IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 91
EMPC 5/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	A1 COMMUNICATION LIMITED First Plaintiff
AND	HAROLD DEO Second Plaintiff
AND	A LABOUR INSPECTOR OF MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	4 May 2021 (Heard at Auckland)
Appearances:	H Deo, representative for first plaintiff and in person J Perrott and M Denyer, counsel for defendant
Judgment:	23 June 2021

JUDGMENT OF JUDGE J C HOLDEN

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[1] In 2018, the Labour Inspector started a proactive investigation of Chorus sub-contractors who provided services to the Chorus ultra-fast broadband project. Those sub-contractors included the first plaintiff, A1 Communication Ltd (A1). Mr Deo, the second plaintiff, is the sole director and shareholder of A1. During the relevant period, it seems A1 employed between three and five employees.

[2] As a result of his investigation, the Labour Inspector brought proceedings in the Employment Relations Authority (the Authority) seeking the imposition of penalties on A1 for:

(a) failure to produce employment records forthwith, in breach of s 229(2) of the Employment Relations Act 2000 (the Act);

(b) failure to keep wage and time records that complied with s 130 of the Act; and

(c) failure to keep holiday and leave records that complied with s 81 of the Holidays Act 2003.

[3] The Labour Inspector also sought penalties to be imposed on Mr Deo personally, as a person involved in A1's breaches of minimum employment standards for:

(a) failure to keep wage and time records that complied with s 130 of the Act; and

(b) failure to keep holiday and leave records that complied with s 81 of the Holidays Act.

[4] Neither A1 nor Mr Deo attended the Authority's investigation meeting. The Authority found for the Labour Inspector and imposed penalties on A1 totalling $19,200 and on Mr Deo totalling $8,000.[1]

[5] Once the Authority's determination became known, Chorus cancelled its contract with A1. This effectively ended the plaintiffs' business and meant the A1 employees lost their jobs.

[6] The plaintiffs now challenge the Authority's determination on a de novo basis. In the challenge, the Court has had the benefit of hearing from Mr Deo, which the Authority did not.

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1 *A Labour Inspector of the Ministry of Business, Innovation and Employment v A1 Communication Ltd* [2019] NZERA 678 (Member Larmer) at [158] and [165].

A1 failed to fully engage with the Labour Inspector

[7] The investigation into A1's employment practices began on 27 June 2018, when two Labour Inspectors visited its premises and endeavoured to speak to somebody there. As there was no one present at the time, the Labour Inspectors left a letter advising of their visit, which included a request that A1 provide an employee list. On 17 July 2018, after there was no response from A1, a Labour Inspector couriered a Notice to Produce Records to A1's registered office. That notice required A1 to provide all past and present employee employment records for employees employed between 17 July 2016 and 17 July 2018. A deadline of 31 July 2018 was given for A1 to provide those records.

[8] On 7 August 2018, the Labour Inspector received an email from Mr Deo which attached two files that appeared to be employment agreements for two employees. As the Labour Inspector was unable to open the attachments to the email, he emailed Mr Deo on 9 August 2018 advising him that the files were not readable and requesting that he provide records in PDF format. Further requests were made to Mr Deo on 2 August 2018 and 14 September 2018 but no response was received. The Labour Inspector advised Mr Deo that, by failing to comply with the Labour Inspector's request, he was obstructing the Labour Inspector's investigation.

[9] Mr Deo responded on 17 September 2018, advising that he was in Australia visiting his sick mother and would be returning to New Zealand on Friday 21 September 2018. Mr Deo advised that the documents would be sent by the weekend. That did not happen.

[10] On 29 November 2018, after not having received any records, the Labour Inspector again emailed Mr Deo suggesting that he could come and meet with Mr Deo at his office to take a look at the records and take copies. The Labour Inspector gave Mr Deo until 30 November 2018 to respond to that email.

[11] On 5 December 2018 Mr Deo responded explaining that for some reason the email sent on 29 November 2018 had gone into his junk mail folder. Mr Deo acknowledged that the documents sent earlier were not readable and advised he would

organise all the documents to be printed by 10 December 2018 at the very latest and that he would deliver them in person to the Labour Inspector on 11 December 2018.

