IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 194
EMPC 136/2021

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	ENTERPRISE MOTOR GROUP (NEW LYNN) LIMITED Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	28 March 2022 (Heard at Christchurch via Audio Visual Link)
Appearances:	P Wicks KC, R Wooders and S Moore, counsel for plaintiff T M Gray, counsel for defendant
Judgment:	26 October 2022

JUDGMENT OF JUDGE K G SMITH

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[1] Enterprise Motor Group (New Lynn) Ltd (EMG) is a car dealership in Auckland. EMG's salespeople are paid by commission. A complaint about how those payments have been calculated prompted an investigation by a Labour Inspector.

[2] The Inspector's assessment was that between 2011 and 2018, EMG did not pay its salespeople in a way that complied with the Minimum Wage Act 1983 (the Act) and relevant minimum wage orders.

[3] The Inspector issued an improvement notice to EMG requiring it to take remedial steps because he concluded it had breached s 6 of the Act.

[4] EMG objected to the improvement notice in the Employment Relations Authority. The Authority removed the objection to the Court for consideration without first investigating it.[1]

[5] The objection sought to alter both the method specified for the remedial steps in the Inspector's notice and the time period over which they were to be performed.

[6] A consequential amendment to the notice was sought to alter the time for compliance to take into account the time required for this proceeding.

[7] The hearing was conducted by relying on an agreed statement of facts.

Agreed statement of facts

[8] At all relevant times EMG employed about seven salespeople whose primary duties were to sell vehicles to retail customers.

[9] Each EMG salesperson was paid a monthly commission based on that person's sales for the month. Each salesperson received a weekly advance payment in anticipation of being paid commission. Until 28 August 2016, the advance on commission was $400 gross per week, but then it increased to $800 gross per week until April 2020.

[10] The commission was a percentage of the gross profit on each vehicle sold by the salesperson in accordance with formulae in individual employment agreements. The percentage of commission appears to have been slightly different for certain salespersons, but the scheme was essentially the same.

[11] The percentage payable to the salesperson rose as that person's sales increased over the month so that sales made toward the end of the month could lift the

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1 *Enterprise Motor Group (New Lynn) Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2021] NZERA 147 (Member Craig).

commission payable on all sales made by the salesperson during the month.[2] For example, one individual employment agreement provided that the salesperson earned commission of 16 per cent on selling between one and eight vehicles. This commission rate then rose in stages to 21 per cent if more than 15 sales were made in the month.[3]

[12] When the commission rose, it applied to all sales made in the month. In the example just described selling more than 15 vehicles earned the salesperson 21 per cent on all sales including those made at the beginning of the month that initially attracted 16 per cent commission.

[13] The method of earning commission meant that the amount payable could not be determined until after the month ended. At that time EMG calculated gross profits by reconciling sale prices, sales-related costs including the advances already paid and other overheads.

[14] From about January 2014 until late-August 2016, EMG smoothed what it paid as commission advances because the weeks in each year do not align perfectly with the calendar months in a year.[4] In some months the advance was more than the amount subsequently deducted as part of the reconciliation, but there were other months when it was less than that amount. Despite that smoothing process the actual deduction was generally $1,733.37 per calendar month.

[15] The smoothing process ceased from 29 August 2016. From then on the monthly deduction from the total of each person's commission equalled the sum of the advance payments during the month.

[16] Salespeople also earned bonuses and other incentives. They were payable as part of schemes to encourage sales and could be earned for such activities as reaching a specific target or for selling old stock. Sometimes bonuses or incentives were paid

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2 Where vehicles were sold at a loss or an employee was subject to a 90-day trial provision, a flat rate of commission of $200 was paid. As to trial provisions see Employment Relations Act 2000, ss 67A and 67B.

3 If a vehicle was returned in the same month in which it was sold, the sale was disregarded for the purposes of calculating commission unless the vehicle was replaced.

4 The calculation was: (commission advance * 52 weeks / 12 months) = deduction.

at the end of the particular promotion or time interval, but otherwise they were paid along with commission at the beginning of the following month.

