IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 313
5605901

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	DAYON TRADING LIMITED T/A ASAHI JAPANESE RESTAURANT Respondent

Member of Authority:	Robin Arthur
Representatives:	Alastair Dumbleton, Counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	14 September 2016
Determination:	15 September 2016

DETERMINATION OF THE AUTHORITY

A. For breaches of its obligations under the Minimum Wages Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000 to pay wages and holiday pay, to provide written employment agreements and to keep accurate records of wages, time, holiday and leave entitlements, Dayon Trading Limited must pay to the Authority, for transfer to the Crown Account, penalties totalling $28,000.

B. Dayon Trading Limited must also pay to the Labour Inspector $800 as a contribution to costs of representation and $71.56 in reimbursement of the fee paid to lodge her application in the Authority.

Employment Relationship Problem

[1] Labour Inspector Kerri Ahomiro sought orders for penalties to be imposed on Dayon Trading Limited (DTL) for multiple breaches of the Minimum Wages Act

1983 (the MWA) and the Holiday Act 2003 (the HA). The breaches concerned failure to keep proper wage, time, holiday and leave records and shortcomings in calculating and paying wages and leave due to 11 employees of the Asahi Japanese Restaurant operated by DTL in Whangarei. She also sought penalties for failure to provide some employees with written employment agreements.

[2] In a statement in reply lodged by counsel acting for it in March 2016 DTL accepted some but not all of the breaches. It sought more details from the Labour Inspector as to which particular employees some of the alleged breaches applied and the "specific manner" of some of those alleged breaches. The Inspector provided a memorandum of further particulars in May 2016.

The Authority's investigation

[3] In May 2016 counsel acting for DTL sought leave to withdraw from the proceedings. DTL's sole director, Sung Chul Shin, was said to be in Korea was "not certain if, or when, he could return to New Zealand".

[4] DTL was notified directly of subsequent steps in the proceeding. The Labour Inspector visited DTL's registered office on three separate occasions to deliver her memorandum of further particulars, the notice of investigation meeting and her witness statement. Those documents were also sent to an email address known to have been used by Mr Shin.

[5] No representative of DTL attended the investigation meeting. It had adequate notice of it. The meeting proceeded as no good cause was shown as to why DTL had not attended or been represented.[1]

[6] At the date of the investigation meeting and the date of this determination DTL remained a registered company. Its registered office, at an address in Whangarei, remained unchanged from when the Labour Inspector had lodged her application. As DTL remained an existing legal entity the Authority could proceed to determine its liability to penalties.

[1] Employment Relations Act 2000, Schedule 2 clause 12.

[7] As permitted by 174E of the Employment Relations Act 2000 (the ERA) this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The admitted conduct

[8] In its statement in reply DTL accepted "there were some deficiencies in the manner in which it was remunerating some of its employees". It accepted failing to keep wage and time records for six current or former workers. It denied doing so in respect of five other workers.

[9] DTL accepted not meeting the requirements of the HA for annual leave and holiday pay entitlements "of all its employees". It also acknowledged its failure to keep holiday and leave records meant there was no clear indication as to whether or not former employees were provided with their HA entitlements. It accepted calculation of annual leave and holiday pay entitlements for five former employees were not carried out in accordance with HA provisions. Pay for public holidays and provision of alternative leave days were also accepted by DTL to be deficient. It admitted failing to keep holiday and leave records.

[10] DTL disputed failing to provide workers with written employment agreements as copies of some such documents had been provided to the Labour Inspector.

The Labour Inspector's evidence

[11] The Labour Inspector's evidence comprised a written witness statement and answers, given under affirmation, to questions asked of her at the investigation meeting. She explained her investigation of DTL began during visits to check the employment practices of a number of sushi businesses in Whangarei early in 2015. While a high level of breaches of employment standards was found in all businesses visited, those identified at DTL's restaurant were "significantly higher than others". The restaurant had since closed but was recently re-opened under a new name by a new entity with new owners who the Labour Inspector understood had no connection with DTL and Mr Shin.

