IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 117
5446750

	BETWEEN	DOUGLAS HIXON, LABOUR INSPECTOR Applicant
	A N D	SEVEN STARS HORT LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in person No appearance for Respondent
Investigation Meeting:	16 July 2014 at Blenheim and 17 July 2014 at Christchurch
Submissions Received:	17 July from Applicant None received from Respondent
Date of Determination:	5 August 2014

DETERMINATION OF THE AUTHORITY

A. A compliance order is granted in accordance with which the respondent is to comply with specified terms of the applicant's Improvement Notice.

B. Penalties totalling $5,000 are imposed upon the respondent.

C. The respondent is to reimburse to the Labour Inspector the lodgement fee of $71.56.

Employment relationship problem

[1] The Labour Inspector seeks a compliance order under s.137 of the Employment Relations Act 2000 (the Act) requiring the respondent to comply with an Improvement Notice served on the respondent and dated 8 November 2013. The Labour Inspector also requests the Authority to consider imposing a penalty against the respondent for failure to comply with the Improvement Notice.

[2] The respondent resists the application on the basis that the four individuals whose wages are the subject of the Improvement Notice did not work the hours that they claimed to and that they are therefore not owed the sums stated by the Labour Inspector in the Improvement Notice. The respondent also states that it has ceased trading.

[3] The investigation into this matter was made somewhat difficult because Mr Fitzsimons now resides in Auckland, Mr Hixon is based in Nelson, one of the key witnesses (Mr Tiueti) resides near Blenheim, another witness resides in Christchurch and the four workers in respect of whom the Improvement Notice was served all now reside in Chile. Accordingly, the investigation meeting took place in two locations, over two days with Mr Hixon and Mr Tiueti attending the first meeting in person in Blenheim. The current sole director of the respondent company, Mr Fitzsimons, had been advised of the dates of the meetings, but an attempt to contact him by telephone at the start of the first meeting was unsuccessful as he did not answer the telephone when he was called as arranged.

[4] The second day of the investigation meeting took place in Christchurch with Mr Samrat attending in person, Mr Hixon by telephone and Mr Hourton, as a representative of the four Chilean workers, attending by telephone. An interpreter in the Spanish language was also present in Christchurch to interpret for Mr Hourton. Again, an attempt was made to telephone Mr Fitzsimons but, again, he did not answer the telephone.

[5] The day following the second meeting Mr Fitzsimons sent an email to the Authority stating that he had had his phone and laptop taken out of the vehicle he was travelling in the preceding weekend, and so was unable to be available for the meetings. Mr Fitzsimons did not explain why he could not have advised the

Authority of a landline or alternative mobile telephone number between Monday 14 July and the start of the first meeting on 16 July. In any event, given that Mr Fitzsimons goes on to say in his email *can you please forward to me the results*, I am satisfied that it is appropriate to make a determination in the absence of Mr Fitzsimons' attendance.

Background

[6] The respondent company was, during the material time, operating as viticulture contractors, employing a number of migrant workers to perform work at two vineyards in Marlborough (Weld Hill and Black Birch) as well as other locations in the North and South Islands.

[7] The company employed migrant workers, paying them on a piece rate basis, at a rate depending on the work carried out. It is the evidence of the Labour Inspector that many viticulture contractor companies typically employ workers for one or two weeks to allow them to get used to the work and to increase their rate of work, paying them the minimum wage during that initial period even if they have not earned it by reference to the piece rate in operation. If a worker does not quickly increase their rate of work to a point where they are earning at least the minimum wage by reference to the piece rate, the employer will typically dismiss the employee relying upon a statutory 90 day trial period incorporated into the worker's employment agreement.

[8] The four workers who are the subject of the Labour Inspector's Improvement Notice were from Chile and were called Christian Mery, Thomas Hourton, Jose Lira and Ricardo Escudero. The Labour Inspector has calculated that Mr Hourton worked a total of 87.5 hours but was only paid for 59.5 hours, as was Mr Mery. Mr Lira, according to the Labour Inspector, worked a total of 108.5 hours but was only paid for 74 hours, as was Mr Escudero.