[17] In November 2017, a draft investigation report was issued by the Inspector concluding that EMG had not complied with the Act.[5] At the time the draft report was prepared the Inspector had invited the company to enter into an enforceable undertaking, but that step does not seem to have been taken and the parties did not address the matter during this proceeding.[6]

[18] The Inspector completed an updated draft investigation report on 6 August 2018, followed by the final report on 24 September 2018. EMG was served with the improvement notice on 11 October 2018.

The improvement notice

[19] The improvement notice stated the Inspector's belief that EMG had breached s 6 of the Act by not paying at least the minimum wage for every hour worked.

[20] EMG was required to take remedial steps to comply by calculating the extent of its breaches beginning on 28 April 2011 and to rectify them. The company was required to identify all past and present employees in sales roles from that date onwards. It was then to review the wages and time records for each of them and to identify the dates on which individual commissions and bonuses were earned. The notice indicated that the dates on which individual commissions were earned could be identified as the date when the "paperwork is finalised and loan documentation is signed". This meant that the date of the sale of each car was also the date on which the commission in respect of that car was earned. From that information the company was to calculate the value of the commissions in accordance with each individual employment agreement.

[21] EMG was also to calculate the value of individual bonuses for each employee and apply that value to the dates on which the "bonuses were earned".

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5 Other alleged shortcomings relating to holiday pay were not the subject of this proceeding.
6 Employment Relations Act 2000, ss 223B and 223C.

[22] EMG's calculations under the notice were to cover two time periods. The first period was between 28 April 2011 and 25 June 2014. For that time period, the relevant minimum wage orders required employees to receive from their employer not less than the required minimum wage for every hour worked each week (referred to in the notice as a calendar week). The notice instructed the company to undertake the minimum wage assessment based on commissions and bonuses "earned in that calendar week only". EMG was specifically prevented by the notice from offsetting any underpayment in one calendar week against earnings from another week.

[23] The second period of time covered by the notice was from 26 June 2014 onwards. The beginning of that period coincided with changes to the "all other cases" category of minimum wage orders so that employees received at least the minimum wage for every hour worked each fortnight. From this date EMG was instructed by the notice that the minimum wage assessment should be based on "commissions and bonuses earned in that calendar fortnight only". It was not to offset any underpayment in one calendar fortnight with earnings in another fortnight.

[24] For both time periods EMG was instructed to top up any shortfall by paying the adversely affected employee and to provide proof to the Inspector that the stipulated remedial steps were completed.

The Act

[25] The Inspector's improvement notice relied on s 6 of the Act:

> **6 Payment of minimum wages**
>
> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[26] Under s 4 of the Act the Governor-General may by order in Council prescribe a minimum adult rate of wages in a monetary amount.[7] Such orders are known as minimum wage orders.[8]

[27] In the period covered by the Inspector's notice the structure of the minimum wage orders changed. Clause 4 of the Minimum Wage Order 2011 provided a minimum adult rate of pay by specifying an amount payable where work was by the hour or piecework, by the day, and "in all other cases" by the week.

[28] The categories were expanded in the Minimum Wage Order 2014. Categories were retained for adult employees paid by the hour or by piecework, by the day, and by the week. The alteration was to cl 4 and the "in all other cases" category which shifted away from weekly pay to an amount per fortnight with a further payment for every hour worked exceeding 80 hours in that fortnight.[9]

[29] The parties agreed that for all periods of time covered by the improvement notice the "all other cases" category in cl 4 of the relevant minimum wage orders applied to EMG's salespeople.

The objection

[30] The objection to the improvement notice was about the method it required EMG to use to calculate compliance with the Act and minimum wage orders. The company considered the Act permitted it to apply its wage calculation across the whole month, provided that in each week or fortnight (depending on the applicable minimum wage order) each hour worked was paid for at not less than the required minimum rate. The Inspector did not agree.

[31] The agreed statement of facts gave the competing positions of the parties as:[10]

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7 Minimum Wages Act 1983, s 4(1)–(2).

8 The relevant orders are: Minimum Wage Order 2011; Minimum Wage Order 2012; Minimum Wage Order 2013; Minimum Wage Order 2014; Minimum Wage Order 2015; Minimum Wage Order 2016; Minimum Wage Order 2017; and Minimum Wage Order 2018.

