IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 198
5629744

	BETWEEN	LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
	A N D	DANMEL FARM LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Thom Clark and Aaron McIlroy, Counsel for Applicant Daniel Higinbottom, Advocate for Respondent
Investigation Meeting:	Determined on the papers by agreement
Submissions Received:	25 August 2015, from the Applicant 8 September 2016, from the Respondent
Date of Determination:	2 November 2016

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

A. **I decline to impose further penalties on the respondent.**

B. **I make no order as to costs.**

Employment relationship problem

[1] The Labour Inspector seeks the imposition of penalties on the respondent in relation to breaches of the respondent's statutory obligation to keep wage records that are compliant with s.130(1)(h) of the Employment Relations Act 2000 (the Act) and s.8A(1)(h) of the Minimum Wage Act 1983, and holiday and leave records that are compliant with the requirements of s.81 of the Holidays Act 2003.

[2] Mr Higinbottom, on behalf of the respondent, lodged a very brief statement in reply that stated that the company was "out of business" and no longer employing anyone and that a penalty had already been paid by the respondent in the sum of $3,354.89 on 13 February 2016.

Background

[3] At the material time the respondent operated a dairy farm in Rangiora.

[4] In February 2014 an Improvement Notice was issued by the Labour Inspectorate requiring the respondent to address various issues.

[5] An audit was carried out by the Labour Inspectorate in 2015 and, in February and April 2015 the Labour Inspectorate issued two requests, pursuant to s.229 of the Act, requiring the respondent to provide additional information in respect of two employees. Once the information had been received, the Labour Inspector reviewed the records provided and concluded that the records did not comply with the requirements of the Act, the Holidays Act and the Minimum Wage Act.

[6] On 9 September 2015 the Labour Inspectorate lodged a statement of problem with the Authority seeking the imposition of a penalty against the respondent for its failure to comply with all the requirements referred to in s.229(1)(d) of the Act and an order for compliance with the Labour Inspectorate's notice dated 28 April 2015 (issued under s.229(1) of the Act) which required the respondent to supply copies of wage, time and holiday records by 8 May 2015.

[7] The Authority held an investigation meeting on 26 January 2016 at Christchurch and its determination was issued on 28 January 2016.[1]

[8] In its determination, the Authority ordered the respondent within 21 days of the date of the determination to comply with the requirements of the Labour Inspector's Notice dated 28 April 2015 to provide copies of payslips for all employees for the six months preceding 28 April 2015, and copies of employment agreements for current employees as at 28 April 2015.

[1] [2016] NZERA Christchurch 8.

[9] The Authority also ordered the respondent to pay a penalty in the sum of $2,700 in respect of the respondent's failure to comply with the requirements of the Labour Inspector under s.229(1)(c) and (1)(d) of the Act.

[10] In the current proceeding, the Labour Inspector states that, on 17 February 2016, the Labour Inspector received two employment agreements and some time sheets from the respondent in compliance with the Authority's orders. It, I infer, also received payslips which covered the period from 3 February 2015 to 28 April 2015 only.

[11] The Labour Inspector states he emailed the respondent on 4 March 2016 advising that the respondent had not fully complied with the Authority's determination and, in reply, the respondent stated that he had no other payslips apart from those already provided.

[12] The Labour Inspector asserts that the respondent has failed to keep wage records for the period between November 2014 and February 2015 and failed to comply with the requirements of the Act. He also asserts that, having reviewed the records that the respondent had previously provided against the further information that was provided pursuant to the Authority's determination, he has concluded that the respondent's records, for the period between November 2014 and April 2015, did not comply with the requirement of s.81 of the Holidays Act.

Applicable legal principles

[13] Section 130(1)(h) of the Act provides that every employer must at all times keep a record (called the wages and time record) showing, in the case of each employee employed by that employer, the wages paid to the employee each pay period and the method of calculation.

[14] Section 130(4) of the Act provides that every employer who fails to comply with any requirement of s.130 is liable to a penalty imposed by the Authority.

[15] Section 8A(1)(h) of the Minimum Wage Act provides the same, in material terms, as s.130(1)(h) of the Act. Section 10 of the Minimum Wage Act provides that every person who fails to comply with the requirements of that Act is liable to a penalty recoverable by a Labour Inspector, and imposed by the Employment Relations Authority, under the Employment Relations Act.