[12] That did not happen and, on 12 December 2018, the Labour Inspector emailed Mr Deo seeking his explanation as to why the records were not delivered as indicated and asking him to provide them by the week ending 16 December 2018. The Labour Inspector advised that he would commence further processes from 17 December 2018 onwards. Mr Deo did not respond to that email or provide any documents at that stage.

[13] The Labour Inspector proceeded to draft an investigation report and emailed a copy of that to Mr Deo on 20 March 2019. The Labour Inspector advised Mr Deo that an application would be made to the Authority seeking a penalty for non-compliance. The Labour Inspector asked for any comment by 27 March 2019.

[14] Mr Deo responded the same day seeking a further extension until 8 April 2019. Mr Deo said he was in India and due to return to New Zealand on 5 April 2019, at which point he would personally deliver the records to the Labour Inspector. There was a telephone call along similar lines the same day.

[15] Mr Deo also emailed some comments on the investigation report that day but claimed he was not able to provide the information requested due to the passing of a family relative, having an ill mother, a busy work schedule and the departure of two employees. In his email, Mr Deo undertook to supply all documents on 8 April 2019.

[16] On 10 April 2019, the Labour Inspector received an email from a Mr Ali providing employment records on behalf of Mr Deo and A1. Mr Ali did not appear to be employed by A1 and there was no clear indication of his authority to represent A1 or Mr Deo. It would seem that Mr Ali was engaged on some basis as an accountant for A1.

[17] After a further request from the Labour Inspector, Mr Ali provided employment agreements for all employees, PAYE summaries and a leave reconciliation report on behalf of Mr Deo and A1. However, the Labour Inspector still had not received any wage and time records.

[18] The Labour Inspector also sought a response from Mr Ali and Mr Deo as to who held the responsibility at A1 for the recordkeeping and business operations. Mr Ali responded by email indicating that all recordkeeping and business operation responsibilities of A1 ultimately lay with Mr Deo who provided information to A1's accountants for them to generate and maintain employee records.

Labour Inspector carried out his investigation based on the information he had

[19] Using the information provided to him, the Labour Inspector endeavoured to analyse the position. He says that he found various breaches to the recordkeeping requirements of the minimum employment standards but that he was not able to determine any potential arrears calculations as the records provided to him were insufficient for him to conduct a calculative analysis.

[20] The Labour Inspector finalised his investigation report and emailed that to Mr Deo on 14 June 2019. He also lodged an application with the Authority seeking penalties against A1 and Mr Deo.

[21] As noted, Mr Deo did not attend the investigation of the Authority. A1 did, however, file a statement in reply that attached further records, including payslips for two employees.

[22] After analysing the payslips, the Labour Inspector accepted that wage and time records were complied with in respect of the two employees. However, the Labour Inspector believed that A1 still had not complied with the requirements in s 130 of the Act of keeping and maintaining compliant wage and time records for three other employees. The Labour Inspector also considered that A1's holiday and leave records did not properly record leave taken and, therefore, were not compliant with s 81 of the Holidays Act.

Mr Deo accepts the recordkeeping was deficient

[23] Mr Deo says that he understands that A1's recordkeeping may not have been up to standard. However, he says he relied on Mr Ali. He also thinks he should have

been given a chance to rectify the problems and that he only came to know about them when he received the Authority's determination.

[24] Another key point Mr Deo made was that his focus was on paying his employees properly and that A1 always did so, even when he had to borrow money to pay them. He also says that the employees were paid for 40 hours a week, even when they worked fewer hours.

[25] He says that the determination of the Authority ruined his life as well as those of his employees and that, as a result of the determination, he was blacklisted by Chorus and could not get other jobs in any of the telecommunications companies. He says he was out of work for nearly four months and had to sell assets to provide for some of his employees to help them during the Christmas period. He says that A1 is not currently trading.

Recordkeeping is required

[26] Section 130 of the Act requires employers to keep a wage and time record. That includes requiring the employer to include, for each employee:

(a) the employee's postal address;[2]

(b) the number of hours worked each day in a pay period and the pay for those hours;[3] and

(c) the wages paid to the employee each pay period and the method of calculation.[4]

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2 Employment Relations Act 2000, s 130(1)(c).
3 Section 130(1)(g).
4 Section 130(1)(h).