[12] The Labour Inspector said Mr Shin had admitted during her visit to the

premises in March 2015 that DTL had not provided written employment agreements to its current workers. Workers she spoke to on the day of her visit confirmed that was so. While the workers were later provided with agreements, the failure had continued for several months. Employment agreements provided by DTL for former employees also showed handwritten notations, supposedly initialled by the particular worker, that were unsatisfactory. In one example the printed hourly rate was accompanied by a note that read "weekly fixed wage $680, no wage record required".

[13] All the workers were from Korea or Japan and were in New Zealand on either a student visa, a working holiday visa or a work visa tied to employment by DTL.

[14] DTL's failure to maintain proper records impeded the Labour Inspector's ability to confirm and calculate the precise extent of DTL's breaches of its obligations regarding payment of minimum wages and provision of holiday and leave entitlements. The Labour Inspector's evidence from available records, interviews of employees and an interview of Mr Shin supported the reasonable inference that the breaches were widespread and persistent in the business operation.

The issues for determination

[15] The following issues required determination by the Authority:

(i) Were the alleged breaches established on the balance of probabilities?

(ii) Were penalties appropriate for the defaults established?

(iii) Should penalties be imposed for individual breaches or on a global basis?

(iv) What level of penalty should be imposed?

(v) Should any part of the penalty be awarded to workers or former workers harmed by the breaches?

(vi) Should a contribution to the costs of representation be awarded to the successful party?

(i) Were the breaches established?

[16] On the admissions made in DTL's statement in reply and on the Labour Inspector's evidence on disputed points, the following breaches of statutory obligations were established on the balance of probabilities:

- failure to pay employees' minimum wage – s 6 MWA

- failure to maintain wage and time records where employees were paid the minimum wage – s 8A MWA
- failure to calculate and pay employees their holiday pay due at termination of employment where the period of employment was less than 12 months or, if more than that, in each successive 12 month period – s 23, s 24, s 25 and s 27 HA
- failure to pay employees time and a half for working on a public holiday – s 50 HA
- failure to provide alternative holidays where employees worked on a public holiday – s 56 HA
- failure to pay holiday pay for alternative holidays on pay remaining untaken at termination of employment – s 60 HA
- failure to keep a holiday and leave record for each of its employees – s 81 HA
- failure to provide every employee with an employment agreement in writing – s 65 ERA.

[17] The extent of the breaches in relation to each of the 11 named workers varied but the Labour Inspector's evidence established as more likely than not that the routine operation of the business failed to comply with statutory obligations on a regular and ongoing basis.

(ii) Were penalties appropriate?

[18] Assessment of the need for a penalty, and the level of any penalties imposed, can be made in answer to these three questions:[2]

(i) how much harm had the breach occasioned?

(ii) how important was it to bring home to the party in default that such behaviour was unacceptable or to deter others from it?

(iii) were the breaches technical and inadvertent or were they flagrant and deliberate?

[19] For breaches that occurred before 1 April 2016 factors to consider in making that assessment included:[3]

- the seriousness of the breaches;

[2] *Xu v McIntosh* [2004] 2 ERNZ 448 at [47] and [48].
[3] *Tan v Yang and Zhang* [2014] NZEmpC 65 at [32].

- whether the breaches were one-off or repeated;
- the impact, if any, on the employees;
- the vulnerability of the employees;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.

[20] Harm resulting from DTL's failure to comply with statutory obligations comprised workers being 'short-changed' on pay and entitlements, the Labour Inspector being impaired in her ability to effectively carry her statutory role of ensuring workers were paid in accordance with the law, and DTL unfairly gaining a competitive advantage in business by not meeting compliance costs.