[16] Section 81 of the Holidays Act provides that an employer must keep a holiday and leave record that complies with the section. Section 81(2) of the Holidays Act sets out 20 requirements in relation to the information that the holiday and leave record must contain (if applicable).

[17] Section 75 of the Holidays Act provides that an employer who fails to comply with any of the provisions listed in subsection (2) is liable to a penalty not exceeding $20,000 if the employer is a company or other body corporate. Section 75(2) of the Holidays Act refers to a number of sections of that Act, including:

> Section 83 (which relates to the failure to keep or provide access to a holiday or leave record).

[18] Section 83 of the Holidays Act does not, itself, set out a requirement (but rather speaks of the consequences of a failure to comply with ss.81 and 82). However, I accept that the purpose behind s.75(2)(e), which refers to a breach of s.83 giving rise to a penalty, must include a failure to keep a holiday and leave record that complies with s.81.

[19] Section 229(1)(d) of the Act refers to the Labour Inspector's power to require any employer to supply to the Labour Inspector a copy of the wage and time record or holiday and leave record or employment agreement, or both, of any employee of that employer.

[20] Section 229(3) of the Act provides that every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subsection (1)(c) or subsection (1)(d) is liable, in an action brought by a Labour Inspector, to a penalty under that Act imposed by the Authority.

[21] There are many authorities which have examined the principles governing the imposition of penalties. One relatively recent one is *Tan v Yang*[2] which I shall refer to below.

Discussion

[22] In the present proceedings the Labour Inspectorate seeks a penalty to be imposed for a failure by the respondent to keep wage records and, separately, a failure

[2] [2014] NZEmpC 65.

to keep holiday and leave records that meet all the requirements of s.81 of the Holidays Act. Its application to the Authority in September 2015 related, inter alia, to a failure by the respondent to supply to the Labour Inspector wage and holiday and leave records. There is, therefore, on the face of it at least, a difference between the basis for the current application for penalties and the previous application for penalties.

[23] When the Authority first perused the current statement of problem together with the Authority's determination dated 28 January 2016, it was concerned that the conclusions reached by the Labour Inspector in reliance upon documents received by him on 17 February 2016 (after the Authority's determination) were no different from those that were reached by the Authority at its investigation meeting on 26 January 2016, and in respect of which penalties were imposed. The Authority was therefore concerned that there appeared to be an overlap between failures which were penalised in the aforementioned determination and failures which the Labour Inspector now wished to be penalised. The Authority invited the Labour Inspector to comment on those concerns.

[24] By way of a memorandum of counsel for the Labour Inspector dated 25 August 2016, Mr Thom Clark, counsel at that time, replied by asserting that the obligation of an employer to keep proper employment records is distinct from the obligation to comply with a notice issued by a Labour Inspector under s.229 of the Act. Mr Clark asserts that those distinct obligations promote different interests. Proper record keeping, on the one hand, is a basic legal requirement, without which employers cannot demonstrate they are providing their employees with minimum entitlements.

[25] On the other hand, notices issued under s.229 of the Act are key investigative tools used by the Labour Inspectorate to gather evidence in its investigations of potential breaches of employment legislation. Employers who receive notices cannot refuse to supply documents or information as this may prejudice an investigation.

[26] Mr Clark asserted that a failure to comply with either obligation represented a distinct breach and that the penalties sought for each therefore seek to punish different conduct.

[27] Mr Clark goes on to say that, during the Authority's investigation on 26 January 2016, Mr Higinbottom confirmed that he would be able to print off and provide the relevant payslips and employment agreements as requested under the Labour Inspector's notice of 28 April 2015. Penalties were therefore sought on the basis that the wage, holiday and leave records did exist but were not provided to the Labour Inspector. According to Mr Clark, the Authority imposed on the respondent a penalty for failure without reasonable cause to comply with the requirements of the notice.

[28] On the understanding that the records did in fact exist, the Authority made an order that the respondent, within 21 days, comply with the requirements of the notice and provide copies of payslips for all employees for the six months preceding 28 April 2015 and copies of employment agreements for current employees as at 28 April 2015.

[29] Mr Clark states that, had the Authority not been led to believe that the records did exist, it could have imposed penalties at that stage for the respondent's failures to keep records.

[30] Mr Clark submits that, despite repeated requests from the Labour Inspectorate and despite a compliance order from the Authority, the respondent has failed to provide evidence of compliant wage, holiday and leave records for the period November 2014 to February 2015. The Labour Inspector can only infer that these records do not exist, says Mr Clark.

