

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 97  
5644332

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              D K TRANSPORT (2009)  
LIMITED  
Respondent

Member of Authority:      Robin Arthur

Representatives:            Marija Urlich, Counsel for the Applicant  
Holly Struckman, Counsel for the Respondent

Investigation Meeting:      On the papers

Determination:               3 April 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. DK Transport (2009) Limited (DKTL) must pay \$40,000 as penalties for breaches of statutory employment standards and minimum entitlements. The penalty must be paid to the Labour Inspector in 12 monthly instalments, beginning on 22 April 2017.**
- B. In accordance with further orders made in this determination, \$17,750 of the penalty is to be paid, in various amounts, to the workers harmed by the breaches, with the Labour Inspector to arrange those payments from the instalments paid by DKTL. The remainder of the penalty must be transferred to the Crown Account.**

**Employment Relationship Problem**

[1] An application lodged in the Authority by Labour Inspector Summer Liu on 29 September 2016 sought orders imposing penalties on DK Transport (2009) Limited (DKTL) for not observing statutory employment standards and minimum entitlements in its employment of 15 employees.

[2] Following discussions between the Inspector and DKTL, including in mediation, DKTL accepted it had committed 58 breaches of the standards and entitlements identified in the Labour Inspector's statement of problem. These comprised:

- (i) Failure to provide an employment agreement to 15 employees, contrary to the requirements of s 63A(3) of the Employment Relations Act 2000 (the Act); and
- (ii) Failure to keep compliant holiday and leave records for 15 employees, contrary to the requirements of s 81 of the Holidays Act 2003; and
- (iii) Failure to keep compliant wages and time records for 15 employees, contrary to the requirements of s 130 of the Employment Relations Act; and
- (iv) Failure to pay one employee \$10,000.09 due to him as minimum wages, contrary to the requirements of s 6 of the Minimum Wages Act 1983; and
- (v) Failure to pay one employee \$3,113.43 holiday pay due to him at the end of his employment, contrary to the requirements of s 24 of the Holidays Act; and
- (vi) Failure to pay one employee \$1056 holiday pay due to him at the end of his employment, contrary to the requirements of s 23 of the Holidays Act; and
- (vii) Deduction of wages without written consent, to a total value of \$9,451.50, from four employees, contrary to the requirements of s 4 of the Wages Protection Act 1983; and
- (viii) Failure to pay six employees minimum entitlements for not working on a public holiday where the day would otherwise have been a working day for those employees, contrary to the requirements of s 49 of the Holidays Act.

[3] In November 2016 counsel for the Labour Inspector and for DKTL advised the Authority, in a joint memorandum, that the parties had agreed an instalment plan for DKTL to pay arrears of wages and holiday pay and to repay the deductions unlawfully made. Counsel have since confirmed those instalments were paid.

[4] In a joint memorandum dated 27 February 2017 counsel further advised the Authority that the parties had reached agreement on the number of breaches involved. They proposed a level of penalty appropriate for those breaches, based on the four step analysis for setting penalties adopted by the Employment Court in its decision in *Borsboom v Preet PVT Limited*.<sup>1</sup>

### **The Authority's investigation**

[5] Penalties in this matter have been determined “on the papers”. This information comprised the statement of problem (including a schedule attached as document A which summarised the circumstances of the 15 employees affected by the breaches) and three joint memoranda of counsel, the two already referred to and one further one dated 23 March 2017. Counsel also assisted with further details during a case management conference held by telephone on 31 March 2017.

[6] Through discussion between the Labour Inspector and DKTL and their respective counsel, DKTL had accepted its wrong-doing and the need to put it right, by paying money owed and penalties. The parties reached an appropriate outcome, consistent with legislation protecting employment standards and its rigorous enforcement, without the state and the business having to incur unnecessary additional time and expense in further litigation. They are to be commended for doing so.

[7] As permitted by 174E of the Act this determination setting the penalties has not recorded all evidence and submissions received but has stated findings, expressed conclusions and specified orders made.

### **Setting the level of penalty**

[8] The appropriate level of penalty in this matter totalled \$40,000. The sum was reached from assessing the scale of the breaches and the severity of their effects, globalising similar offences, accounting for mitigating factors, and considering the overall proportionality of the outcome. The following has summarised the four-step methodology applied to do so.<sup>2</sup>

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<sup>1</sup> [2016] NZEmpC 143.

<sup>2</sup> See *Borsboom v Preet PVT Limited*, above n 1, at [137] – [151].

[9] Firstly, the number and nature of the breaches have been listed earlier in this determination, by reference to the number of workers subject to them and the specific failure to meet a statutory requirement. Each of the 58 breaches, being by a company, attracted a potential liability of up to \$20,000. The maximum potential penalty for those breaches therefore totalled \$1,160,000. A globalised penalty for some of the breaches was appropriate for multiple and similar breaches. The failure to provide employment agreements and keep compliant records of wage and holiday entitlements were part of a single course of conduct of deficient administration. The breaches in two categories of failure in respect of holiday pay requirements at the end of employment could be similarly globalised as could the breaches for failure to pay for days off on public holidays. The specific failures in respect of the payment of minimum wages (one) and making unlawful deductions from wages (four) were more appropriate to penalise on an individual basis.

[10] Secondly, the breaches, taken as a whole, were serious. DKTL's failure to keep records and provide employment agreements impeded the Labour Inspector's investigation. Workers had been left without payments for which they were entitled for holidays and public holidays. Unlawful deductions meant they had gone without money to which they were entitled at the time. This was made worse because they were young, migrant workers less likely to be aware of their rights or how to go about getting those rights honoured.

