IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 106
ARC 39/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PACIFIC FLIGHT CATERING LIMITED First Plaintiff
AND	PRI FLIGHT CATERING LIMITED Second Plaintiff
AND	THE SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC First Defendant
AND	VA'A NGAKAU Second Defendant
AND	SONNY TUITI Third Defendant
AND	KEVIN MEHANA Fourth Defendant
AND	SALA PARKER Fifth Defendant

Hearing:	22-24 April 2013 (Heard at Auckland)
Appearances:	Anthony Drake and Ben Nicholson, counsel for plaintiffs Peter Cranney, counsel for defendants
Judgment:	7 June 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This matter involves a challenge by way of a hearing de novo of a determination of the Employment Relations Authority (the Authority) dated 13 June 2012.[1] The determination of the Authority is expressed as "Determination of the Authority (No 2)" because it follows an earlier determination dated 12 December 2011.[2] The earlier determination dealt with the main issue of access to wage, time, holiday and leave records for the second to fifth defendants. Some additional observations are contained in the determination. The proceedings were then adjourned on the basis that they would be later reopened and the investigation continued in respect of the claim by the defendants to penalties. The determination (No 2), dated 13 June 2012, then held that in respect of the four former employees of the plaintiffs, who are the second to fifth defendants in these proceedings, the first plaintiff should be ordered to pay a penalty for breaches of s 130 of the Employment Relations Act 2000 (the Act). A penalty of $5,000 in respect of each employee was imposed making a total of $20,000. Of those penalties one half was to be paid to each of the employees respectively and the balance of $10,000 was to be paid to the Crown.

[2] The matter of costs was reserved, but in a subsequent determination of the Authority[3] both plaintiffs were ordered to pay costs of $4,500 together with fees of $71.56 and witnesses expenses of $82.60 to the first defendant union (SFWU).

[3] The present challenge is against the determination (No 2), imposing the penalties but it also raises issues dealt with in the earlier determination.

Factual summary

[4] PRI Flight Catering Limited (PRIFCL), which is the second plaintiff, trades under the name Pacific Flight Catering (PFC). Pacific Flight Catering Limited (PFCL), which is the first plaintiff, is a subsidiary of PRIFCL and was incorporated simply for the purposes of protecting the Pacific Flight Catering brand name and

[1] [2012] NZERA Auckland 200.
[2] [2011] NZERA 525.
[3] [2012] NZERA Auckland 327.

does not otherwise trade. While the employment connection between these companies and the trading entity, PFC, on the one hand and the employee defendants in this matter on the other is in dispute, the actual operating position is as stated. Nevertheless, throughout this entire matter and in related proceedings, the parties have tended to interchange the names and commonly simply refer to the employer as Pacific Flight Catering or PFC.

[5] PRIFCL, as a separate legal entity and trading under the name Pacific Flight Catering, formerly held the catering contracts for Singapore Airlines. This contract was to provide catering services to Singapore Airlines for flights from New Zealand. Singapore Airlines put the contract up for tender. The successful tenderer was LSG Sky Chefs NZ Limited (LSG) and that company took over the catering services to Singapore Airlines on 23 February 2011. Logically the contract held by PRIFCL ended the previous day, 22 February 2011.

[6] As there were employees (whether of PRIFCL or PFCL) who were providing food catering services and therefore covered by Schedule 1A of the Act, Part 6A of the Act applied. This required continuity of their employment so that they were, with their consent, required to be employed by LSG. On 15 February 2011, slightly less than a week before the takeover, PRIFCL provided LSG with information concerning the wage records, leave entitlements and other employment information relating to the workers who were to transfer. This was updated on 22 February 2011. Prior to the transfer, PRIFCL had provided increases in wages and other entitlements to most of the employees who were transferring. These included two of the defendants. PRIFCL did not advise LSG or the employees that it had made these increases just prior to the transfer. However, from the evidence it appears that those employees who did receive increases of wages realised that this had occurred from their final payslips.

[7] When the new employees who were transferring to LSG and who had their wages and other entitlements increased became aware of this fact, they became concerned at its implications as did LSG. Attempts were then made by LSG and SFWU on behalf of the transferring employees who were members of the Union to

obtain further wage and time records from PFC so that the position could be checked.

