

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 185
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BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
AND	GOLDEN FLEECE SHEEPSKIN MANUFACTURING COMPANY LIMITED First Respondent
AND	DEREK BELL Second Respondent

Member of Authority:	Christine Hickey
Representatives:	Jodi Ongley, Counsel for the Applicant Derek Bell, the Second Respondent in person, and as a representative of the First Respondent
Investigation meetings:	23 May and 29 June 2017
Submissions received:	31 July 2017 from the Applicant 28 August 2017, from Mr Bell for the First and Second Respondents
Determination:	31 October 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 30 June 2017¹, I issued a preliminary determination on these matters. In it I issued compliance orders requiring the First and Second Respondents to comply with an Improvement Notice issued by The Labour Inspector, Vikram Lakhera, on 29 August 2016.

¹ [2017] NZERA Christchurch 108

- [2] As I set out in the 30 June 2017 determination, the Labour Inspector sought:
- (i) Compliance orders to provide records;
 - (ii) A penalty for the failure to comply with the Improvement Notice. Mr Bell accepts there was failure to comply;
 - (iii) Penalties for the breach of s 27 of the Holidays Act 2003 (the HA) being the failure to pay four former employees their holiday pay with their final pay;
 - (iv) Penalties for breach of the Minimum Wage Act 1983 (the MWA) in relation to three employees. Mr Bell conceded that the MWA may have been breached for one employee but not for the others; and
 - (v) A penalty against Mr Bell personally on the basis that he was a person involved in the above breaches under ss 142W, 142X and 142Y of the Employment Relations Act 2000 (the Act).

[3] In the 30 June 2017 determination I ordered that by 4 pm, Thursday, 20 July 2017, and in order to comply with the Improvement Notice, the Respondents were required to:

- (i) Provide a copy of a time and wages review for three named employees that complied with the requirements of s 130 of the Employment Relations Act 2000;
- (ii) Provide copies of calculations for final holiday pay and provide proof annual leave payments were made to four named former employees in line with their entitlement under s 27 of the Holiday Act 2003.

[4] In her submissions received on 31 July 2017, Ms Ongley for the Labour Inspector raised a new claim that the Respondents had failed to comply with the compliance orders I made.

Procedural background

[5] In December 2016, the Authority set down these two matters for investigation on Wednesday, 23 May 2017. Those applications had been made on 7 October and 18 October 2016, and duly served on the Respondents.²

[6] Prior to 22 May 2017, the only contact that had been received from either of the respondents was an email from Mr Bell dated 29 November 2016 which the Authority treated as a statement in reply to both claims, and further email correspondence with the Authority officer when she was arranging a case management teleconference.

[7] On 22 May 2017, the Respondents instructed their solicitor, Mr Abdinor, that they had no knowledge of the investigation meeting to take place on 23 May. I required both parties and their counsel to appear at 9:30 am on 23 May 2017 in front of me at the Authority offices.

[8] This allowed me to clarify what the claims were, to ensure Mr Abdinor had all the relevant documents in legible form and to allow Mr Abdinor to further consult and take instructions from his client. I also facilitated a meeting between counsel in the hope that some matters were able to be resolved prior to the investigation of both matters, which I set down for Thursday, 29 June.

[9] At that first meeting in May 2017, I notified the Respondents that because to date they had not engaged by the Authority's process, I was considering whether or not to impose a penalty under s 134A of the Act. Section 134A makes every person liable to a penalty who, without sufficient cause, obstructs or delays an Authority investigation. At that stage, due to Mr Abdinor's involvement I was hopeful that such a consideration would not be necessary.

[10] I also informed Mr Bell that if the respondents cooperated and paid their past and current employees the amounts owed and I was able to establish that they had reliable records and proof that the payments had been made, these would be matters that would be seen favourably by me when considering whether to impose penalties.

² Although service was not entirely straightforward I am satisfied that the Respondents were served in sufficient time to respond to the claims.

[11] However, I also told him that if a compliance order was necessary after the June investigation meeting, that would be a matter likely to increase the amount of any potential penalty or penalties.