[31] Mr Clark finishes his submissions by stating that the respondent does not deny the breaches of s.130 of the Act, s.8A of the Minimum Wage Act and s.81 of the Holidays Act.

[32] Mr Higinbottom replied to this memorandum of counsel by way of an email dated 8 September 2016 in which he said that:

> The first I heard that Vikrum[3] wanted more information was on 25th July 2016 [sic].

[33] It is likely that Mr Higinbottom made a mistake in relation to the date cited. Mr Higinbottom then went on to explain what records he had showed Mr Lakhera

[3] Vikram Lakhera, Labour Inspector

during his visits to the farm and that he and his accountant could not get the information from the payslips on their accounting system which Mr Lakhera was asking for. Mr Higinbottom also said that he felt that Mr Lakhera *had it in for us personally* and that the business is now *out of business* and that it no longer employs staff.

[34] I do accept Mr Clark's submissions that there is a difference between a failure to keep records that an employer has a statutory obligation to maintain, on the one hand, and a failure to comply with a notice issued by a Labour Inspector to provide copies of those records, on the other. I also accept Mr Clark's analysis for the reasons behind the distinction.

[35] I also accept that it is reasonable to infer that the respondent did not keep wage records as required from the fact that Mr Higinbottom was not able to provide payslips prior to the period commencing 3 February 2015. The Authority saw a copy of an email exchange between Mr Lakhera and Mr Higinbottom in which Mr Lakhera asked Mr Higinbottom to either advise him if he does not have the records, or has not kept them, or to send him the records for the full period that was the subject of the determination. Mr Higinbottom's response was as follows:

> Hi Vik, I only had the payslips back to the date I provided, very sorry for that. I did mention it to Liz Allen[4]. Regards Daniel

[36] However, in deciding whether it is appropriate to impose penalties on the respondent, I need to be satisfied that the reason for the failure to comply with s.229(1)(d) of the Act, which led to the penalty already imposed on the respondent, was not the same reason (ie failure to keep the records in the first place) which causes the Labour Inspectorate to seek further penalties to be imposed. If the reasons are the same, then I am not satisfied that it would be just to impose a further penalty as the same underlying breach would be penalised twice.

[37] In *Tan v Yang*, the Court made it clear that the imposition of a penalty is for the purposes of punishment. Section 26(2) of the New Zealand Bill of Rights Act 1990 provides that no one who has been finally acquitted or convicted of, or pardoned for an offence shall be tried or punished for it again. Whilst s. 26(2) does not expressly apply to the imposition upon a corporate body of a penalty in an

[4] Liz Allan, Senior Authority Officer in the Christchurch office of the Employment Relations Authority

employment context, the underlying principle of not imposing a punishment for the same wrong twice is applicable here.

[38] In other words, I believe that it would be a miscarriage of justice for the Authority to impose a penalty upon the respondent for failing to keep wage records if the reason it attracted a penalty previously was also caused by its failure to keep wage records even though the claim by the Labour Inspector was couched as a failure to provide those records. Clearly, the respondent could not provide records that it did not have.

[39] I must therefore investigate whether this is the case. I refer to the following parts of the Authority's determination dated 28 January 2016 which I think are relevant to the analysis I must carry out:

> [11] On or about 12 May 2015 Mr Higinbottom sent an email to Mr Lakhera which provided all the information requested except for the pay slips. Mr Higinbottom advised he was still trying to print these pay slips off from CashManager Payroll System.
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> [12] On 16 March 2015 Mr Lakhera emailed Mr Higinbottom and advised how to set up a "read only" function on the CashManager for him to have a look at the required information. He also requested, after looking at the bank statements, leave records including public and annual holidays for two employees from 1 October 2014 to 31 January 2015, copies of pay records *ie detailed payslips* for the two employees between the same dates. He asked for some clarification of the salary for one of the employees.
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> …..
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> [14] On 28 April 2015 Mr Lakhera issued the second notice under s.229(1) of the Act requiring supply of a copy of wage, time and holiday records by 5pm, 8 May 2015. Danmel Farm was specifically required to provide:
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> - Time an wage records for all employees for the last 6 months;
> - Holiday and leave records for all employees for the past 6 months;
> - Any documentation related to deductions the business taken from the wages of any of its employees [sic];
> - Employment agreements for all current employees;
> - Payslips for all the employees for the past 6 months and
> - Final pay records for employees who left in the past 6 months.
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> …..
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> [16] On 29 April 2015 Mr Higinbottom sent an email to Mr Lakhera in which he advised that he had the holiday records and time records and was working to sort out correct payslips. He wrote that Mr Lakhera had seen the time sheets, holiday records, sick days and the bank statements. Some leave records were also provided.