[8] Prior to this in late December 2010 a meeting had taken place at the offices of the lawyers for PRIFCL. This was preparatory to the transition in February 2011 when LSG would take over the Singapore Airlines catering contract. Attending this meeting were Ms Gerda Gorgner (Human Resources Manager at PRIFCL) and her lawyer, Mr Tim Oldfield (Legal Officer at SFWU) and SFWU delegates and officials. The purpose of this meeting was to discuss the restructuring and procure information concerning the transferring workers' terms and conditions of employment, rates of pay and entitlements to enable a smooth transition. It was made plain to Ms Gorgner and her legal advisers that such information would need to be provided to LSG.

[9] The sequence of events, which then followed, was the subject of lengthy evidence. The subsequent narrative and exchanges between SFWU, Ms Gorgner, Ms Marie Park (LSG's Human Resources Manager New Zealand), legal advisers, and the individual employees affected, are set out as follows:

(a) PRIFCL and/or PFCL did provide the individual employment contracts and information on wage rates and leave balances. This was done prior to the transition. However, as indicated it became soon apparent that employees' entitlements had been increased just prior to the transfer. This did not apply to all the defendants; two received increases, two did not.

(b) Concerned at the consequences, which might flow from this, and to verify the accuracy of the information, Mr Oldfield wrote to Ms Gorgner on 16 February 2011 requesting wage, time, holiday and leave records for the previous 12 months. He provided a list of transferring employees.

(c) Ms Gorgner replied, stating she was frantic with transfer issues and was busy. She asked whether Mr Oldfield was acting on behalf of

LSG and whether one of SFWU's members had requested the information. She indicated that she had given all the payroll information to LSG the previous week. No further information was provided in response to Mr Oldfield's letter.

(d) On 16 March 2011 Ms Park wrote to PFCL. She sensibly indicated that she was then presently setting up records for the new employees for LSG. She requested information concerning the employees. She enclosed signed written requests from each employee individually showing the employees had authorised her to receive the information. She indicated the position was urgent. No written reply was received by LSG.

(e) Ms Park had clearly not received any written response to her letter but, on 6 April 2011, entered into an exchange of what I regard as unfortunate emails with the lawyer then acting for PFC. Unfortunately she indicated she was authorised to act as the employees' representative when all she had been authorised to do was receive the information on their behalf. However, this might have been a natural misunderstanding on her part. Instead of responding sensibly to the email from Ms Park, the lawyer for PFC was clearly instructed to seize upon this looseness of language and deliberately misinterpreted Ms Park's clearly stated position. A heated exchange of correspondence ensued with Ms Park in the face of the lawyer's intransigence threatening to seek compliance orders and the lawyer threatening to seek full solicitor-client costs if compliance was sought.

(f) Independently of Ms Park's sensible attempts to get information on what were clearly altered conditions from that previously prevailing for the employees, SFWU, on 28 March 2011, had written to Ms Gorgner requesting the same information. Mr Oldfield's letter of that date pointed out PFCL's obligations under s 130 of the Act and that the Union had authority to represent the employees. This was by

virtue of their signing the union membership form from which the employer companies had received a signed detachment as authority to make periodic deductions from the wages for union dues. The position was clearly spelled out.

(g) Ms Gorgner responded to this letter. She stated that the earlier request in February was incorrect and not actioned. Exact details of the alleged mistakes were not stated. She made allegations as to the employees' authorities being forged. She repeated a claim to require clarification as to whether SFWU was acting for LSG. She asked whether the Union was alleging under-payment to the employees listed.

(h) On 1 April 2011 Mr Oldfield wrote to Ms Gorgner again when cooperation was not apparent within the timeframe prescribed in his letter of 28 March 2011. He pointed out that a penalty imposed earlier by the Authority for earlier breach of the Act by PFCL had not been paid. He threatened that compliance orders and penalties would be sought.

(i) On 4 April 2011 Ms Gorgner wrote to the former employees individually advising them that they were welcome to view the time and wage records at PFC's premises if an appointment was made. Curiously, the letter to the employees enclosed a form for them to sign if they no longer required viewing of the records. Evidence was heard from three of the four defendant employees that, with some language difficulties and in view of their representation by SFWU and previous dealings with Ms Gorgner, they were reluctant to visit the premises to view the records. They also indicated that they may not know what to look for. This direct approach to the employees on 4 April 2011 may have been Ms Gorgner's response to SFWU's request as well as LSG's request.

(j) On 11 May 2011 Mr Oldfield wrote to Ms Gorgner again. By this time it was plain that she was indulging in obfuscation to try and avoid meeting the Union's and employees' requests. In his letter he pointed out that failure to provide the information as to the variations in pay rates and leave balances was causing the employees disadvantage with their new employer, LSG. Personal grievances were raised in this letter on behalf of the employees. Even though authorities to act were clearly with the company, Mr Oldfield enclosed further authorities signed by each of the union members who were employees.