[12] Counsel agreed to talk directly to one another in the hope that at least some matters could be resolved prior to the June investigation meeting.

[13] I note that the Labour Inspector does not seek payment for the allegedly underpaid employees. That is because of the lack of records. The Labour Inspector has been unable to establish how much, if anything, the Respondents still owe those employees. Also, some employees do not wish to be involved in these proceedings.

[14] On 27 June 2017, two days before the investigation meeting, Mr Abdinor sought leave to withdraw as counsel on the record on the basis that Mr Bell had emailed him on 26 June 2017 withdrawing the Respondents' instructions to him to appear at the investigation meeting on 29 June 2017. I granted Mr Abdinor leave to withdraw.

[15] Mr Bell represented the respondents at the investigation meeting. I heard affirmed evidence from Mr Lakhera and Mr Bell. They both answered questions from me and from the other party.

[16] I heard oral submissions from Ms Ongley, and from Mr Bell. After that, I issued the determination including the compliance orders.

[17] On 20 July 2017, Mr Bell provided a number of documents to the Authority. These were spreadsheets that he compiled after the investigation meeting. For each named employee, Mr Bell created records out of Golden Fleece's payroll information, and from bank statements. The spreadsheets included dates and amounts of any late payments that have been made.

The parties' submissions

[18] At the investigation meeting, Mr Bell gave evidence of how he and Golden Fleece saw the situation in relation to each employee. I have taken account of that evidence in my consideration of the submissions on penalties.

[19] After Golden Fleece and Mr Bell supplied the records, I made a direction that by 11 August, the Labour Inspector's submissions needed to be in and the

Respondents had until 25 August to make submissions. I directed that “financial records” should be supplied and that the submissions should address:

... the size of penalties that should be imposed based on the respondents’ financial positions, as well as any applications to pay any penalties by instalments.

[20] As part of her submissions, counsel for the Labour Inspector submits that the records created and supplied, by 20 July 2017, were not compliant with the requirements of s 130 of the Act, as I had ordered them to be. In addition, Ms Ongley requested that I impose a penalty for breaches of the compliance orders.

What breaches have been established for which penalties could be awarded?

[21] First, I note that Mr Bell was not the employer. Golden Fleece was the employer. However, Mr Bell represents the employer. As the sole director and manager of the business, he was the controlling mind of Golden Fleece at all relevant times.

Did the Respondents fail to comply with the Improvement Notice?

[22] Mr Bell accepts that proof of a review of wages paid to three employees and proof of the calculation and payment to all former employees of their holiday pay and leave records were not supplied to the Labour Inspector in line with the Improvement Notice dated 29 August 2016. That gives rise to a potential penalty under s 223F of the Act for failure to comply with an Improvement Notice.

Did the Respondents fail to pay former employees their holiday pay in breach of s 27 of the HA?

[23] Section 27 of the HA provides that the employer must pay the annual holiday pay as part of the pay that relates to the employee’s final period of employment.

[24] Mr Bell denied that there was any ongoing breach of s 27. He also presented what he considered extenuating circumstances in relation to each of the four employees, arguing for no penalties to be imposed.

[25] I accept the Labour Inspector’s evidence that on 12 August 2016, when he visited the Golden Fleece factory, Mr Bell told him that about five employees had left his employment since July 2015 and that he was “catching up on their final holiday pay.”

[26] I accept Mr Lakhera's evidence that between 22 and 25 August 2016, Mr Bell provided him with information about holiday pay for Ms Davey, Ms Wanstall, Mr Chang and Ms Townrow. From those records, Mr Lakhera was able to calculate how much holiday pay was still owed to those four employees. I accept his calculations as accurate as at the date he made them.

[27] In August 2016, Ms Wanstall made her own application to the Authority for recovery of unpaid holiday pay. That was resolved with Member van Keulen's intervention, by Golden Fleece paying the outstanding amount to Ms Wanstall in two instalments. That is proof of Golden Fleece's failure to pay Ms Wanstall in line with s 27 of the HA.