[27] Section 81 of the Holidays Act also requires employers to keep records. These may be kept as part of the wages and time records.[5] The additional details that need to be kept for each employee include:

(a) the amount of payment for any annual holiday, sick leave, bereavement leave, or family violence leave that has been taken;[6]

(b) the dates of, and payments for, any public holiday on which the employee worked;[7]

(c) the date on which the employee became entitled to any alternative holiday;[8]

(d) the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay;[9]

(e) the details of any payment to which the employee is entitled in exchange for an alternative holiday;[10] and

(f) the amount paid to an employee as holiday pay upon the termination of the employee's employment (if applicable).[11]

[28] Section 229 of the Act enables a Labour Inspector to seek wage and time records or holiday and leave records from an employer.[12] Where a Labour Inspector makes such a requirement of an employer, the employer must forthwith comply with that requirement.[13] An employer who, without reasonable cause, fails to supply those records is liable to a penalty under the Act.[14]

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5 Holidays Act 2003, s 81(5).
6 Section 81(2)(h).
7 Section 81(2)(i).
8 Section 81(2)(k).
9 Section 81(2)(l).
10 Section 81(2)(n).
11 Section 81(2)(p).
12 Employment Relations Act 2000, s 229(1)(c)(i) and (d).
13 Section 229(2).
14 Section 229(3).

A1 failed to supply the Labour Inspector with the requested employment records "forthwith"

[29] As can be seen from the chronology, despite multiple requests from the Labour Inspector and extensions of time granted by him, A1 failed to provide the requested records over many months. The term "forthwith" is not prescriptive as to the number of days but means "immediately; without delay".[15]

[30] Here the delay started in June 2018. While there was some communication from A1 starting relatively early, and more urgency was shown after the draft investigation report was provided on 20 March 2019, it was not until the filing of the statement in reply in July 2019 that some payslips of employees were provided. The delay in providing required information was clearly a failure to provide records "forthwith".

[31] I acknowledge that Mr Deo had some personal matters that he was dealing with throughout this time, but notwithstanding those matters, A1's responses to the Labour Inspector, at least up until 20 March 2019, were woeful.

[32] I am satisfied that A1, without reasonable cause, failed to provide the required records forthwith. It is liable to a penalty.[16]

Some information was missing

[33] One aspect of this case is that, when the payslips for two of the employees were supplied with the statement in reply, they satisfied the Labour Inspector that, for those employees, the Act's recordkeeping requirements had been met. It may be that the payslips for the other three employees would likewise have satisfied those recordkeeping requirements, but they do not seem to have been kept by A1, as is required by the legislation.[17]

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15 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005) at 417.
16 Employment Relations Act 2000, s 229(3).
17 Section 130.

[34] The Labour Inspector confirmed in evidence that it is quite common to come across poor recordkeeping when conducting an investigation. When asked about the impact poor recordkeeping has, the Labour Inspector said that proper recordkeeping is not only about protecting employees, but also protects employers so that, if there is any issue, the employer is able to provide accurate records to show the entitlements due and paid. This case demonstrates that impact for A1.

[35] In respect of the three employees for whom no payslips were provided, I accept that, in breach of the Act, A1 failed to keep records of:

(a) the employee's postal address;

(b) the number of hours worked each day and the pay for those days;

(c) the wages paid for each pay period and method of calculation.

[36] Reviewing the holiday records supplied, I am satisfied that, in breach of the Holidays Act, A1 failed to record information regarding public holidays – either not worked but paid, or worked and paid with an entitlement to alternative days in lieu.[18]

[37] In respect of the employees who left A1 during the period under investigation, there is no record of the amount paid as holiday pay on termination of employment.[19]

[38] There also is some inconsistency between the leave records and the pay slips, but that may reflect, in part anyway, that A1 paid employees on leave, even when they had no current entitlement to paid annual leave.

Not shown that Mr Deo was "involved in a breach"

[39] A person involved in a breach of employment standards includes a director of an employing company if the director has aided, abetted, counselled, or procured the breach or has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach.[20]

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18 Holidays Act 2003, s 81(2)(i)–(l) and (n).
19 Section 81(2)(p).
20 Employment Relations Act 2000, ss 142W(1)(a) and (c), 142W(2) and 142W(3)(a).

