

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 289
3014916

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Applicant

A N D SHERRIE AND HENRY
 LIMITED t/a The Page Corner
 Café
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Shona Carr, Counsel for Applicant
 No appearance by or for Respondent

Investigation Meeting: 11 September 2017 at Auckland

Submissions Received: 04 September 2017 and orally on 11 September 2017
 from Applicant

Date of Determination: 18 September 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Sherrie and Henry Limited (S&H) has breached various provisions of the Employment Relations Act 2000 (ERA), Minimum Wage Act 1983 (MWA) and the Holidays Act 2003 (HA) in respect of its former employees Mr Jian Ye and Ms Liwanhua Xu.**
- B. Within 21 days of the date of this determination, S&H is to make the following payments totalling \$9,377.38 gross to the Labour Inspector, for the use of Mr Jian Ye:**

- (a) **\$3,492.24 gross minimum wages;**
 - (b) **\$960.75 gross, alternative days for public holidays worked;**
 - (c) **\$4,924.39 gross, annual holiday pay due on termination of employment;**
 - (d) **Interest on the total sum of \$9,377.38 gross owing at the rate of 5% per annum from 9 June 2017 until the date of payment.**
- C. Within 21 days of the date of this determination, S&H is to make the following payments totalling \$1,027.68 gross to the Labour Inspector, for the use of Ms Liwanhua Xu:**
 - (a) **\$619.68 gross, annual holiday pay due on termination of employment;**
 - (b) **\$408.00 gross, alternative days for public holidays worked;**
 - (c) **Interest on the total sum of \$1,027.68 gross owing at the rate of 5% per annum from 9 June 2017 until the date of payment.**
- D. For breaches of its obligations under the ERA, MWA, and the HA in respect of its former employees, Mr Ye and Ms Xu and for its failure to provide employment records when requested by the Labour Inspector, S&H must pay to the Authority, for transfer to the Crown account, penalties totalling \$20,000.**
- E. \$10,000 of the total amount of penalties (\$20,000) is to be paid to the Labour Inspector for the use of Mr Ye and Ms Xu (\$7,000 for Mr Ye and \$3,000 for Ms Xu) pursuant to s.136(2) of the ERA.**
- F. S&H must pay to the Labour Inspector \$562.50 as a contribution to the costs of representation, and \$71.56 in reimbursement of the fee paid by her to lodge the application in the Authority.**
- G. For clarity, all the above payments are to be made by S&H to the Labour Inspector within 21 days of the date of this determination.**

Employment relationship problem

[1] The Labour Inspector has brought various claims against S&H arising out of its employment obligations in respect of Mr Ye and Ms Xu, both of whom were employed by it.

[2] Alleged breaches of employment obligations by S&H in respect of Mr Ye include:

- (a) Not paying him gross minimum wages;
- (b) Not paying him holiday pay on termination of his employment;
- (c) Not paying alternative days for public holidays worked.

[3] Alleged breaches of employment obligations by S&H in respect of Ms Xu include:

- (a) Not paying alternative days for public holidays worked; and
- (b) Not paying her holiday pay on termination of her employment;

[4] The Labour Inspector further claims S&H failed to provide or produce when sought, employment agreements, wages and time records and holiday and leave records for its employees.

[5] The Labour Inspector says these failures by S&H breach the ERA, the MWA and the HA. Penalties are sought.

No statement in reply filed by S&H

[6] S&H failed to file a statement in reply despite the statement of problem being served on it on 17 July 2017 and despite a follow up letter being served on it on 2 August 2017.

[7] S&H was aware of the proceedings as it had been served on 17 July 2017 and had been served with a follow up letter on 2 August 2017. There was no application to the Authority by S &H seeking leave to respond to the statement of problem.

[8] Notice of the Investigation Meeting in the Authority, to be held on 11 September 2017, was served on S&H on 15 August 2017. There was no response.

The Labour Inspector prepared witness statements in accordance with directions made by the Authority which were also served on S&H on 28 August 2017 together with relevant documents. There was no response by S&H. In all the circumstances, the Authority determined its investigation meeting was to proceed as scheduled.

Non-appearance by S&H

[9] No representative of S&H attended the investigation meeting. It had adequate notice of it, it failed to seek the Authority's leave to respond and no reasons were provided for non-attendance¹.