[28] In relation to Ms Davey, Mr Bell's records, supplied on 20 July 2017, show that amounts paid after 16 January 2016 were holiday pay that was paid in small amounts and not with her final pay.

[29] In relation to Mr Chang, Mr Bell's records, supplied on 20 July 2017, show that amounts paid in and after 23 July 2016 were holiday pay that was paid in small amounts and not with his final pay.

[30] In relation to Ms Townrow, Mr Bell's records, supplied on 20 July 2017, show that amounts paid in 2017, despite her employment ending in 2016, were holiday pay that was paid in small amounts and not with her final pay.

[31] There is no claim for a penalty in relation to the employee known only as Sue.

[32] Golden Fleece is potentially liable to a penalty or penalties for breaching s 27 of the HA.

Did the Respondents fail to pay employees in line with the MWA?

[33] On 12 August 2016, Mr Lakhera became aware that three employees, Ms Derrick, Mr Lawrence and Ms Woolford, were owed wages because Mr Bell told him so. Mr Bell told him that he had paid them only part of the wages owed for the hours they had worked.

[34] I accept Mr Lakhera's evidence of this. In the absence of reliable records compliant with minimum employment standards this is the strongest evidence.

[35] I agree with the Labour Inspector that Golden Fleece was not entitled to under pay the employees in order to save the business. However, the problem with the claim that more than one employee was not paid the minimum wage is the state of the records kept and provided by Golden Fleece and therefore the level of evidence that the Labour Inspector could bring to the Authority.

[36] I am certain that, more than once, Mr Lawrence was paid less than the minimum wage for every hour he worked. Mr Bell has conceded that, although he says Mr Lawrence was paid only minimally below the minimum wage.

[37] However, I do not consider it proved that Ms Derrick and Ms Woolford were paid less than the minimum wage.

[38] A claim based on breaches of the Wages Protection Act 1983 in relation to Mr Lawrence, Ms Derrick and Ms Woolford would have been sustainable on the evidence before me, but breaches of the Wages Protection Act were not pleaded.

[39] The Respondents' failure to pay Mr Lawrence the minimum wage gives rise to a potential penalty.

Did the Respondents fail to comply with the compliance orders, and should there be penalties imposed?

[40] The records provided by Mr Bell in attempted compliance with my orders do not fully comply. For example, they were not time records, in that they did not record the number of hours worked by each employee, each day, in each pay period. Only wages or pay records were provided, based on payroll and bank records.

[41] Mr Bell's evidence at the investigation meeting was that employees clocked in and clocked out. Therefore, time records were kept and could have been incorporated into the records he was ordered to produce, but they were not. There are other ways the hours worked could have been recorded. If the employees always worked a fixed agreed number of hours in each pay period it would have been sufficient for the Respondents to supply a copy of the employment agreements, if they stated the hours

to be worked. Otherwise, rosters or any other kind of like document would have been sufficient.

[42] In addition, the Labour Inspector says information contained in the pay roll system was not reliable. For example, he said that although employees were provided with pay slips, which recorded what they should have been paid in most pay periods since mid-2015, some employees were paid less than the amounts set out in the pay slips.

Was there a breach of the compliance order?

[43] A claim for a penalty for a breach of the compliance order/s was included in what were intended to be final submissions. It was not pleaded in a timely manner that allowed me to investigate that issue. It would have required a further investigative process. I consider that in all the circumstances that was not practical and would have delayed the resolution of these proceedings unnecessarily.

[44] The reason the compliance order was sought was in the hope that some kind of accurate record would be produced to allow the Labour Inspector and/or the Authority to calculate or at least estimate any amounts outstanding to employees, or to be satisfied that there were no such amounts. However, the fact that the records were not created and maintained contemporaneously led to the failure to comply with the Improvement Notice and supply adequate records then as well as the failure to comply with the compliance order.

[45] In addition, I consider that imposing a penalty for breach of a compliance order would be somewhat akin to double jeopardy. There is already a claim for failure to comply with the Improvement Notice, for which a penalty will be considered. The records were not provided because they did not exist in the required format.

