

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 45
5629817

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS, INNOVATION
 AND EMPLOYMENT
 (VIKRAM LAKHERA)
 Applicant

AND KINGS CURRY HOUSE
 LIMITED trading as
 TANDOORI KING
 Respondent

Member of Authority: Christine Hickey

Representatives: Aaron McIlroy, counsel for the Applicant
 Charlotte Clifford and Thomas Nation, counsel for the
 Respondent

Investigation meeting: 1 December 2016 at Timaru

Submissions: At the investigation meeting and on 5 December 2016
 from the Applicant
 23 December 2016 from the Respondent
 Further information from both parties' counsel on 23
 March 2017

Determination: 28 March 2017

INTERIM DETERMINATION OF THE AUTHORITY

- A. Within ten working days from the date of this determination, the applicant may make further submissions about the respondent's financial position related to Step Three of the *Boorsboom* approach, and any submissions it wishes to make on time payments and its costs.**

B. The respondent has a further ten working days from the date of the applicant's further submissions to respond to those submissions, after which I will issue my determination. The respondent should particularly address its ability to make time payments of whatever eventual penalties the Authority imposes.

Employment relationship problem

[1] This determination concerns two applications made by the Labour Inspector about the same business, and based on the same concerns about minimum labour standards.

[2] Pratulal Teli and Vijayeshni Chand are husband and wife and joint directors of Kings Curry House Limited (the company), trading as the restaurant, Tandoori King. Mr Teli is a chef and takes care of the practical side of the business. Mrs Chand has the best command of English and takes care of the accounts and duties such as payroll.

[3] On 17 July 2015, three Labour Inspectors, including Vikram Lakhera, undertook a random audit of the Tandoori King.¹ The purpose of the audit was to check compliance with employment legislation. The restaurant was open for lunch at the time.

[4] The applicant lodged its first application on 16 June 2016. It set out a number of alleged failures to comply with employment minimum code legislation. Mr Lakhera sought wage and other monetary arrears for more than one employee and a number of penalties.

[5] On 9 June 2016, Mr Lakhera also served an Improvement Notice on the company, with compliance required by 10 August 2016. He granted a number of extensions of time. Mr Lakhera continued to engage with Mrs Chand and with the company's lawyer up until 12 September 2016, after which he decided it was necessary to lodge a new application with the Authority. He lodged the new application on 28 October 2016.

¹ The Labour Inspectorate was conducting random audits of three different industries – the construction industry, the dairy farming industry and the hospitality industry.

[6] He alleged that the company had not complied with the Improvement Notice and sought compliance orders and penalties for non-compliance. The two matters that had not been complied with by the date of lodgement were:

- final holiday payments to Amandeep Singh (6.2.12 of the Improvement Notice); and
- evidence to show the company had reviewed all public holidays from 1 January 2013 for all employees and show evidence that the employer had provided alternative holidays and paid arrears to all past employees and credited current employees with their entitlements (6.2.8 of the Improvement Notice).

[7] By the date of the investigation meeting, the company had paid all amounts owed to Amandeep Singh. At the investigation meeting, Mr Lakhera withdrew the application for compliance orders arising out of the second application. That is because the company had largely complied with all matters set out in the Improvement Notice, although it did so after the extended deadline in the Improvement Notice had passed.

[8] At the investigation meeting, I heard sworn or affirmed evidence from Mr Lakhera, Mrs Chand and Mr Teli. All three answered questions from me and from opposing counsel. I received no affidavits or oral evidence from the four former employees or the two other Labour Inspectors who carried out the audit visit.

The claims and remedies sought

[9] At the beginning and again at the end of the investigation meeting, I clarified with Mr Lakhera and Mr McIlroy which claim they wished to proceed and which remedies they were still seeking. There was some confusion about that initially, but I am satisfied that the claims I need to investigate and determine are:

- (i) Was Anand Singh paid less than the minimum wage because he worked longer hours than the respondent recorded? Does the respondent still owe him any wages?
- (ii) Should I impose a penalty for the respondent's failure to pay the minimum wage for every hour worked?