[17] On 5 May 2015 Mr Higinbottom supplied timesheets for all employees and partial holiday and leave records and medical certificates as required under the notice but no further information about wages and holiday and leave entitlements.

[18] Mr Lakhera says that Danmel Farm has time but no wage record and very limited holiday and leave records which do not show the entitlement and calculation for each employee as required under s.8A(1)(h) of the Minimum Wage Act 1983 and s.81 of the Holidays Act 2003. Mr Lakhera say [sic] that this has prevented him assessing whether the employment practices of the company comply with minimum employment standards.

…..

[22] The information provided to Mr Lakhera for wages did not satisfy the requirements of the wage record in s.130 of the Act and/or s.8A(1) of the Minimum Wage Act 1983. The payslips would have provided the amount paid to each employee for each pay period and the method of calculation and together with the timesheets would have been an adequate record. Mr Higinbottom, I accept, had some issues with extracting the information so the payslips have not been provided.

[23] There was a record of sick days, statutory days worked and days off for the employees provided by Mr Higinbottom. I do not find that it was a record completely compliant however with the requirements of a holiday and leave record as set out under s.81 of the Holidays Act 2003.

……..

[24] I do not find there was full compliance with the requirement by the Labour Inspector for a provision of wage, holiday and leave records. I do record the Labour Inspector has seen employment agreements for at least two of the employees.

…….

[27] Mr Higinbottom did confirm that he would now be able to print off and provide the relevant payslips as requested under the notice dated 28 April 2015. He has provided the time records already and company bank accounts showing the net amounts paid to the employees. He has employment agreements which he can provide.

[28] The Authority will not make a compliance order if it would serve no practical purpose. I have reflected on that particularly in light of the clarification that the payslips will contain no leave detail. I am not satisfied that Mr Higinbottom can provide the leave records in any other form than he has already provided to Mr Lakhera. I do not that amongst the leave records supplied is his notes setting out what public holidays were worked and what amount of alternative days and holidays were owing at the relevant date to the employees at that time, Shane, Josh and Chris.

[29] I intend to limit an order for compliance under s.137 of the Act to provision of the payslips and employment agreements.

[30] I order that within 21 days of the date of this determination Danmel Farm Limited is to comply with the requirements of the Labour Inspector as set out in the Notice under s.229(1) of the Act and provide him with copies of payslips for all employees for the six months preceding 28 April 2015 and copies of employment agreement [sic] for current employees as at 28 April 2015.

…….

[33] [5]The first factors I consider are the seriousness of the breach and whether it was one-off or repeated. Mr McIlroy submits that Danmel Farm was on notice regarding the importance of keeping records because of the earlier audit by Ms Belley and improvement notice. Mr McIlroy submits that there were several opportunities for Danmel Farm to comply and the consequences of not doing so were made clear to Mr Higinbottom. Therefore the breach must be deliberate. Mr Higinbottom says that he was simply unable to extract from CashManager the relevant payslips. He says that there were significant steps forward in record keeping and having employment agreements since Ms Belley made the requirements clear including implementation of timesheet records filled in by employees. He said that he made serious attempts with his accountant to print off the payslips.

[34] In assessing seriousness of the breach I do take into account that there was some compliance and some improvements since the involvement of Ms Belley. I cannot rule out, at least with respect to leave records, that there may have been a genuine misunderstanding about what the requirements were. There was no suggestion that Danmel Farm had previously been the subject of a penalty from the Authority. There was a failure though to provide the payslips or even direct [inaudible] to the company accountants for an extended period. Payslips in this case are effectively the wage record and will show the final pay details and any deduction.

[35] There has not been a complaint by an employee of Danmel Farm but Mr Vakhera has been unable to conclude with any certainty whether there has been compliance with minimum standards because the records are not complete and payslips have not been provided. Farm workers, because of their roles in the often isolated environment in which they work, are vulnerable if full employment records are not kept. It is important that a Labour Inspector is able to ascertain if minimum employment standards are being met for farm workers and records should be provided to enable that to happen when the request is made.