(k) On 13 May 2011 Ms Gorgner wrote in reply responding to Mr Oldfield's letter. She raised allegations of defamation. She claimed not to have seen the detachment from the membership forms even though her company, over several years, had made union fee deductions from employees' wages on the basis of the authority contained in such detachment.[4] She raised issues of confidentiality. She stated that she remained concerned about the Union's relationship with LSG. Generally, her letter would be interpreted as a further attempt to obstruct the Union. Again, somewhat curiously, Ms Gorgner stated that while she had finally received appropriate authorisation she was not going to provide the information as she claimed to have serious concerns about confidentiality and requested that confidentiality agreements be signed. She required Mr Oldfield to address her further concerns on this issue.

(l) On 16 May 2011 Mr Oldfield, clearly frustrated by this time, wrote to Ms Gorgner again, advising that confidentiality agreements would not be provided; they could not be legally required. A further request was made and a claim for compliance and penalties was threatened in the event of failure to provide the further information requested. Ms Gorgner replied to this letter on 18 May 2011, again making it plain that the information would not be supplied. She referred to the fact

[4] A copy of the printed form with detachment was produced in evidence as exhibit 38.

that, as mediation was pending, that would be an opportunity to "move forward".

[10] It appears that mediation did not resolve the issue. The Authority Member, in his determination, refers to this period of correspondence from 11 May 2011 until final compliance on 21 July 2011, but only when required to do so by the Authority, as being the period for which he imposed the penalties. The parties of course went to an investigation. The Member, in his determination, points to perhaps the final aggravating feature of PFC's failure to comply when he completes the narrative of this sorry saga in the following paragraphs of his determination:

> [57] The respondents' breach was in the nature of a continuing one by its failure to "immediately" comply with s 130 of the Act. In the case of each employee applicant the breach occurred over a period of time between about 11 May, when the request for access to the records was made, and about six weeks later when the remaining wages and time records were produced shortly after the investigation meeting held on 21 July.
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> [58] Further, I take into account that shortly before this application was made PFC was found by its conduct to have breached other provisions of the Employment Relations Act 2000. For that conduct it was fined $6,000, or 60% of the $10,000 maximum at that time. Two of the applicant employees, Mr Ngakau and Mr Tuiti, were involved in that case and so once again have become the victims of breaches by PFC.

Other litigation

[11] There has been other litigation between PRIFCL, PFCL, PFC, LSG, SFWU, and the employees arising from previous employment contract negotiations and the loss of the Singapore Airlines catering contract to LSG. As stated in the determination, in January 2011 SFWU also obtained a penalty from PFCL arising from the latter's failure to observe the obligation of good faith during bargaining for a collective agreement. This involved Ms Gorgner directly approaching employees during the bargaining process with SFWU. That behaviour has some similarities to her dealings in the present dispute. So far as the present dispute is concerned, the previous judgments of this Court involved interlocutory matters. In addition, two decisions of this Court involved applications by former senior employees of PFC requiring that LSG employ them under Part 6A of the Act. One was successful and the other was not.

[12] On 25 October 2012, in a judgment of Woolford J in the High Court at Auckland,[5] LSG successfully sued PFCL and PRIFCL for the costs arising out of the last minute inflation of the leave entitlements for the transferring employees. Interestingly, in the judgment Woolford J dealt with the issue of the proper employer by simply linking the two companies, PRIFCL and PFCL, together and referring to them in combination as "Pacific". This judgment also provides valuable background for my consideration of the circumstances pertaining to the transfer of employees and the consequences arising as a result of PFCL's or PRIFCL's actions.

Counsel submissions and discussion

[13] The position of the plaintiffs is that they have complied with the requirements to provide wage and time records by providing the information to LSG and indicating to the individual employees that they would be entitled to view the records. So far as the requirement of s 130(2) of the Act that the records be provided immediately is concerned, this, Mr Drake submitted, must mean within a reasonable time. He then submitted that in the circumstances the requests made by Ms Gorgner for further clarification were reasonable.

