

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 35
5558803

BETWEEN WARREN SMITH (LABOUR
INSPECTOR)
Applicant

AND SHOPPERSTOP 1 LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Greg La Hood, Counsel for Applicant
Christopher Griggs, Counsel for Respondent

Investigation Meeting: 15 December 2015 at Wellington

Submissions Received: 18 November and 15 December 2015 from the Applicant
18 November and 1 December 2015 from the
Respondent

Determination: 18 March 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Labour Inspector Warren Smith has brought claims against Shopperstop 1 Limited (Shopperstop) for the recovery of premiums paid in breach of s.12A(2) of the Wages Protection Act 1983 on behalf of Tarun Bhola. He seeks a penalty for the breaches under s.13 of the Wages Protection Act.

[2] Additionally, Labour Inspector Smith claims for the following: arrears of minimum wages under s.6 of the Minimum Wage Act 1983; annual leave arrears on termination of employment under s.27(2) of the Holidays Act 2003; arrears of wages relating to payment of time and a half for working on public holidays under s.50(1) of the Holidays Act; and arrears relating to a failure to provide an alternative holiday for

working on a public holiday under s.56(2) of the Holidays Act. Those claims are all made on behalf of Mr Bhola. The Labour Inspector also claims penalties against ShopperStop in respect of these matters.

[3] ShopperStop is a small business in Courtenay Place that sells takeaway food and some grocery items. It is open 7 days per week and was, during Mr Bhola's employment, open for approximately 22 hours per day.

[4] Shopperstop initially denied all claims made by the Labour Inspector, although it did acknowledge its time and wage records may not have strictly complied with s.130(1) of the Employment Relations Act 2000 (the Act). It made a similar concession regarding its holiday and leave record for Mr Bhola but, in relation to all of those records, maintained it acted in good faith and was not aware of the detailed requirements of either s.130(1) of the Act or of s.81(2) of the Holidays Act, and says it should not have penalties awarded against it.

[5] Some four months later, however, ShopperStop, through the witness statement of its sole director, Harpreet Mundra, acknowledged those denials were incorrect and conceded some of the Labour Inspector's claims, including that it had not paid Mr Bhola annual leave owing on termination of his employment. Mr Mundra acknowledged receiving premiums in respect of Mr Bhola's employment in the form of an initial lump sum payment and ongoing payments throughout Mr Bhola's employment. He disputes the amount of the ongoing payments and says Mr Bhola initiated the employment premiums.

Background

[6] Mr Bhola arrived in New Zealand on 2010 on a student visa for the purpose of study. He was initially based in Auckland where he completed a Diploma in Tourism Management in June 2011. He then studied for a Diploma in Business Management which he completed within three months. During Mr Bhola's studies he undertook part-time work at a fast food restaurant in a well-known franchise.

[7] In December 2011 he relocated to Wellington where he obtained employment with the same well-known fast food chain of restaurants in one of its city outlets. Mr Bhola was able to save money and started repaying his parents for the money they had given him when he came to New Zealand. In June 2012 he transferred a total of \$7,996 to his parents for that purpose.

[8] Unfortunately for Mr Bhola he was dismissed from that employment in July 2012. As his work visa was linked to his employment, it was important to Mr Bhola to obtain new employment with an employer who could assist him with a new visa. He obtained an offer of employment as Assistant Manager at Shopperstop in August 2012. Mr Mundra agreed to sponsor him with his work visa and provided documentation to Immigration New Zealand for that purpose.

[9] Mr Bhola was employed by Shopperstop from 13 September 2012 until June 2014. When he left his employment he made a complaint to the Labour Inspectorate about the matters that are the subject of this determination.

