

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 392
3020412

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

AND IT-GUYS NZ LIMITED
 Respondent

Member of Authority: TG Tetitaha

Representatives: M Urlich, Counsel for Applicant
 S Latu, Respondent Director

Investigation Meeting: 31 May 2018 at Auckland

Submissions received: 29 June and 2 October 2018 from Applicant
 30 August and 1 October 2018 from Respondent

Determination: 7 December 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. The application for compliance orders and penalties is dismissed.**

- B. The parties are to meet their own costs.**

Employment Relationship Problem

[1] This is an application for a compliance order and penalties in respect of an Improvement Notice issued by the Labour Inspector to IT Guys Limited pursuant to s223D of the Employment Relations Act 2000 (the Improvement Notice).

[2] There is an issue about the Labour Inspector's use of its discretionary power to issue the Improvement Notice requiring payment of wage arrears to comply. At hearing I raised with the parties whether the relevant statutes allowed Improvement Notices to be used to recover wages and whether the more appropriate recovery mechanism were Demand Notices or wage arrears claims. Both parties were directed to file submissions on this point.

[3] The Labour Inspector submits:

- a) The issuing of this Improvement Notice was the exercise of a discretion and there is no evidence this was an unreasonable exercise of the discretion;
- b) The Authority has no power to query the use of an Improvement Notice over one of the other enforcement tools. The Authority's role is to examine whether the respondent has complied with the Improvement Notice and if not to impose a penalty under s223F;
- c) An examination may include an assessment of the reasonable grounds on which the Labour Inspector believed the employer failed to comply under s223D(1);
- d) Improvement Notices are broader tools than Demand Notices because they can include compliance with arrears as well as non-compliance with record keeping obligations;
- e) There is no unfairness or prejudice to the respondent because of the objection processes. No objection has been lodged here; and

- f) The Authority should give no weight to the respondent's evidence the records are unreliable because they were created for immigration purposes.

[4] The respondent submits s228 Employment Relations Act 2000 (ERA) does not allow the Labour Inspector to issue an Improvement Notice while seeking wage arrears.

Improvement Notices

[5] Improvement Notices are part of a suite of tools available to the Labour Inspector to ensure compliance with minimum standards of employment under various Acts. These tools are set out in Part 11 of the ERA. A plain reading of the relevant sections indicates these tools have different levels of intervention by the Labour Inspector with employers to encourage compliance.

[6] The lowest level of intervention is the Enforceable Undertaking.¹ These are agreements in writing with an employer to rectify breaches of relevant Acts by payment of money owed or any other appropriate action by specified dates. There is no set process to be followed in obtaining an enforceable undertaking.

[7] An Improvement Notice is the next level of intervention. This notice may be issued without any set process being followed other than the Labour Inspector must hold a reasonable belief "that any employer is failing, or has failed to comply" with the relevant Acts before he/she issues the Improvement Notice:

223D Labour Inspector may issue improvement notice

(1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.

¹ Section 223B ERA.

(2) An improvement notice issued under subsection (1) must state—

- (a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and
- (b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and
- (c) the nature and extent of the employer's failure to comply with the provision; and
- (d) the steps that the employer could take to comply with the provision; and
- (e) the date before which the employer must comply with the provision.

(3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

(4) An improvement notice may be issued—

- (a) by giving it to the employer concerned; or
- (b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.

(5) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.

(6) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.

[8] An Improvement Notice was intended to improve a non-compliant employers' practice. This was highlighted by the explanatory note to the Employment Amendment Relations Bill (No 2):²

Improvement notices

The Bill provides that Labour Inspectors may issue statutory improvement notices. This is to create an incentive for non-compliant employers to improve practice. The improvement notice draws on the mechanism currently available to health and safety inspectors under the Health and Safety in Employment Act 1992. Improvement notices have the aim of both avoiding litigation and encouraging a co-operative approach to compliance. It is intended that improvement notices provide a practical addition to the employment relations enforcement framework.