[14] So far as penalties are concerned, Mr Drake submitted that a high threshold is imposed and that the penalties imposed in comparison with other reported authorities are excessive. He submitted that no harm has been occasioned to the plaintiff employees even if the requirements of the Act had been breached; which the plaintiffs deny. He then dealt with the issues of deterrence and whether the breaches could be regarded as egregious, flagrant, deliberate and repeated. These are part of the criteria established in *Prins v Tirohanga Group Limited (formerly Tirohanga Rural Estates Ltd).*[6] Mr Drake also made submissions, based on Ms Gorgner's evidence on the point that PRIFCL was the correct employer and that no penalty should be levied against PFCL. So far as this issue of the identity of the employer is concerned, Mr Cranney referred to the plethora of previous decisions involving these plaintiffs. He pointed out that in previous hearings the plaintiffs have not raised this issue. I have already referred to Woolford J's decision where he regarded both

[5] [2012] NZHC 2810.
[6] [2006] ERNZ 321.

jointly as the employing party. Certainly when the point was taken before the Authority, apparently for the first time, the Authority Member noted the fact that "Pacific Flight Catering" was loosely used and the fact that this was a trading name used by PRIFCL was not previously raised. Generally the other litigation refers to PFCL as employer.

[15] Mr Cranney, in his submissions, took me through the sequence of events. He pointedly referred to the fact that the plaintiffs had authorities from members of SFWU in the form of the detachment from the membership form sent to the employer to authorise deduction of union dues. The plaintiffs did deduct union dues from wages on the basis of this authority. Ms Gorgner in her evidence conceded this to me in answer to my questions of her.

[16] Mr Cranney submitted that the penalties in this case are appropriate because of the repeated failure to comply with reasonable requests from SFWU backed by the employees themselves. LSG, he submitted, needed the information requested so that the correct position of the employees could be recognised with the new employer. He submitted that the plaintiffs refused to provide the information in order to conceal their cynical actions in belatedly increasing terms and conditions to transfer illegitimate obligations to LSG. He submitted that in this case the breach was blatant and aggravated by the repeated behaviour of Ms Gorgner and that deterrence is required. He made a final submission that in comparison with the authorities, the penalties are consistent with the principle of totality and were reasonable.

The Authority's determination

[17] It is appropriate in this case to consider the reasoning of the Authority Member. I have already set out some parts of his determination in completion of the narrative of events earlier in this decision. Having traversed the background fully, including previous litigation, he formed the view that the plaintiffs clearly acted in breach of the Act and that the obstruction was deliberate. He considered that it was reasonable for the employees to be able to provide proper wage and leave records to their new employer. The request, after transfer, was also reasonable having regard to

anxiety surrounding the increase in the terms and conditions right on the date of transfer.

[18] As to the effect of the plaintiffs' behaviour on the employees he stated:

> [50] The lack of wage records to verify their entitlements with their new employer LSG caused anxiety to the employees and they gave evidence of the impact on them of PFC's actions in that regard. Their new positions of employment with LSG were compromised and they were not afforded equal treatment while there were doubts remaining about their transferred PFC entitlements.
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> [59] The applicant employees gave compelling evidence as to the consequences they suffered as a result of the failure by their former employer to comply with s 130 of the Act. Their correct pay rates and other entitlements could not be confirmed by LSG until, as the new employer, it had obtained some verification or clarification of their former pay rates and other entitlements relevant to establishing their new terms and conditions of employment. With some justification, the applicants are bitter about their treatment by their former employer and have urged the Authority to impose heavy penalties.

Similar evidence from the defendants was presented to this Court when the challenge was heard.

[19] As I have indicated earlier, while there were previous instances of failure to cooperate, the Authority Member concentrated on the final period from 11 May 2011 and the final compliance in July 2011. He also referred to the plaintiffs' final aggravating behaviour in [56] as cited earlier in this decision. It was not until directed by the authority that such compliance was made.

Conclusions and disposition

[20] So far as the correct identity of the employer is concerned, the correct position is that PRIFCL, trading as PFC, is technically the employer. However, the plaintiffs have held out in previous litigation that PFCL was the employer. No real attempt was made over the period of the employment, and during the period when this dispute arose, to draw a distinction, and it has only been raised for the first time before the Authority.

[21] I consider it appropriate, having regard to the facts and the way the parties periodically dealt with each other, to regard both plaintiffs as being in the position of the employer. It is possible for more than one entity to hold that position, particularly where that is held out, as it was in this case, and employees had relied upon that representation accordingly. That appears also to have been the position taken by Woolford J, without any demur by the plaintiffs, in the High Court proceedings.

