

[4] The Authority is advised that the Labour Inspectors also visited Dreamz's registered company office which is an apartment in an apartment building situated in Flat Bush. Although the Labour Inspectors attempted to speak with occupants of the apartment, there was apparently no answer when they rang the intercom.

[5] This matter was subsequently allocated to the applicant Labour Inspector who then posted via normal mail a General Inspection Letter and Notice to Produce to Dreamz's registered office as per the Companies Register.

[6] Dreamz did not respond to that Notice so the Labour Inspector sent an email to Dreamz's director, Mr Gaurav Kumar Paul, advising of the previous attempts to visit the business premises and the registered office undertaken by the two Labour Inspectors on 13 July 2016.

[7] The applicant's email to Mr Paul noted that the business premises were not open when the labour Inspectors visit could not be inspected during that part of the investigation. He also attached copies of the General Inspection Letter and the Notice to Produce documents which had been posted to Dreamz's registered office on 20 July 2016.

[8] We know that Dreamz has received this email because its director Mr Paul responded to the Labour Inspector in two emails, the first dated 08 August 2016 and the second on 13 August 2016.

[9] Neither the Labour Inspector nor the Authority has had any communication with Dreamz or Mr Paul since then.

[10] The Labour Inspector personally served the Statement of Problem on Dreamz at its registered address for service on 22 November 2016 and the Notice of Hearing on 11 January 2017.

[11] The Labour Inspector has provided photographs, which are annexed to his sworn affidavit, of the Authority's investigation documentation being placed inside the letterbox which is named on the Companies Register as being the company's address for service. The Labour Inspector also had some email communications with the owner of the building who said that he did not recognise the name Dreamz.

[12] I am satisfied that the respondent has been put on notice of the Labour Inspector's claim and of the Authority's investigation meeting today but has elected not to participate. Dreamz has not had any communications with the Labour Inspector about this matter nor has it had any communications with the Authority.

[13] When first contacted by the Labour Inspector, Mr Paul said he was unable to provide the documentation sought for two months because he was out of the country. When he was pressed by the Labour Inspector to provide the information, he then emailed back saying that he could not provide any documents until he came back to the country and would hopefully be back the following month. Those communications occurred in August 2016 and there have not been any communications since.

[14] The Labour Inspector told the Authority that Dreamz and its director, Mr Paul, have not made any arrangements for anyone else to provide the information identified in the Notice to Produce nor have they made arrangements themselves to provide this information or provided any explanation as to why this information has not been forthcoming, other than the emails Mr Paul sent the Labour Inspector in August of 2016.

[15] The Labour Inspector seeks a compliance order from the Authority that Dreamz complied with the Notice to Produce and also further seeks that a penalty be imposed on Dreamz for failing to produce the documents identified in the Notice to Produce. He also seeks reimbursement of the filing fee but advised the Authority that costs were not sought.

[16] I am satisfied that this is an appropriate matter to exercise the Authority's discretion to order Dreamz to comply with the Notice to Produce within 28 days of the date of this determination. I am satisfied that if a compliance order were not issued it is highly likely that Dreamz would not produce any of the documents the Labour Inspector needs to conduct his investigation.

[17] I am also satisfied that this is an appropriate matter in which to impose a penalty for Dreamz's failure to comply with identifies the approach to be taken in respect of imposing penalties for breaches of minimum employment standards under the Act.

[18] The Employment Court in *Borsboom v Preet Pvt Ltd*¹ is a Full Court decision which deals with the approach to be taken in respect of imposing penalties for breaches of minimum employment standards under the Act.

[19] I consider that these same penalty assessment factors are also relevant to a consideration of penalties sought by a Labour Inspector against a party who has not produced the information that the Labour Inspector is legally entitled to require an employer to produce.

[20] The Full Court in *Borsboom*² set out nine relevant factors to be considered when imposing a penalty so I have had regard to each of those factors when assessing penalties in respect of this matter.

