

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 32  
5520886

BETWEEN	JEANIE MAY BORSBOOM (LABOUR INSPECTOR) Applicant
AND	PREET PVT LIMITED First Respondent
AND	WARRINGTON DISCOUNT TOBACCO LIMITED Second Respondent
AND	DILBAG SINGH BAL Third Respondent

Member of Authority:	M B Loftus
Representatives:	Alastair Dumbleton, Counsel for Applicant Andrew Shaw, Counsel for Respondents
Investigation Meeting:	Various exchanges and telephone conferences up to 4 November 2015
Determination:	16 March 2016

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**DETERMINATION OF THE AUTHORITY**

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[1] The applicant, Ms Borsboom, sought various orders against the three respondents regarding unpaid wages and holidays. She also sought penalties for various breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000.

[2] Prior to a scheduled investigation meeting the parties discussed their differences and concluded an agreement in respect of the alleged arrears. These were disposed of through a consent determination issued on 13 April 2015.<sup>1</sup> It saw the respondents pay a total of \$73,345.04 to five individuals.

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<sup>1</sup> [2015] NZERA Christchurch 47

[3] The parties were, at the time, unable to resolve the penalty claims but continued with their attempts to do so. They have, however, been unsuccessful and the issue has returned to the Authority for determination. By agreement this is to be done on the papers which include various affidavits along with submissions.

[4] In the original statement of problem Ms Borsboom sought penalties for:

- a. Multiple breaches of s 6 of the Minimum Wage Act 1983;
- b. Multiple breaches of the minimum payment provisions of the Holidays Act 2003;<sup>2</sup>
- c. A failure to keep time and wage records pursuant to s 130 of the Employment Relations Act 2000 (the Act);
- d. A failure to keep and produce holiday and leave records pursuant to s 81 of the Holidays Act 2003; and
- e. A failure to comply with s 85 of the Act in that the employer(s) failed to provide employees with employment agreements except when required by Immigration New Zealand for the processing of visas.

[5] Mr Dumbleton now advises penalties are no longer being sought against the third respondent and the claim relating to s 130 of the Act ([4](c) above) is no longer being pursued. This is due to a technicality and it is submitted the fact the breaches occurred may nevertheless be a factor in assessing the respondents conduct. Mr Dumbleton also noted there may be questions about whether or not the penalty application was, at least in respect to one of the affected employees, raised in time but the respondents concede the Authority has jurisdiction to consider the claim.

[6] Turning to the facts Mr Dumbleton noted five employees were affected over different periods between June 2012 and February 2014. Following receipt of their complaint the Labour Inspectorate investigated and found evidence of multiple breaches of various acts. These included the underpayment of minimum wages and holiday pay along with a failure to keep or supply appropriate records while the content of some of those that were maintained was either inadequate or falsified.

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<sup>2</sup> Sections 23, 24, 25 50, 60 and 71

[7] It is submitted my earlier consent determination has the effect of a binding decision which holds the five workers *are owed money for underpayment of minimum wages and the total determined is the same as the total assessed by the Inspector. It follows the employers breached the requirements of s 6 of the Minimum Wage Act.*

[8] Similarly it is argued the respondents' concessions as recorded in the consent determination confirm the alleged breaches of the Holidays Act and the amounts involved show these were not insignificant. To that can be added the failure to keep records as required by s 81 of the Holidays Act.

[9] There are then the employment agreements which were not completed for all employees. Those that did exist were completed after the employment commenced and their terms did not correspond to those which actually applied. In particular it is noted these *bogus documents ... were misleading and deceptive in relation to the actual rate of pay, and their purpose was to facilitate the issue of work visas and make the employers scheme* (namely the engagement of underpaid workers and the resulting attainment of a competitive advantage) *workable.*

[10] While it is accepted the immigration issues fall within another jurisdiction the breaches are relevant to culpability and therefore the level of penalties as well as detrimentally affecting the Inspector's ability to investigate.

[11] It is acknowledged on behalf of the respondents they were responsible for unpaid wages and holiday pay but it is denied these breaches were deliberate or *part of a uniform method of employment adopted by the employers in running their business* as alleged in the applicant's submissions. Similarly it is accepted the record keeping was deficient but while not a defence they note various factors which contributed to the failures which are not nefarious.

[12] The respondents deny the allegation the employment agreements were bogus and a subterfuge for immigration purposes. They also deny allegations they intimidated employees in order to get them to co-operate and point to the statements of other employees which, they say, show them as good employers.

[13] It is asserted the respondents have changed their ways with the retirement of the third respondent and the attainment of professional advice and assistance.

[14] Finally, and importantly, there is an assertion the respondents face a serious risk of liquidation and even if this does not occur their financial positions are precarious.