[22] It is hard to understand the position taken by the plaintiffs, and Ms Gorgner in particular, in this matter. The only explanation can be that this was an attempt to conceal the action of the "poisoned chalice", as it has been referred to, of the increased liabilities being passed on to LSG. Ms Gorgner and her employers appear to have allowed their overwhelming animosity and antagonism towards their commercial competitor, LSG, to override their obligations to their former employees to be a good and fair employer. I do not accept Ms Gorgner's evidence before me as to the reasons for these increases being made when they were.

[23] Ms Gorgner provided the information containing the general increase in wages and leave entitlements to LSG without explaining it to the employees themselves. It was only natural that the employees (and indeed LSG) would then require clarification so that the correct wages, service increments and entitlements, and the like would be bedded into the records of the new employer. Requests were made respectively for information going back 12 months and eventually six years. When considering the issue of service increments, such periods of information required to be provided were reasonable. It was also natural that the employees would turn to their union to procure this information. Indeed, they had provided authority from early in their employment with the plaintiffs for SFWU to act as their agent and the plaintiffs recognised this by making the appropriate deductions for union dues.

[24] There is more than one inconsistency in the stand taken by Ms Gorgner. For instance, she claimed in her evidence to have difficulties late in the piece with confidentiality as the records of the employees were computerised. Therefore, she alleged, a print-out of the computerised information would contain information of

employees not involved in the dispute. She also claimed that it took 20 hours to redact information from the records before they were finally handed over in July 2011. This, however, did not appear to be a problem when she gave information initially to Ms Park at LSG in February 2011 before the takeover. It also did not appear to be a difficulty when she offered individual employees the right to come and view the records at the plaintiffs' premises. Her behaviour was consistent with her simply trying to obstruct SFWU from obtaining the information or at that stage having to give further information to LSG. If she had any regard for the wellbeing of the plaintiffs' previous employees, she would have provided it to both. In any event the obligation under the Act required the plaintiffs to have wage and time records for each employee available. It is not onerous and is an obligation of long history in employment law. With modern computerised records and technology I have considerable scepticism of Ms Gorgner's claims. The number of employees originally requesting the information was not large. Her allegations of problems with confidentiality are not tenable.

[25] It is correct that the plaintiffs did hand information over to LSG prior to the transfer of the business. It is also correct that Ms Gorgner offered to allow individual employees to view the records. Mr Drake has pointed to legal authority that such an offer is technical compliance with s 130(2) of the Act and that the prerogative as to how information is provided under that section rests with the employer.[7] There are, however, problems associated with the plaintiffs' stand in these aspects. If the information given to LSG had been information not containing the belated increase in conditions, that would have been acceptable at that point. Presumably no further issue would have arisen. But the underhand actions then added to the anxiety of the employees as the Authority Member has stated it, and led LSG, clearly to the disadvantage of the employees, to have to delay the final confirmation as to wages and entitlements arising from service until the position was clarified. A further request was made in an effort to clarify and it is the plaintiffs' intransigence in the face of these requests which gives rise to the breach. Compliance at the earlier time, if that is what it was, does not excuse failure to

[7] See: *Long v Leisure Lodge Motor Inn Limited and Sanders* ET Christchurch, CT171/94, 10 October 1994 and *Northern Hotel etc IUOW v Johannink (t/a Asia World Restaurant & Piano Bar) (No 1)* [1991] 2 ERNZ 494.

provide information in answer to a later request reasonably made in view of the circumstances that had unfolded.

[26] So far as the offer later made to individual employees to view the records is concerned, this cannot be acceptable compliance. The request by this stage had been made on two fronts. First, LSG had sent individual authorisations signed by the employees to the plaintiffs to provide information to their new employer. They were not authorising LSG to act as their agent but were simply authorising LSG to *receive* the information. This was a reasonable request in the circumstances. If Ms Gorgner had felt some equivocation as to whether she should release the information to LSG and that she should only invite the employees to inspect the records, that equivocation would soon have been dispelled by the request from Mr Oldfield of SFWU. To put to rest any doubts she may have had as to his authority under s 236 of the Act he then provided her with clear written authorities. He did not need to do this of course because the plaintiffs already had authorities dating from the time of commencement of the employees' employment and by virtue of which union fees were periodically deducted from wages. So on another front, SFWU, properly authorised, had also requested the information. The plaintiffs at that point were required to provide the information to the Union but chose not to do so. If the plaintiffs had not wanted to copy and send the information, they should have complied with the request by offering to allow Mr Oldfield to visit their premises and view the records. He was the person authorised to do that. Mr Oldfield said in evidence that if he had received such an invitation he would have taken it up. But no such offer was made to him. Again, for the same reason of necessity to have the information available to the new employer, his request was reasonable.

