

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 166
5614355

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

A N D TE RAKIAMOA
 MANAGEMENT LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Aaron McElroy, Counsel for Applicant
 Nicole Manawatu, Advocate for Respondent

Investigation Meeting: 13 September 2016 at Christchurch

Date of Determination: 21 September 2016

DETERMINATION OF THE AUTHORITY

- A. A penalty of \$1,000.00 is imposed on the respondent for failing to provide documents pursuant to the Labour Inspector's demand dated 16 February 2016.**
- B. Costs are reserved.**

Employment relationship problem

[1] The Labour Inspector seeks a penalty pursuant to s 229(3) of the Employment Relations Act 2000 (the Act) for Te Rakiamao Management Limited's (TRM) failure to comply with a demand from the Labour Inspector to produce documents in a request dated 16 February 2016.

- [2] TRM opposes the imposition of a penalty on the basis that:
- (a) It has largely complied with the Labour Inspector's demands albeit not within the timeframe provided;
 - (b) Any failure to provide the documents or delay in providing those documents was not deliberate and occurred as a result of the inability to print or produce the documents in a deliverable format;
 - (c) The Labour Inspector should take some responsibility for the failure to provide the documents, she was inflexible failing to cooperate or assist to TRM it was clear that it had difficulty in producing the documents;
 - (d) That any harm caused by the failure to provide the documents is negligible, no employees were adversely affected and there was no underlying breach of minimum standards, there was no intention to conceal any behaviour or not provide the documents.

Relevant facts

[3] TRM operates a construction business in Canterbury.

[4] On 8 January 2016, the Labour Inspector conducted an audit of TRM's payroll system. Two of the Labour Inspector's colleagues conducted an interview with the shareholder and director of TRM, Nicole Manawatu.

[5] As a result of the audit and the interview the Labour Inspector concluded there was an incorrect set up in TRM's payroll system. The Labour Inspector explained this to TRM. She requested that TRM provide her with specific reports from the payroll system as she had not been able to complete her analysis of the records during the audit and the reports could not be printed during the audit meeting.

[6] The Labour Inspector confirmed the request for documents in an email on 8 January 2016. The request was expressed as:

As for the copies of reports I'd like to have are:

"Detailed hours worked report" (under reports) between 1/11/14 – 31/1/16

"Leave paid report" – for all employees and;

If you go also into the details of your husband that we looked at – the one where you said that 2 days meant to be public holidays but was recorded as annual leave please

Some payslips from “Ed”

If you could please produce these either in an electronic format or drop it off on Monday when you pick up the timesheets that would be great.

[7] Between 8 January 2016 and 31 January 2016 TRM did not respond to the Labour Inspector. On 2 February 2016, Ms Manawatu sent two emails to the Labour Inspector stating:

Sorry for the radio silence but last week was a big week for us with the loss of one of our SLT members at CERA and I have not found time to look at this.

....

I can bring the reports up but I can't save them electronically and I don't have a working printer to print them off. I am going to ring payroll when I am back on Thursday to see if I can send them electronically.

With regard to number 3 I am not sure what you are wanting from me here, Can you please be more specific so I know what to get.

Eds payslips are electronic so all I can show you is the confirmation that he has received them as I can't forward them on unless I change his email address to your. Is that what you want me to do?

[8] The Labour inspector responded to Ms Manawatu on 2 February 2016 in an email that included the following:

As for Ed's payslips – I showed you on the spot how to retrieve previous payslips in bulk. I would suggest that you discuss this with ACE payroll when you ring them back.

A suggestion that may ease this exercise, that if you ring ACE, you are able to ask them to provide us a guest login and I can then from my office print the reports that I looked at your house and wasn't able to print. Please let me know whether that would resolve your concerns.

[9] Despite the email exchange and other attempts by the Labour Inspector to contact TRM the requested reports were not provided nor was any explanation for the failure to provide the reports or any further request seeking clarification received.

[10] On 16 February 2016, the Labour Inspector issued TRM with a formal demand to produce documents pursuant to s 229 of the Act. This demand required TRM to

produce “*a copy of all wages, time and holiday records and employment agreements and any other documentation which records the remuneration*” of all employees employed by TRM. This demand advised TRM that the documents were to be provided within three days and if TRM failed to provide the documents, the Labour Inspector could seek a penalty against TRM of up to \$20,000.00.

[11] Ms Manawatu responded by calling the Labour Inspector on 16 February 2016 and leaving a voice mail message. The Labour Inspector did not receive the voice mail message. Ms Manawatu followed up with an email on 19 February 2016 explaining that TRM had been unable to get a guest login to its payroll system for the Labour Inspector but ACE (the TRM payroll provider) had explained to Ms Manawatu that she could back up the payroll programme and send it to the Labour Inspector. Ms Manawatu had tried to send this information through but it was too large to deliver by email so she offered to copy it onto a USB memory stick and drop that off with the Labour Inspector.

[12] The Labour Inspector responded on 19 February 2016, accepting the offer to provide the information on a USB stick.

[13] Ms Manawatu did not deliver the USB stick, despite assurances to the Labour Inspector that she would. This was because she could not save the reports to the USB stick despite believing she would be able to.

[14] On 26 February 2016, Ms Manawatu sent low-resolution screenshots from the TRM payroll system through to the Labour Inspector. The Labour Inspector could not read these screenshots and she advised Ms Manawatu of this. The Labour Inspector reminded Ms Manawatu that a failure by TRM to provide the requested documents would leave her with no choice but to apply to the Employment Relations Authority for penalties.

[15] On 29 February 2016, Ms Manawatu emailed a high-resolution screen shot of one of the reports that had been requested. The Labour Inspector advised Ms Manawatu later that day that this was acceptable. Ms Manawatu advised that all of the requested information would be sent through. Ms Manawatu then attached the screen shots of the reports to an email and sent this to the Labour Inspector. Unfortunately, the attachments were too large and were not delivered. Ms Manawatu was not aware of this delivery failure.

[16] As a result the Labour Inspector issued an Improvement Notice on 4 March 2016 and then filed an application with the Authority, for penalties and compliance.

[17] Ms Manawatu was confused about what was required but responded to the Improvement Notice. The Labour Inspector subsequently confirmed to TRM that she did not require any further documents.

Penalty

[18] The Labour Inspector seeks penalties for the failure to provide documents pursuant to the demand issued on 16 February 2016.

[19] The Labour Inspector may apply for penalties pursuant to s 229(3) of the Act. The Authority's power to award penalties on such an application is conferred under ss133-135 of the Act.

[20] I note that s 229(3) of the Act provides that an action may be brought by a Labour Inspector seeking a penalty under the Act where an employer has, without reasonable cause, failed to comply with the requirement made of it to produce documents (that requirement being set out in the notice of 16 February 2016).

[21] The Act now includes at s 133A a summary of relevant factors for assessment in the consideration of a penalty. However, this action for a penalty was commenced prior to 1 April 2016 when the express criteria in s 133A were added by amendment.

[22] So relevant factors for my assessment in the present matter about the failure to provide documents in February 2016 include¹:

- a. The seriousness of the breach, the impact the breach had on any employees affected including aspects of vulnerability of such employees;
- b. The nature of the breaches including whether they were one-off or repeated and whether they were technical and inadvertent or flagrant and deliberate;
- c. The need for deterrence;

¹ *Xu v McIntosh* [2004] 2 ERNZ 448 (EC) at [47]-[48] and *Tan v Yang* [2014] NZEmpC 65 at [31]

- d. Remorse shown by the party in breach; and
- e. The range of penalties imposed in other comparable cases.

[23] In considering whether a penalty should be imposed and, if so, the quantum, I note the following:

- a. There is no dispute that TRM failed to provide the documents as requested. Whilst there is some explanation I am not satisfied that there is reasonable cause for all of the failed delivery attempts;
- b. Notwithstanding the failure to provide the documents, there was subsequently an Improvement Notice served on TRM which it complied with and the Labour Inspector was satisfied on the basis of that compliance that there were no breaches in minimum standards that required further action;
- c. The respondent through the evidence of Ms Manawatu admitted that it did not prioritise the Labour Inspector's request sufficiently as it did not appreciate fully the consequences of a failure to comply or the significance of such failure;
- d. The breaches were not deliberate in that TRM attempted to provide copies of the documents requested to the Labour Inspector but failed to do so for various technological and practical reasons and because it failed to prioritise the demand;
- e. TRM did not properly advise the Labour Inspector of the difficulties it was having in producing the documents requested. The frustration and ultimately further steps taken by the Labour Inspector arose out of this lack of communication from TRM;
- f. TRM in fact asked for further assistance from the Labour Inspector in facilitating the production of documents and it was TRM's submission that actually the mitigating circumstances for it in this matter was that there was a failure of support from the Labour Inspector to provide the documents;

[24] There was a failure by TRM to provide the documents as requested. I am not satisfied that there was, overall, a reasonable cause for that failure. Notwithstanding TRM's expectation that the Labour Inspector would be more cooperative in assisting it in providing the documentation, I believe TRM could and should have done more through communications and the efforts being made to provide the documents. I do accept TRM's submission that the Labour Inspector could have done more also and this mitigates the circumstances somewhat.

[25] I also accept the Labour Inspector's submission that the failure to provide the documents prevented the Labour Inspector from completing its audit and therefore prevented it from being completely satisfied that there were no underlying breaches of minimum employment standards in respect of the employees of TRM until TRM complied with the Improvement Notice.

[26] However, this is to be balanced against the fact that the failure to provide the documents was not deliberate, or intentional and it was not designed by TRM to prevent some discovery of breach or breaches of minimum standards. Nor was it the case that TRM did not have the documentation as the Labour Inspector had viewed the reports and various documents that it had sought and knew that these existed. There were no aggravating features in this case of concealment or a complete failure to provide the minimum standards or keep records as is often the case in penalty applications.

[27] I need to weigh that against the requirement to send a clear message for deterrence purposes that the powers of a Labour Inspector to carry out an audit and demand documents to assist it in that audit should be respected and complied with, and any failure to do so without reasonable cause is unacceptable.

[28] I conclude that the breach was minimal, it was not intentional and not designed to cover up some underlying fault on the part of TRM such as a failure to keep records or meet minimum standards. The breach did prevent the Labour Inspector from completing a timely audit in respect of this matter. A penalty is also appropriate for deterrent purposes also.

[29] On this basis, I believe that a small penalty is appropriate and set that at \$1,000.00. Payment of the penalty is to be made to the Crown via the Ministry of Business Innovation and Employment

Costs

[30] Costs are reserved. The parties are encouraged to try to resolve any issue of costs between themselves.

[31] Having been successful in the application for a penalty the Labour Inspector may be entitled to some costs. At a minimum it should receive the filing fee of \$71.56.

[32] If the Labour Inspector is unable to agree the amount of costs with TRM and seeks a contribution, then I note the following:

- a. The applicable daily rate for this matter is not \$4,500.00 as requested in the Applicant's Submissions dated 12 September 2016 but rather \$3,500.00 the claim having been issued before the latest practice direction and increase to the daily tariff;
- b. Whilst it may be appropriate to assess costs on the basis of the daily tariff, in this instance I need to be satisfied of the actual costs incurred by the Labour Inspector and therefore require a summary setting out the time spent and the cost charged (albeit internally) for counsel's time in preparing this matter.

[33] If a determination of costs is needed, then the Labour Inspector may lodge and serve its memorandum of costs within 28 days of the date of this determination. TRM will have 14 days from the date of service of that memorandum to lodge and serve any reply. I will not consider any application for costs outside this timetable unless leave is sought and granted.

Peter van Keulen
Member of the Employment Relations Authority