9 Minimum Wage Order 2014, cl 4(d).

10 MWA means Minimum Wage Act 1983.

(a) EMG's position was that EMG's Salespeople's commissions and bonuses were "paid" monthly and therefore MWA compliance should be assessed on a monthly basis by evenly apportioning all commissions, Commission Advances, and bonuses payable in relation to each calendar month to the calendar weeks or fortnights of the year (as per the applicable Minimum Wage Order…); and

(b) the Labour Inspector's position was that EMG's Salespeople should have their income assessed against the minimum wage payable under the relevant Order (prior to 26 June 2014, on a weekly basis, and from 26 June 2014 onwards, on a fortnightly basis), based solely on the commission and bonus payments that had been "earned" in those weeks or fortnights.

The issues

[32] The issues are:

(a) Does EMG's method of calculating wages comply with the Act and relevant minimum wage orders?

(b) If EMG's method does not comply, does the improvement notice specify a method for calculating minimum wages that complies with the Act and relevant minimum wage orders?

(c) What is the earliest time from which the Inspector can require EMG to undertake remedial steps by using an improvement notice?

Does EMG's method of calculation comply?

[33] Mr Wicks KC, counsel for EMG, described the company's case as the Act, and relevant orders, requiring it to take the following steps:

(a) Calculate the value of all commission, commission advances and bonus payments to the salesperson in relation to each calendar month.

(b) For work between 28 April 2011 and 25 June 2014:

(i) evenly apportion all commission, commission advances and bonuses that were payable to salespeople in relation to each calendar month to the calendar weeks of the year;[11]

(ii) assess whether salespeople received at least the minimum wage for each hour worked in each week; and

(iii) top up the wages of any salesperson who did not receive at least the minimum wage for every hour worked in that calendar week.

[34] As to work from 26 June 2014 onwards, when the "all other cases" category of the minimum wage order changed, the methodology would be the same but over a fortnight instead of a week.

[35] EMG's method created a dispute about whether it was impermissible averaging, which the full Court of the Employment Court and Court of Appeal rejected in *Idea Services Ltd v Dickson* as not complying with the Act.[12]

[36] An issue in *Dickson* was whether the employer had complied with the Act in the way it paid employees for sleepover work.[13] The employer's unsuccessful argument was that "rate" in s 6 of the Act and in cl 4 of the relevant minimum wage order meant "average rate over a pay period".[14] If that argument had been accepted, it would have meant compliance could be tested by taking the employee's total pay over the pay period and dividing it by the number of hours worked. Only if that average rate was below the minimum wage rate would it be said non-compliance occurred.

[37] The employer's interpretation was rejected because it applied an approach that would see the employee paid a dollar amount per hour on average over his pay

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11 Mr Wicks said that where the months of the year did not align with calendar weeks in the year some weeks would comprise proportionate payments relating to two months.

12 *Idea Services Ltd v Dickson* [2009] ERNZ 372 (EmpC); and *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

13 *Idea Services Ltd v Dickson* (CA), above n 12, at [4].

14 At [32].

period.[15] Using that approach would mean the pay period became crucial but that concept was not contained in the Act. The Court of Appeal was satisfied that "rate" used in the Act and minimum wage orders meant an "amount per unit of time".[16]

[38] The employee's successful argument in *Dickson* was that he was entitled to at least the minimum rate of pay for every hour of work regardless of his earnings over the pay period. The Court of Appeal accepted that a purpose underlying minimum rates of wages was to counter exploitation and to ensure employees always received a minimum rate of wages for every part of their work.[17]

[39] Mr Wicks and Mr Gray, counsel for the Inspector, accepted that averaging as referred to in *Dickson* was impermissible. Counsel also agreed that in both the Act and orders "rate" applies to the unit of time.[18] There was no dispute that in determining what rate to apply a finding is required about the terms of the employment agreement.