[40] Where a person is involved in a breach of employment standards they are liable to a penalty under the Act, on application by a Labour Inspector, if the Act provides for a penalty for the breach.[21]

[41] Employment standards include the requirements of s 130 of the Act and of s 81 of the Holidays Act. They do not include the requirements of s 229 of the Act.[22]

[42] As identified in *Southern Taxis v Labour Inspector*, the language used in s 142W(1) suggests deliberate involvement in a breach.[23] That too is consistent with the Parliamentary history of Part 9A of the Act, which was intended to, amongst other things, hold persons other than the employer to account if they are found to be knowingly involved in a breach of employment standards. In *Southern Taxis*, Judge Corkill agreed with the conclusions that had been reached by Judge Perkins in *Labour Inspector v Sampan Restaurant Ltd*, that proof of intentional, purposeful actions on the part of the person accused of being involved in a breach is required.[24]

[43] Section 142W(1) overall is directed to wrongdoing by a person, separate from the wrongdoing by the employer. It is not enough to simply rely on the person's position within the employing entity to give rise to a liability for a penalty.

[44] The Labour Inspector says that Mr Deo is a person involved in A1's failure to keep compliant wage and time records, as required by s 130 of the Act, and in its failure to keep compliant holiday and leave records, as required by s 81 of the Holidays Act. The Labour Inspector notes that Mr Deo is a director of A1 and relies on Mr Ali's statement that all recordkeeping and business operation responsibilities of A1 ultimately lay with Mr Deo.

[45] While Mr Deo did not dispute that he was ultimately responsible for A1's recordkeeping, he says he relied on Mr Ali. He did not go so far as establishing a defence under s 142ZD(2) of the Act.

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21 Section 142X.
22 Section 5.
23 *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, [2020] ERNZ 183 at [180].
24 *Labour Inspector v Sampan Restaurant Ltd* [2018] NZEmpC 69, [2018] ERNZ 196 at [46].

[46] Nevertheless, the evidence before me did not establish that Mr Deo intentionally kept insufficient records. The payslip evidence indicates the opposite – that employee payslips included the information required by s 130. Although other employees' payslips were not retained, there was no suggestion that they were not created or that they were deliberately discarded or destroyed. There also was no evidence as to whether it was Mr Deo or Mr Ali who failed to retain those payslips. There were gaps in the holiday and leave records but nothing to suggest that Mr Deo intentionally left matters unrecorded.

[47] I do not consider it proved that Mr Deo aided, abetted, counselled or procured the breaches or that he was directly or indirectly knowingly concerned in and/or party to the breaches.

[48] Accordingly, the penalty against Mr Deo personally, ordered by the Authority, is set aside. I therefore turn to consider the appropriate penalty for A1 for its breaches.

There are identified principles to apply when considering penalties

[49] The purposes of penalties in this jurisdiction are: [25]

(a) to punish those who breach minimum employment standards;

(b) to deter employment breaches;

(c) to compensate victims of such breaches; and

(d) to eliminate unfair competition.

[50] A four-step approach has been recognised by the Court when assessing penalties:[26]

(a) identify the number and nature of the breaches;

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[25] *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514 at [61]-[64].
[26] At [151].

(b) establish a provisional starting point by assessing the severity of the breach in each case, considering both aggravating and mitigating features;

(c) consider the means and ability of the person in breach to pay the provisional penalty; and

(d) apply a proportionality test to ensure the amount of the final penalty is just in all the circumstances.

[51] While the Labour Inspector identified an appropriate penalty for A1 higher than that ordered by the Authority, he said that he considered the Authority's decision was an appropriate one and would abide by the Court's endorsement of that decision, if the Court was so minded.

Step one – the number and natures of the breaches

[52] Here, the breaches by A1 comprise:

(a) one breach of s 229(2) of the Act;

(b) three breaches of s 130 of the Act, being one for each of the three employees for whom payslips were not provided; and

(c) five breaches of s 81 of the Holidays Act, being failures in respect of all five employees.

[53] The maximum penalty available for each of A1's breaches is $20,000.[27] This means that the maximum sum for the combined penalties available for A1 is $180,000.

[27] Employment Relations Act 2000, s 135(2); Holidays Act 2003, s 75(1).

