IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 115
EMPC 430/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Plaintiff
AND	IT-GUYS NZ LIMITED Defendant

Hearing:	27 May 2019 (Heard at Auckland)
Court:	Chief Judge Inglis Judge K G Smith Judge J C Holden
Appearances:	M Urlich, counsel for plaintiff No appearance for the defendant S McKechnie, counsel assisting the Court
Judgment:	2 September 2019

JUDGMENT OF THE FULL COURT

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[1] This judgment resolves a challenge brought by a Labour Inspector of the Ministry of Business, Innovation and Employment (the Labour Inspector). It is directed to whether a Labour Inspector can use an improvement notice, issued under s 223D of the Employment Relations Act 2000 (the Act), to recover wages and holiday pay.

[2] In the Employment Relations Authority (the Authority), the Labour Inspector had sought a compliance order to enforce an improvement notice it had issued against the defendant, IT-Guys NZ Ltd (IT-Guys), principally directed to the recovery of wages and holiday pay due to IT-Guys' former employees.

[3] The Authority declined to make a compliance order, after finding that improvement notices are not to be used for the purpose of recovery of specific amounts of wages and holiday pay.[1]

[4] The Authority also found that there was insufficient evidence to support making a compliance order compelling payment of wages.

[5] The Labour Inspector challenges both these findings.

The Labour Inspector sought compliance with the Improvement Notice

[6] IT-Guys is a company based in Auckland that formerly offered computer consultancy services.

[7] In 2017 the Labour Inspector reviewed IT-Guys' compliance with the Act, the Minimum Wage Act 1983 and the Holidays Act 2003 and, as a result, considered that IT-Guys was not compliant in certain respects.

[8] The Labour Inspector issued an improvement notice to IT-Guys dated 17 August 2017 (the Improvement Notice). The Improvement Notice required IT-Guys to pay three named former employees wage arrears and/or holiday pay arrears.

[9] The Improvement Notice also required IT-Guys to review the public holiday and sick leave entitlements, and termination pay for another named former employee, and to pay that former employee any entitlements due and owing.

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1 *A Labour Inspector of the Ministry of Business, Innovation and Employment v IT-Guys NZ Ltd* [2018] NZERA Auckland 392.

[10] IT-Guys was required to comply with the terms of the Improvement Notice by 15 September 2017. At the time the notice was issued, IT-Guys no longer had any employees. No objection was lodged to the Improvement Notice.[2]

[11] After determining that IT-Guys had not complied with the Improvement Notice, the Labour Inspector applied to the Authority for a compliance order, a penalty and costs. That application resulted in the determination now being challenged.

[12] Although IT-Guys was represented by Mr Simon Latu, a director, in the Authority, it took no part in the hearing of the challenge before the Employment Court. When it became apparent that IT-Guys was not going to participate in the Court hearing, the Court appointed Ms McKechnie to appear as counsel to assist the Court. We are grateful for her assistance.

The key issue for determination

[13] The key issue for determination by the Court is whether an improvement notice can require payment of minimum wages and holiday pay arrears.

[14] The Labour Inspector says that s 223D of the Act allows for the recovery of minimum wage and holiday pay arrears:

(a) On a plain reading of s 223D an improvement notice may require an employer to comply with obligations to pay minimum wages and holiday pay arrears. That an improvement notice could include arrears is provided for by s 228(2) of the Act.

(b) A purposive approach aligns with the plain meaning. The purpose of s 223D is to provide a practical tool for Labour Inspectors to incentivise non-compliant employers to comply with their statutory obligations and improve practice.

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[2] Although not material to our analysis, we note that the Labour Inspector gave IT-Guys an opportunity to comment on the proposed Improvement Notice and information on making an objection to the Improvement Notice under s 223E of the Act.

(c) An improvement notice is one of a range of enforcement tools available to Labour Inspectors. Which tool is appropriate is a matter of discretion for the Labour Inspector.

[15] The Labour Inspector seeks orders from the Court:

(a) Requiring compliance with the Improvement Notice dated 17 August 2017;

(b) For IT-Guys to pay a penalty for failure to comply with the Improvement Notice;

(c) Awarding costs and disbursements to the Labour Inspector.