[27] None of these earlier incidents actually provides the basis for the Authority's imposition of penalties, the subject of this challenge. It was the later behaviour. Even if there were defects in the authorities these had by this later period been rectified. Ms Gorgner, recognising that, then took the stance of requiring confidentiality agreements and inexplicably acted in a way where the only means by which a resolution could be reached was for the Authority to direct the information to be provided. Even then, the plaintiffs acted in a recalcitrant way; for which

further aggravating behaviour the penalties were imposed. It was against the background of the earlier history that such a decision had to be made.

[28] This later behaviour transcends the arguments put forward by Mr Drake as to technical compliance. It is necessary to analyse the whole sequence of events and to consider the matter against the background and in the context of the clear motivations of the plaintiffs for their actions. It then becomes clear that this was behaviour that, to use the test in *Prins*, was an egregious, flagrant, deliberate, and repeated breach. It was behaviour requiring a deterrent penalty. It needs to be assessed from the perception of the second to fifth defendants and the difficult position in which they found themselves as Mr Cranney has submitted. They were service and food workers. The provisions of the Act are designed to provide protection to such vulnerable workers. Ms Gorgner would know they were not sophisticated people. Her offer, bypassing SFWU, for them to view the records at the plaintiffs' premises and in the face of a clearly authorised request from the Union, was facetious and cynical.

[29] Upon all the evidence I have heard I find that I am in agreement with the well reasoned decision of the Member of the Authority. The hearing before me was a de novo hearing. The evidence was not only from Ms Gorgner, being the sole witness for the plaintiffs, but also from Mr Oldfield, who was then the legal officer with the first defendant. Of course I also heard evidence from the other defendants as to their perspective on the entire episode and the consequences resulting to them from the failure of the plaintiffs to deal in a sensible fashion with LSG and their union. Ms Park from LSG gave evidence. Some evidence was heard that LSG was able to solve its position so far as the records of the employees were concerned by dealing with wage slips. However, the issue of wages is only part of the equation. In a situation where continuity of employment is to continue with such a transfer, it would be essential for the new employer to have full records of the employees' service for obvious reasons. Mr Drake submitted that as the Union had done nothing with the records since they had been provided by the second plaintiff a penalty should not be levied. However, employment records such as this continue to have relevance throughout the entire period of employment. These employees had been

transferred to a new employer. They were entitled to have their records secured even if they may continue to be stored by their union.

[30] It is necessary, in a situation where the breach is clearly proved as it has been in this case, for the Authority, and indeed this Court, to ensure that a deterrent remedy is imposed. Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith and not to do anything to mislead or deceive each other. That position has been breached in the present case. Section 130 itself, which deals with access to records of wages, by its very provisions, including the provision in issue in this case, is designed to ensure the protection of the employee on the important issue of their wages and service increments. The plaintiffs may well have been disappointed at losing a lucrative contract to LSG. That would be understandable. However, it did not excuse the effect of their vindictive behaviour being visited upon their vulnerable employees.

Disposition

[31] For all of these reasons, I consider that the penalties imposed in this case are appropriate. Accordingly, I make the same order as that contained in the determination. It may well be that, having regard to the repeated nature of the obstruction of the employer in this case, a higher penalty might have been imposed. However, the moderate approach taken by the Authority Member is, in my view, correct. It will provide a sufficient deterrent to any other employer who may in the future be tempted to behave in this way. Higher penalties may then in such circumstances be appropriate. I reconfirm the penalties imposed that in respect of each of the four defendant employees, the plaintiffs are jointly and severally ordered to pay a penalty of $5,000 for breach of s 130(2) of the Act. The total is $20,000. In each case one-half of the penalties, $2,500, is ordered to be paid directly to the second to fifth defendants respectively. The balance is to be paid to the Crown which will then receive $10,000 in total.

[32] The Authority's determination on costs dated 18 September 2012,[8] which incidentally was made against both plaintiffs, is also confirmed, and becomes an order of the Court against them jointly and severally, in the sum of $4,500, together with fees of $71.56 and witnesses expenses of $82.60.

[33] That leaves remaining the issue of costs in respect of the challenge to this Court. Costs will normally follow the event. Costs are reserved. If the matter of costs cannot be resolved between the parties, then the defendants shall have 14 days to file a memorandum as to any costs sought and the plaintiffs shall have 14 days thereafter to file any memorandum in answer.

ME Perkins
Judge

Judgment signed at 4.15 pm on Friday 7 June 2013

[8] [2012] NZERA Auckland 327.