

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 320
3014620

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

A N D JES CONSTRUCTION LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Sarah Blick, Counsel for Applicant
 No appearance by or for Respondent

Investigation Meeting: 12 October 2017 at Auckland

Submissions Received: 5 October 2017 and orally on 12 October 2017 from
 Applicant

Date of Determination: 12 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Jes Construction Limited (“Jes”) breached s.229(2) of the Employment Relations Act 2000 (the Act) by failing to comply with the requirement of the Labour Inspector under s.229(1)(c) and (d) of the Act that wages and time records, holiday and leave records and employment agreements be provided.**
- B. Pursuant to s.137 of the Act, within 21 days of the date of this determination, Jes is to comply with the Labour Inspector’s Notice to Produce, dated 12 May 2017 by:**
- (i) Providing copies of full wages and time records, holiday and leave records and employment agreements for all its employees both current and past, going back six years from 13 May 2011 to 12 May 2017;**

- C. For its failure to comply with the requirement to provide wages and time records, holiday and leave records and employment agreements, within 21 days of the date of this determination, Jes is to pay a penalty of \$6,000 to the Authority, for transfer to the Crown account, pursuant to ss.229(3) and 133 of the Act.**
- D. Costs. Jes is to make a contribution of \$500.00 to the Labour Inspector's costs, along with paying \$71.56 for the filing fee. These amounts are to be paid to the Labour Inspector within 21 days of the date of this determination.**

Employment relationship problem

[1] The Labour Inspector of the Ministry of Business, Innovation and Employment, Mr Fanjun (Jackie) Sun, seeks orders that Jes:

- (a) Complies with a notice from the Labour Inspector in writing on 12 May 2017 (Notice to Produce) pursuant to s.229(1)(c) and (d) of the Act, that Jes provide copies of wages and time records, holiday and leave records and employment agreements for past and current employees;
- (b) Pays a penalty for failure to comply with the Notice to Produce copies of wages and time records, holiday and leave records and employment agreements for past and current employees; and
- (c) Makes a contribution towards the Labour Inspector's costs.

No Statement in Reply filed by Jes

[2] Jes failed to file a Statement in Reply. The Statement of Problem was personally served on Mr Jialiang Hong, sole director and shareholder of Jes on 17 August 2017 by the Labour Inspector. No application was made by Jes to the Authority seeking leave to respond to the Statement of Problem.

[3] On 4 September 2017, an email was sent by the Authority to Mr Jialiang Hong, attaching proof of service of the Statement of Problem and supporting documents on him on 17 August 2017 at 15:02pm and reminding him of the obligation to file a Statement in Reply within 14 days of service. No response was received to the email.

Authority's investigation process

[4] A case management conference with the parties was scheduled by the Authority, for 14 September 2017 at 12 noon. The Authority sent an email to Mr Hong to notify him of the conference call, on 11 September 2017 at 1:10pm. There was no response by Mr Hong and no participation by him or any other representative of Jes in the telephone conference.

[5] On 19 September 2017, the Labour Inspectorate attempted to deliver the Notice of Investigation Meeting of today's investigation meeting on Mr Hong. Mr Hong was not able to be personally served as he had left for China on 12 September 2017. According to the evidence of the Labour Inspector, Mr Hong returned to New Zealand on 21 September 2017 and departed again on 23 September 2017.

[6] On 28 September 2017, the Labour Inspectorate again attempted to deliver by registered courier the Notice of Investigation Meeting of today's investigation meeting at the registered office of Jes at Unit 320/60 Cook Street, Auckland. The documents were returned to the Labour Inspector. There was also an attempt by the Labour Inspector to serve the documents by registered courier on Mr Hong at 14 Marconi Place, New Windsor, being the address at which the Statement of Problem had been personally served on him. The documents were not able to be served.

[7] On 28 September 2017, the Labour Inspector sent the Notice of Investigation Meeting by email to Mr Hong's email address and to which communications had previously been sent, the email was not rejected.

[8] The Statement of Problem was personally served on Mr Hong by the Labour Inspector. The Authority sent emails to Mr Hong at his email address reminding him of his obligation to file a Statement in Reply and that if he failed to do so, he would need to seek the Authority's leave to do so. No leave was sought. Attempts were made to serve the Notice of Investigation Meeting at the registered office of Jes and on Mr Hong personally. The Notice of Investigation Meeting was emailed to Mr Hong and the email was not rejected.

[9] I am satisfied Mr Hong was aware of the proceedings, he accepted personal service of the Statement of Problem and emails to him from the Authority were not

rejected. Jes was aware of the proceedings filed in the Authority by the Labour Inspector but failed to participate or engage in the Authority's process.