² <http://www.legislation.govt.nz/bill/government/2010/0196/6.0/DLM3172503.html>

[9] The next level of intervention is the issue of Demand Notices by the Labour Inspector. Section 224 of the ERA sets out the process the Labour Inspector must follow before issuing a Demand Notice below:

224 Demand notice

(1) A Labour Inspector (or a person authorised by a Labour Inspector to do so) may serve on an employer a demand notice, in the prescribed form, if—

(a) an employee makes a complaint to the Labour Inspector, or the Labour Inspector believes on reasonable grounds, that an employee has not received wages or holiday pay or other money payable by the employer to the employee under the Minimum Wage Act 1983 or the Holidays Act 2003; and

(b) the Labour Inspector has given the employer not less than 7 days to comment on the complaint or the grounds for the Labour Inspector's belief; and

(c) the Labour Inspector, after considering any comments made by the employer under paragraph (b), is satisfied that the employee is entitled to the wages or holiday pay or other money; and

(d) the Labour Inspector is satisfied that the employer is not willing to pay the wages or holiday pay or other money to the employee in a reasonable manner or within a reasonable time.

(2) A demand notice must be served—

(a) by giving it to the employer concerned; or

(b) if the employer does not accept the demand notice, by leaving it in the employer's presence and drawing the employer's attention to it.

(3) A demand notice may not be served in the period commencing on 17 December and ending with the close of 8 January in the following year.

(4) A demand notice has no effect to the extent, if any, that it claims money (being wages or holiday pay or other money) that was payable more than 6 years earlier than the date on which the demand notice is served on the employer concerned.

[10] The final level of intervention (excluding infringements) are recovery of wage and holiday pay by the Labour Inspector on behalf of employees under s228:

228 Actions by Labour Inspector

(1) A Labour Inspector may commence an action ... on behalf of an employee to recover any wages or holiday pay or other money payable by an employer to that employee under the Minimum Wage Act 1983 or the Holidays Act 2003.

(2) If a Labour Inspector commences an action under subsection (1), the Labour Inspector must not issue an improvement notice under section 223D or serve a demand notice under section 224 in respect of the same wages or holiday pay or other money.

(3) Sections 131 and 132 apply, with the necessary modifications, to actions commenced under subsection (1).

[11] Sections 131 and 132 of the ERA set out a process for determining wage arrears, including ordering payment by instalments and the consequences of the failure to keep or produce wage records.

[12] The Authority has the power to order compliance “where any person has not observed or complied with any provision of” an improvement notice, enforceable undertaking and Demand Notice.³

What did the Improvement Notice here require?

[13] The Improvement Notice in this matter required payment of wage arrears to comply. This was set out in the part of the notice that described the steps to comply below:

6.1 The steps that the employer could take to comply with the provisions of the minimum employment standards are:

6.1.1 Pay \$10,737.46 [gross] to former employee, [A], for outstanding wages calculated at the relevant minimum wage pursuant to s 6 of the MWA 1983.

6.1.2 Pay \$2,116.91 [gross] to former employee, [A], for outstanding annual holiday entitlements, pursuant to ss 24, 25 and 27 of the HA 2003.

Pay \$592.80 [gross] to former employee, [B], for outstanding annual holiday entitlements, pursuant to ss 23 and 27 of the HA 2003.

Pay \$760.11 [gross] to former employee, [C], for outstanding annual holiday entitlements, pursuant to ss 23 and 27 of the HA 2003.

³ Section 137(1)(a) (iia) to (iic) ERA.

6.1.3 Review the wage and time records and holiday leave records for former employee, [D], to identify periods in which public holidays fell.

Where [D] has not been paid his public holiday entitlements, the employer must pay these to him.

6.1.4 Review the wage and time records and holiday and leave records for former employee, [D], to identify periods in which his sick leave fell.

Where [D] has not been paid his sick leave entitlements, the employer must pay these to him.