[16] Ms McKechnie's submissions were appropriately directed to the issues of principle, essentially acting as contradictor to the Labour Inspector. She submits that the Authority was right to find that, to use an improvement notice for the purpose advanced by the Labour Inspector is unlawful and outside the Labour Inspector's powers:

(a) To recover wage arrears under the Act, the appropriate mechanism is for the Labour Inspector to use a demand notice under s 224;

(b) To use an improvement notice for this purpose:

(i) Misunderstands the statutory scheme;

(ii) Circumvents key protections for the employer in the demand notice process; and

(iii) Risks statutory redundancy, by avoiding the demand notice process.

[17] Ms McKechnie's submissions were directed to the requirement in the Improvement Notice that IT-Guys pay three named former employees wage arrears

and/or holiday pay arrears. She did not contest the requirement that IT-Guys review the public holiday and sick leave entitlements, and termination pay for the other named former employee to determine what entitlements were due and owing.

Enforcement mechanisms are in Part 11 of the Act

[18] Labour Inspectors have a range of enforcement tools available to them. These are set out in Part 11 of the Act: enforceable undertakings[3], improvement notices[4] and demand notices.[5] In addition, Labour Inspectors can apply to recover arrears of wages[6] and issue infringement notices.[7]

[19] While the different mechanisms provide for various levels of intervention, they can be directed to the same end. It is clear that, if a Labour Inspector considers there are moneys due to an employee under the Minimum Wage Act or the Holidays Act, the Labour Inspector can seek an enforceable undertaking from an employer, or issue a demand notice, or commence an action on behalf of the employee to recover any wages or holiday pay. The issue in this case is whether an improvement notice is another option available to the Labour Inspector.

The introduction of improvement notices was part of a more flexible approach

[20] Enforceable undertakings and improvement notices were introduced by the Employment Relations Amendment Act 2010.

[21] The Explanatory Note to the Bill discussed the drivers for change:[8]

> Current enforcement levers, in particular, penalties and demand notices, are insufficient and inefficient ways to incentivise compliance with employment legislation by employers. They do not support appropriate responses for low-level non-compliance, nor do they adequately deter severe or long-standing non-compliance. The current system of enforcement does not effectively target non-compliant practices in workplaces. The Bill addresses this

3 Employment Relations Act 2000, s 223B.
4 Section 223D.
5 Section 224.
6 Section 228.
7 Section 235C.
8 Employment Relations Amendment Bill (No 2) 2010 (192-1) at 10.

> inefficiency in the current system and supports greater responsiveness to businesses and a more flexible and efficient use of inspection resources. The changes made by the Bill are intended to strengthen and improve overall compliance and fairness for both employers and employees. These changes will widen the role of Labour Inspectors from a narrow complaints focus to enable a more proactive approach to achieving compliance.

[22] The purpose of improvement notices was described in the Explanatory Note to the Bill:[9]

> This is to create an incentive for non-compliant employers to improve practice. The improvement notice draws on the mechanism currently available to health and safety inspectors under the Health and Safety in Employment Act 1992. Improvement notices have the aim of both avoiding litigation and encouraging a co-operative approach to compliance. It is intended that improvement notices provide a practical addition to the employment relations enforcement framework.

[23] The then Minister of Labour noted the reason for the amendment as:[10]

> The Act does not provide a mechanism by which labour inspectors are able to respond in a prompt and targeted way to motivate an unwilling employer to comply with the law. Current enforcement is dependent on the inspector seeking compliance through the Authority. The result is lengthy and costly litigation that is not efficient for government or businesses.

[24] The then Minister of Labour went on to note:[11]

> Improvement notices provide a practical addition to the employment relations enforcement framework. These notices exist in health and safety legislation and provide a template for their application for labour inspectors. The guidance and education they provide is likely to prove valuable in encouraging compliance. The ongoing nature of the improvement notice may generate increased costs for the Department, the Authority and employers.

[25] That material indicates that the purpose of the amendment to the Act that introduced ss 223A-223G was to widen the tools available to Labour Inspectors, including to provide broad and practical tools that could be used to encourage employers to comply with the relevant legislation. Although Parliament may have drawn on the mechanisms in the Health and Safety in Employment Act 1992, the

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9 At 12.

10 Office of the Minister of Labour, Cabinet Business Committee "Proposals to Amend the Employment Relations Act 2000 and Related Work" (July 2010) Appendix 1 at [126], cited in *Mazengarb's Employment Law* (online ed, LexisNexis) at [ERA223D.3].