[21] The breaches were not one-off but repeated over a number of years and continued through the employment of new staff as former employees left. They were part of DTL's deliberate business practice rather than inadvertent occurrences. For example Mr Shin admitted in an interview with the Labour Inspector, on her evidence of their meeting, that workers employed on work visas were paid less than the amounts disclosed in employment documents provided to Immigration New Zealand because he could not afford to pay the declared amounts (which were between $11.40 and $16 an hour). The workers, who were Korean and in one case Japanese nationals, were vulnerable to exploitation due to their immigration status and likely unfamiliarity with their employment rights in New Zealand.

[22] Mr Shin had asked the Labour Inspector to take account of some personal financial difficulties which was really an excuse for DTL's business practices rather than demonstrating any significant remorse for what was done.

[23] Penalties were appropriate to bring home to DTL that its prolonged, systemic practice of breaching the employment standards set in the MWA, the HA and the ERA was unacceptable and to deter other businesses from acting in the same way.

(iii) Should penalties be imposed for individual breaches or globally?

[24] While it was possible to identify breaches in relation to individual workers, on the evidence of the Labour Inspector and DTL admissions, the nature of the available

information (which included some conclusions made by inference) supported a global approach to penalties for the breaches of each of the three Acts.[4]

(iv) What level of penalty should be imposed?

[25] DTL's repeated, ongoing breaches of employment standards for workers who were not in a strong position to seek compliance by their employer required, as the Labour Inspector submitted, "penalties of such size as will send a strong message of denunciation and deterrence to this and to other employers".

[26] Authority determinations in comparable cases, where a cluster of MWA, HA and ERA breaches were part of the overall practice of a business, show a range of penalties. Factors such as the severity of breaches, degree of harm, number of workers affected, remorse and remedial efforts by the employer contribute to different outcomes appropriate to the particular circumstances established in the evidence.[5]

[27] In *Labour Inspector v Uasi,* after considering the range of awards in comparable cases of individual employers, the Authority imposed a penalty of $7500 for multiple breaches of MWA and HA requirements.[6]

[28] In *Labour Inspector v Maudarra Limited* the Authority imposed a penalty of $15,000 for the employer's failure to pay minimum wages and holiday pay.[7]

[29] In *Labour Inspector v Marx* the Authority imposed a penalty of $23,000 for failure to keep accurate records, not paying money due and not paying minimum wage and alternative holiday entitlements.[8]

[30] In *Labour Inspector v Alpine Motor Inn & Café (2008) Limited* the Authority imposed a penalty of $12,500 for breaches of the MWA and failure to keep proper records in respect of one worker.[9]

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[4] *Labour Inspector v Pekanga o te Awa Farms* [2016] NZEmpC 19 at [57].
[5] *Labour Inspector v Pekanga o te Awa Farms*, above n 4, at [56].
[6] [2016] NZERA Christchurch 134 referring to *Labour Inspector v Neal Alan Summers* [2015] NZERA Christchurch 188, *Labour Inspector v Mele Ford* [2015] NZERA Wellington 112, *Labour Inspector v Hugh and Darla Le Fleming as Trustees of Le Emari Trust* [2015] NZERA Christchurch130 and *Labour Inspector v Manku* [2015] NZERA Wellington 82.
[7] [2015] NZERA Christchurch 185.
[8] [2016] NZERA Wellington 100.
[9] [2016] NZERA Christchurch 130.

[31] In *Labour Inspector v Sun 2 Moon Limited* the Authority imposed total penalties of $17,000.[10] These comprised $5000 for breaches of the requirement to pay the minimum wage, $5000 for breaches of the HA, and $7000 for failure to keep wage and time records in accordance with the law.

[32] In *Labour Inspector v MD Dara Miah Horticulture Limited* the Authority imposed a penalty of $6000 for breaches in relation to minimum wages, holiday entitlements and the requirement to keep records and provide written employment agreements. The penalty was set in the context of apparent remorse and ongoing remedial efforts by the employer.[11]

[33] In *Labour Inspector v Sharmas & Sons (2009) Limited* the Authority imposed penalties on the two respondent parties totalling $42,000 for failures to provide written employment agreements, to pay minimum wages and to pay holiday entitlements.[12] These comprised $20,000 for breaches of the MWA, $14,000 for breaches of the Holidays Act, and $8,000 for failure to keep wage and time records in accordance with the law.