The Labour Inspector's investigation

[10] Former Labour Inspector Janette Andrews undertook an extensive investigation following Mr Bhola's complaint. Labour Inspector Smith was also involved in this and took over the matter when Ms Andrews resigned from her position. Mr Bhola and Mr Mundra were interviewed during the investigation and the Labour Inspectors undertook an analysis of Mr Bhola's bank transactions in relation to the cash employment premiums he claimed to have paid. By examining his transactions before and during his employment they were able to form a comprehensive picture of his spending patterns.

[11] The Labour Inspector's report established numerous minimum standards breaches and concluded that the evidence pointed to "*systematic, calculated and egregious breaches involving fabricated time and wage records and severe harm to Mr Bhola*" during his employment with Shopperstop.

[12] The Labour Inspectors calculated that Mr Bhola had paid his employer \$20,426 in employment premiums over the course of his employment. He had paid \$7,996 as a lump sum at the start of his employment and \$12,430 during his employment when he was required to repay part of his weekly wages in cash. They also calculated he was owed approximately \$19,000 in arrears of wages, including holiday pay.

The Authority's investigation

[13] This determination, reserved at the conclusion of an investigation meeting, has been issued three days outside the statutory period of three months. I record that

when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

Undisputed matters

[14] Shopperstop does not dispute that it received \$7,996 as a lump sum employment premium from Mr Bhola. Nor does it dispute that Mr Bhola was owed payment for untaken annual leave at the termination of his employment. It concedes it failed to pay Mr Bhola that annual leave entitlement and it accepts the amount of \$6,576.96, as sought by the Labour Inspector, is owing to him. Orders will be made accordingly.

Disputed matters

[15] Mr Mundra acknowledges receiving cash amounts totalling \$12,080 from Mr Bhola during his employment with Shopperstop and concedes that an order should be made for repayment of that amount. This is \$350 less than the Labour Inspector calculated Mr Bhola had paid in employment premiums. Mr Mundra's explanation for the difference is that the Labour Inspector made an error of \$10 in the amount, which was a \$360 transaction.

[16] He also says that transaction represented a personal rent payment by Mr Bhola and was not a withdrawal made for the purpose of making a cash payment to his employer. The Labour Inspector accepts the \$10 mistake and has amended its claim in respect of the cash premiums sought on behalf of Mr Bhola to \$12,440. He does not accept that Mr Bhola's \$360 bank account transaction from October 2012 was a personal rent payment.

[17] Having considered the views of both parties on the matter I am not persuaded the evidence is sufficiently strong to establish that that the \$360 was an employment premium paid to Shopperstop. I find that Mr Bhola made cash payments (premiums) of \$12,080 to his employer during his employment. Accordingly that sum will be included in the order for repayment of premiums to Mr Bhola.

Minimum wage arrears

[18] The Labour Inspector claims \$8,412.75 as minimum wage arrears based on statements about his hours of work that Mr Bhola made to former Labour Inspector Andrews shortly after making his complaint about Shopperstop. In the written and oral evidence Mr Bhola gave to the Authority's investigation, he said he had worked from 6 pm to 6 am and worked at least 50 hours a week or more. This evidence differs from the information he gave the Labour Inspectors.

[19] Shopperstop accepts that the wage and time records it "*reconstructed*" after Mr Bhola's employment had ended are inaccurate. Mr Mundra says those records are based on how the business was supposed to operate during that time. He acknowledges that it is very difficult to know what hours Mr Bhola actually worked but said the shop was not open for the hours claimed by Mr Bhola for all of his employment.

[20] Employers are required to keep wage and time records in respect of each of their employees.¹ If an employee is prejudiced in his or her ability to bring an accurate claim for wage arrears because the employer has failed to keep time and wage records, the Authority has the discretion to accept as proved all claims made by the employee as to hours, days, and times worked.² In this instance Mr Bhola has been prejudiced in his ability, through the Labour Inspector, to bring an accurate claim for wage arrears.

[21] When I questioned Ms Andrews about the difference between the hours Mr Bhola had told the Labour Inspectors he had worked she said he was taking "*a broad brush approach*" in his evidence to the Authority. In her view I should accept the hours of work he had reported to the Labour Inspectors when interviewed close to the termination of his employment. I agree with Ms Andrews.