11 At [129].

differences between the sections of the two Acts make any close comparison unhelpful.[12]

[26] Section 223D, which introduced improvement notices, provides:

> **223D Labour Inspector may issue improvement notice**
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> (1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.
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> (2) An improvement notice issued under subsection (1) must state—
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> (a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and
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> (b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and
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> (c) the nature and extent of the employer's failure to comply with the provision; and
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> (d) the steps that the employer could take to comply with the provision; and
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> (e) the date before which the employer must comply with the provision.
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> (3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).
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> (4) An improvement notice may be issued—
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> (a) by giving it to the employer concerned; or
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> (b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.
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> (5) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.
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> (6) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.

[12] Now see Health and Safety at Work Act 2015, ss 101-104.

[27] Mr McGowan, who is a Labour Inspector employed by the Ministry of Business, Innovation and Employment, gave evidence as to when the different enforcement mechanisms currently are adopted, using the "range of tools" approach. He attached to his affidavit relevant extracts from the Labour Inspectorate Investigation and Enforcement Guide, as at April 2019. The Guide also describes the different mechanisms available to a Labour Inspector and some of the considerations the Labour Inspectorate suggests a Labour Inspector consider in determining which one he or she wishes to use. The Labour Inspectorate notes that enforceable undertakings and improvement notices are directed to getting an employer to comply with its obligations, rather than at punishing the employer. They are seen as appropriate when issues are less serious, including when they are used to underpin a voluntary agreement by an employer to remedy non-compliance.

[28] Ms Urlich, appearing for the Labour Inspector, submitted that which "tool" is selected is a matter of discretion for the Labour Inspector. Only Labour Inspectors can use these tools and the Act is silent on which tool to use in which circumstances.

There are indicia supporting both approaches to improvement notices

[29] The principles that apply to interpreting s 223D are:[13]

(a) Its meaning must be ascertained from its text and in light of its purpose;[14]

(b) This means that, even if the meaning of the text appears plain, it should always be cross-checked against the purpose of the legislation; and

(c) In determining purpose, regard must be had to both the immediate and general legislative context; of relevance too may be the social, commercial or other objective of the legislation.

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13 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

14 Interpretation Act 1999, s 5.

[30] Considered in isolation, there is nothing in the text of s 223D that would preclude an improvement notice being issued to require an employer to remedy a past failure to comply with the requirements of the Minimum Wage Act and the Holidays Act. Section 223D(2)(a) applies not just to ongoing failings but previous failings; s 223D(3) anticipates that an improvement notice would include the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision.

[31] The question then is whether there is anything in the context of the legislation that would limit the use of improvement notices to requiring an employer to rectify non-compliant employment practices going forward.

[32] Ms McKechnie points to what she says is the natural meaning of "improvement", with "improve" meaning "make or become better".[15] This may suggest the focus of improvement notices is to move non-compliant employers from their current practice towards best practice.

[33] Ms McKechnie distinguishes that aim from that of a wage arrears claim, which is to recover a debt owed by an employer to an employee, and which would typically be binary. In that respect she says debts are not capable of "improvement" within the usual meaning of the term.

[34] While we acknowledge the point made, we do not consider that its name so limits the purposes for which an improvement notice can be used, particularly in light of the words used in s 223D and Parliament's purpose.

[35] There are no specific references to the use of improvement notices for the recovery of wage arrears. Section 11 of the Minimum Wage Act refers to the Labour Inspector's ability to recover wage arrears through an action on behalf of an employee but does not refer to either demand notices or improvement notices. Section 77 of the Holidays Act refers to the Labour Inspector's ability to recover holiday pay through an action on behalf of an employee. It also refers to the ability of a Labour Inspector

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[15] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, 2005) at 547.

to recover wage arrears through the issuing of a demand notice, but it does not refer to the issuing of an improvement notice.

[36] However, there are other pointers that would indicate that an improvement notice is able to be used to recover wages or holiday pay due to employees. There is the ability for an improvement notice to state the nature and extent of any loss suffered by an employee as a result of the employer's failure to comply with the provision (if applicable).[16] If an objection to the improvement notice then is filed by the employer, one of the Authority's functions is to determine the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision in issue (if applicable).[17] The Authority may confirm, vary or rescind the improvement notice, which must include being able to confirm or vary the amount (if any) the Labour Inspector has included in the improvement notice by virtue of s 223D(3).[18] This raises the question of what the purpose of identifying that loss is if not to require the employer to make it good.