[34] The Labour Inspector submitted the Authority's determination in *Labour Inspector v Civic City Limited* was a relevant comparable case. Penalties of $60,000 were awarded for breaches of the MWA and HA in the employment of 11 workers by three employers. Further penalties of $55,000 were awarded for the failure by those employers to provide workers with written employment agreements.[13]

[35] While accepting DTL's breaches were not as outstandingly bad as some recent cases of exploitation of migrant workers, the Labour Inspector submitted they were serious and could not be excused or mitigated. For that reason the level of penalties awarded in the *Sharmas* and *Civic City* determinations were submitted to be appropriate for imposition on DTL.

[36] On my reading of determinations concerning comparable evidence of a 'cluster' of breaches, DTL's serious and sustained failures to observe minimum

[10] [2016] NZERA Wellington 92.
[11] [2016] NZERA Wellington 78.
[12] [2016] NZERA Auckland 169.
[13] [2013] NZERA Auckland 385. This determination was set aside, by consent, in a subsequent Employment Court judgment: *Civic City Limited & 2 Others v Labour Inspector* [2014] NZEmpC 46.

employment standards warranted total penalties in the band of between $20,000 and $30,000. The number of workers (11) involved over several years and their vulnerability to exploitation suggested an award at the upper end of that band should be imposed with global amounts set for the breaches of the three acts: $11,000 for breaches of the MWA in respect of all workers; $11,000 for breaches of the HA in respect of all workers; and $6000 for not having written employment agreements in place for six workers at the time of the Labour Inspector's visit in March 2015. The total amount is a significant deterrent for any other employer who might consider committing such breaches.

(v) Should any part of penalties imposed go to workers harmed by the breaches?

[37] The Labour Inspector's inquiries that resulted in this application were not the result of complaints from the workers. She had some contact details for some of the workers but others had since left New Zealand or were elsewhere. The prospects for collection of the penalties from DTL, given its director Mr Shin had left New Zealand and ceased to operate the business, meant there was no likely benefit to the workers if awarded a portion of the penalties imposed. In those circumstances there was no likely useful purpose in ordering payment of part of the penalties to the workers harmed by the breaches of their employment rights. The whole of the penalty, to be paid to the Authority, should be transferred to the Crown Account.

Costs

[38] The Labour Inspector sought a reasonable contribution to legal costs based on investigation meeting time and an order for reimbursement of the fee of $71.56 paid to lodge her application.

[39] On the basis of its internal accounting the actual costs of representation to the Labour Inspector by counsel employed by the Ministry of Business to provide legal services were estimated to be more than $3800. The amount was calculated at its relatively modest internal 'charge out' rate of $160 an hour for a senior solicitor. This comprised time taken to prepare a memorandum of further particulars for service on DTL, to prepare and lodge a memorandum of issues in advance of the investigation meeting, to prepare submissions on the facts and legal issues for the investigation meeting and to attend the investigation meeting. Those costs were reasonably incurred. On the principle that costs follow the event, the Labour Inspector was

entitled to a reasonable contribution to those costs for representation by in-house counsel.[14]

[40] Those costs were similar to the Authority daily tariff of $3500 applied for a full day investigation, for applications lodged before 1 August 2016. This particular investigation meeting was completed within two hours. On a tariff basis the starting point for assessing costs would be around one quarter of the daily amount – that is about $875. From that starting point, and in light of the actual and reasonably incurred costs of preparation and attendance at the investigation meeting by in-house counsel, $800 seemed a modest and reasonable contribution to require from DTL. DTL must pay $800 to the Labour Inspector as a contribution to her costs of representation and a further $71.56 in reimbursement of the fee to lodge an application.

Robin Arthur
Member of the Employment Relations Authority

[14] *G L Freeman Holdings Limited v Belley (A Labour Inspector)* [2016] NZEmpC 44 at [21].