

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 74
3000074

BETWEEN LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS INNOVATION
 AND EMPLOYMENT
 Applicant

AND HUA STAR HOMES LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Annabelle Skadiang for Applicant
 No appearance for Respondent

Submissions Received: 15 February 2017 from Applicant

Investigation Meeting: On the Papers

Determination: 20 March 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Hua Star Homes Limited is ordered to comply with the Improvement Notice dated 9 August 2016 within 28 days of the date of this determination**
- B. Hua Star Homes Limited is ordered to pay a penalty of \$5,000 under section 136 into the Authority within 28 days of the date of this determination.**
- C. Hua Star Homes Limited is ordered to reimburse the Labour Inspector its filing fee of \$71.56 within 28 days of the date of this determination.**

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business Innovation and Employment (the Labour Inspector) seeks a compliance order against Hua Star Homes Limited that it comply with an Improvement Notice dated 9 August 2016 and asks the Authority to impose a penalty and award costs in the Labour Inspector's favour.

[2] As permitted by s 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 Hua Star Homes Limited 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.

Procedural background

[3] The Labour Inspector lodged the statement of problem in the Authority on 9 November 2016. The Authority was unsuccessful in serving the statement of problem on Hua Star Homes Limited and required the Labour Inspector to personally serve the statement of problem.

[4] The Labour Inspector served the statement of problem and associated documents on the registered office of Hua Star Homes Limited at 11.04am on 13 December 2016.

[5] No statement in reply was received from Hua Star Homes Limited. On 25 January 2017 I set out in a Notice of Direction a proposal that the matter be dealt with on the papers and proposed a timetable for the lodgement and service of submissions. Included in the Notice of Direction was a direction to Hua Star Homes Limited that any correspondence to the Authority must include an application for leave to respond to the matter.¹

[6] The Notice of Direction was personally served on Hua Star Homes Limited on 26 January 2017. The parties were advised that any objections to the proposal could be lodged within 7 days. No objections have been received.

¹ See Employment Relations Regulations 2000, Regulation 8(3).

[7] Hua Star Homes Limited has not engaged in the Authority's process and as provided in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act fully in the matter as if the respondent had engaged in the process or was represented.

Background

[8] On 15 December 2015 two Labour Inspectors visited a site at which Hua Star Homes Limited was undertaking construction work. Mr Yi Zhang, Managing Director, was interviewed and presented with a General Inspection letter and a Notice to Produce. The Notice to Produce identified documents to be produced to the Labour Inspector which included copies of the full wage and time records, holiday and leave records and employment agreements for all employees employed by Hua Star Homes Limited.

[9] Mr Yi Zhang produced copies of bank statements and pay slips on 29 January 2016 which were the only documents he had pertaining to the employment of his employees. During a telephone discussion on 29 January Mr Yi Zhang acknowledged that he did not have copies of employment agreements and he was unable to locate the diary which contained the time records.

[10] On 15 March 2016 the Labour Inspector wrote to Mr Yi Zhang and requested him to provide copies of the Inland Revenue Department (IRD) Employer Monthly Schedules for the past 24 months. The IRD Employer Monthly Schedules were provided to the Labour Inspector in April 2016.

[11] In a report dated 26 April 2016 the Labour Inspector found Hua Star Homes Limited was not complying with sections 65 and 130 of the Act and section 81 of the Holidays Act 2003. The Labour Inspector concluded that based on his investigation Hua Star Homes Limited was complying with the Minimum Wage Act 1983 by paying at least the minimum wage to its employees and section 49 of the Holidays Act 2003 relating to the payment of public holidays.

[12] The Labour Inspector issued two Improvement Notices. The first on 9 May 2016 and the second on 9 August 2016. Both Improvement Notices contained the same information and required the following steps to be taken by the Hua Star Homes Limited:

- a) Provide all employees with a written employment agreement which meets the requirements of section 65 of the Act;
- b) Establish and maintain wage and time records for all current employees that meet the requirements of section 130 of the Act; and
- c) Establish and maintain holiday and leave records for all current employees that meet the requirements of section 81 of the Holidays Act 2003.

[13] The Labour Inspector directed Hua Star Homes Limited to provide the following evidence of the steps taken to comply with the steps as set out:

- a) A copy of signed employment agreements for two current employees;
- b) A copy of the wage and time records established and maintained for two current employees for a three week period commencing 9 May 2016;
- c) A copy of the holiday and leave records established and maintained for two current employees for a three week period commencing 9 May 2016.

[14] In the 9 May 2016 Improvement Notice Hua Star Homes Limited was required to provide the evidence by 6 June 2016. The 9 August Improvement Notice amended that date to 6 September 2016.