Penalties for breaches of the Act and minimum employment standards

[46] The main purposes of penalties are to punish and deter, rather than to compensate.

[47] For companies, the maximum penalty the Authority can impose is \$20,000 for each breach. The maximum penalty was doubled in 2011 and was “enacted to mark

stronger parliamentary disapproval” of activities that breach minimum employment standards.

[48] In determining whether I should award penalties for the breaches that I have established have occurred, I must consider s 133A of the Employment Relations Act as well as the other matters outlined by Judge Inglis in *David Lumsden v SkyCity Management Ltd.*³ The factors that I must consider include:

- (a) The objects of the Act set out in s 3.
- (b) The nature and extent of any breaches.
- (c) Whether any breaches were intentional, inadvertent or negligent.
- (d) The nature and extent of any loss or damage suffered by any employees.
- (e) Whether the Respondents have paid any amount of compensation, reparation or restitution, or taken other steps to mitigate the effects of any of the breaches.
- (f) The circumstances in which the breach took place, including the vulnerability of the employees.
- (g) Whether the Respondents have engaged in similar conduct previously.

[49] In addition, recent judicial guidance is contained in *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited.*⁴ The Court set out a four-step analysis for reaching decisions on whether to penalise and how to fix penalties.

Is it appropriate to impose penalties on Golden Fleece?

[50] The Labour Inspector, Mr Lakhera, attempted to resolve the issues at the lowest possible level. He visited the premises and spoke with Mr Bell. Mr Bell was candid about the financial difficulties the business was experiencing that meant he had not paid some staff their weekly wages in full or their final holiday pay.

[51] The first request from the Labour Inspector was for the kind of records the business ought to have been keeping and therefore ought to have been very easily

³ [2017] NZEmpC 30

⁴ [2016] NZEmpC 143

produced. They were not produced. Mr Lakhera moved to the next tool available to him of issuing an Improvement Notice.

[52] At this stage if Mr Bell and Golden Fleece had any view that the Labour Inspectorate's intervention was not serious and urgent the Improvement Notice should have disabused them of that notion.

[53] The Respondents did not or could not comply with the Improvement Notice.

[54] Mr Lakhera then moved to lodge two sets of proceedings in the Authority. The Respondents' cooperation and engagement with the Authority's processes was minimal, up until the day before the first investigation meeting.

[55] At the first investigation meeting, I was very clear that if the Respondents complied with the Labour Inspector's requests as soon as possible that would be an issue that I would look on favourably.

[56] The Respondents did not do so and instead came to the second investigation meeting arguing that they did not bear real responsibility for their lack of action.

[57] The objects of the Act, set out in s 3, are key to my decision about whether it is correct to impose penalties for the breaches I have identified. In particular, the Authority is required to:

- acknowledge and address the inherent inequality of power in employment relationships; and
- promote the effective enforcement of employment standards.

[58] Powers to enforce employment standards are conferred on Labour Inspectors and on the Authority. I am satisfied that the claims for penalties were lodged with the Authority within 12 months after the cause of action first became known to the Labour Inspector.

[59] I am satisfied that the breaches were intentional, although I accept that they were during a time of stress for Mr Bell and Golden Fleece when the business was having financial difficulties.

[60] The Respondents have now paid the four affected employees their holiday pay. They have also paid Mr Lawrence what they consider they owed him. However, due to the lack of suitable records it is not possible for any of the affected employees to be certain they have received what was due to them.

[61] Penalties are important to punish Golden Fleece but also to convey to other employers that the kinds of breaches committed are entirely unacceptable and will attract negative consequences.

[62] Golden Fleece was presented with a number of opportunities to demonstrate its compliance with minimum standards. It has failed to do so, has admitted some breaches, although pleading extenuating circumstances. In all the circumstances of this case, it is appropriate to impose penalties on Golden Fleece for all of its breaches identified above.

Step One – identify the nature and number of statutory breaches in relation to Golden Fleece

[63] This step requires me to assess how many penalties I will impose by assessing the types of breaches.

