

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 292
5628115

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

A N D LOTUS BODY CLINIC
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Marija Urlich, Counsel for Applicant
 No appearance by Respondent

Investigation Meeting: 25 and 26 August 2016 at Auckland

Date of Oral
Determination: 26 August 2016

Date of Written Record: 26 August 2016

ORAL DETERMINATION OF THE AUTHORITY

- A. **Lotus Body Clinic Limited is ordered to comply with the Improvement Notice issued to it by Thomas Liang, Labour Inspector, on 10 February 2016.**

- B. **Within 21 days of the date of this determination, Lotus Body Clinic Limited is to pay a penalty of \$7000 to the Crown for failure to comply with the Improvement Notice.**

- C. **Lotus Body Clinic Limited is to make a contribution of \$800.00 to the Labour Inspector's costs, along with paying \$71.56 for the filing fee.**

Employment relationship problem

[1] The Labour Inspector, Thomas Liang, seeks orders that the respondent, Lotus Body Clinic Limited (Lotus):

- (a) Comply with an Improvement Notice issued in accordance with s 223D of the Employment Relations Act 2000 (the Act) on 10 February 2016;
- (b) Pay a penalty for failing to comply with the Improvement Notice; and
- (c) Make a contribution towards the Labour Inspector's costs.

[2] Lotus' position regarding the claim is largely unknown due to the lack of a statement in reply and its almost complete failure to participate in the Authority process.

[3] Mr Liang attended the investigation meeting and gave evidence.

Non-appearance of the respondent

[4] Lotus was neither present nor represented at the investigation meeting. I therefore considered whether or not I should proceed in its absence.

[5] The Authority has been sending its correspondence to Lotus' registered office.

[6] The statement of problem is recorded as having been received at the company's registered office.

[7] As outlined below¹, during the Labour Inspector's dealings with the company, Lotus was represented by Mr Ashley Palmer. Mr Palmer advised Mr Liang that he was both the representative of Lotus and was a director.

[8] Mr Palmer gave Mr Liang his business card which refers to Mr Palmer as the CEO of Meditech NZ Ltd. According to Companies Office records Meditech NZ Ltd is the sole shareholder of Lotus. The card also lists in the contact details Lotus' website and a Lotus email address.

¹ Under "Account of events"

[9] The Authority thus also sent correspondence to both the Lotus email address and another email address which Mr Palmer used in his later dealings with Mr Liang. Emails to the latter email address resulted in the Authority receiving read receipts, indicating that the emails had been opened.

[10] No statement in reply has been received from Lotus.

[11] A case management conference was held on 12 July 2016. Notice of the case management conference was sent to Lotus' registered office, and the two email addresses. There was no attendance by Mr Palmer or anyone else on behalf of Lotus at the case management conference.

[12] The notice of investigation meeting was delivered by courier to the company's registered office on 14 July 2016. The delivery was signed for by Yaksha Lal, one of the Lotus employees whose information Mr Liang received. In evidence Mr Liang said that he could see no good reason or motivation why Ms Lal would attempt tamper with the notice of investigation meeting or defeat it getting to Lotus.

[13] In addition, the notice of investigation meeting was emailed to Mr Palmer at the two email addresses. A read receipt was received by the Authority.

[14] The notice of investigation meeting includes advice that if the respondent does not attend the investigation meeting the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

[15] In the circumstances, and given the lack of an explanation for the absence, I considered it appropriate to continue.

[16] After the investigation meeting on 25 August was closed for the day, the Authority received an email from Mr Palmer in response to an earlier email from the Authority confirming that the investigation meeting was to proceed. Mr Palmer's email read "Please note, These matters are handled by Yaksha Lal who is in Fiji for a month".

[17] I remain satisfied that Lotus had proper notice of the investigation meeting and I am proceeding to issue my determination.

Account of events

[18] Lotus provides beauty therapy services in Auckland and employed Yaksha Lal and Priya Samy as beauty therapists.

[19] On 10 June 2015, the Labour Inspectorate received a complaint concerning Lotus' failure to pay the minimum wage. Then on 18 September 2015, Mr Liang commenced an investigation into the complaint.