6.1.5 Calculate and pay the correct terminal pay for former employee, [D], ensuring that:

- Correct holiday pay has been calculated (refers to ss 23, 24 and 25 of the HA for guidance on which calculation to use)
- Public holidays falling after employment that the employee may be entitled to have been added, if any (refer to s 40 of the HA 2003 for guidance)
- Correct alternative holiday payments have been calculated, if any.
- The correct gross earnings figure has been applied.

For the purposes of this review and calculation of any potential arrears, the employer is required to review the complete records for [D] from 22 February 2016 onwards.

6.2 The information the employer is required to provide to the Inspector is evidence that the steps taken (as listed in section 6.1 of this notice (R):

6.2.1 A copy of the bank statement or receipt confirming the payment outlined under 6.1.1 has been paid into [A's] bank account.

6.2.2 A copy of a bank statement or receipt confirming the payments outlined under 6.1.2 have been paid into the named employee's bank accounts.

6.2.3 A list of each public holiday that has fallen during the employment of [D], his pay entitlement of the day, and the date that the public holiday entitlement was paid to him.

6.2.4 A list of each day of sick leave that has fallen during the employment of [D], his pay entitlement for the day, and the date that the sick leave entitlement was paid to him.

6.2.5 A copy of the calculation of [D]’s termination pay and a copy of a bank statement or receipt confirming that the termination pay has been paid into [D]’s bank account.

Is the Authority required to issue a compliance notice upon application by the Labour Inspector?

[14] While the decision to issue an Improvement Notice may be an exercise of discretion, there are limitations on the ability to seek remedies where it is exercised illegally or ultra vires. Ultra vires or illegality arises where decision makers exceed the authority vested in them by statute. Abuses of discretionary power can occur even where the decision maker was acting in good faith. Decision makers such as the Labour Inspector should not operate outside of the jurisdictional boundaries imposed by their governing statute.

[15] When awarding remedies the Authority’s statutory role requires compliance with the principles of natural justice, promotion of good faith behaviour and furthering of the objects of the ERA. The Authority is expressly empowered to act “as it thinks fit in equity and good conscience” but “must not do anything that is inconsistent with this Act”.⁴ The Authority’s role guides the exercise of its powers to grant remedies such as compliance orders.

[16] Compliance orders are discretionary remedies. Consequently the Authority is not required to make a compliance order upon application by the Labour Inspector. Section 138 below confirms the discretionary nature of compliance orders by the phrase “may be exercised by the Authority”:

138 Further provisions relating to compliance order by Authority

- (1) The power given to the Authority by section 137(2) may be exercised by the Authority—
 - ...
 - (b) on the application of—
 - ...
 - (iii) in the case of sections 223C, 223D(6), and 225(4)(c), a Labour Inspector.

⁴ Section 157 of the Act.

(2) Before exercising its power under section 137(2) in relation to a person who is not a party to the matter, the Authority must give that person an opportunity to appear or be represented before the Authority.

(3) Any time specified by the Authority under section 137 may from time to time be extended by the Authority on the application of the person who is required to obey the order.

(4) A compliance order of the kind described in section 137(2)—

(a) may be made subject to such terms and conditions as the Authority thinks fit (including conditions as to the actions of the applicant); and

(b) may be expressed to continue in force until a specified time or the happening of a specified event.

(4A) If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

(5) Where the Authority makes a compliance order of the kind described in section 137(2), it may then adjourn the matter, without imposing any penalty or making a final determination, to enable the compliance order to be complied with while the matter is adjourned.

(6) Where any person fails to comply with a compliance order made under section 137, the person affected by the failure may apply to the Court for the exercise of its powers under section 140(6).

Should the Authority grant the compliance order and penalties sought?

[17] At the time this Improvement Notice was issued, I understand the respondent no longer employed anyone. Therefore the Improvement Notice and the consequential compliance orders seek to recover wage arrears only. It is not aimed at improving this employers practice.

[18] While s223D of the ERA does not expressly allow or disallow recovery of wages, there is relevant statutory context that suggests Improvement Notices should not be used for this purpose.