- (iii) Were final wages incorrectly withheld from Madan Lal Kakaraliya (for not giving adequate notice and for uniform costs, mobile phone costs), despite his written agreement?
- (iv) Were Amandeep Singh's wages incorrectly withheld (for board), and without his written agreement?
- (v) Should I impose a penalty for incorrectly withholding wages?
- (vi) Should I impose a penalty for the respondent failing to pay Jatinder Singh Khaira his final holiday pay?
- (vii) Should I impose a penalty for the respondent's failure to keep adequate holiday and leave records in breach of s 81 of the Holidays Act 1983 (the HA)?
- (viii) Did the respondent fail to pay T1.5 for employees who worked on public holidays and give an alternative holiday for those employees?
- (ix) If so, should I impose a penalty for that failure?
- (x) If the respondent did not comply with the Improvement Notice should I impose a penalty for that?

Breaches admitted

[10] The respondent admits:

- it failed to keep holiday and leave records,
- it failed to correctly pay Anand Singh the minimum wage for every hour worked,
- it failed to correctly pay holiday pay (but says Mr Kaira has received his full holiday pay entitlements),
- it made unlawful deductions (but says it understood it was entitled to do so in Mr Kakaraliya's case, and that it was the fair thing to do in Amandeep Singh's case), and
- it did not fully comply with the Improvement Notice within the timeframe given.

[11] The respondent's submissions also contain an admission that it did not record what public holidays its employees worked. I consider that part of its failure to keep holiday and leave records.

Background facts

[12] On the day the Labour Inspectors visited the restaurant Mr Anand Singh, a chef, was present and working. He and Mr Teli were responsible for the lunch cooking and service that day. There were some patrons in the restaurant.

[13] Mr Lakhera interviewed Mr Singh in the restaurant. They mainly spoke in English, and Mr Lakhera's notes are in English. However, Mr Singh asked some clarifying questions in Hindi and Mr Lakhera answered him in Hindi. At the end of the interview, Mr Lakhera asked Mr Singh to sign at the bottom of the interview notes written by Mr Lakhera. Mr Singh signed and wrote the date beside his signature.

[14] Labour Inspector Nicola Rowe interviewed Mr Teli and Mrs Chand. They were questioned, and they answered, in English. Ms Rowe wrote notes in English. At the end of the interview, Ms Rowe asked Mr Teli to sign at the bottom of the three to four pages of interview notes she had written. Mr Teli signed and dated the last page alongside the handwritten words "true and nothing to add". Mr Teli says that the interview interrupted his work and at times he needed to stop the interview to deal with customers. He also says he did not have an opportunity to read the notes before Ms Rowe asked him to sign them.

Anand Singh – is he owed wages?

[15] The Labour Inspector claims that Mr Singh was not paid the minimum wage for all the hours that he worked. The respondent accepts that there are no time records showing the exact hours per day and days per week Mr Singh worked.

[16] The respondent accepts that after the minimum wage increased to \$14.75 per hour on 1 April 2015 it did not pay Mr Singh the minimum wage. Once Mr Lakhera pointed that out to the respondent, it submits that it increased Mr Singh's gross salary to \$36,000 per year effective from 1 April 2015, and therefore, he was appropriately paid.

[17] There is a dispute between the parties about the number of hours worked by Mr Singh. The Labour Inspector contends that Mr Singh worked 6 days a week, beginning work at 10.30 am, working until 2.30 pm (4 hours), and then again from 5 pm until 9 pm (4 hours), making a total of 48 hours per week.

[18] The respondent's submission is that Mr Singh usually worked 6 days a week from 11.30 am to 2.30 pm and from 5 pm to 9 pm, making a total of 42 hours a week.

[19] Mr Lakhera's evidence was that Mr Singh told him he started work at 10.30 every morning. That is written in his notes. Ms Rowe's notes of her interview with Mr Teli say that Mr Singh worked from 10.30 each morning. I cannot put a lot of weight on Ms Rowe's notes because she was not present at the investigation meeting to be questioned under oath or affirmation. In addition, having questioned Mr Teli at the investigation meeting, I do not consider his English so fluent he was able, in all the circumstances, to adequately read and understand what he signed after the interview.