[15] On 2 June 2016 Mr Yi Zhang emailed the Labour Inspector and advised him that all of his employees had left and he himself was going back to China. When the Labour Inspector served the second Improvement Notice on 9 August 2016 he noted that no one was present at the address.

Issues

[16] The issues for determination are whether a compliance order and penalties should be issued against Hua Star Homes Limited.

Determination

[17] I start my determination commenting on whether this exercise is one of futility. Mr Yi Zhang advised the Labour Inspector in June that he was leaving New Zealand and no longer had any employees. The Labour Inspector confirms that when he served the 9 August 2016 Improvement Notice no one was present at the address for service. If Mr Yi Zhang has in fact left New Zealand it is highly unlikely any orders made by the Authority will be adhered to.

[18] The reasons for pursuing compliance and penalties may have wider implications for Hua Star Homes Limited. For example I understand that matters such as this are of interest to Immigration New Zealand and therefore I have directed that a copy of my determination is to be provided to Immigration New Zealand.

Compliance Order

[19] The Labour Inspector has established to my satisfaction that Hua Star Homes Limited has failed to comply with the Improvement Notice served on it on 9 August 2016. I have today, checked the Companies Register and note that Hua Star Homes Limited continues to be a registered New Zealand company and Mr Yi Zhang is recorded as the sole shareholder and director of the company.

[20] Hua Star Homes Limited is ordered to comply with the Improvement Notice dated 9 August 2016 within 28 days of the date of this determination.

[21] The Authority's order may be the subject of a further application for compliance in the Employment Court which is empowered to impose penalties for continuing non-compliance which include imprisonment, fines and the sequestration of property.

Penalties

[22] Hua Star Homes Limited has taken no steps to comply with the Improvement Notice and in these circumstances it is liable to a penalty under section 223F of the Act. There was one breach in this case, which is a failure to comply with an improvement notice which attracts a maximum penalty of \$20,000.

[23] The full bench of the 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.²

[24] The Court also set out the relevant factors to be considered when imposing a penalty.³ I have had regard to each of those factors when assessing penalties in respect of this matter.

[25] I have briefly summarised my views as to how each of these relevant factors relate to the current matter:

- a) This matter is at the lower end of the spectrum of seriousness of breaches under the Act;
- b) There is a low degree of culpability. It is clear that Mr Yi Zhang received the first Improvement Notice dated 9 May 2016 but it is not so clear that he was in the country and received the second Improvement Notice although I am satisfied the 9 August 2016 Improvement Notice was served correctly on the address for service of the registered company;
- c) This is a one-off breach;
- d) This is a first instance of a breach by Hua Star Homes Limited on record. There is no information to establish that Hua Star Homes Limited 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. 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. Further, the Labour Inspector was satisfied after interviewing Hua Star Homes Limited employees that there had been no failures to pay minimum wages or for public holidays.

² *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143.

³ *Ibid* at [65] – [68].

- f) The Labour Inspector is not aware of any inherent vulnerability of any employees or prospective employees in this case.
- g) A penalty is needed to act as deterrence not only to Hua Star Homes Limited but also to the wider community of employers. It is not appropriate for an employer to breach the fundamental requirements of the law by failing to provide its employees with correctly recorded terms and conditions of employment and providing access to properly maintained wages and time records and holiday and leave records.
- h) Hua Star Homes Limited has not participated in the Authority's investigation so there is no information of remorse.

[26] 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.

[27] Likewise there is no information before the Authority of Hua Star Homes Limited's financial means or ability to pay and as previously noted the company is still registered on the Companies Register.

[28] This does appear to be a situation in which Hua Star Homes Limited has deliberately breached its obligations because it is clear that its director, Mr Yi Zhang, was well aware of the steps he had to take, by when and why. Mr Yi Zhang has elected not to engage with the Labour Inspector subsequent to his last email on 2 June 2016.

[29] The failure to comply with the Improvement Notice strikes at the heart of the Labour Inspector's ability to undertake his duties and has prevented him from fully undertaking his investigation and enforcement role under the Act.

[30] 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 Hua Star Homes Limited and other employers who may not be minded to engage with a Labour Inspectorate investigation.

[31] 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.

[32] I consider a penalty at 25% to be an appropriate penalty in this case. Accordingly, Hua Star Homes Limited is ordered to pay a penalty of \$5,000 under section 136 into the Authority within 28 days of the date of this determination. The penalty will then be paid by the Authority into the Crown Bank Account.

Costs

[33] It is appropriate that the Labour Inspector be reimbursed the filing fee in this matter. Hua Star Homes Limited is ordered to reimburse the Labour Inspector its filing fee of \$71.56 within 28 days of the date of this determination.

Service of Determination

The Labour Inspector is directed to personally serve a copy of this determination on Hua Star Homes Limited and provide an affidavit of service to the Authority.

Vicki Campbell
Member of the Employment Relations Authority