[64] I agree with the submissions for the applicant that the breaches of the MWA and the HA could be described as multiple or continuing breaches. The following are the type and number of breaches:

- (i) Four separate penalties for continuing breaches of s 27 of the HA in failing to pay four employees their final holiday pay – a maximum of \$80,000; and
- (ii) One breach by failing to comply with the Improvement Notice – maximum of \$20,000; and
- (iii) One penalty for a continuing failure to pay Mr Lawrence at least the minimum wage for each hour worked – a maximum of \$20,000.

[65] Therefore, the maximum total of penalties imposed on Golden Fleece could be \$120,000.00.

Step Two – assess the severity of the breaches, considering aggravating and mitigating factors

[66] Golden Fleece has not previously been found to have breached employment standards.

[67] **Failure to comply with the Improvement Notice** – the Labour Inspector characterises this as an administrative failing. I agree with its submission that the breach was deliberate. The records did not exist but could have been created from information held by the company. I consider a failure to comply with an Improvement Notice to be a relatively significant breach, because Golden Fleece had already had an opportunity to comply with the Labour Inspector’s request for the records.

[68] There are no mitigating factors.

[69] I assess the appropriate level of the penalty to be 60%, or \$12,000.

[70] **Failure to pay the minimum wage** – all breaches of minimum wage provisions are serious. This is no exception. The failure to pay Mr Lawrence the minimum wage is admitted.

[71] Mr Bell’s evidence is that after the earthquakes in 2010 and 2011 the business began suffering difficult financial problems. By 2015, there were serious cash flow problems. He decided that Golden Fleece would keep trading and retain staff. He decided that was a better option than closing the business and letting staff go.

[72] Mr Bell said that each week wages were calculated and pay slips made up by an administrative staff member. The pays were calculated on the hours each employee had worked and therefore, what they should be paid. However, he would then work out what Golden Fleece could afford to pay and would “consult” with each affected employee about that. He says that the employees would then agree to be paid less than they were owed based on what he said he could pay them and his assurances that he would make up the deficit at some future date.

[73] The factors affecting Mr Lawrence being the failure to pay him and to correctly document that failure aggravate the seriousness of the ongoing breach.

Mr Lawrence is deaf and therefore has a certain added vulnerability in his ability to gain alternative employment. His affidavit evidence is that the ongoing uncertainty about how much he might be paid each week and the lack of full pay owed led to great stress and financial hardship in his life.

[74] Mr Bell said that he was always a good employer to Mr Lawrence because he had made allowances for Mr Lawrence's ill health. He also suggests that the fact that Mr Lawrence was able to go on an overseas trip while the pay uncertainty continued must mean he was not as badly affected as he now claims.

[75] It was not Golden Fleece's right as Mr Lawrence's employer to employ and pay him on a 'grace and favour' basis as Mr Bell's evidence appears to suggest was permissible. It was not Golden Fleece's business to decide that it could continue to regularly underpay Mr Lawrence because his overseas holiday convinced Mr Bell that Mr Lawrence had enough money.

[76] It is an overall aggravating factor that it was only after the involvement of Mr Lakhera and the commencement of these proceedings that, at least according to Mr Bell, all amounts outstanding have now been paid. They were paid in a piecemeal fashion.

[77] By the time the investigation meeting began Mr Bell's evidence and submissions were about how much was or had been owed. It was his evidence that Mr Lawrence's evidence of how much Golden Fleece owed him was incorrect because Mr Lawrence had previously stated that Golden Fleece owed him less than he now claimed to be owed.

[78] I do not accept that Mr Lawrence's apparent earlier concession that Golden Fleece owed him less than he now claims is a factor that should lead to a decision not to impose a penalty, or to impose a lesser penalty. It is not up to an employee to work out what an employer who has breached its obligation to pay him the minimum wage over a prolonged period still owes him. This issue also arises out of the failure to keep accurate records, as Golden Fleece was obliged to do.