[15] In *Tan v Yang & Zhang*<sup>3</sup> the Court set out a non-exhaustive list of factors that may usefully be considered when deciding whether to award a penalty and, if so, the quantum.<sup>4</sup> They are:

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

[16] As already said the evidence is by untested affidavit.

[17] There can, as Mr Dumbleton submits, be no doubt the alleged breaches occurred. This is conceded through both the consent order and concessions in the submissions.<sup>5</sup> That the breaches are serious cannot, in my view, be disputed given the amounts involved, their repetitive nature and the fact they continued for a significant period of time. To that can be added various aggravating features such as attempts to conceal the breaches.<sup>6</sup>

[18] The evidence of those the applicant represented regarding impact and vulnerability is persuasive and largely unchallenged. With respect to vulnerability I simply quote a passage from Mr Dumbleton's submissions with which I concur. He says:

*The five workers were vulnerable as young people, relatively impecunious, new to NZ life and customs, and without the established network of family and friends a resident would usually have. As the Court aptly observed in Tan, their immigration status left them in a particularly tenuous position.*

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<sup>3</sup> [2014] NZEmpC 65

<sup>4</sup> n 3 at [33]

<sup>5</sup> Respondent submissions dated 18 August 2015 at [10] and [11]

<sup>6</sup> See for example the affidavit of Harbaldeep Singh at [33] and [34]

[19] Finally there is the need for a deterrent message which is, in my view, obvious, especially given the serious and repetitive nature of this offending.

[20] Turning to the response. The respondents primarily rely on three assertions – they have changed their ways; there are mitigating factors and they may be on the brink of liquidation. The first two assertions fail to persuade me. For example I find reference to the Christchurch earthquakes questionable given none of the applicant's clients were engaged by the respondents at that time. Similarly I am not persuaded by arguments pertaining to the number and geographical spread of the respondent's outlets as they managed to address other matters such as regulatory requirements regarding planning, health and the sale of liquor.

[21] There are then the statements of other staff which were attached to the submissions. Again these fail to persuade. The bulk of these comprise short answers to ten form questions and the other two can hardly be regarded as fulsome. The fact others may have received their entitlements does not excuse the failures in respect to those the Inspector represents.

[22] The one issue that may have persuasive power is that of impecuniosity. In support of their claims the respondents have provided financial statements prepared by their accountant. The picture they paint is mixed. A deficit is recorded for the year to 31 March 2015 but assets exist with retained earnings being a significant portion there-of. I also note the first respondent was successful in obtaining an Off License and this removed a significant threat to its future wellbeing.

[23] In reply Mr Dumbleton notes that while Mr Bal has resigned as a director and been replaced by his now ex-wife, she has given evidence in a Licensing Committee hearing she has no knowledge of the accounts veracity. That is far from satisfactory especially as they have not been finalised and are six months out of date. In addition there have been various changes with respect to the companies' assets given the matrimonial property division. There is also a question about where liability really lies as notwithstanding the fact he is no longer a respondent it appears Mr Bal has been making the payments required by the consent determination. Why is unknown and the accounts shed no light on it. Finally it is noted that while ability to pay may be a consideration it should not be determinative of the quantum of penalty and is not referred to as such in cases such as *Tan*. It becomes an issue if enforcement is required.

[24] I now note Mr Dumbleton's suggestion I take a global approach to penalties under each of the three statutory heads of claim: Minimum Wage Act, Holidays Act and Employment Relations Act.

[25] Having considered this I conclude a more appropriate approach, especially given the attachments appended to the respondents' submissions and the argument others were not similarly affected, is to take a global approach in respect to the breaches as they pertain to each of the five affected workers. While the amounts each worker was deprived of varied there were, in all instances, multiple breaches – indeed and with one exception the number of breaches were identical. The exception was the breach of section 71 of the Holidays Act in respect to Harbaldeep Singh. In these circumstances I consider an identical penalty appropriate for each of the five workers.

[26] Having considered the evidence, the submissions, multiple and significant breaches, the effect on the workers concerned, their vulnerability, the need for deterrence and the lack of persuasive evidence from the respondents I consider a penalty of \$5,000 for the breaches in respect to each of the five workers appropriate.

[27] The total is therefore \$25,000 with the first respondent liable in respect to two of the affected workers (\$10,000) and the second respondent liable in respect to the other three (\$15,000).

### **Orders**

[28] The first respondent, Preet PVT Limited, is to pay to the Crown, via the Authority, a penalty of \$10,000.00 (ten thousand dollars).

[29] The second respondent, Warrington Discount Tobacco Limited, is to pay to the Crown, via the Authority, a penalty of \$15,000.00 (fifteen thousand dollars).

[30] Payment is to be made no later than Wednesday 13 April 2016.

M B Loftus  
Member of the Employment Relations Authority