[19] The Improvement Notice refers to s6 Minimum Wage Act 1983 (MWA) as the basis to recover specified wage arrears for employee A. This section only sets out minimum wage entitlements. It does not expressly allow the Labour Inspector to seek recovery of wages. Section 11 of the MWA empowers the Labour Inspector to seek recovery of wage arrears below:

11 **Recovery of wages**

- (1) This section applies where, in relation to wages or other money payable by an employer to a worker whose wages are prescribed under this Act,—
 - (a) there has been a default in payment; or
 - (b) payment has been made at a lower rate than that prescribed under this Act or otherwise legally payable to the worker.
- (2) The whole or any part of wages or other money referred to in subsection (1)(a) or (b) may be recovered by the worker or by a Labour Inspector on behalf of the worker by action commenced in the Employment Relations Authority in the same manner as an action under section 131 of the Employment Relations Act 2000, and subsection (2) of that section applies accordingly.
- (3) Subsection (2) applies despite—
 - (a) acceptance by the worker of payment at the lower rate; or
 - (b) any express or implied agreement to the contrary.
- (4) This section does not affect any other remedies for the recovery of wages or other money payable by an employer to any worker whose wages are prescribed under this Act.

[20] Section 11(2) specifies that the Labour Inspector is to recover wage arrears under the MWA under s131 of the ERA. Although the section does not affect “any other remedies for the recovery of wages” it does not refer to s223D of the ERA and the use of improvement notices for wage recovery.

[21] This Improvement Notice also referred to ss23, 24, 25, 27 and 40 Holiday Act 2003 (HA) as the basis for recovery of holiday pay. All of these sections relate to calculation and timing of payment of holiday pay. They set out minimum entitlements for employees. They do not allow for recovery of wage arrears by the Labour Inspector. Section 77 HA specifically empowers the Labour Inspector to seek recovery of holiday pay under that Act:

77 Proceedings by Labour Inspector to recover arrears of pay

- (1) A Labour Inspector may take proceedings on behalf of an employee to recover unpaid holiday pay or leave pay that the employee is entitled to under this Act.
- (2) If a Labour Inspector takes proceedings under subsection (1), the Labour Inspector must not issue a demand notice under section 224 of the Employment Relations Act 2000 in respect of the same pay.
- (3) Section 131 of the Employment Relations Act 2000 applies, with all necessary modifications, to proceedings taken under subsection (1).
- (4) An action initiated or taken under this Act by a Labour Inspector may be completed by another Labour Inspector.

[22] Section 77 refers to two methods for the Labour Inspector to recover arrears of holiday pay under the HA – s131 of the ERA. It does not allow for recovery by Improvement Notices. Section 223D cannot be used to override the specific method for recovery of holiday pay set out in s77 HA.

[23] The statutory context infers Improvement Notices should not be used to recover wages under the MWA or holiday pay under the HA. If Parliament had intended Improvement Notices to be used in this way it would have expressly provided for this.

[24] Section 223D is substantially different to the sections relating to Demand Notices and recovery of wages actions. This suggests it is not aimed at the specific recovery of wage arrears or holiday pay. It does not prevent employers from making payments of wage or holiday pay arrears as part of compliance. However Labour Inspectors must utilise different tools when seeking payment of specific amounts of wages and holiday pay.

[25] One example of the differences is the lack of any formal process under s223D before the issue of an Improvement Notice other than the Labour Inspectors reasonable belief an employer has failed to comply with the relevant Acts.

[26] By contrast s224 of the ERA requires the Labour Inspector follow a specified statutory process before exercising its discretion to issue a Demand Notice. The Demand Notice process requires an employee provide a complaint to the Labour Inspector. Based upon that complaint the Labour Inspector must form a reasonable belief the employee is owed money owed under the MWA or HA. The Labour Inspector must provide an employer with the employee's complaint and the grounds for the Labour Inspectors reasonable belief wages are owed. The employer then has 7 days to reply. The Labour Inspector must then consider the comments and be satisfied the employee is entitled to the money and the employer is not willing to pay the wages or holiday pay before the Demand Notice shall issue.