[11] Whether DKTL's actions were deliberate and calculated rather than inadvertent failure was not established on the information available to me. One mitigating factor weighed strongly in DKTL's favour. It had co-operated with the Labour Inspector's investigation, accepted all her findings, paid all arrears and co-operated with Authority directions, including by attending mediation.

[12] Thirdly, there was no information suggesting DKTL lacked the means and ability to pay penalties imposed. Rather there was agreement it could do, provided this was by instalments.

[13] Fourthly, the assessment of proportionality or totality of penalties to be imposed required a considerable adjustment from the potential maximum, even after applying reductions appropriate for the globalising and mitigation factors referred to in the earlier steps. Taking account of the range of penalties awarded across a variety

of other cases, the following sums met the requirements of justice in the particular circumstances of this case.

[14] For the total of 30 breaches by failing to provide employment agreements (or providing them only later in the employment) to 15 workers and for failing to keep compliant wage and holiday records for each of those workers, a globalised penalty of \$20,000 should be imposed.

[15] For failing to provide one worker with his minimum wage entitlement, a penalty of \$4000 should be imposed.

[16] For failures to pay two workers what they were due in holiday pay when they finished work, a penalty of \$2000 should be imposed.

[17] For failures to pay six workers for public holidays that would otherwise have been work days for them, a penalty of \$6000 should be imposed.

[18] For unlawful deductions from the wages of four workers, a penalty of \$2000 for each worker should be imposed and totals \$8000.

[19] Those penalties are a strong public sanction for the harm done to the workers, to varying degrees, by not getting written employment agreements from the outset of their employment, not getting wages and holiday pay due to them, and by having money unlawfully deducted from their wages. The penalties also have a deterrent effect for other employers who might consider acting in similar ways.

[20] DKTL is to pay those penalties, totalling \$40,000, in monthly instalments of equal amounts over a 12 month period. Payments must be made by no later than the 22<sup>nd</sup> day of each month, starting from 22 April 2017. If the payments are not made by direct bank transfer and the 22<sup>nd</sup> day of the month is not a working day, the payment should be made on the last working day before the 22<sup>nd</sup> of that month.

### **Orders for application of penalties recovered**

[21] Under s 136(1) of the Act the penalty must be paid to the Authority but, under s 136(2), the Authority may order that the whole or any part of the penalty be paid to any person. In this case I order DKTL to pay the penalties, in the monthly instalments, directly to the Labour Inspector, for the benefit of the Crown and, in

respect of orders also made in this determination, for the benefit of the workers. Counsel are to liaise to ensure DKTL has the necessary details for making the payments to the Labour Inspector, with the appropriate reference information required for accounting purposes.

[22] Payment of part of the penalties to workers subjected to the breaches of their employment standards is appropriate where those workers cannot be properly compensated for the effects on them.<sup>3</sup> Failure to provide an employment agreement is an example of such a loss. Unlawful deductions or withholding of money due may be another example because, although interest on those amounts could have been ordered, interest alone does not compensate for the hardship or anxiety caused by shortfalls at the time they occurred.

[23] In this case the hardship and anxiety caused by the breaches is to be acknowledged by a payment of part of the penalty to the workers according to the extent, broadly assessed, to which they were subject to the identified breaches. The names of the workers and the relevant details are set out at paragraphs 2.17 and 3 of the Labour Inspector's statement of problem and the schedule attached as document A to that statement.

[24] To each worker named in paragraph 2.17 of the statement of problem \$750 of the penalty is to be paid in respect of non-provision or late provision of an employment agreement.

[25] A further \$500 of the penalty is to be applied to each worker for each of the four categories of other breach they individually experienced.

[26] The Labour Inspector, through counsel, has undertaken to make the necessary arrangements for the payments of parts of the penalties to the workers as the instalment payments are received from DKTL. Each instalment received is to be applied to the payments to the workers until they are paid in full. The remaining payments, for a total sum of \$22,250, are to be transferred to the Crown Account.

[27] The following table sets out the apportionment. The number corresponds to the order of each workers' name in document A:

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<sup>3</sup> *Borsboom v Preet PVT Limited*, above n 1, at [150].

	No or late IEA	WPA s 4	MWA s 6	HA s 23 and s 24	HA s 49	Total
1.	\$750	\$500	\$500	\$500	\$500	\$2750
2.	\$750				\$500	\$1250
3.	\$750					\$750
4.	\$750				\$500	\$1250
5.	\$750	\$500			\$500	\$1750
6.	\$750					\$750
7.	\$750	\$500			\$500	\$1750
8.	\$750	\$500			\$500	\$1750
9.	\$750					\$750
10.	\$750			\$500		\$1250
11.	\$750					\$750
12.	\$750					\$750
13.	\$750					\$750
14.	\$750					\$750
15.	\$750					\$750
	\$11,250	\$2000	\$500	\$1000	\$3000	<b>\$17,750</b>

[28] The order in which payments are made to each worker is left to the Labour Inspector's discretion, with a recommendation that those awarded the higher amounts are paid first. If the Labour Inspector, after making reasonable endeavours, is not able to locate a worker within one year of the date of this determination, to arrange payment of the part of the penalties applied to that worker, the payment due is to be forfeited and should be transferred to the Crown Account

### **Costs**

[29] By agreement between the parties there is no issue as to costs.

Robin Arthur  
Member of the Employment Relations Authority