

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 44
3001812

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

A N D RATTU & LALLI
 DEVELOPMENTS LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: M Denyer, Counsel for the Applicant
 S Ahmed, Advocate for the Respondent

Investigation Meeting: 6 October 2017 at Auckland

Submissions Received: 13 October 2017 from Applicant
 28 November 2017 from Respondent

Date of Determination: 12 February 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] The Labour Inspector applies for penalties following non-compliance with an improvement notice dated 27 July 2016 issued under s223D of the Employment Relations Act 2000 (Improvement Notice) by Rattu & Lalli Developments Limited (RLDL).

[2] It is accepted RLDL complied with 3 of the 4 requirements of the improvement notice within the time given. At the time of filing for penalties only one requirement was outstanding namely failure to calculate holiday pay taken in advance

in accordance with s22 of the Holidays Act 2003 resulting in underpayment to at least one employee.

Determination

[3] There was evidence of a breach of s22 of the Holidays Act 2003 and non-compliance with the Improvement Notice within the time limitation provided. In June 2016 RLDL provided evidence of payments of holiday pay to four affected employees. An employer who fails to comply with an Improvement Notice is liable to a penalty imposed by the Authority.¹

[4] I am not required to follow the methodology applied by the Court in *Borsboom v Preet PVT Ltd & Anor*² in determining the penalty. This is because that case set out the methodology for multiple breaches of minimum standards statutes involving multiple employees.³ Here the proceeding seeks a penalty for a single breach of the Improvement Notice that has, by RLDL's own evidence, affected four employees. The methodology does not lend itself easily to dealing with these facts.

[5] I must however take account of s133A of the Employment Relations Act 2000 (Act) in determining the amount of penalty:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.]

[6] The nature and extent of a breach of the Holiday Act is serious. However I have determined the breach was inadvertent. This is because RLDL has produced evidence it relied upon its accountant and MYOB to accurately calculate employees

¹ Section 223F of the Act.

² [2016] NZEmpC 143.

entitlements. RLDL's evidence showed the losses to the affected employees were \$1,062.64. RLDL remedied these losses in June 2017 by payment to the affected employees. These employees were vulnerable because they have to rely upon employers correctly calculating the minimum entitlements they are owed.

[7] Although an employer could face a penalty of \$20,000 for a single breach, I have determined the appropriate penalty in these circumstances is \$200.

[8] I order Rattu & Lalli Developments Limited to pay a penalty of \$200 to the Employment Relation Authority's Bank Account.

Costs

[9] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.



T G Tetitaha
Member of the Employment Relations Authority