[20] On 5 October 2015 Mr Liang and two other labour inspectors, visited Lotus' business premises/registered office at 295 Ti Rakau Drive, Auckland. Mr Liang requested relevant employment documents and interviewed Mr Palmer, who was at the premises when Mr Liang arrived, and identified himself as a representative of Lotus.

[21] On 14 October 2015 Mr Liang received Ms Lal and Ms Samy's employment agreements and wage, time and holiday records. Mr Palmer had signed both agreements on behalf of Lotus.

[22] On 19 October 2015 Mr Palmer confirmed to Mr Liang that the employer put the employees' daily work hours on a piece of paper but that the employer disposed of these daily records.

[23] On 28 October 2015 Mr Liang spoke to Mr Palmer who stated that he is the director of Lotus but that the information at the Companies Office had not been updated. Mr Palmer is not recorded as being a Lotus director with the Companies Office.

[24] At some point Mr Palmer also advised Mr Liang that he had a law degree and had some sort of legal business.

[25] On checking the employment agreement and employment records, Mr Liang concluded that there were inadequacies in the employment agreements and the wage and holiday records, and that the correct method had not been used to calculate annual holiday and sick leave.

[26] On 13 January 2016 Mr Liang emailed an audit report and an improvement notice fact sheet to Mr Palmer, to seek any feedback or questions on the findings of the audit report. No response or feedback was received.

[27] On 10 February 2016 Mr Liang issued an Improvement Notice pursuant to s 223D of the Act requiring Lotus to rectify the problems found in the investigation.

[28] Mr Liang delivered the Improvement Notice on 10 February 2016 to Lotus' registered office and handed it to Mr Palmer. Mr Palmer signed as the receiver of the Improvement Notice. Mr Liang and Mr Palmer had a discussion so that Mr Liang could ensure that Mr Palmer understood the Improvement Notice.

[29] After that Mr Liang made three phone calls to Mr Palmer to remind him of Lotus' obligation to send in the evidence of compliance by the deadline, which was 11 March 2016. In the call on 10 March 2016, when reminded of the deadline, Mr Palmer said that he would have a look at it. During the call on 15 March 2016 Mr Palmer said that he would send in the documents. During the call on 17 March 2016 Mr Palmer hung up before Mr Liang finished speaking. When Mr Liang attempted to ring Mr Palmer again, no one answered the call.

[30] Mr Liang followed up with an email to Mr Palmer on 21 March 2016 advising that the deadline had passed and he had not received any information from Lotus. The email also stated that if the required information was not received by 24 March 2016 they would consider taking further enforcement action.

[31] On 22 March 2016 Mr Palmer emailed Mr Liang sheets said to be prepared by Yaksha (Lal) showing her holiday pay, sick leave, bereavement etc. Attached were a worksheet for Ms Lal and a worksheet for Ms Samy ("the new worksheets").

[32] Mr Liang found that the new worksheets merely extended the record period for the wage and holiday records already provided on 14 October 2015, without containing any of the amendments required by the Improvement Notice. Mr Liang had not received any amended employment agreements.

[33] On 29 March 2016 Mr Liang emailed Mr Palmer advising that the information provided did not contain any of the amendments required by the Improvement Notice. The email advised of the intention to apply to the Authority for a compliance order.

[34] Lotus filed no objection to the Improvement Notice in the Authority, under s 223E of the Act.

[35] Mr Liang has received no phone call, email or letter from Lotus since his last phone call to Mr Palmer on 17 March 2016, nor the required amendments or records to satisfy the requirements of the Improvement Notice. Mr Liang has received no information suggesting that Lotus is no longer trading.

Compliance Order

[36] Under s 137(1)(a)(iiib) of the Act the Authority may issue a compliance order with an improvement notice, where it is satisfied that any provisions of the notice have not been observed or complied with.

[37] I am satisfied that the Improvement Notice contained the matters which must be stated in notices under s 223 D of the Act. Lotus received the Notice on 10 February 2016.

[38] I must also be satisfied that the steps which the Improvement Notice identifies that the employer must take to comply with the provisions of the minimum employment standards, are valid. Also that the employer has not complied with the steps outlined.

[39] I am satisfied that the Improvement Notice clearly sets out what is required of Lotus in order to comply with its obligations under the Employment Relations Act and the Holidays Act 2003.