[9] Accordingly, applying a rate of $14.85 per hour (being the applicable minimum hourly rate of $13.75 plus 8% holiday pay as prescribed by s.23 of the Holidays Act 2003) the Labour Inspector calculates that the respondent company owes the four Chilean men a total of $946.78.

[10] Unfortunately, Mr Hixon made an error in preparing the Improvement Notice and miscalculated the sums due to the four Chilean men. His error resulted in the Improvement Notice naming sums less than that which Mr Hixon now says is due to

them. However, Mr Hixon asks that, rather than him reissuing the Improvement Notice, that it be enforced by way of a compliance order in the form that it was served. This set out that Mr Mery was due the sum of $142.27, Mr Hourton the sum of $294.16, Mr Lira the sum of $236.31 and Mr Escudero the sum of $131.24.

[11] It is Mr Hixon's submission that time sheets that had been completed showing the hours worked by the four Chilean men had been later amended to show that they had worked fewer hours. Annotations on the time sheets and copies of diary notes sent in by the respondent indicate on their face that these amendments had been made because the four Chilean workers did not work the hours that they had recorded but had spent several hours sitting in their van instead.

[12] Mr Hixon maintains that these changes were made in order to avoid paying the men what is due to them. The Labour Inspector asserts that this practice has resulted in a breach of s.6 of the Minimum Wages Act 1983 and s.23 of the Holidays Act 2003.

The issue

[13] In order to decide whether a compliance order should be made in respect of the Improvement Notice, it is necessary to determine whether the four Chilean individuals did indeed work fewer hours than they had recorded or whether, alternatively, amendments have been made by the respondent to the time sheets inaccurately or in bad faith.

[14] In order to decide this issue, I heard evidence from Mr Tiueti and Mr Samrat, both of whom had worked for the respondent company at the material time as supervisors. Mr Tiueti had been primarily based on the Weld Hill vineyard and Mr Samrat at the Black Birch vineyard. I also took evidence from Mr Hourton through an interpreter.

[15] It was Mr Tiueti's evidence that Mr Hourton and his Chilean co-workers were generally good workers and the only occasion he had for complaint about them was that he once turned up at the vineyard to find that they had gone home leaving some other workers behind. However, Mr Tiueti said that he was often not at the Weld Hill vineyard as the workers did not need constant supervision.

[16] Mr Samrat said that he was primarily based at the Black Birch vineyard but was also responsible for collating the time sheets for both vineyards. Mr Samrat confirmed that annotations made on time sheets shown to the Authority and diary entries were made by him. He said that he did this on the instruction of Mr Fitzsimons. He said that Mr Fitzsimons had told him that he had heard from *a supervisor* that the Chilean men had not been carrying out the work that they were supposed to and that they had been sitting in their van for several hours. It was on this basis that he instructed Mr Samrat to reduce the hours recorded.

[17] Evidence was given that Mr Tiueti and Mr Samrat were the two main supervisors but that there were occasionally temporary supervisors working at the vineyard although none of them could be sure as to when this was.

[18] Mr Hourton's evidence confirmed Mr Samrat's evidence that Mr Samrat had once spoken to him to say that, basically, he and his colleagues were not working hard enough but Mr Hourton denied that he had ever been told that they were spending too long sitting in the van.

[19] The Authority saw a diary note that stated the following:

> *Spoke to George/Blair regarding 4 Chilean guys. Told them they should finish.*

[20] This note was made on 18 August 2013 according to the diary. Mr Hourton's evidence is that he and his three co-workers were not told to leave but decided to leave of their own volition. He said that, in fact, the respondent wanted them to stay on. Mr Samrat says that he is not sure whether he actually did speak to the four Chilean workers on 18 August 2013 to tell them that they needed to leave. He was also not sure whether he actually had made the amendments to the time sheets, reducing the hours recorded, before or after the Labour Inspector had written to Mr Fitzsimons passing on the complaint of the Chilean workers about their pay.

Determination

[21] When I consider together the evidence of Mr Tiueti, Mr Samrat and Mr Hourton, on balance I am satisfied that there was no basis for the hours recorded in the time sheets to be reduced. It is unfortunate that Mr Fitzsimons chose not to take part in the investigation meeting but he had his opportunity to do so.