[20] Mr Teli and Mrs Chand's oral evidence at the investigation meeting was different to the notes. They both said that Mr Singh did not formally start work until 11.30 am. The family and Mr Singh shared a kitchen for their domestic use, being the restaurant kitchen.

[21] Mr Singh and Mr Teli and Mrs Chand would go to the restaurant kitchen at about 10.30 am to make and eat their breakfast. Mr Teli would be doing food preparation work between 10.30 and 11.30 am, which was Mr Singh's official work start time.

[22] Mrs Chand and Mr Teli say that from time to time Mr Singh would start doing a small amount of work before 11.30 am, for example, getting things out of the chiller. Mr Teli says that would have been for only about 10-15 minutes spread over the hour. The rest of the time Mr Singh would have been eating his breakfast, on his phone, reading the newspaper or talking to Mr Teli and Mrs Chand.

[23] Mr Teli says that the small amount of work was not "preparations for the day's service ... but more a case of organising things."

[24] Mr Teli presented a signed statement from Mr Singh dated 24 July 2014. I am satisfied that date is incorrect and should be 24 July 2016 because the statement refers to payments made in late 2015. However, relevantly, he writes:

It was my personal choice to come into the restaurant kitchen around an hour before my start time to prepare and have breakfast. My official start time was 11.30 am. I often started to do bits of work after my breakfast so I did not have to rush to finish work on time.

[25] The respondent did not keep a wages and time record. Section 132 of the Employment Relations Act 2000 provides that if an employer failed to keep a wages and time record and that failure prejudiced an employee's ability to bring an accurate claim for wage arrears, the Authority may accept all claims made in respect of hours, days and time worked by the employee. That is so unless the employer can prove the wage claims are incorrect.

[26] This claim is not one made by Mr Singh as an employee, but is made by the Labour Inspector. In the absence of a wages and time record, I need to deal with evidence in the best way that I can.

[27] I do not consider that it is safe to conclude that Mr Singh started work every day at 10.30 am. I am satisfied that is when he came to the kitchen for breakfast. However, I accept that he did start doing some organisational work before 11.30 am every day. His statement says that it was his personal choice that he would come into the kitchen an hour before his start time to prepare and have breakfast. However, that seems to suggest I should accept that the preparation he did during that hour should be treated as voluntary. It was not. It was part of his job. He should have been paid for that work.

[28] I do not accept Mr Teli and Mrs Chand's assessment of the work only being 10-15 minutes each day. I consider that it is more likely that over the whole of his employment Mr Singh worked about 30 minutes each day over the 10.30 to 11.30 time, interspersed with eating breakfast and reading etc.

[29] That means that Mr Singh worked 45 hours a week, not 42 or 48 hours. From 1 July 2014 until 31 March 2015 is 39 weeks at \$14.25 per hour minimum wage. He was paid \$615.38 gross per week and should have been paid \$641.25 gross per week. That is an underpayment of \$25.87 per week, or \$1,008.93 over 39 weeks.

[30] For the period 1 April 2015 to his last day, 29 October 2015, the minimum wage was \$14.75 per hour. Therefore, the minimum Mr Singh should have been paid was $\$14.75 \times 45 \text{ hours} = \663.75 per week. He was actually paid \$673.07, which is \$9.32 per week more than the minimum wage $\times 30 \text{ weeks} = \279.60 . Mr Singh is not owed any wage arrears for this period.

[31] I have not accepted the calculations of either party for Mr Singh's wages. I find that overall, when considering the full period he was employed for; he is owed \$729.33 ($\$1,008.93 - \279.60) to ensure he was paid the minimum wage for every hour worked from 1 July 2014 until 31 March 2015.

Amandeep Singh

[32] The Labour Inspector submits that deductions for the cost of accommodation were made from Mr Singh's wages without his written consent in breach of ss 4 and 5 of the Wages Protection Act 1983 (the WPA).

[33] That is correct and the respondent has paid Mr Amandeep Singh back the amounts it withheld.

[34] In its defence, the respondent says the first individual employment agreement (IEA) it offered to Mr Singh included the offer of Mr Singh boarding with Mr Teli and Mrs Chand at a cost of \$180 per week. To grant a working visa Immigration NZ required the salary offer to be increased, which it was.