[40] Mr Gray criticised EMG's method as indistinguishable from averaging that *Dickson* held was not lawful. He described the company's approach as reaching a mean value by dividing the sum of several payroll runs by the number of minimum wage order periods within the month. Since the result was an average, he submitted EMG's method was inconsistent with the Court of Appeal's interpretation of the Act.

[41] Mr Gray supported his submission by noting that the salespeople received weekly payments from EMG in the form of advances on commission and paid some bonuses in the weekly payroll runs. During the month data for commission payments were collected by the company to be used in the subsequent reconciliation. He submitted that these facts illustrated that the Inspector's approach was a pragmatic and fair way to assess compliance.

[42] The Inspector's analysis served the dual purpose of supporting the argument that the company was seeking approval for impermissible averaging and his selection of the earnings-based requirement used in the improvement notice. That is, the

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15 At [35].
16 At [32].
17 At [40].
18 That is pay by the hour, day, week, and "all other cases" as described in the relevant orders.

minimum wage applied in each week or fortnight (depending on the order) and pay had to be, and could be, calculated for each unit of time.

[43] Conversely, Mr Wicks said EMG could assess its compliance across the calendar month so long as what it paid complied with either the weekly minimum adult wage before June 2014 or the fortnightly rate after that date.

[44] Mr Wicks submitted that the averaging in EMG's method was distinguishable from the impermissible averaging described in *Dickson.* In support of this submission, he developed two broad arguments: first, that the minimum wage orders permitted some averaging within a pay period; and secondly, that the structure of the orders meant that there were occasions when pragmatic and commercially realistic conclusions needed to be reached, so long as each hour was paid for at not less than the minimum rate.

[45] An example was used to illustrate that some forms of averaging are permissible. Mr Wicks described an employee paid fortnightly under the Minimum Wage Order 2015. In his example the employee must receive at least $1,180 per fortnight plus $14.75 per hour for each hour exceeding 80 worked per fortnight. The order was said to be satisfied if the employee worked 20 hours in the first week and 60 hours in the second week and was paid $1,180.

[46] Mr Wicks illustrated impermissible averaging using a similar example. If an employee worked less than 80 hours in one fortnight and more than 80 hours in the following fortnight, the employer would not be permitted to average income over those two fortnightly periods.

[47] Mr Wicks' reference to pragmatic and realistic conclusions being reached relied on observations from the full Court's decision in *Dickson*. In that decision, the Court discussed the treatment of the sleepover payment paid to the employee. The employer paid a single sum for each sleepover without defining how much of it was to be applied to particular hours worked.[19] The Court accepted that the omission was understandable because the company did not regard the sleepovers as work. The Court

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[19] *Idea Services Ltd v Dickson* (EmpC), above n 12, at [69].

then observed that at a practical level the payment could only be dealt with by averaging the contractual entitlement over the number of hours worked in the sleepover.[20]

[48] The full Court in *Dickson* referred to averaging potentially being required to give effect to the legislation in "some piecework situations" before adding that would only need to be over a few hours or at most a day. The necessity to do so in some situations the Court said was not, however, a justification to adopt a construction of the legislation allowing the broader averaging approach being argued for by the employer in that case.[21]

[49] Mr Wicks relied on the comments just referred to from *Dixon* and drew on two other cases to justify EMG's position:[22]

(a) *Sealord Group Ltd v New Zealand Fishing Industry Guild Inc*; and

(b) *Law v Board of Trustees of Woodford House*.

[50] A favourable comparison was invited between this case and *Sealord* because they both involved productivity-related pay for employees. In *Sealord* the crews of fishing boats were paid a share of the profit from the catch in each voyage.[23] The fishing crew also received advances in anticipation of the catch. Sometimes those advance payments were less than the applicable minimum wage rate. The Court held that the company was entitled to combine the pay advances and catch share in determining whether the employees had received the relevant minimum wage. It is that aspect of the case with which Mr Wicks sought to draw a comparison.

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20 At [69].

21 At [70]; the Court commented that it was aware payment by piecework was relatively uncommon today.

22 *Sealord Group Ltd v New Zealand Fishing Industry Guild Inc* [2005] ERNZ 535 (EmpC); and *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

23 *Sealord v New Zealand Fishing Industry Guild*, above 22, at [5].

