

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 37
5635376

BETWEEN	LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	GUJARAT CUISINE 2012 LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Shona Carr for Applicant Catherine Stewart for Respondent
Investigation Meeting:	On the papers before the Authority
Submissions received:	20 January 2017 from Applicant 3 February 2017 from Respondent
Determination:	15 February 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The application for the imposition of a penalty is declined.**

- B. Costs are reserved.**

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business Innovation and Employment (the Labour Inspector) has applied to the Authority for the imposition of penalties against Gujarat Cuisine 2012 Limited (Gujarat Cuisine). The application for penalties relates to breaches of minimum standards.

[2] As permitted by section 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the Labour Inspector and Gujarat Cuisine but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[3] The parties have consented to this matter being determined by the Authority on the papers currently before it.

Background

[4] On 29 July 2015 the Labour Inspector received a complaint from an employee. An investigation was carried out and a Notice Requiring Production of Records Wages and Time Records, Holiday and Leave Records and Employment Agreements was served on Gujarat Cuisine 20 August 2015.

[5] Gujarat Cuisine provided its Pay Records, Annual Leave Registers and Individual Employment Agreements to the Labour Inspector on 28 August 2015. Wage records were provided but not time records, although Gujarat Cuisine provided copies of rosters which showed the start and finishing times for each of its employees and each shift worked.

[6] Gujarat became aware that its wage, time and holiday records did not meet its legal requirements and took immediate steps to purchase and implement a new compliant payroll system to remedy any deficiencies. The new system operated from October or November 2015.

[7] As part of implementing its new system an audit of all employee's annual leave balances was undertaken and all employees who had been incorrectly paid annual leave had their balances reinstated. This resulted in some employees effectively being paid twice for annual leave. At the same time any employees who had been underpaid were immediately reimbursed.

[8] In May 2016 the Labour Inspector furnished a report to Gujarat Cuisine following its investigations. Much of the report was disputed by Gujarat Cuisine and it advised the Labour Inspector that all shortfalls in its systems had since been rectified.

[9] The Labour Inspector issued an Improvement Notice on 14 June 2016 which resulted in Gujarat Cuisine having new compliant employment agreements drafted and issued to all of its employees by July 2016.

[10] In a statement of problem lodged by the Labour Inspector on 19 July 2016 the Labour Inspector claimed payment of minimum wages for a complainant, recovery of a penalty for the complainant and penalties for breaches of minimum standards. The statement of problem named three related respondents including Gujarat Cuisine.

[11] The parties attended mediation on 1 November 2016 and resolved all matters between them. On 11 November 2016 the parties lodged a joint memorandum seeking the imposition of a penalty of \$10,000 against Gujarat Cuisine for:

- a) Failing to provide four employees with employment agreements;
- b) Failing to provide 17 employees with employment agreements that comply with section 65(1) and (2) of the Act;
- c) Failing to keep way and time records of 37 employees; and
- d) Failing to comply with “pay as you go” holiday pay requirements for 10 employees.

[12] Between attendance at mediation and receiving the joint memorandum on 11 November 2016 the full bench of the Employment Court on 4 November 2016 published its judgment in the matter of *Borsboom v Preet PVT Limited*.¹ In relation to agreements to resolve matters on penalties the Court stated:²

... on the matter of the proceedings before the Authority, that if the parties had reached any consensus about penalties, whether to award these and, if so, the amounts, could only have been determined by the Authority, even if by consent of the parties. Penalties could not have been imposed or fixed solely by the consent of the parties. The Authority would have to be satisfied of the appropriateness of any awards and the amounts of them. It will be an unusual case where the Authority will leave questions of penalty to the parties to attempt to resolve, given the penal and public law nature of such orders.

¹ [2016] NZEmpC 143.

² At [41].

[13] I denied the application for consent orders in respect of the imposition of penalties. During a case management call with the parties a timetable was agreed to allow the lodgement and service of amended statements and submissions.

[14] Gujarat Cuisine accepts that it did not retain copies of employment agreements issued to 3 employees (despite the Labour Inspector claiming it was four employees, I am satisfied Gujarat Cuisine subsequently located one of four missing agreements), its employment agreements were not fully compliant with legal requirements, that there were minor deficiencies in its wage and time records and that it incorrectly paid 8% holiday pay with employee's pay.

[15] It is accepted by the Labour Inspector that Gujarat Cuisine had relied on template agreements and advice it obtained in relation to the employment matters and the employment agreements it had supplied to their staff prior to the concerns being raised by the Labour Inspector.

[16] The Labour Inspector accepts that Gujarat Cuisine took immediate steps to remedy the concerns raised by the Labour Inspector as a matter of urgency and Gujarat Cuisine willingly participated in the Labour Inspector's investigation. It is common ground that the mistakes discovered by the Labour Inspector were unintended mistakes.

Issues

[17] The issues for determination are whether penalties should be imposed on Gujarat Cuisine and if so, the quantum of such penalties.

Should a penalty be imposed

[18] As noted by the Court in *Borsboom* it is a matter for the Authority to determine whether a penalty should be imposed.³ When parties attend mediation it is not uncommon for them to enter into agreements to dispose of all issues between them. Often these will be pragmatic agreements to avoid the cost of further litigation but without any admission as to liability.

³ *Borsboom v Preet PVT Limited*, above n 1 at [41].

[19] The purpose of a penalty is to punish those who breach statutory minimum standards and to deter both the company and others to commit deliberate breaches.⁴ The functions of a Labour Inspector are set out at section 223A of the Act. Those functions include taking all reasonable steps to ensure the relevant Acts are complied with.

[20] I find that in all the circumstances of this case, the Labour Inspector identified minor deficiencies in Gujarat Cuisine's compliance with the Act and the Holidays Act 2003. Once those deficiencies were identified Gujarat Cuisine acted quickly to remedy the deficiencies and in large part this occurred at least seven months prior to the Labour Inspector's report being completed and the issue of the Improvement Notice. In accordance with the requirements of the Improvement Notice all deficiencies were remedied by 11 July 2016.

[21] This is not a case where an employer has failed to pay minimum wages or sought to exploit its employees by withholding passports. There are no allegations of unfair or unsafe working conditions or that Gujarat Cuisine threatened employees with the removal of support for immigration visas.

[22] I am satisfied the functions of the Labour Inspector were met in this case when it raised issues with Gujarat Cuisine about its minor breaches of the relevant Acts and the subsequent, almost immediate, compliance by Gujarat in remedy of the identified deficiencies.

[23] Given the overall circumstances it is not appropriate to impose penalties and I decline to do so.

Costs

[24] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Gujarat Cuisine shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Labour Inspector shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

⁴ *Borsboom v Preet PVT Limited*, above n 1 at [61].

[25] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority