

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 23
5577343

BETWEEN LYNETTE RUSSELL, LABOUR
 INSPECTOR
 Applicant

AND WALIA HOLDINGS LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
 No appearance for or on behalf of the Respondent

Investigation Meeting: 16 February 2016 at New Plymouth

Submissions Received: 15 February 2016 from the Applicant
 from the Respondent

Oral Determination: 16 February 2016

Written Determination: 18 February 2016

WRITTEN DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Walia Holdings Ltd (WHL) operates an Indian restaurant, 'Indian Zaika', in Hawera.

[2] This matter first came to the attention of the Labour Inspectorate following a complaint to Immigration New Zealand (INZ).

[3] On 29 April 2014 Ms Lynette Russell, in her role as a Labour Inspector¹, and accompanied by a representative from INZ, visited Indian Zaika. Ms Russell's

¹ Pursuant to s 223(2) Ms Russell holds a warrant as a Labour Inspector

inquiries led her to conclude that WHL had not maintained wage and time and holiday and leave records (the “records”) for previous and current employees. Those concerns were discussed with WHL shareholder Ms Menisha Walia, and practical guidance was given as to implementing a compliant system of records.

[4] On 7 May 2014 an Improvement Notice was served on WHL. Amongst a range of activities, WHL was required to establish and maintain records for current and future employees, and to provide evidence of the records by 6 June 2014.

[5] Ms Russell says the records were not provided. On 23 July 2014 she inquired with Ms Walia as to their whereabouts.² She says Ms Walia told her that the information had been sent but agreed to despatch another copy of the material to Ms Russell.

[6] Ms Russell says no records were ever received. She says she decided not to pursue immediate compliance with the Improvement Notice but planned to revisit WHL as part of a strategy to re-audit employers with whom the Labour Inspectorate had previous interactions.

[7] On 9 December 2014 Ms Russell wrote again to WHL, inquiring as to whether records were being kept. No response to the correspondence was received.

[8] On 6 May 2015, Ms Russell notified WHL by letter that she intended to visit the restaurant premises on 18 May 2015 to inspect the records of its current employees. In the alternative she asked for the records to be sent by post or electronically.

[9] The day before the anticipated visit the Labour Inspector received an email from Ms Walia advising she was unavailable to meet but would forward the records at the end of the week.

[10] Ms Russell replied by email the following day³. She reiterated that the records were required to be produced pursuant to s. 229(1) of the Employment Relations Act 2000 and s. 82 of the Holidays Act 2003 and detailed the exact nature of what was required, noting that:

² during a telephone conversation

³ 18 May 2015

...failure to supply these records will result in further formal action including penalties through the Employment Relations Authority.

[11] The notice concluded with advice that the Employment Relations Act provides for penalties not exceeding \$20,000 for companies, and that if the documents were not received by 29 May 2015 then formal action including penalties would commence.

[12] Nothing further was heard from WHL.

[13] On 19 August 2015, the Labour Inspector filed a statement of problem seeking compliance orders to have WHL supply copies of wage and time, and holiday and leave records of its employees. In addition Ms Russell asks the Authority to order a penalty against WHL for its failure at not having provided the records it was obliged to furnish⁴, and to which it had agreed.

[14] A copy of that application was served on WHL's registered address on 24 August 2015, and 'Notice of an Investigation Meeting' and 'Notice of Direction' was delivered on 11 December 2015⁵.

[15] WHL has not responded to any correspondence from the Authority. I am satisfied WHL knew or should have known of the Labour Inspector's claim and of the Authority's intention to investigate the matter.

[16] WHL did not attend the investigation meeting. The investigation meeting was deferred by 15 minutes to allow the Authority's officers to contact WHL and Ms Walia. Those calls and corresponding voice messages to contact the Authority urgently went unanswered. No good cause has been shown as to why WHL did not appear at the Authority's investigation meeting.

[17] Pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act), I proceeded with an investigation as if WHL or a representative of it attended the meeting.

Determination

Order for compliance

⁴ pursuant to s. 229(3)

⁵ The service of each set of documents was couriered to WHL's registered address and signed by M. Walia

[18] I am satisfied that WHL has failed to provide records requested pursuant to s. 229(1)(d). Despite the passage of time the Labour Inspector remains committed to ensuring WHL is providing minimum wage and holiday entitlements to its employees. In the absence of any information to verify whether WHL observes minimum employment standards I consider a compliance order is warranted.

Should a penalty be awarded?

[19] The Authority's power to impose a penalty is discretionary.⁶ WHL's failure to supply records requested by the Labour Inspector on 6 May and again on 18 May 2015 is unacceptable and justifies a penalty.

[20] In assessing the quantum of a penalty I have considered and applied the factors set out recently by the Court in *Tan v Yang and Zhang*⁷ as follows:

- 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
- the range of penalties imposed in comparable cases

[21] Whilst this application concerns WHL's failure to comply with the Labour Inspector's requests on 6 and 18 May 2015 respectively to that effect, it is appropriate to measure those omissions alongside the Labour Inspector's endeavours over 16 months⁸ to have WHL comply with its obligations to provide records before seeking assistance from the Authority.

[22] During the material timeframe the Labour Inspector made no less than five requests for WHL to provide records, either by; issuing an Improvement Notice; Notices pursuant to s. 229(1) or with WHL's agreement. WHL has been given repeated opportunities to remedy its past omissions and informed of the consequences if it did not.

[23] On two separate occasions WHL met the Labour Inspector's request with an assurance that records would be furnished. When these not materialise WHL appears to have ignored or disregarded the Labour Inspector's further inquiries on the matter.

⁶ *Xu v McIntosh* [2004] 2 ERNZ 488

⁷ *Tan v Yang and Zhang* [2014] NZEmpC 65

⁸ May 2014 to August 2015

I consider WHL's failure to provide the Labour Inspector with documents lawfully requested can be fairly characterised as serious, ongoing and deliberate.

[24] I further accept Ms Russell's evidence that WHL's failure to provide the records have undermined her ability to perform her statutory duties generally and, in particular, to evaluate whether WHL employees are receiving minimum entitlements in accordance with legislation. The effect of that failing has prevented her from additionally assessing the vulnerability of WHL's employees and/or whether they have been negatively impacted by its approach to provide wage and time records. Ms Russell reports the concerns about WHL's failure to maintain appropriate records originally stemmed from WHL's inability to evidence public holiday entitlement payments in circumstances where there was disparity between a WHL employee (whose spoken English was limited) and WHL's assertions to the contrary on the matter.

[25] I have considered the quantum of penalties currently ordered by the Authority and, in particular, recent determinations where an employer's omission (without good cause), to respond to reasonable and lawful requests to provide statutorily required records, obstructed a Labour Inspector from assessing compliance with minimum employment standards.⁹ I have no doubt that WHL's failure in this way constitutes conduct deserving of a \$7,000 penalty to signify condemnation, and to act as a deterrent to further non-compliance.

Orders

[26] Walia Holdings Limited is ordered to:

(a) within 21 days of the date of this determination supply to the Labour Inspector the following¹⁰:

- *the time and wage records for all your current employees*
- *the holiday and leave records for all your current employees*
- *April and May 2015 IRD Monthly Employer Schedules (IR348)*

⁹ See for example: *Lakhera v Peniel Construction Ltd* [2015] NZERA Christchurch 122; *Norton v KRSVP Limited* [2015] NZERA Christchurch 176.

¹⁰ pursuant to s. 137

(b) pay a penalty of \$7,000 to the Crown for its failure to comply with s. 229(1)(d)¹¹. The penalty is to be paid to the Employment Relations Authority in Wellington. That sum will then be forwarded to the Crown Bank account.

(c) reimburse the Labour Inspector the filing fee of \$71.56

Michele Ryan
Member of the Employment Relations Authority

¹¹ pursuant to s. 229(3)