[40] I now consider whether the employer has complied with the Improvement Notice. I accept the Labour Inspector's evidence that the only response from Lotus to the Improvement Notice was the provision of the new worksheets, which simply updated to add new wage payments which had been made since the wages records were first provided.

[41] I am satisfied that the new worksheets still do not comply with the Employment Relations Act and the Holidays Act, as indicated in the Improvement Notice.

[42] There has also been no provision of amended employment agreements to satisfy the requirements of the Improvement Notice.

[43] I therefore order that Lotus comply with the requirements of the Improvement Notice dated 10 February 2016 issued by the Labour Inspector Thomas Liang.

Penalty

[44] Under s 223F of the Act the Authority may impose a penalty on an employer in an action brought by a labour inspector, where the employer has failed to comply with an improvement notice. The maximum penalty against a company is \$20,000.

[45] In *Xu v McIntosh*² the Employment Court provided some guidance for the Authority, in deciding whether or not to impose a penalty, and if so, in what amount:

[47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[48]The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. ... ”

[46] Later in *Tan v Yang & Zhang*³ the Court suggested a non-exhaustive list of relevant factors to be considered in penalty applications, which included:

- The seriousness of the breach;
- Whether the breach is one off or repeated;
- The impact, if any on the employee/prospective employee
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties in other comparable cases.

[47] Aggravating and mitigating factors also need to be considered, and the penalty should be proportionate to the breaches found.

[48] Here there is a single breach in the sense of the failure to comply with the Improvement Notice. It is an on-going breach. The Improvement Notice concerns

² [2004] 2 ERNZ 448

³ [2014] NZ EmpC 65 at [32]

several obligations which the employer had regarding the contents of the employment agreements, wage and time records, and holiday and leave records.

[49] This is not a situation of a total failure to have employment agreements or keep records. I accept that Lotus had employment agreements in place and had records which comply with some aspects of the requirements.

[50] However, Lotus has not fully complied with its obligations. A failure to keep proper records is not a minor failing. In the present case, the Labour Inspector noted in the Improvement Notice that the failure to keep records put the employees at risk of not receiving their correct wage entitlements, and holiday and leave entitlements.

[51] Mr Palmer admitted to the Labour Inspector that he randomly came up with a figure for the leave pay provided to Ms Lal. This increases the company's culpability. It is not the case of an employer who attempts to make the proper calculations but fails to achieve them.

[52] It is important to deter other employers from not keeping proper records or failing to comply with improvement notices.

[53] I therefore consider that a penalty should be imposed in this case. In terms of quantum in *Norton v KRSVP Ltd*⁴ the Authority accepted a submission that the range of penalties for breaches of improvement notices in recent cases was between \$6,500 and \$8,000.

[54] I do not accept that the failure to comply with the Improvement Notice was a merely technical or inadvertent breach. Whilst it may have been possible that the original failure to keep accurate records could be described as inadvertent, Lotus had a significant amount of warning of the issues which the Labour Inspector had and how to rectify them.

[55] Lotus received the Audit Report of 13 January 2016, which sets out clearly the action points required of Lotus. There was no response from Lotus to that report. The Improvement Notice of 10 February 2016 likewise clearly stated the steps which Lotus had to take. The only response from Lotus was to provide a version of the same wage/holiday records as previously provided, but with figures added for more recent pay weeks.

⁴ [2015] NZERA Christchurch 176

[56] Mr Liang also contacted Mr Palmer on several occasions after the Improvement Notice was issued, in an attempt to ensure that Lotus would meet its obligations.

[57] No reason has been provided for the non-compliance with the Improvement Notice. The company has chosen not to participate and explain its position. There is no indication of remorse on Lotus' part.

[58] There was no evidence of the company's financial position. I take into account that it is a small employer.

[59] I order that within 21 days of the date of this determination Lotus pay a penalty of \$7000.00 to the Crown via the Ministry of Business, Innovation and Employment.

Costs

[60] Costs have been sought on behalf of the Labour Inspector. The investigation meeting lasted less than two hours. On the basis of the applicable daily tariff of \$3,500.00 I award the Labour Inspector \$800.00 as a contribution to its costs and \$71.56 for the filing fee.

Nicola Craig
Member of the Employment Relations Authority