Step two – provisional starting point

[54] The considerations for setting a provisional starting point are those set out in s 133A of the Act as well as those identified in *Nicholson v Ford*:[28]

(a) the object of the Act, as stated in s 3 of the Act;

(b) the nature and extent of the breaches;

(c) whether the breaches are intentional, inadvertent or negligent;

(d) the nature and extent of any loss or damage suffered by any person;

(e) whether the person in breach or involved in the breach has paid an amount in compensation, reparation, or restitution, or taken other steps to avoid or mitigate any adverse effects of the breach;

(f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;

(g) engagement in any previous similar conduct;

(h) deterrence (both particular and general);

(i) culpability;

(j) the consistency of penalty awards in similar cases;

(k) ability to pay; and

(l) the proportionality of any outcome to the breach.

[55] The most relevant object in s 3 of the Act is the promotion of effective enforcement of employment standards, in particular by Labour Inspectors.[29] Here A1's breaches impeded the Labour Inspector's investigation and meant he was not able to determine whether the employees had received their proper entitlements.

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28 *Nicholson v Ford* [2018] NZEmpC 132, [2018] ERNZ 393 at [18].
29 Employment Relations Act 2000, s 3(ab).

[56] Although the employees of A1 were, like Mr Deo, migrants to New Zealand, there was no evidence that they were, in fact, disadvantaged by A1's poor recordkeeping. This case is somewhat different from those often before the Court, in that no originating complaint was made against A1, rather it got caught up in a broader, proactive investigation of Chorus subcontractors.

[57] I take into account that the payslips that were retained for two employees showed that they were paid their entitlements. Mr Deo says all employees were and there was no reason to suggest otherwise.

[58] There is no evidence of any loss or damage suffered by any person. Compensation, reparation and/or restitution is, therefore, not in issue. Nor is there any suggestion of vulnerability. A1 has not previously come to the attention of the Labour Inspector and has not been before the Authority before.

[59] The breaches under s 130 of the Act and s 81 of the Holidays Act by A1, were negligent rather than intentional. It seems that systems were in place to record employee entitlements to wages and to leave, but that the wages records were not retained for all employees and the holidays and leave records were incomplete.

[60] A1's most significant breach was in failing to produce employment records to the Labour Inspector when requested. As noted, the outcome of that failure has been that the Labour Inspector issued proceedings against A1 and Mr Deo. One cannot help but think that cooperation with the Labour Inspector may have led to a different outcome.

[61] The situation was exacerbated by the failure of A1 to attend the employment investigation meeting. Mr Deo has said he did not know of it but clearly advice was provided to him and/or to his representative.

[62] Mr Deo presented as extremely remorseful. It may be that was in part because of the significant impact that the Authority's determination has had on him and his business. Nevertheless, I take Mr Deo's expressions of remorse into account in setting a provisional starting point.

[63] As noted, this case is not a usual case which comes before the Court or Authority, where the Labour Inspector's investigation has been as a result of complaints by employees or former employees. Nevertheless, it is important that the need to keep accurate records and to cooperate with a Labour Inspector is made clear to other similarly placed employers, and indeed to A1, which is hoping to resume the work it had been undertaking.

[64] With all considerations in mind, the starting point I consider appropriate is a little less than found by the Authority, being $40,000.[30]

Step three - means and ability to pay

[65] A1 has ceased trading. Its principal business was its contracting with Chorus, which has terminated. Mr Deo is now employed but he was out of work for nearly four months. Some assets were lost.[31] I take these matters into account and would reduce the penalty by a quarter for this step, to $30,000.

Step four – proportionality of outcome

[66] In the Authority, a discount of 60 per cent was allowed. That is an appropriate discount and leads to a figure of $12,000.

[67] A1 is ordered to pay total penalties for all its breaches of the Act and the Holidays Act of $12,000. The entire amount is to be paid into the Crown Bank Account.

[68] The costs order in the Authority was against A1 and Mr Deo jointly and severally.[32] That order was not challenged and is appropriate in any event, particularly given the plaintiffs' non-attendance at the Authority investigation meeting.

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30 *A Labour Inspector of the Ministry of Business, Innovation and Employment v A1 Communication Ltd*, above n 1, at 24 (Appendix One).

31 It was not clear which lost assets were owned by A1 and which were Mr Deo's personal assets.

32 *A Labour Inspector of the Ministry of Business Innovation and Employment v A1 Communication Ltd* [2019] NZERA 729 at [16].

[69] There is no order for costs in the Court. Mr Deo represented both himself and A1 and, accordingly, although the plaintiffs have had significant success, they have not incurred legal costs.

J C Holden
Judge

Judgment signed at 2.15 pm on 23 June 2021