[35] Mr Singh told the respondent he would find his own accommodation, stating he would only need to stay with the respondent for two weeks. He asked the respondent to delete the accommodation clause, which it did. Mr Teli and Mrs Singh attempted to help Mr Singh find alternative accommodation. However, Mr Singh did not find alternative accommodation and remained staying with Mr Teli and Mrs Chand and family until the end of his employment.

[36] Because of the fact that Mr Singh stayed with them Mr Teli and Mrs Chand considered it fair that he pay for board during his employment. However, they did not enter into a written or verbal agreement with Mr Singh for the cost of board to be paid to them.

[37] The respondent was aware that Mr Singh did not agree to it deducting accommodation costs from his final pay.

[38] In fact, in April 2015, Mr Singh complained to MBIE about the amounts withheld from his final wages. MBIE did not pursue this further at the time because the respondent appeared to disagree, i.e. Mrs Chand said Mr Singh knew it would cost him \$180 per week to board. I note that on 6 May 2015 Tahnee Campbell, a Client Service Advisor from MBIE's labour standards team emailed Mrs Chand noting that keeping accurate time and wage and leave records was a statutory requirement. She wrote that "it can ... help an employer to protect their business if there is a dispute with an employee over hours worked or entitlements." She included links to examples of the kind of records that should be kept.

[39] In addition, Ms Campbell informed Mrs Chand about the issue of deductions from wages and included a link to a section of the MBIE website on employers' obligations.

Madan Lal Kakaraliya

[40] Mr Kakaraliya left his employment after giving ten days' notice and not the eight weeks' notice his IEA required (at clause 9.1). The respondent understood that because of that it was entitled to withhold wages of \$2,461.56. That was equivalent to a month's salary and expenses of \$180.94 – made up of a uniform (\$130.94), a SIM card (\$30) and a mobile phone top up (\$20).

[41] Mrs Chand says she took advice from her local MP's electorate office and spoke to an employee of the Ministry of Business Innovation and Employment by telephone. She emailed a copy of Mr Kakaraliya's IEA to both of them. She said she told them that because Mr Kakaraliya had not given the full notice period in his IEA she wanted to deduct some wages from him for the inconvenience his failure to give appropriate notice caused. She says both people told her that she would have to get Mr Kakaraliya's written agreement to any deduction.

[42] Mrs Chand prepared an outline of what the respondent owed Mr Kakaraliya and the deductions it proposed to make. Mr Kakaraliya signed a letter stating that he had "read the terms of final pay set out in this letter and agree that I have breached my employment agreement by resigning from my job on my own terms."

[43] When the Labour Inspectorate became involved through the audit process, Mrs Chand telephoned Mr Kakaraliya to check whether he understood what he agreed to and whether he was now seeking to be paid the amounts withheld. I have seen a written translation of the recording of the telephone conversation between them, which was in Hindi. I accept that Mr Kakaraliya told the Labour Inspector that he was happy with the respondent's decision to withhold a month's pay and other expenses and had agreed to it. He confirmed that with Mrs Chand. I am satisfied Mrs Chand did not put any pressure on Mr Kakaraliya during the telephone call.

[44] The applicant claims that even though Mr Kakaraliya agreed to the deductions the respondent has breached its obligations under the Wages Protection Act 1983. The law states that, not only must an employee agree to any deductions being made in writing, any deductions from wages must be lawful² and reasonable³.

[45] The applicant claims that the respondent has breached sections 4 & 5 and claimed a premium under s 12 of the WPA.

[46] The respondent accepts that it was not entitled to withhold the amount of wages it withheld because that did not reflect any actual damages to its business caused by Mr Kakaraliya not giving eight weeks' notice.

[47] The 2013 Employment Court decision in *G L Freeman Holdings Limited v Diane Livingston*⁴ is relevant. In that case, there was a clause in Ms Livingston's individual employment agreement stating she had to give six weeks' notice if she wished to leave. If she did not, the IEA allowed the employer to withhold the equivalent pay for notice not given from any wages and holiday pay owed.