[22] Accordingly, I am satisfied that it is appropriate to issue a compliance order under s.137 of the Act pursuant to which the respondent to is comply with the terms of the Improvement Notice dated 8 November 2013, subject to my comments below.

[23] The Improvement Notice required the respondent to carry out the following steps:

1. Pay minimum wage arrears to the Inspector, for the benefit of Mr Mery, Mr Hourton, Mr Lira and Mr Escudero in the total sum of $803.98;

2. Cease altering time sheet hours;

3. Undertake a review, and provide a copy to the Labour Inspector, showing the hours worked and payments made to all employees of the respondent company since 1 April 2013;

4. Identify any minimum wage arrears arising from the review; and

5. Provide evidence to the Labour Inspector that any minimum wage and holiday pay under-payments identified as a result of the review have been paid to employees.

[24] The Labour Inspector also recommended that the respondent provide the opportunity to all employees to initial both their start and finish times on time sheets required to be kept under s.8A of the Minimum Wages Act 1983.

[25] The Labour Inspector had originally given the respondent until 5pm on Friday 6 December 2013 to complete the improvement, including providing the Inspector with evidence, and ensuring compliance. Given that that timeframe has, of course, elapsed, the respondent has 28 days from the date of this determination to comply with the terms of the Improvement Notice issued to it by the Labour Inspector on 8 November 2013 to the following extent:

1. Pay to the Labour Inspector for the benefit of Messrs Mery, Hourton, Lira and Escudero the sum of $803.98;

2. Undertake the review referred to by the Labour Inspector;

3. Identify any minimum wage arrears arising from the review; and

4. Provide evidence to the Labour Inspector that any minimum wage and holiday pay under-payments identified as a result of the review are being paid to employees.

[26] Because the step identified by the Labour Inspector of the employer having to cease altering time sheet hours is too broadly expressed, as, clearly, alterations of time sheet hours could be justified on occasions, I decline to order compliance with that aspect of the Improvement Notice. Similarly, as the Labour Inspector has expressed a recommendation only with respect to the initialling of start and finish times, and as the respondent says that the company has ceased trading, I decline to order compliance with that aspect of the Improvement Notice.

[27] The error in the Improvement Notice results in the following shortfalls between what I have ordered the respondent to pay and what the four men's minimal entitlements are:

a. Mr Mery - $30.63;

b. Mr Hourton - $30.63;

c. Mr Lira - $40.78; and

d. Mr Escudero - $40.78.

[28] However, the Authority does not have the power to rewrite the Improvement Notice and then order compliance in respect of it, and nor can it order the respondent to pay the shortfalls to the four men in the absence of them being parties to the proceedings.

Penalties

[29] It has been established in *Tan v. Yang and Zhang* [2014] NZEmpC 65 that penalties are to be imposed for breaching minimum employment standards in order to send an unequivocal message that this sort of conduct is wholly unacceptable.

[30] Section 223F of the Act empowers the Authority to impose a penalty on an employer who fails to comply with an Improvement Notice. In considering whether to award such a penalty, I take into account the fact that, on balance, it would appear

that hours recorded by workers on time sheets had been amended wilfully in order to avoid paying workers their minimum entitlements.

[31] Furthermore, although the respondent has stated that the company is no longer trading, the review that the Improvement Notice required the respondent to undertake was still a valid exercise as it related to a period (from 1 April 2013) when it clearly was still trading. There appears to be no legitimate reason given by the respondent to justify the failure of the respondent to carry out this review.

[32] In considering the appropriate sum to impose, I consider that it is appropriate to impose a penalty of $1,000 per employee whose wages have been adversely affected by the actions of the company. That amounts to a total of $4,000.

[33] In addition, there is a failure to carry out the review, without reasonable excuse, which I believe should attract an additional penalty of a further $1,000.

[34] This amounts to a total penalty under s.223F of the Act in the sum of $5,000, which is to be paid by the respondent to the Authority through its Christchurch office within 28 days of the date of this determination, and which will then be paid by the Authority into a Crown bank account.

Costs

[35] The Labour Inspector did not engage any legal representation but did incur the Authority's lodgement fee of $71.56. Accordingly, I also order that the respondent reimburse the Labour Inspector in that sum within 28 days of the date of this determination.

David Appleton
Member of the Employment Relations Authority