[10] In all the circumstances, the Authority determined its investigation meeting was to proceed today as scheduled. There was no appearance on or behalf of Jes at the investigation meeting today. At the date of the investigation meeting and the date of this determination, Jes remains a registered company. Its registered office at an address at Unit 320/60 Cook Street, CBD, Auckland 1010 remained unchanged from when the Labour Inspector had lodged his application. As Jes remained an existing legal entity, the Authority could proceed with its investigation and determine Jes's liability in respect of its obligations under the Act to provide employment records to the Labour Inspector when requested, and penalties.

Investigation meeting

[11] As permitted by s.174E of the Act, this determination has not set out all the evidence received. The determination states findings and relevant facts and legal issues, and makes conclusions in order to efficiently dispose of the matters.

[12] The investigation of the matters in respect of Jes took approximately one hour in the Authority.

[13] For the Authority's investigation, the Labour Inspector filed a witness statement and affirmed his evidence was true and correct. The Labour Inspector was given the opportunity to provide any additional comments and information and did so.

[14] A Labour Inspector, Ms Weiran (Summer) Liu (Ms Liu), filed a sworn affidavit in support of the Labour Inspector's application to the Authority.

Relevant facts

[15] Mr Jialiang Hong is the sole director and shareholder of Jes. Jes was incorporated on 11 February 2013. It trades as a building and construction company.

Labour Inspector's investigation

[16] On 23 February 2017 Ms Liu visited construction sites on Mettam Drive, Swanson, Auckland. During the site visit she spoke with Mr Hong. Ms Liu observed

three people working on the site and made some enquiries of Mr Hong about those working. Mr Hong said he had one full time and one part time employee.

[17] Ms Liu asked Mr Hong whether Jes had kept any employment agreements, wages and time records, holiday and leave records, and was informed by him that he did not have employment agreements or records for the employees. Ms Liu asked for and was provided with contact phone numbers and an email by Mr Hong.

[18] Ms Liu then passed the information to the Labour Inspector, Mr Sun.

[19] Upon receipt of the information supplied by his colleague, Ms Liu, the Labour Inspector initiated an investigation. On 19 April 2017, the Labour Inspector issued a notice to Jes requiring employment records to be supplied by 5pm, Friday 28 April 2017. The information was not provided.

[20] On 5 May 2017 the Labour Inspector emailed Mr Hong informing him of the deadlines by which he was to provide the employment records.

[21] On 12 May 2017, the Labour Inspector telephoned Mr Hong and was told by him that he had asked his manager to respond and he had not done so. The Labour Inspector informed Mr Hong he was to provide the requested documents by 5pm on 15 May 2017.

[22] Immediately following the telephone conversation with Mr Hong on 12 May 2017 the Labour Inspector sent him an email confirming their telephone conversation and that he had until 5pm on Monday, 15 May 2017 to provide the required employment records for Jes.

[23] The email included the following:

I have also warned you the consequence for failing to comply.... I have underlined to you that if you fail to communicate with me ...and do not provide ...documents to me within the deadline I will consider to apply through the Employment Relations Authority to impose a penalty on you for failing to comply...

I am confirming with you that you have until 5pm Monday 15 May 2017 to provide the requested documents to me. Should you have failed again to fulfil my request then I will lodge an application to the Employment Relations Authority seeking a penalty on you for failing to comply with a Labour Inspector's request. I have attached in this email an updated copy of the notice for you to give to your manager. Thank you. Kind regards, Jackie Sun, Labour Inspector.

[24] There was no further communication from Mr Hong or anyone else from Jes and the required employment records were not produced to the Labour Inspector.

[25] The Labour Inspector seeks a compliance order for the production of the employment records sought from Jes together with penalties for the failures to do so.

Compliance Order

[26] I am satisfied that this is an appropriate matter to exercise the Authority's jurisdiction to order Jes to comply with the Notice to Produce dated 12 May 2017, within 21 days of the date of this determination. I am satisfied that if a compliance order is not issued it is highly likely that Jes will not produce any of the documents the Labour Inspector needs to conduct his investigation.

[27] I am also satisfied that penalties are appropriate.

The law

[28] Ms Blick, counsel for the Labour Inspector, helpfully provided the Authority with a useful synopsis of submissions in respect of the law concerning penalties. The leading case on penalties in the employment jurisdiction is *Borsboom (Labour Inspector) v Preet PVT Limited & Ors*¹.

[29] In that case, a full bench of the Employment Court considered the approach which is to be taken by the Authority and the Court when considering penalties for breaches of minimum employment entitlements. The Court in *Borsboom* set out the objectives of penalties in employment law generally at paras [61] to [63] of its decision. To summarise, they are to:

- (a) Punish those who breach statutory obligations;
- (b) Deter deliberate breaches;
- (c) Compensate the victim of the breach;
- (d) Eliminate unfair competition in business.

