these matters as justifying a starting point for the breach at 30% percent of the maximum. This brings the working total to $6,000.00 before considering ability to pay and proportionality.

Step 3: Financial circumstances of FCI

[84] The Labour Inspector says the business is a going concern and has the ability to pay a penalty at the provisional level.

[85] FCI says the recession has hit the hospitality sector hard, and inflation makes the cost of doing business challenging. Across four branches, it now only has eight full

[8] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

time and two part-time employees. FCI has a significant GST bill. It says it does not have money to pay any penalty imposed by the Authority.

[86] No supporting evidence has been provided to demonstrate FCI's financial situation. There is no information to support that a reduction to an otherwise appropriate penalty may be appropriate based on ability to pay. There is therefore no basis to reduce the provisional penalty of $6,000.00.

Step 4: Proportionality or totality test

[87] Penalties should be set at a level which both punishes a party for its breaches and deters it from future non-compliance. The Authority must take into account whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk that a penalty could be of such magnitude as to create a significant risk of non-payment.[9]

[88] I have considered an appropriate figure in comparison to other cases – particularly relating to non-compliance with an IN. Standing back and looking at the matter in totality and taking a proportionate approach to the overall circumstances, I consider $6,000.00 to be a fair and appropriate penalty. The penalty of $6,000.00 must be paid to the Crown within 28 days of the date of this determination.

Orders

[89] Under s 137(1)(a)(iiib) and s 137(2) of the Employment Relations Act 2000, Friends Cuisine of India Limited is ordered to comply with the Improvement Notice issued by the Labour Inspector on 22 September 2022 by providing the Labour Inspector with information and documentation as follows:

(a) Provide, in respect of all affected employees (whether they have made a money claim or not against the respondent), a document showing the calculation or re-calculation of each and every employee's:

(i) minimum wage entitlements;

(ii) annual holiday pay entitlements;

(iii) sick leave entitlements;

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[9] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [147].

(iv) public holiday pay entitlements; and

(v) alternative holiday entitlements.

(b) Provide, in respect of all affected employees (whether they have made a money claim or not against the respondent), copies of the respondent's communication with each and every employee advising them about:

(i) the purpose of the audit;

(ii) the respondent's record-keeping issues;

(iii) the possibility that the employee might have wage / pay arrears owing to them; and

(iv) asking the employee to confirm whether they had paid any premiums, or have been asked to pay premiums, in respect of their employment with the respondent.

(c) Provide, in regard to all affected employees who are unable to be contacted, evidence of the respondent's attempts to contact them.

(d) In regard to subparagraphs (b) and (c) above, for the avoidance of doubt, the relevant communication or attempt at communication with the affected employees should not pre-date the issuance of the IN.

(e) Provide, in cases where arrears have been identified as being owed to an affected employee (as per the calculation or re-calculation exercise), a copy of:

(i) the respondent's communication to the affected employee advising the employee how much they are owed, when they will be paid, and asking the employee to confirm their bank account details; and

(ii) a bank statement or similar bank record, identifying the arrears payment made to the affected employee.

(f) Provide, in the case of Narinder Singh, a copy of:

(i) The re-calculation of Narinder Singh's annual holiday pay entitlements;

(ii) Communications with Narinder Singh (not dated earlier than the date of issuance of the IN), advising him of the amount of any

arrears owing, when he will be paid, and asking him to confirm his bank account details; and

(iii) a bank statement or similar bank record, identifying the arrears payment made to Narinder Singh.

[90] This order must be complied with within three months from the date of this determination.

[91] Friends Cuisine of India Limited is ordered to pay a penalty of $6,000.00 to the Employment Relations Authority within 28 days of the date of this determination. On recovery of this amount, the Authority must transfer this to the Crown Bank Account.

Costs

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[93] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the Labour Inspector may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Friends Cuisine of India Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[94] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[10]

Natasha Szeto
Member of the Employment Relations Authority

[10] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1