[51] However, in *Law v Board of Trustees of Woodford House*, *Sealord* was explained and distinguished. *Sealord* was said to turn principally on interpreting the Act and described it as "an industry-specific case based on a unique regime".[24]

[52] *Sealord* was also distinguished by the full Court in *Dickson*. The full Court observed that *Sealord* largely turned on the distinction between assessing the minimum amount of wages payable and the time at which payment is to be made. While the full Court received submissions that *Sealord* supported the averaging approach which was argued for by the employer in that case the arguments were rejected because they misconstrued the decision. That was because the amount of wages payable to the crews was not in issue in *Sealord* and there was no discussion about how such amounts were to be calculated.[25]

[53] Despite the fact that some parallels can be drawn between this case and *Sealord* because the employees' earnings in both cases depended on their productivity, I am not persuaded that it assists EMG. While *Sealord* touched on what was payable to the fishing crew, and when, it did not analyse whether the method of payment complied with the minimum wage legislation.

[54] *Law*, however, provides some assistance to EMG. Mr Wicks compared EMG's method for complying with the Act with the way the Court in *Law* dealt with applying the Act to salaries falling within the "all other cases" limb of the relevant orders.

[55] *Law* described five steps to ensure compliance with the Act when determining if an annual salary complies which are summarised as:[26]

(a) Step 1: establish each week of work performed by each employee.

(b) Step 2: calculate the number of hours worked in each week.

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24 *Law v Board of Trustees of Woodford House,* above n 22, at [203].
25 At [98].
26 At [236]–[241]; *Law* was decided before the amendment changed the "all other cases" category in cl 4 of the order to fortnightly sums.

(c) Step 3: ensure that the employee received at least the minimum weekly rate under the order up to a maximum of 40 hours worked in the week.

(d) Step 4: ensure that any hours worked above 40 in the week are paid at least at the rate required by the order.

(e) Step 5: ascertain that for any weeks in which the employee was remunerated but did not perform any work at all, that person received no less than the applicable minimum rate.[27]

[56] Mr Wicks submitted that these summarised steps from *Law* provided a framework for assessing the "all other cases" criteria relevant to this case, with adjustments for the period post-June 2014, but that a decision was still required as to what would be included in Steps 3 and 4. His point was that the minimum wage orders do not prescribe how payments are to be attributed to each week or fortnight and, therefore, EMG's method was not contrary to the Act or orders.

[57] To support that conclusion Mr Wicks used a further example to justify EMG's position and explain his point about the assessment required in Steps 3 and 4 from *Law*. The example was that if an employee earns a salary and is paid on a monthly basis, the employer is not required to treat that income for the purposes of the "all other cases" category as if he or she received no pay in the first fortnight of the month and all of it in the second fortnight. Mr Wicks said the order would be complied with if the total of the monthly payment was evenly apportioned across each fortnight in the month.

[58] In contrast Mr Gray submitted that EMG's election of a calendar month as a pay period for assessment was an interval not provided in either the Act or relevant minimum wage orders. He submitted EMG's method operates to the disadvantage of the salespeople. On Mr Gray's analysis EMG was constrained by the Court of Appeal's reasoning in *Dickson* which rejected averaging. That was, he argued, a principle that there should be a payment made for and identified with each period of

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[27] The method in *Law* required a deduction for a sleepover payment made to some employees to arrive at a net balance.

work identified by the relevant minimum wage order and that principle does not provide support for an assessment that "arbitrarily substitutes" an employer-selected calculation or reconciliation period under its own remuneration structure. In other words, the complexity of EMG's pay structure meant the company brought on itself any difficulties which resulted and should not influence assessing its non-compliance.

[59] Mr Gray sounded a cautionary note that EMG's approach was effectively seeking to adopt the minority judgment from the full Court's decision in *Dickson*, which was not accepted by the Court of Appeal. His response to the examples used by Mr Wicks was that taken to their potential conclusions they could result in alarmingly untenable situations. He foresaw risks from similar structures being developed in industries such as farming where historically quieter winter periods of work might be offset against busy summer periods.