[27] Wage recovery actions require the filing of a statement of problem and evidence to meet the criteria set out in s131. A formal hearing is required to test the evidence before any order for recovery is made.

[28] An Improvement Notice does not require the Labour Inspector to state the nature and extent of the loss.⁵ Therefore they are not required to be satisfied the money is even owed or the losses incurred. By contrast a Demand Notice requires the Labour Inspector be satisfied the employee is entitled to the wages or holiday pay owed.⁶ Wage arrears applications also require the Authority is satisfied the wages or holiday pay is owed.

[29] The level of formality and evidence required before issuing a Demand Notice or ordering wage arrears is a clear indication that Improvement Notices were never intended to be utilised in this way.

Was there sufficient evidence to support the making of a compliance order compelling payment of wage arrears?

[30] The Labour Inspector gave hearsay evidence about the wages owed for four employees. At hearing he produced one of the four employees, employee A. Employee A did not confirm the Labour Inspector's evidence and gave generic evidence about his losses.

[31] The employment agreement for Employee A provides for a salary of \$32,000 per annum with 40 hours work per week. This equated to \$15.38 per hour. The minimum wage up and until 1 April 2017 was \$15.25 or lower. He was employed from 29 June 2015 to 8 January 2017. Given his employment ended before the increase in minimum wage, he was contractually entitled to receive an hourly rate for 40 hours work above the minimum wage rate. The issue here is whether he did in fact receive this money and if not, why not.

⁵ Section 223D(3) of the Act.

⁶ Section 224 of the Act.

[32] Employee A alleged he was not paid his salary in full each week and should have been. The Labour Inspector alleged this employee was owed a specified amount but does not explain the basis for his belief these amounts are owed. Employee A does not confirm the amount he is allegedly owed or provide proof of his hours of work.

[33] The respondent director, Simon Latu, alleged Employee A was at times not showing up for work. He also referred to a different agreement about hours of work than the written agreement. He inferred this had been completed for immigration purposes. He stated the wage records were inaccurate because he added hours even when employee A did not work to meet his immigration requirements. He also disputed the amounts owed to the other employees for various reasons including failures to work notice periods.

[34] This dispute could not be resolved by an objection to an Improvement Notice because s223E(2)(c) restricts the Authority's function to determine the "nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision."

[35] The dispute in this matter requires a different type of determination focused upon resolving factual disputes between the respondent and its former employees about the wage record, terms and conditions of employment, hours of work and wages or salary paid. This type of dispute is commonly resolved by way of a wage arrears claim under s131 and 132 of the ERA. It would not be resolved by having to focus upon the respondent's failures to comply with s6 MWA or ss23, 24, 25, 27 and 40 HA.

[36] This application also seeks compliance orders compelling payment of wages to three other employees. None of the remaining three employees were produced to give evidence. The Labour Inspector relied upon its own hearsay evidence. This evidence did not explain how he has calculated the holiday pay owed.

[37] The evidence produced would be insufficient to satisfy the Authority that wages were owed to all four sampled employees. To seek to enforce payment in lieu of any disputed facts hearing would also be unjust.

Determination

[38] In my view the Improvement Notice issued was ultra vires, even if issued in good faith by the Labour Inspector. I decline to exercise my discretion to make a compliance order seeking to enforce it. To do so would produce a result that entrenches illegality. This does not accord with my role to act in equity and good conscience.

[39] There was also insufficient evidence wages were owed to all four employees.

[40] There are other remedies available to the Labour Inspector. It may still withdraw the Improvement Notice and issue either a Demand Notice or wage arrears action on behalf of these employees. To decline this remedy does not leave the Labour Inspector without any other recourse.

[41] The application for compliance orders and penalties is dismissed.

[42] Given the respondent was represented by its director, the parties are to meet their own costs.

TG Tetitaha
Member of the Employment Relations Authority