[79] There are no mitigating factors. I understand Mr Bell believed his actions were good for the employees as well as for the business because the employees remained employed. However, the employees involved in this action do not agree

that was the best decision or situation for them. It is inappropriate to tell the employees that the business would fail unless they accepted lower payments of wages than they were entitled to receive.

[80] The only mitigating factor raised by Mr Bell is that he has now paid all that Golden Fleece owed Mr Lawrence.

[81] I consider the breach to be a serious one.

[82] The appropriate level of the penalties is 90% or \$18,000.

[83] **Failure to pay holiday pay** – this was a serious breach of the employees' rights to get paid their holiday pay with their final pay.

[84] Again, the real reason for this was Golden Fleece's inability, as assessed by Mr Bell, to pay the full amounts owed at the time they were owed. He prioritised paying for other aspects of Golden Fleece's requirements.

[85] The Labour Inspectorate submits that the breaches are moderately severe and suggests a level of 70% of the maximum being $\$14,000 \times 4 = \$56,000$. I agree that is an appropriate level.

The overall level of penalties for Golden Fleece

[86] The overall level of penalties Golden Fleece potentially faces at this stage in the analysis is \$86,000.00. I still need to consider Steps Three and Four, in which I consider Golden Fleece's financial circumstances and the overall proportionality of the penalties to assess their appropriate level. I will do so after I have looked at Mr Bell's personal liability to penalties.

Is it appropriate to impose penalties on Mr Bell?

[87] Sections 142W and 142X of the Employment Relations Act 2000 were inserted by an amendment act and came into force on 1 April 2016. They were amended again on 31 March 2017. The sections deal with the "liability of persons involved" in breaches of employment standards.

[88] The Labour Inspector claims that in addition to Golden Fleece’s liability to pay penalties, Mr Bell is personally liable because he was a person involved in breaches of employment standards.

What are breaches of employment standards?

[89] The breaches of the HA and the MWA are breaches of minimum employment standards as defined under s 5 of the Act. The failure to comply with the Improvement Notice is not a breach of employment standards. Therefore, Mr Bell cannot be liable to a penalty for a failure to comply with the Improvement Notice.

How should ss 142W and 142Y be applied?

[90] In the Employment Court judgment in *Strachan v Moodie*⁵ Chief Judge Colgan, as he then was, stated that:

to render someone who is not the employer liable for aiding and abetting an employer’s breaches, a high standard of proof is required⁶....

[91] That decision was made before ss 142W and 142X came into force, and was in relation to s 134(2) of the Act that allowed penalties to be imposed on every person who “incites, instigates, aids, or abets any breach of an employment agreement”. Because ss 142W and 142X do not appear to have been considered in any other Authority determination or Court decision to date I will adopt the careful approach to imposing secondary liability the Court suggested was necessary under s 134(2) of the Act.

[92] The relevant parts of s 142W provide:

(1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—

(a) *has aided, abetted, counselled, or procured the breach; or*

(b) *has induced, whether by threats or promises or otherwise, the breach; or*

(c) *has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or*

(d) *has conspired with others to effect the breach.*

⁵ [2012] NZEmpC 95.

⁶ At paragraph [150].

(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:

(a) a person occupying the position of a director of a company if the entity is a company:

...

(Emphasis added)

[93] In this case, the employer was Golden Fleece. Golden Fleece is a company and therefore s 142(2) and 142(3) apply. Mr Bell is a director, and so is treated as if he is an officer of the company.

[94] An application to make a secondary party pay a penalty as a person involved in a breach may only be made by a Labour Inspector, as it has been here.

Sections 142W and 142X apply only to breaches that occurred after 1 April 2016

[95] Some of the breaches of the failure to pay Mr Lawrence the minimum wage occurred before 1 April 2016. However, some of the minimum wage breaches occurred after 1 April 2016. I have characterised the breaches as one continuing breach. Therefore, I consider Mr Bell may be personally liable to a penalty for the breaches that occurred after 1 April 2016.