[22] I accept he worked the hours he told the Labour Inspectors in his interviews with them, the first of which occurred in October 2014. That information was given many months closer to the event than his written evidence to the Authority which was filed in August 2015. I find the earlier evidence, which is specific and detailed, is

¹ s. 130(1) of Employment Relations Act 2000 (the Act)

² s. 132(2)(b) of the Act

more likely to be accurate than the more general and approximate information he provided to the Authority.

[23] The adoption of the Labour Inspector's calculations results in a lesser award of arrears to Mr Bhola, but reflects more accurately the amount to which he is entitled. The Labour Inspector has calculated the difference between the wages paid to Mr Bhola and the wages he was entitled to receive under minimum wage legislation throughout his employment. During that time the minimum wage increased twice and the calculations have taken those changes into consideration. I have checked the calculations and accept their accuracy. Orders will be made accordingly.

Payment for working Public Holidays and for alternative days

[24] It is Mr Bhola's evidence that he worked on public holidays during his employment at Shopperstop. He says he did not receive payment above his normal rate of pay for that work and did not receive an alternative day off as required by the Holidays Act. The Labour Inspector analysed Mr Bhola's stated hours for 2012, 2013 and 2014 and identified 12 public holidays on which he worked. It calculates he is owed \$1,269 in arrears of wages with respect to the those days, and \$2,538 in payment for the alternative days to which he was entitled.

[25] Mr Mundra denies that Mr Bhola worked on public holidays. However, in the absence of proper time and wage records I reject his evidence. I am satisfied from the evidence that Shopperstop failed to keep a holiday and leave record in respect of Mr Bhola as required by s. 81 of the Holidays Act 2003. That Act provides that, where the absence of holiday and leave records has prevented an employee from making an accurate claim, I may accept as proved, in the absence of evidence to the contrary, the statements made by the employee about public holidays (and other leave) taken by the employee.³ I accept the evidence of the Labour Inspector and Mr Bhola and accordingly award arrears of wages for public holidays Mr Bhola worked. An order for payment of \$1,269 will be made as well as an order for \$2,538 in respect of the 12 alternative days' holidays he should have received.

³ Section 83 Holidays Act

Penalties

[26] The Labour Inspector seeks penalties in respect of each of Shopperstop's breaches of statutory provisions. Mr La Hood submits separate penalties should be imposed for the lump sum employment premium and the subsequent, ongoing employment premiums. This is because the breaches were distinct and had severe consequences for Mr Bhola. The lump sum premium deprived him of the savings he had intended for repayment of his parents. The ongoing cash repayment to his employer of a large portion of his wages left him with little money on which to live for almost two years. In respect of the other breaches of provisions of the Holidays and Minimum Wage Acts, Mr La Hood submits one global penalty would be appropriate.

[27] Mr Griggs, in submissions on behalf of the respondent, notes the admissions made by Mr Mundra and asks that Mr Bhola's evidence be treated with some scepticism where his evidence differs from that of Shopperstop's. He also submits the financial situation of Shopperstop is precarious and any orders made by the Authority could have serious implications.

[28] With regard to the minimum wage claim, Mr Griggs submits the onus is on the applicant to establish Mr Bhola was paid below the minimum wage for the hours he actually worked. Similarly, with regard to the claims over public holidays, Mr Griggs submits the onus is on the Labour Inspector to prove Mr Bhola worked those days. For reasons I have given above, in relation to the Authority's discretion in situations where an employee's ability to bring accurate claims is prejudiced by the employer's failure to keep and retain the records required by statute, I do not accept Mr Griggs' submissions in these matters.