[10] At the date of the investigation meeting and the date of this determination, S&H remained a registered company. Its registered office, at an address at 10 Campana Road, Wiri, Auckland, 2025, remained unchanged from when the Labour Inspector had lodged her application. As S&H remained an existing legal entity, the Authority could proceed with its investigation and determine S&H's liability in respect of its obligations under the ERA to provide employment records to the Labour Inspector when requested, its obligations under the MWA to pay minimum wages, and its obligations to pay holidays under the HA in respect of Mr Ye and Ms Xu and penalties.

Investigation meeting

[11] As permitted by s.174E of the ERA, this determination has not set out all the evidence received. The determination states findings and relevant facts and legal issues and makes conclusions in order to efficiently dispose of the matters.

[12] The investigation of the matters in respect of S&H took less than an hour in the Authority.

[13] For the Authority's investigation, the Labour Inspector filed a witness statement as did S&H's former employees, Mr Ye and Ms Xu. Each witness affirmed or swore on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

¹ Employment Relations Act 2000, Schedule 2, clause 12

Relevant Facts

[14] Ms Sherrie Lin is the sole director and shareholder of S&H. S&H was incorporated on 9 December 2014. It trades as The Page Corner Café situated at 460 New North Road, Kingsland, Auckland.

Complaints to Labour Inspector

[15] On 27 October 2016, Mr Ye complained to the Labour Inspector. Mr Ye said S&H owed him wages and holiday pay.

[16] On 23 November 2016, a further complaint was received by the Labour Inspector from Ms Xu who said that S&H owed her wages, holiday pay and alternative days for public holidays worked by her.

Labour Inspector's investigation

[17] Upon receipt of the complaints, the Labour Inspector initiated an investigation. On 8 February 2017, the Labour Inspector and one of her colleagues from the Labour Inspectorate, visited S&H.

[18] During the site visit, the Labour Inspector spoke with Ms Sherrie Lin, the director of S&H, who confirmed that she had authority to speak on behalf of the employer, S&H.

[19] The Labour Inspector asked for a copy of wages and time records, holiday and leave records and employment agreements. A notice to supply these records was left with Ms Lin on 8 February 2017. The notice required that Ms Lin comply with the Labour Inspector's request by 5pm on Wednesday, 15 February 2017. The records were not produced or provided to the Labour Inspector.

[20] The Labour Inspector made a number of further requests of Ms Lin, both orally and in writing, for the employment records. Ms Lin asked for an extension of time so that S&H's accountant could produce the records. The extension was granted by the Labour Inspector but S&H never produced or provided the employment records to her.

[21] The Labour Inspector spoke with both Mr Ye and Ms Xu. A written statement was taken from Mr Ye on 7 June 2017 and from Ms Xu on 13 June 2017. Following

the review of the statements, the Labour Inspector concluded her investigation and completed her report².

Labour Inspector's conclusions

[22] The Labour Inspector's report concluded that S&H had not provided employment records as requested in the notice issued to it on 8 February 2017 and had breached its employment obligations to both Mr Ye and Ms Xu. The report was sent to S&H. S&H was given until 16 June 2017 to respond or comment on the findings and/or to meet with the Labour Inspector to discuss the findings. S&H did not take any steps.

The issues

[23] The issues for determination in respect of Mr Jian Ye and Ms Liwanhua Xu are:

- (a) Whether S&H failed to meet minimum employment standards identified in the Labour Inspector's investigation;
- (b) If minimum employment standards were breached, should penalties be imposed on S&H and in what amount?

Did S&H fail to meet minimum employment standards as identified in the Labour Inspector's investigation?

[24] The Labour Inspector claims S&H breached its employment obligations pursuant to the ERA, the MWA and the HA as follows:

- (a) Under Section 229(1)(d) of the ERA, for failing to provide the Labour Inspector with the requested employment agreements, wages and time records and holiday and leave records for its employees;

In respect of Mr Ye:

- (b) Section 6 of the MWA, for failing to pay him gross minimum wages;
- (c) Section 27(1)(b) of the HA, for failing to pay him gross holiday pay on termination of employment;

² Labour Inspector's Investigation Report 9 June 2017

- (d) Section 60 of the HA, for failing to pay alternative days for public holidays worked by him.