[96] Some of the breaches of failure to pay holiday pay in line with s 27 of the HA originally occurred before 1 April 2017. However, some of them were continuing breaches lasting past 1 April 2016. That is the case for Ms Townrow, Ms Wanstall and Ms Davey. Mr Bell may be personally liable to a penalty for the breaches that occurred after 1 April 2016.

[97] The failure to pay Mr Chang his final holiday pay occurred entirely after 1 April 2016. Mr Bell may be personally liable to a penalty for those breaches.

Does s 142W apply?

[98] As an officer of the company, Mr Bell would be a person involved in a breach or breaches if he had:

- aided, abetted, counselled or procured the breach or breaches, or
- had been in any way knowingly concerned in, or party to, the breach or breaches.

[99] Mr Bell was the controlling mind of Golden Fleece. He was the person Mr Lakhera dealt with in relation to all aspects of his investigation into Golden Fleece.

[100] Mr Bell's evidence was very clear. He had been operating Golden Fleece and employing staff for a number of years. Mr Bell personally made the decisions in each pay cycle when he decided that Mr Lawrence would be paid less than he was owed. He made the payments of wages himself after the administration staff member calculate pay owed and prepared pay slips. He also made the decision not to pay the four employees their holiday pay with their final pay.

[101] The evidence is clear and strong. Mr Bell personally made the decisions not to pay when payments were due. Therefore, I am satisfied that Mr Bell was personally involved in aiding and abetting the company to breach its obligations in relation to employment standards. Alternatively, Mr Bell was knowingly concerned in or was a party to the breaches.

Should the Authority impose personal penalties on Mr Bell?

[102] Section 142Y applies to a person involved in a breach if wages or other money is owed to an employee. If the employer defaults in paying wages or other money and breaches employment standards by so doing, and if there is a person involved in the breach the employee may recover their wages or other money from the person involved in the breach. However, that section only applies if the employer is unable to pay the arrears.

[103] Unlike s 142Y, s 142X does not apply only where a corporate entity, such as a company, is insolvent or has finished trading and cannot pay the penalty or penalties imposed on it. If Parliament intended s 142X only to apply when the employer could not pay the penalty it would have clearly expressed that, as it did in s 142Y.

[104] That must mean that penalties can be imposed on Mr Bell personally as well as on Golden Fleece for the same breaches.

[105] In considering whether to impose penalties on Mr Bell as a person involved in the breaches, I need to consider the factors set out in s 133A of the Act. If I decide to impose penalties on Mr Bell, I also need to consider them in the way set out in *Preet*.

[106] I consider Mr Bell's personal actions and decisions meant that Golden Fleece breached employment standards. The purpose of penalties is to punish such actions. Section 3 of the Act makes one of the purposes of the Act the recognition of the inherent power imbalance in employment relationships. A further object is to promote the effective enforcement of employment standards by conferring enforcement powers on the Authority. Those purposes favour the imposition of penalties.

[107] The breaches were serious, and intentional. The employees were vulnerable to the extent that they had no way of ensuring they received their entitlements without involving the Labour Inspectorate. I have already conveyed why I consider Mr Lawrence was particularly vulnerable.

[108] However, Golden Fleece and Mr Bell have now paid the amounts apparently owed. Mr Bell has not previously been found to have breached employment standards.

[109] I consider that penalties should be imposed on Mr Bell.

Step One

[110] For individuals, the maximum penalty the Authority can impose for each breach is \$10,000. There are five breaches Mr Bell could be liable for. They are four breaches of the HA and one breach of the MWA at a potential total of \$50,000.

Step Two

[111] After considering all the same aggravating and mitigating factors as for Golden Fleece, and the fact that I consider:

- for the breach of the MWA it is reasonable to impose a penalty at 50% of the maximum, or \$5,000.00 and

- for the breaches of the HA it is reasonable to impose a penalty at 50% of the maximum, or \$20,000.00

[112] Therefore, the total possible penalty to be imposed on Mr Bell is \$25,000.00.

Step Three - the Respondents' financial circumstances

[113] Golden Fleece remains on the Companies Register. It is not in receivership or liquidation. Mr Bell remains solvent. He is not bankrupt. I have no financial records for either Respondent, despite having specifically directed that these should be provided.