[36] The purpose of a penalty is to punish and deter others from engaging in such conduct. Of particular concern in this case was the inability and/or failure to provide payslips over an extended period to the Labour Inspector including up to the date of the Authority investigation meeting. I find that prevented him from ascertaining whether minimum employment standards had been adhered to.

…..

[38] I take into account all matters including the partial compliance with the requirements, and measure of improvement by Danmel Farm with record keeping and with employment agreements and the possibility, which I cannot rule out, of some confusion about the leave records. I am satisfied that there should be a penalty of $2,700.

Emphasis added

[5] The following paragraphs appear in a section where the Authority was considering whether a penalty should be imposed, and if so, what amount.

[40] When I analyse this determination, two themes emerge. The first is that the Member who issued the determination dated 28 January 2016 was not satisfied that there were any further leave records in any other form that the respondent could provide to Mr Lakhera and, accordingly, she declined to issue a compliance order in respect of the provision of further holiday and leave records.

[41] The second theme to emerge is that, based on what Mr Higinbottom stated in the investigation meeting on 26 January 2016, the Member believed that payslips were available for all employees for the six months preceding 28 April 2015 and that the penalty that was imposed was, at least in part, imposed due to a failure to provide payslips over a period required by the Labour Inspector.

Holiday and leave records

[42] I am not convinced that it would be just to impose any penalty on the respondent in relation to failing to keep and retain holiday and leave records that meet all the requirements of s.81 of the Holidays Act. This is for two reasons. First, the Authority has already determined that the respondent was unable to provide any further holiday and leave records, and so has already found that there was a failure to comply with the legislation in respect of the keeping of such records. Although the Member imposed a global penalty, I infer from the determination that it was, in part, based upon a failure to keep fully compliant holiday and leave records. Therefore, the respondent has already been penalised in relation to that failure.

[43] Furthermore, and in any event, in the current proceedings Mr Lakhera has not set out the way in which the holiday and leave records fail to comply with s.81 of the Holidays Act. All that he has stated, at para.2.15 of the statement of problem lodged in respect to the current proceedings, is:

> After reviewing the records that the respondent had previously provided, against the further information that was provided, pursuant to the compliance order for the period between November 2014 and April 2015, the applicant determined that the respondent's records taken together, for the period between November 2014 and April 2015, did not comply with the requirements under s.81 of the Holidays Act 2003.

[44] Unfortunately, no detail whatsoever has been given of the way in which there has been a failure to comply fully with those requirements since the further records were made available.

[45] Therefore, it would not be appropriate to impose a penalty upon the respondent in respect of a failure to comply with s.81 of the Holidays Act.

Wages

[46] I am satisfied that the Authority's penalty in respect of wage records was for the failure to provide access to them, rather than for keeping them at all. However, I note that Mr Higinbottom did partially comply with the Authority's compliance order and provided payslips as ordered. Unfortunately, they were not for the full period for which it had been ordered.

[47] I therefore agree with the inference that has been drawn by the Labour Inspector, and Mr Clark, that this must be because the records are not there to be supplied.

[48] If they are not there to be supplied now, they were presumably not there to be supplied originally. Therefore, I do believe, on a balance of probabilities, that the same underlying breach (namely, a failure to keep records pursuant to s.81 of the Holidays Act) was the cause for the breach in relation to the provision of those records to the Labour Inspector, which in turn led to the imposition of the penalty by the Authority in January 2016.

[49] Whilst Mr Higinbottom obviously made a representation to the Authority earlier that he would provide the payslips, which he was in no position to make, that statement alone (whether made rashly or mendaciously) does not justify the imposition of penalties under s.130(4) of the Act.

[50] Therefore, I conclude that the Authority has already penalised the respondent for that breach. It would not, therefore, be just to impose a further penalty on it.

[51] In any event, Mr Higinbottom states that the company is no longer in business (presumably, no longer trading) and no longer employs any individuals. Whilst that alone would not be sufficient reason not to impose a penalty, it is another factor which dissuades me from the imposition of a penalty, albeit not the most persuasive factor.

Conclusion

[52] For the reasons set out in this determination, I decline to impose penalties upon the respondent company.

Costs

[53] The respondent has not been represented by a professional representative at any point during the current proceedings and it is therefore not appropriate to order any contribution towards its costs from the Labour Inspector as it is highly unlikely that any costs associated with defending these proceedings have been incurred.

David Appleton
Member of the Employment Relations Authority