In respect of Ms Xu:

- (e) Section 27(1)(b) of the HA, for failing to pay gross holiday pay on the termination of her employment;
- (f) Section 60 of the HA, for failing to pay alternative days for public holidays worked by her.

Mr Ye

Employment

[25] Mr Ye was employed by S&H at The Page Corner Café as a chef. Mr Ye had a one day trial on 16 May 2015 at the café where he worked with the Head Chef in the kitchen. Mr Ye was employed part time by S&H on 17 May 2015 as a chef. Ms Lin asked Mr Ye for his Inland Revenue Department (IRD) number and bank account details on 17 May 2015, which he provided to her.

[26] Mr Ye was not provided with an individual employment agreement by S&H even though he asked Ms Lin for it on a number of occasions. Mr Ye continued to work part time for S&H until 10 April 2016.

[27] On 11 April 2016, Mr Ye was employed full time and was provided with an employment agreement. However, despite working full time, he was not paid for the weeks beginning 16 May 2016, 20 June 2016, 27 June 2016, 4 July 2016, and for ten hours on 12 September 2016. After Mr Ye went to work on 17 September 2016, finding the kitchen in a mess, he decided he had had enough and resigned.

Wages and holidays owing

[28] During the period of his employment by S&H, Mr Ye says he was not paid:

- (a) All the wages to which he says he was entitled,
- (b) For public holidays worked on 1 January 2016, 4 January 2016, 8 February 2016, 25 March 2016, 28 March 2016, 25 April 2016, and

6 June 2016. These holidays related to New Year, Waitangi Day, Easter, ANZAC Day, and Queen's Birthday public holidays,

- (c) Annual leave owing upon termination of his employment.

[29] The Labour Inspector has calculated that the following amounts are owed by S&H to Mr Ye:

- (a) Minimum wages from 16 May 2016 to 12 September 2016 totalling \$3,492.24 gross, being a total of 229 hours at the minimum wage of \$15.25 gross;
- (b) Alternative holidays owed for public holidays worked as above at the rate of \$137.25 per day totalling \$960.75 gross;
- (c) Holiday pay owing of \$4,924.39 gross.

[30] The total amount owing to Mr Ye by S&H amounts to \$9,377.38 gross.

Ms Xu

Employment

[31] Ms Xu was employed by S&H on 10 May 2016 at The Page Corner Café as a café assistant. Ms Xu was not provided with an employment agreement. Ms Xu resigned on 27 May 2016.

[32] Ms Xu says she was not paid:

- (a) For public holidays worked on 25 March 2016, 28 March 2016, and 25 April 2016. These holidays related to Easter, and ANZAC Day public holidays;
- (b) Annual leave owing upon termination of her employment.

[33] Based on Ms Xu's IRD records, the Labour Inspector has calculated that the following amounts are owed by S&H to Ms Xu:

- (a) Alternative holidays owed for 3 public holidays totalling \$408.00 gross;

- (b) Holiday pay owing of \$619.68 gross, based on gross earnings of \$7,338 gross.

[34] The total amount owing to Ms Xu by S&H amounts to \$1,027.68 gross.

Orders in respect of Mr Ye and Ms Xu

[35] In total, S&H is ordered to pay the Labour Inspector (for the use of Mr Ye) the sum of \$9,377.38 gross. S&H is ordered to pay the Labour Inspector (for the use of Ms Xu) the sum of \$1,027.68 gross.

Interest

[36] The Authority may, under clause 11 of the Second Schedule to the ERA, if it thinks fit, order the payment of interest at the rate prescribed under s.87(3) of the Judicature Act 1908. I intend to do so from the time that the Labour Inspector provided S&H with her investigation report on 9 June 2017 until the date of payment.

[37] I order S&H to pay interest on the sum of \$9,377.38 gross owing to Mr Ye and on the sum of \$1,027.68 gross owing to Ms Xu (as set out in para [35]) at the rate of 5% per annum from 9 June 2017 until the date of payment.

[38] The entire amount, including interest, is to be paid by S&H to the Labour Inspector (for the use of Mr Ye and Ms Xu respectively), within 21 days of the date of this determination.