[114] Instead, at the 29 June investigation meeting, Mr Bell gave sworn oral evidence. He followed that up with an email comprising submissions, which also contained some evidence.

[115] Mr Bell says that the bank has withdrawn Golden Fleece's ability to draw on an overdraft facility. He says that Golden Fleece has been slowly paying its debts but still owes the IRD \$80,000. He says Golden Fleece's bank forced him to sell his house to pay what Golden Fleece owed.

[116] Mr Bell's evidence is that all current employees are being paid appropriately but Mr Bell and his mother are not being paid for all the hours they work because the business is still struggling.

[117] Mr Bell also says that Golden Fleece has "no pot of gold" ... "for this contingency". He says if a "large fine" is imposed, it is going to put "15 staff out of work and not really achieve a lot."

[118] Before consideration of this step, Golden Fleece's penalty total is \$86,000. I consider that Golden Fleece's financial circumstances mean the penalties should be reduced by 80% to \$17,200.00.

[119] I consider Mr Bell's financial circumstances mean the penalties should be reduced from \$25,000 by 80% to \$5,000.00.

*Step Four - proportionality***Golden Fleece**

[120] There are no decided cases that are directly comparable to the situation that Golden Fleece and Mr Bell are involved in.

[121] The factors that I need to consider include the severity and harm caused by the breaches, and the proportionality between the amounts owed and the amount of the penalties imposed.

[122] If any amount is still owed to the affected employees, it must be a relatively small amount. The amounts owed were large enough to be concerning to each of the affected employees but overall were not especially large.

[123] A penalty must be high enough to be a deterrent but not so high as to be at a level an employer cannot pay. These proceedings involved past employees. Mr Bell's evidence is that Golden Fleece has 15 current employees whose jobs could be threatened by the necessity to pay a large "fine".

[124] In the circumstances, I consider the level of penalties should be reduced to \$8,000.00 for Golden Fleece and \$2,000.00 for Mr Bell.

Should any amount of the penalties be paid to the employee/s?

[125] Generally, penalties are payable to the Authority for the benefit of the Crown. However, the Authority has discretion to order the whole or any part of any penalty to be paid to the affected employees.

[126] If any penalty is paid to an employee, it must not be by way of compensation for losses that have already been compensated for, such as the unpaid wages and holiday pay already paid to the affected employees.

[127] In this case, I consider that each of the five affected employees was disadvantaged by the loss of use of the money that should have been paid when it became due. In each case, I consider that \$1,600.00 each must be paid to the Labour Inspector for the benefit of Mr Lawrence, Ms Wanstall, Ms Davey, Ms Townrow and Mr Chang.

[128] The balance of \$2,000.00 must be paid to the Authority for transfer to a Crown Bank Account.

Payment by instalments?

[129] Section 135(4A) of the Act empowers the Authority to order penalty payments to be made by instalments if the respondents' financial circumstances require it. I consider that both Respondents' financial circumstances require payments to be made by instalments.

Orders

[130] I order that Golden Fleece make 5 x payments of \$1,600.00 per month to the Labour Inspector starting on or before 20 November 2017, on or before 20 December 2017, on or before 20 January 2018, on or before 20 February 2018 and on or before 20 March 2018.

[131] I order that Mr Bell make one payment of \$2,000.00 on or before 20 March 2018 to the Authority for transfer to a Crown Bank Account.

Costs

[132] Costs are reserved. Unsuccessful parties can usually be expected to make a contribution towards the successful party's costs of legal representation. The parties should seek to agree on costs. The Authority's usual approach is to consider costs on the basis of a daily tariff of \$4,500, pro rata, for the first day of an investigation meeting. The meeting did not last a full day.

[133] If the Labour Inspector intends to claim costs, submissions about what costs are claimed should be lodged within 28 days of the date of this determination. The Respondents would then have a further 14 days to make their own submissions.

Christine Hickey
Member of the Employment Relations Authority