[37] There then is s 228(2) of the Act, which provides that if a Labour Inspector commences an action for recovery of wages or holiday pay, the Labour Inspector must not issue an improvement notice in respect of the same wages or holiday pay or other money. That too indicates that the use of an improvement notice could be an alternative to an action for recovery of monies under s 228.

The two processes are different

[38] Another point that Ms McKechnie makes is that the process for issuing and enforcing demand notices includes protections for employers that are not provided for with an improvement notice. She says this indicates a clear Parliamentary intention that the demand notice process is to be used to recover debt.

[39] A Labour Inspector wishing to issue a demand notice must give an employer not less than seven days to comment on the complaint or the grounds for the Labour

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16 Employment Relations Act 2000, s 223D(3).
17 Section 223E(2)(c).
18 Section 223E (3).

Inspector's belief that wages, or holiday pay or other money is payable by the employer to the employee under the Minimum Wage Act or the Holidays Act.[19] It also expressly restricts demand notices to monies that were payable within six years prior to the date upon which the demand notice is served on the employer concerned.[20]

[40] An improvement notice on the other hand, can be issued without consultation with the employer, provided the Labour Inspector reasonably believes that the employer is failing, or has failed to comply with the provision of one of the relevant Acts. Ms Urlich said that, in practice, it would be difficult to conceive of a situation where a Labour Inspector reached that reasonable belief without engaging with the employer, but while that practicably may be the position, that cannot be assumed. However, there is a mechanism for an employer to object to an improvement notice; the employer may, within 28 days after receipt, lodge with the Authority an objection to the notice.[21]

[41] Where there is an objection made to a demand notice under s 226 the role of the Authority is to determine whether the whole or part of the wages or holiday pay or other money specified in the notice is due to the employee by the employer and, if so, the amount payable. It is only directed to monies due.

[42] Where there is an objection to an improvement notice the Authority may vary it. This terminology leaves it open to the Authority to vary the requirements of the improvement notice directed to the employer's practices, for example how it maintains its wage and time records, and reflects the broader scope of improvement notices.

[43] Another difference is that the determination of the Authority, or if there is no objection, the amount included in the demand notice, is enforceable as a judgment debt under s 141 of the Act; where there is a failure to comply with an improvement notice, this is enforced by way of a compliance order under s 137.

[44] These differences underscore that the two notice processes operate differently. One process may be more suited to the circumstances than the other. This reinforces

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19 Section 224(1)(b).
20 Section 224(4).
21 Section 223E.

that improvement notices and demand notices are 'tools' in the Labour Inspector 'toolkit' for the Labour Inspector to use as he or she considers appropriate.

[45] In summary, the purpose of the sections introduced by the Employment Relations Amendment Act 2010 was to broaden the enforcement mechanisms available to a Labour Inspector, including making available less formal mechanisms to get employers to meet their obligations to their employees. This is reflected in the different processes for demand and improvement notices, including for enforcement.

[46] Reading the Act to exclude the use of improvement notices to recover moneys due would require the Labour Inspector to use multiple mechanisms in situations where, for example, the calculation method for holiday pay is incorrect – an improvement notice would be required to deal with the employer's practice going forward, and then either a demand notice or a wage recovery action would need to be initiated to recover past payment. This runs counter to the legislative purpose of the relevant part of the Amendment Act.

[47] In conclusion, the various mechanisms identified in Part 11 of the Act comprise tools potentially available to a Labour Inspector, including when considering past non-compliance with the relevant Acts that has resulted in moneys being due to employees.

Compliance order granted

[48] The Labour Inspector has challenged the Authority's refusal of a compliance order and seeks an order requiring compliance by IT-Guys of the Improvement Notice.

[49] Although Mr Latu corresponded with the Labour Inspector involved in the investigation of IT-Guys, no objection was lodged to the Improvement Notice. The evidence provided to the Court by Employees A and C and by the Labour Inspector, establishes that the amounts set out in the Improvement Notice have not been paid. IT-Guys also has failed to review public holiday and sick leave entitlements and termination pay for Employee D or pay him any entitlements due and owing.[22]

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[22] Names anonymised for this judgment.