[21] To briefly summarise my views as to how each of these relevant factors relate to the current matter, I consider;

- a. this matter to be at the lower end of the spectrum of seriousness of breaches under the Act;
- b. there to be a high degree of culpability because it is clear that Mr Paul received the Notice to Produce and is aware of the Labour Inspector's attempts to proceed with his investigation but he has deliberately not engaged with that;
- c. this is a one-off breach;
- d. this is a first instance of this breach on record. There is no information to establish that Dreamz has been involved in a Labour Inspectorate investigation before and there is no record of it having had any penalties imposed on it by the Authority previously;
- e. The impact of the breach on any employees or prospective employees cannot be assessed because the Labour Inspector has been unable to identify Dreamz's employees. The Labour Inspector's involvement in this matter did not arise out of a complaint from an employee but arose as a result of a Labour Inspectorate operation which identified Dreamz

¹ [2016] NZEmpC 143.

² *Supra*.

as an employer that needed to have further or specific investigation done.

- f. I am therefore unable to identify the vulnerability of any employees or prospective employees in this case. However I do note that the Labour Inspectorate operation was focused on employers who were potentially taking advantage of vulnerable employees by way of requiring them to pay employment premiums, which are illegal. I acknowledge that concern has not yet been able to be properly investigated in terms of Dreamz at this stage because Dreamz has not provided the information that would allow the Labour Inspector to investigate these matters and which it was requested to do under the Notice to Produce.
- g. a penalty is needed to act as a deterrence not only to Dreamz but also to the wider community of employers. It is inappropriate for an employer to be able to prevent a Labour Inspectorate investigation with impunity so the penalty needs to be set at a level that punishes Dreamz for its failure to comply with its statutory obligations.
- h. because Dreamz has not participated in the Authority's investigation there is no information of remorse. However I further note that there is no information subsequent to August 2016 of any attempts by Dreamz to comply with the Notice to Produce or to engage with the Labour Inspector regarding his advice that it instruct someone in New Zealand to comply with the request if the director was out of the country, or for that matter with the Authority, to ensure that the appropriate information is put before the Labour Inspectorate so it can complete its investigation.

[22] I recognise there is a general desirability to have consistency in the Authority decisions on penalties but I have not had any particular penalty cases cited to me. The failure to produce documents under a Notice to Produce and the associated penalties is not a common matter which we see before the Authority. I therefore just have regard to the level of penalties in respect of other matters involving claims by a Labour Inspector which relate to breaches of minimum protection legislation.

[23] The full Employment Court set out a four-step process which is to be adopted when a penalty is being assessed by the Authority to ensure that there is a consistent and reasonably predictable result with penalties across the board. I therefore adopt that process in this matter.

[24] There was one breach of s.229(1)(c) of the Act because Dreamz failed to produce the documents identified in the Labour Inspector's Notice to Produce. That put it at risk of a penalty in accordance with s.229(3) of the Act for which the maximum for a company is \$20,000. Because it was a one off breach there is no issue around global penalties.

[25] In terms of the type and nature and extent of the breaches that the Authority regularly has to deal with, I consider that this is at the lower end of the scale. I am not aware of any aggravating or mitigating factors so I consider penalties should just reflect an appropriate level for this particular breach without adjustment.

[26] Likewise there is no information before the Authority of Dreamz's financial means or ability to pay. The company is still registered on the Companies Register.

[27] This does appear to be a situation in which Dreamz is deliberately breaching its obligations because it is clear that its director, Mr Paul, was well aware of what documents had to be provided by, when and why but he has elected not to engage with the Labour Inspector subsequent to his last email on 13 August 2016.

[28] I consider that the breach in this matter strikes at the heart of the Labour Inspector's ability to undertake his duties and therefore has prevented him from fully undertaking his very important investigation and enforcement role under the Act.

[29] Such a situation is highly undesirable so the Authority must impose a penalty at a level that signals its disapproval of such conduct and which acts as a deterrent to Dreamz and other employers who may not be minded to engage with a Labour Inspectorate investigation. Such employers need to be clearly put on notice by way of this penalty that such behaviour is unacceptable and they can expect to face financial consequences in the event they breach their obligations.

Outcome

[30] I order Dreamz within 28 days of the date of this determination to:

- a. Comply with the Labour Inspector's Notice to Produce to it dated 20 July 2016;
- b. Pay a penalty of \$3,000 under s.133(1)(b) of the Act directly into the Crown bank account;
- c. Reimburse the applicant \$71.56 for its filing fee.

Rachel Larmer
Member of the Employment Relations Authority