[29] In *Tan v Yang & Zhang*⁴ Judge Inglis observed (citing *Xu v McIntosh*⁵) it was generally accepted that a penalty should only be imposed for the purpose of punishment and not as an alternative route for increasing compensation. The Judge noted the following non-exhaustive list of factors that might usefully be considered:

- the seriousness of the breach;
- whether the breach is one-off or repeated;
- the impact, if any, on the employee/prospective employee;

⁴ [2014] NZEmpC 65 at [31]

⁵ [2004] 2ERNZ 228 at 464

- the vulnerability of the employee/prospective employee;
- the need for deterrence;
- remorse shown by the party in breach
- the range of penalties imposed in other comparable cases.

[30] Mr Bhola's evidence was that, when asked by Mr Mundra for a lump sum payment to cover his tax and ACC payments, he was shocked. Mr Mundra told him if he did not pay the money he would lose his job and his visa. Mr Mundra's evidence is that it was Mr Bhola's idea to offer a lump sum payment and ongoing cash payments throughout his employment. Mr Mundra said he had no need for another employee in September 2012 and the business could not afford to employ one. His evidence was that he only agreed to employ Mr Bhola as a favour to a fellow Punjabi who was begging for a job. He said this sort of arrangement (employment premiums) was common in India and he did not know it was unlawful in New Zealand.

[31] I prefer Mr Bhola's evidence. In doing so, I take into account a number of factors including the untrue statement Mr Mundra made to the Labour Inspector that he had kept wage and time records, which he provided without acknowledging they were "*reconstructed*". I also take into account the Statement in Reply filed on Shopperstop's behalf which contained many statements Mr Mundra subsequently acknowledged were not accurate. These include that he did not seek or receive any premium in respect of Mr Bhola's employment; that Shopperstop regularly paid annual holiday pay with Mr Bhola's wages; and that Mr Bhola took paid annual leave of not less than four weeks in each of the years of his employment with Shopperstop.

[32] Mr Mundra, in his written evidence, claimed to lack "*even a basic understanding of an employer's legal obligations in New Zealand*". However, he acknowledged under questioning that he was aware of the minimum wage and holiday pay requirements as he had previously worked in the hotel industry in New Zealand between 2006 and 2011.

[33] I find Shopperstop deliberately took advantage of Mr Bhola's vulnerability as a migrant worker dependent on a work visa by requiring the lump sum and the ongoing premiums from him. It supported his application for a visa and demanded the premiums after he had received his visa and started his employment. By this time Mr Bhola believed he had no option but to accede to his employer's demands or lose both his employment and his ability to remain in this country.

[34] I find a penalty is appropriate in this instance as the breaches were serious and sustained, having a significant effect on a vulnerable employee. I saw no evidence of remorse by Mr Mundra who regards himself as having demonstrated misplaced generosity to Mr Bhola. I agree with submissions on behalf of the Labour Inspector that it is important to send a strong message to both Shopperstop, and to other employers, that such conduct is unacceptable. I disagree with the imposition of separate penalties and find one global penalty to be appropriate.

Orders

[35] Shopperstop 1 Limited is ordered to pay the following sums to Tarun Bhola:

- a. \$6,576.96 under s. 27(2) Holidays Act 2003, being payment of holiday pay owing at termination of employment;
- b. \$20,076 under s. 12A(2) Wages Protection Act 1983, being repayment of employment premiums;
- c. \$8,412.75 under ss. 6 and 11 Minimum Wage Act 1983, being arrears of wages;
- d. \$1,269 under s. 50(1) Holidays Act, being arrears of wages in respect of the difference between wages paid and time and a half;
- e. \$2,538 under s. 56(2) Holidays Act, being arrears of wages in respect of alternative days not provided.

[36] Shopperstop 1 Limited is also ordered to pay a penalty of \$15,000 to the Crown in respect of the statutory breaches identified in this determination.

Costs

[37] Shopperstop 1 Limited is ordered to reimburse the Labour Inspector the Authority filing fee of \$71.56.

Trish MacKinnon
Member of the Employment Relations Authority