[50] The Labour Inspector is entitled to a compliance order in the terms sought. Accordingly, the determination of the Authority is set aside and this judgment stands in its place.[23]

[51] IT-Guys is ordered to:

(a) Pay to [Employee A] minimum wage arrears of $10,737.46 (gross) pursuant to section 6 of the Minimum Wage Act 1983;

(b) Pay to [Employee A] holiday pay arrears of $2,116.91 (gross) pursuant to ss 24, 25 and 27 Holidays Act 2003;

(c) Pay to [Employee B] holiday pay arrears of $592.80 (gross) pursuant to ss 23 and 27 Holidays Act 2003;

(d) Pay to [Employee C] holiday pay arrears of $760.11 (gross) pursuant to ss 23 and 27 Holidays Act 2003;

(e) Review public holiday and sick leave entitlements and termination pay for [Employee D] and pay any entitlements due and owing.

[52] IT-Guys must comply with this order within 14 days of the date of this judgment. Failure to comply with this order could result in IT-Guys being ordered to pay a fine not exceeding $40,000 and/or an order that IT-Guys' property be sequestered.[24]

Penalty appropriate

[53] The Labour Inspector also seeks a penalty against IT-Guys for non-compliance with the Improvement Notice, in accordance with s 223F of the Act.

[54] Section 133A of the Act applies to the claim for a penalty and provides as mandatory considerations:

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

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23 Employment Relations Act 2000, s 183(2).
24 Section 140(6)(d) and (e).

(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.

[55] Other considerations that may apply in particular cases include:[25]

(a) deterrence, both particular and general;

(b) culpability;

(c) consistency of penalty awards in similar cases;

(d) ability to pay; and

(e) proportionality of outcome to breach(es).

[56] The Employment Court in *Borsboom v Preet PVT Ltd* identified a four-step process that might usefully be applied when setting penalties:[26]

Step 1 Identify the nature and number of statutory breaches;

Step 2 Assess the severity of the breach to establish a provisional penalty starting point. Consider both aggravating and mitigating features;

Step 3 Consider the means and ability of the person to pay the provisional penalty arrived at Step 2;

Step 4 Apply the proportionality or totality test to ensure that the amount for each final penalty is just in all the circumstances.

[57] Here there is a single breach with a maximum penalty of $20,000.[27]

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25 *Nicholson v Ford* [2018] NZEmpC 132 at [18].
26 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514 at [151].
27 Employment Relations Act 2000, ss 135(2)(b) and 223F.

[58] The failure by IT-Guys to comply with the Improvement Notice by failing to pay its employees the amounts outstanding has left those employees out of pocket and, while the amounts owing to the employees may not objectively seem large, they are at a level that would be significant to the employees concerned, especially for Employee A. This failure also has required the Labour Inspector to engage in litigation.

[59] However, the breach is not at the highest level and there was no evidence that the shortfall in wages or holiday pay was deliberate. Further, IT-Guys seemed to have genuine concerns over the process and issuance of the Improvement Notice.

[60] It appears that IT-Guys may have sought advice to improve employment processes, meet employment standards and keep accurate records, but there is no evidence that improvements were made.

[61] There is no evidence of any financial circumstances of IT-Guys that would impact on its ability to pay a penalty, so no reduction is justified on that basis.

[62] The Labour Inspector submits that weighing the relevant aggravating and mitigating factors, a penalty of $7,000 is appropriate.

[63] In all the circumstances and considering the overall proportionality of the outcome, we agree that a penalty of $7,000 is warranted and it is ordered. This amount is to be paid by IT-Guys to the Registrar of the Employment Court within 14 days of the date of this judgment. Of that penalty $3,000 is to be paid to Employee A, who has been most significantly impacted by IT-Guys' failures; Employees B, C and D are to receive $200 each as the impact on them appears to be comparatively minimal; and the balance of $3,400 is to be paid to the Crown.[28]

[64] As IT-Guys was not represented before the Court, the Labour Inspector is to promptly provide it with a copy of this judgment.

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[28] Section 136.

Costs awarded

[65] The Labour Inspector seeks a modest award of costs together with disbursements, including reimbursement of the filing fee in the Court.

[66] We invite the Labour Inspector to file a memorandum setting out the costs and disbursements he seeks. He is to do that within 21 days of the date of this judgment.

J C Holden
Judge
for the full Court

Judgment signed at 3 pm on 2 September 2019