Penalties appropriate

[39] The following breaches of statutory obligations were established on the balance of probabilities:

- Mr Ye was not paid alternative days for public holidays worked (s.60 HA);
- Mr Ye was not paid minimum wages for work performed by him (s.6 MWA);
- Mr Ye was not paid holiday pay upon termination of his employment (s.27(1)(b) HA);

- Ms Xu was not paid alternative holidays for public holidays worked (s.60 HA);
- Ms Xu was not paid holiday pay upon termination of her employment (s.27(1)(b) HA);
- S&H failed to provide the Labour Inspector with wages and time records requested by her on 8 February 2017 (s.229 ERA).

[40] Harm resulted from S&H's failure to comply with its statutory obligations which meant that Mr Ye was not paid in the weeks beginning 16 May 2016, 20 June 2016, 27 June 2016, 4 July 2016 and for ten hours on 12 September 2016. This caused Mr Ye stress as he had to keep asking to be paid and this was not happening. This was one of the factors that led to his resignation on 17 September 2016.

[41] Harm also resulted from S&H's failure to pay Mr Ye for alternative holidays and for holiday pay owing to him upon the termination of his employment. Similarly, Ms Xu was affected by S&H's failure to pay her alternative holidays and holiday pay upon termination of her employment. In her statement, Ms Xu says she asked for moneys owing to her which were not paid by Ms Lin. Ms Xu felt that Ms Lin's attitude towards her was that she would not be reported because Ms Lin would know that Ms Xu would be afraid to lose her visa.

[42] Further, the failure by S&H to comply with its statutory obligation to provide and produce employment records, including wages and time records, to the Labour Inspector, affected the Labour Inspector's ability to effectively carry out her statutory role of ensuring employees are paid in accordance with the law.

[43] This may have led to S&H potentially unfairly gaining a competitive advantage in business by not meeting statutory compliance costs.

The Law

[44] Ms Carr, Counsel for the Labour Inspector, helpfully provided the Authority with a useful synopsis of submissions in respect of the law concerning penalties. The

leading case on penalties in the employment jurisdiction, is *Borsboom (Labour Inspector) v Preet PVT Limited & Anor*³.

[45] In that case, a full bench of the Employment Court considered the approach which is to be taken by the Authority and the Court when considering penalties for breaches of minimum employment entitlements. The Court in *Borsboom* set out the objectives of penalties and employment law generally at paras [61-63] of its decision. To summarise, they are to:

- (a) Punish those who breach statutory obligations;
- (b) Deter deliberate breaches;
- (c) Compensate the victim of the breach;
- (d) Eliminate unfair competition in business.

[46] The Court applied a four step process to the assessment of penalties by the Authority and the Court in order to provide “*a uniform, reasonably predictable result*”. The four step process is to ensure that “*fixing the amount of a penalty, or penalties, is consistent and transparent*”.

Step 1 - Nature and number of breaches

[47] The Labour Inspector has identified six breaches. In summary, the Labour Inspector claimed, and it was not disputed by S&H, that there was one breach of the ERA, multiple breaches of the MWA, two breaches of the HA being failure to pay holiday pay on termination to two employees. A further two breaches of the HA were failure to pay alternative holiday pay to two employees. A potential maximum total of \$120,000.

Should global penalties apply?

[48] I agree with the Labour Inspector that it is permissible to consider the breaches under 4 heads of breach as follows:

- (a) Failure to provide wages and time records – one breach;

³ [2016] NZEmpC 143

- (b) Multiple failures to pay minimum wages each pay day. This can be regarded as a consistent pattern of breach of s.6 of the MWA – one breach;
- (c) Failure to pay holiday pay on termination to two employees – two breaches;
- (d) Failure to pay alternative days for public holidays worked – two breaches.

[49] Global penalties therefore amount to a maximum of \$80,000.

Step 2 - Assessment of the severity of the breach in each case to establish a provisional penalties starting point and consider both aggravating and mitigating factors.

Aggravating factors

[50] S&H failed to provide to the Labour Inspector employment records requested by her on a number of occasions in breach of s.229(1)(d) of the ERA. This failure seriously hampered the Labour Inspector's investigation.