[60] Mr Gray also placed weight on the regulatory impact statement that preceded the amendment to the Minimum Wage Order 2014, introducing a change to cl 4 of the minimum wage order that year. While recognising the limitations of interpreting the minimum wage order by relying on the regulatory impact statement, Mr Gray said that the modification to cl 4 responded to the Court's decision in *Law* and that the executive foresaw and attempted to address problems presented by remuneration structures such as EMGs.

[61] I prefer Mr Wicks' analysis. While EMG's method involves an element of averaging, it is different from the method disapproved of in *Dickson*. The averaging approach disapproved of by *Dickson* was one which attempted to assess the amounts payable over more than one unit of time; it had the effect of suppressing the employee's earnings because he would not receive at least the minimum rate for each hour worked. While EMG's method means income is applied to each week (or fortnight) after the event, it still ensures that for each unit of time not less than the applicable minimum adult wage is paid. EMG's method does not deprive the salespeople of at least the minimum rate of pay for each hour worked, so it is not inconsistent with *Dickson.*

[62] It is true that the method involves attributing some pay across the whole month, but that was a function of the way income was earned. It does not off-set underpayment in one week (or fortnight) against earnings in another pay period.

[63] In contrast the Inspector's approach has a ring of artificiality about it. It introduces a concept of what was earned by each salesperson but truncates that assessment by concentrating on the date of each sale. It overlooks or downplays the assessment required by the employment agreements, which provided for commissions to increase with performance over the whole month. Concentrating on when the commission was earned, by looking at the sales transaction, was supported by Mr Gray as pragmatic. However, doing so required putting aside the fact that the value of the transaction to the employee was not established at that time.

[64] The Inspector's approach also makes assumptions about how the employee earned commission, which put aside the way in which the commission sales arrangements worked. The agreed statement of facts acknowledged that sales did not necessarily take place over a short period of time and that the effort a salesperson put in to effecting a sale may not bear fruit immediately. The Inspector's approach of confining the notice to what is earned, and in turn relating that to the completion of the sales transaction by signing relevant documents, does not allow for the variable nature of the industry.

[65] Finally, Mr Gray sought to support the Inspector's approach by describing the salespeople as being paid weekly, referring to the weekly commission advances and some bonuses or incentives. However, the statement of agreed facts on which both cases were presented stated that payment was based on commissions earned during each month reconciled at the beginning of the following month. On that basis I cannot accept Mr Gray's submission that the pay arrangement was something else.

[66] I consider EMG's method of calculation complies with the Act and orders. That conclusion addresses the first and second issues. It follows that the improvement notice will need to be amended.

What is the earliest time for remedial work?

[67] The next issue to address is the length of time over which EMG is to take remedial action. The company was required by the improvement notice to review what it paid to each worker from 28 April 2011 onwards. The Inspector appreciated the amount of work the notice required because he allowed a year to comply. The improvement notice was signed on 11 October 2018, and compliance was required before 5 pm on Friday 11 October 2019.

[68] EMG considered that, because s 142 of the Employment Relations Act 2000 (the ER Act) prevents claims being started where the cause of action is more than six years old, the most it could be expected to do is go back six years from the date of the notice and not to any earlier date. If that argument is accepted, the effective date to begin reviewing compliance would become 11 October 2012.

[69] Mr Gray explained the Labour Inspectorate's usual practice was to issue improvement notices requiring remedial action for up to six years before the date on which an Inspector first requests steps to be taken by an employer.

[70] The Inspector made informal requests for information from EMG in May 2017, but it was not until 25 August 2017 that a formal notice to supply information was given.[28] Consequently, the Inspector considered he was entitled to require compliance calculated back from August 2017. However, a concession was made to compute time from the date when the investigation report was issued on 24 November 2017. If accepted, this concession would mean the date for the compliance work to start would be 24 November 2011.

[71] Improvement notices are issued under s 223D of the ER Act. There is no time limit in s 223D restricting the length of time over which it applies. EMG's objection was that the timespan in the notice exceeded the period over which it was required to keep time and wage records under s 130 of the ER Act.[29] The argument was that, if the notice was not amended, it effectively circumvented both s 130 and the six-year

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[28] See Employment Relations Act 2000, ss 229(1)(c) and (d).