[30] The Court applied a four step process to the assessment of penalties by the Authority and the Court in order to provide "a uniform, reasonably predictable result".

¹ [2016] EmpC 143

The four step process is to ensure that “fixing the amount of a penalty, or penalties, is consistent and transparent”.

Step 1 – Nature and number of breaches

[31] The first step is to identify the nature and number of breaches. The Labour Inspector claims that Jes has failed to provide employment records in the timeframe requested of it by the Labour Inspector in breach of s.229(1)(d) of the Act. The maximum penalty available for a breach of s.229(1)(d) is \$20,000 under s.135 of the Act.

Step 2 – Assessment of the severity of the breach in each case to establish a provisional penalty starting point and consider both aggravating and mitigating factors.

Aggravating factors

[32] Jes failed to provide to the Labour Inspector employment records requested by him on a number of occasions in breach of s.229(1)(d) of the Act. This failure is serious as it prevented the Labour Inspector from assessing Jes’s compliance with its obligations under the Act.

[33] Jes completely failed to engage with the Labour Inspector. As submitted by counsel for the Labour Inspector, the impact of the breach by Jes of its obligations under the Act cannot be assessed. The Labour Inspector’s involvement did not arise out of a complaint by an employee. His involvement arose as a result of Ms Liu’s visit to a construction site at which Jes was engaged. There were individuals working and upon enquiry, Ms Liu was informed that there were no employment records for employees.

[34] The failure by Jes to produce the information requested by the Labour Inspector has prevented him investigating and assessing whether or not the employees employed by it have been paid the minimum wage and entitlements under the Minimum Wage Act 1983 and entitlements under the Holidays Act 2003. A penalty is needed to act as a deterrent not only to Jes but also the wider community of employers.

[35] It is inappropriate for an employer to be able to prevent a Labour Inspectorate investigation with impunity. Therefore the penalty needs to be set at a level that punishes Jes for its failure to comply with its statutory obligations.

Mitigating factors

[36] The Labour Inspector acknowledges that this appears to be the first record of a breach of the Act by Jes. There is no record of Jes being involved in an investigation by the Labour Inspectorate before and no record of any penalties having previously been imposed on it by the Authority. In light of these factors, the Labour Inspector considers a provisional penalty of \$7,000 to be appropriate.

Step 3 – Means and ability to pay the provisional penalty

[37] There is no evidence as to Jes's financial circumstances or means and ability to pay. Therefore, it is not appropriate in my view to reduce penalties.

Step 4 – Proportionality of outcome

[38] The Labour Inspector has referred the Authority to three of its decisions in which penalties of between \$3,000 and \$4,200 were imposed in respect of similar breaches. The Labour Inspector seeks a penalty of \$7,000 to be imposed on Jes.

[39] There is a general desirability to have consistency in the Authority decisions on penalties. However, in the decisions referred to by Ms Blick, the employer did engage with the Labour Inspector. In this case, the only engagement by Jes was when the Labour Inspector rang and spoke with Mr Hong. Despite the phone call and subsequent email attaching the Notice to Produce, there was no further engagement.

[40] I consider a penalty of \$6,000 to be appropriate and consistent with the above decisions.

[41] A penalty of \$6,000 is to be paid by Jes to the Authority, for transfer to the Crown account within 21 days of the date of this determination.

[42] A table showing the amounts calculated in respect of the four steps, bringing the Authority to a total of penalties imposed, is set out as an Appendix to this Determination.

Costs

[43] The Authority has general power to award costs as set out in clause 15(1) of Schedule 2 to the Act as follows:

The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

[44] The Labour Inspector seeks costs. The Authority's investigation meeting took less than one hour. This was largely due to the well-prepared and presented case on behalf of the Labour Inspector which included relevant evidence and helpful submissions.

[45] Applying the notional daily tariff in respect of costs in the Authority, based on an eight hour day, costs would be approximately total \$500.00. The filing fee of \$71.56 is also sought. I order Jes to pay the Labour Inspector within 21 days of the date of this determination, costs of \$500.00 together with the filing fee of \$71.56.

Anna Fitzgibbon
Member of the Employment Relations Authority

APPENDIX

JES CONSTRUCTION LIMITED		
Step 1: Nature and number of breaches. Potential maximum penalties		
Failing to provide documents requested. ERA ² (1 breach (s229))	\$20,000	\$ 20,000
	Subtotal	\$ 20,000
Step 2: Aggravating and ameliorating factors as a proportion of maxima in Step 1		
Failing to provide documents requested.	35%	\$ 7,000
	Subtotal	\$ 7,000
Step 3: Respondent's financial circumstances		
		\$0
No evidence provided	Subtotal	\$7,000
Step 4: Proportionality		
Reduce modestly	Total	\$ 6,000

² Employment Relations Act 2000