[51] Both Mr Ye and Ms Xu are young migrants, concerned about residency in New Zealand and in my view were in a vulnerable position. The failures to pay minimum wages and holiday entitlements adversely affected both Mr Ye and Ms Xu. S &H provided Mr Ye with an employment agreement and should have been aware of its employment obligations. Minimum code employment entitlements and standards are universally known⁴.

[52] The failure to cooperate with the Labour Inspector or to engage in the Authority's investigation are also aggravating factors.

Mitigating factors

[53] S&H is a small and relatively new business which is no longer trading. S&H was paying Mr Ye and Ms Xu their lawful entitlements for a period of time and then stopped. It is unclear why this occurred.

⁴ *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157

[54] Taking into account these factors, I consider a reduction of 50% across the 4 heads of breach to be appropriate. The adjusted total for penalties so far amounts to \$40,000.

Step 3 - Means and ability to pay the provisional penalty

[55] There is no evidence as to S&H's financial circumstances or means and ability to pay. From the Companies Office records it appears S&H is no longer trading; it is still registered but on notice that it will be struck off the register if annual returns are not filed. No evidence as to the assets or liabilities of S&H or of its directors has been provided to the Authority, despite ample opportunity to do so. A reduction in penalties on this ground is not appropriate in the circumstances.

Step 4 - Proportionality of outcome

[56] The penalties imposed should be in proportion to the amounts of money unlawfully withheld⁵. Mr Ye is owed a total of \$9,377.38 gross, plus interest. Ms Xu is owed a total of \$1,027.68 gross plus interest.

[57] Standing back and assessing the proportionality of the outcome for S&H, I conclude an appropriate global figure for all penalties under the ERA, MWA and HA to be \$20,000 in the circumstances, following the four step approach and taking into account the Court's observations in *Borsboom*⁶. This amounts to \$5000 for each head of breach.

[58] The penalties of \$20,000 are to be paid by S&H to the Authority, for transfer to the Crown account.

[59] \$10,000 of the total amount of penalties (\$20,000) is to be paid by the Authority to the Labour Inspector for the use of Mr Ye (\$7,000) and Ms Xu (\$3,000) pursuant to s.136(2) of the ERA.

[60] The balance of \$10,000 is to be paid by the Authority, for transfer to the Crown account. Both amounts are to be paid by S&H within 21 days of the date of this determination.

⁵ *Borsboom* at [190]

⁶ Paras.[190]-[194] with regard to proportionality and totality of outcome.

[61] A table showing the amounts calculated in respect of the four steps, bringing the Authority to a total of penalties imposed, is set out as an appendix to this determination.

Costs

[62] The Authority has general power to award costs as set out in clause 15(1) of Schedule 2 to the ERA as follows:

The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

[63] Counsel for the Labour Inspector seeks costs based on the Authority's current notional daily rate of \$4,500 for the first day. The Authority's investigation meeting took approximately less than an hour. This was largely due to the well prepared and presented case by the Labour Inspector which included relevant and helpful submissions.

[64] Applying the notional daily tariff in respect of costs, based on an 8 hour day, costs would total \$562.50. The filing fee of \$71.56 is also sought. I order S&H to pay the Labour Inspector within 21 days of the date of this determination, costs of \$562.50 together with the filing fee of \$71.56.

Anna Fitzgibbon
Member of the Employment Relations Authority

APPENDIX

SHERRIE AND HENRY LIMITED (2 employees)		
Step 1		
Nature and number of breaches	Potential maximum penalties	Following globalisation
HA ⁷ (4 breaches (ss.27 &60 x 2 each))	\$ 80,000	\$ 40,000
MWA ⁸ Failure to pay minimum wages (1 breach)	\$ 20,000	\$ 20,000
ERA ⁹ (1breach s.229(1)(d))	\$ 20,000	\$ 20,000
	Subtotal	\$ 80,000
Step 2: Aggravating and ameliorating factors as a proportion of maxima in Step 1		
HA (ss.27 and 60) (50%)		\$ 20,000
MWA (50%)		\$ 10,000
ERA (50%)		\$ 10,000
	Subtotal	\$ 40,000
Step 3: Respondent's financial circumstances \$0		
No evidence provided	Subtotal	\$ 40,000
Step 4: Proportionality		
Reduce modestly	Total	\$ 20,000

⁷ Holidays Act 2003

⁸ Minimum Wage Act 1983

⁹ Employment Relations Act 2000