[29] And previously by s 8A of the Wages Protection Act 1983, which was repealed by s 5 of the Minimum Wage Amendment Act 2016.

limitation on taking action imposed by s 142 on any employment relationship problem that is not a personal grievance.[30]

[72] Ms Wooders, who made submissions for EMG on this aspect of its objection, contrasted s 223D with s 224 which deals with the Inspector's power to make demands of an employer for unpaid wages. Section 224(4) limits the time period over which a Labour Inspector may make a formal demand so that it has no effect if the claim is for payment of money more than six years earlier than the date on which the demand is served on the employer. She considered that the omission in s 223D of a similar provision did not create a situation the Inspector could take advantage of to EMG's detriment.

[73] The Inspector did not share EMG's view. The statement of defence contained the concession previously discussed, but otherwise disagreed with EMG's contention that the notice went further than was permissible.

[74] Mr Gray contended that it would not be appropriate to equate the Inspector's statutory powers to require information to be provided and for remedial steps be taken, with a cause of action to which s 142 applies. The analogy with a cause of action was said to be misplaced because the Inspector was merely requiring the company to remedy a failure to comply with its obligations under the ER Act; he was not taking action himself.

[75] Both counsel relied on *Labour Inspector v IT-Guys NZ Ltd* with divergent views about how the decision helped their cases.[31] In *IT-Guys* the Court considered an Inspector's use of an improvement notice to recover unpaid wages and holiday pay. The Court discussed the purpose of improvement notices (and enforceable undertakings) concluding that they broaden the enforcement mechanisms available to an Inspector. The decision did not, however, address the time period over which notices may be given under s 223D.

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30 Section 114(6) of the Employment Relations Act 2000 imposes a three-year time limit on personal grievances.

31 *Labour Inspector v IT-Guys NZ Ltd* [2019] NZEmpC 115, [2019] ERNZ 337.

[76] There is nothing in pt 11 of the ER Act explaining why improvement notices have no limitation period while some other provisions have them. There is nothing in the explanatory material for the Employment Relations Amendment Act 2010, which introduced improvement notices into the ER Act, explaining why there is no limitation period in s 223D.

[77] It is possible that the limitation period in s 142 was seen as sufficient. That, however, does not explain why demand notices, which can be issued by a Labour Inspector to demand payment for unpaid wages and holiday pay, have a six-year sunset provision but improvement notices capable of being used to achieve the same result do not.[32]

[78] The Inspector's position is difficult because the improvement notice required compliance over a longer time period than the company was required to keep records for or over which a demand notice could be issued. The work required of EMG by the notice would place it in a position of having to consult wage and time records which it was no longer obliged to keep under s 130(2). Failure to comply would expose EMG, as a defaulting employer, to the risk of sanctions in the form of a compliance order or penalty.[33] That unsatisfactory position cannot have been intended by Parliament.

[79] In my view there is an effective limitation on what the Inspector is able to achieve created by the obligations imposed on employers by the ER Act. The improvement notice cannot require EMG to undertake remedial work by reference to anything other than the wage and time records it is required to keep under s 130(2).

[80] The appropriate outcome is to vary the improvement notice so that it applies from the date on which it was served on 11 October 2018.

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[32] Compare ss 223D and 224(4) of the Employment Relations Act 2000.
[33] Sections 223D(6) and 223F.

Outcome

[81] The objection is successful. The improvement notice is varied in the following respects:

(a) The method by which EMG is to calculate its compliance with the Minimum Wage Act and relevant minimum wage orders is as described in paragraphs [33] and [34] of this decision; leave is reserved to apply for further orders if there is difficulty in calculating the amount due to specific employees.

(b) The date from which remedial work under the improvement notice is to be undertaken is 11 October 2012.

(c) The date for compliance with the improvement notice as amended by this decision is 12 months from the date of this judgment, namely no later than **26 October 2023**.

[82] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment signed at 11.30 am on 26 October 2022