[48] Ms Livingston did not give six weeks' notice and the employer failed to pay her the wages and holiday pay that would have been due to her, which was the equivalent of three weeks' pay. The issue for the Court was whether the forfeiture clause was legally enforceable. The Court decided that the clause in the IEA was not legally enforceable because it was not a genuine pre-estimate of damages but a penalty for breach of contract. A penalty clause to compel performance is generally not enforceable if the amount withheld is not in line with actual loss suffered.

² Section 5 of the WPA.

³ Section 5A of the WPA. However, that section did not apply at the time the money was withheld.

⁴ [2015] NZEmpC 120.

equity takes the view that it is unconscionable in a case of breach of contract to recover a sum which is out of proportion to the loss which actually occurs.⁵

[49] In this case, although the amount withheld was initially referred to as “recruitment expenses”, the respondent actually withheld a month of Mr Kakaraliya’s wages as a punishment to him for not giving eight weeks’ notice. The respondent withheld his wages as a penalty that bore no relation to any measurable monetary losses it may have suffered.

[50] Therefore, even with Mr Kakaraliya’s written agreement the penalty withheld would not have been enforceable if Mr Kakaraliya had chosen to challenge it⁶. That makes it a breach of s 5 of the WPA.

[51] However, as in the *Livingston* case, the Authority or the Court may have imposed a penalty on Mr Kakaraliya for breaching clause 9.1, a term of the IEA. That penalty would have been much smaller than the amount withheld. In Ms Livingston’s case, she was penalised \$500.00.

[52] The applicant has also claimed that in withholding a month’s wages, and uniform costs, the respondent sought and received an unlawful premium in breach of s 12 of the WPA. However, since the submissions refer to a “premium” I assume what is intended is a claimed breach of s 12A of the WPA. Section 12A prevents an employer from seeking or receiving a premium “in respect of the employment of any person”.

[53] The applicant submits that the cost of a uniform and any costs associated with limited notice of termination are expenses associated with an employer operating a business, and not costs that an employee should pay. In its submissions, the respondent accepts that deductions from Mr Kakaraliya’s final pay were premium deductions in breach of s 12A of the WPA. I am not so sure.

[54] I have carefully considered the recent Full Court of the Employment Court case *Labour Inspector v Tech 5 Recruitment Limited*⁷ that considered a clause in an employment agreement allowing the employer to deduct recruitment costs from an

⁵ *Ozturk v Gultekin (t/a Halikarnas Restaurant)* [2004] 1 ERNZ 572, at [5].

⁶ The applicant has not claimed that the respondent should pay it the amount withheld from Mr Kakaraliya, for his benefit.

⁷ [2016] NZEmpC 167

employee's wages during employment to have been an unlawful premium in breach of s 12A. The Court described s 12A as:

... part of a suite of provisions designed to prevent exploitation of vulnerable employees or potential employees.⁸

[55] The Court further defined what the word "premium" in s 12A covers:

"premium" ... being used as a compendium to apply to straightforward cases of payment being sought or received to purchase a job, or to more subtle or ingenious arrangements.

... naturally captures paying to acquire a job (that is, consideration over and above the wage paid for the work performed in the wage/work bargain) However, we consider "premium" extends beyond those situations to apply to an employer recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer. Given the ingenuity with which agreements can be drafted each case will be fact-specific. However, the feature that stands out in this case is the lack of a benefit to the employee in meeting the trade testing costs ... an inference arising strongly ... is that obtaining the job was conditional on agreeing to pay those costs.⁹

[56] In Mr Kakaraliya's case, the money withheld was the price for being able to leave his employment "on his own terms" or within the notice period he wished to give. I am not convinced the word "premium", despite considerable elasticity of meaning, covers the situation in this case. Premiums have generally been amounts agreed to be paid at the beginning of an employment relationship. I have not found any example of a Court or Authority decision holding that an amount withheld at the end of the relationship because of a failure to give appropriate contractual notice is a premium, in breach of s 12A.

[57] I consider it more correct to consider the withheld wages as in breach of s 5 of the WPA, in that the withholding of one month's wages was not lawful in this case, despite Mr Kakaraliya agreeing to it. It was not lawful because the amount withheld was out of all proportion to any financial loss occasioned by Mr Kakaraliya's shortened notice period. Therefore, I consider that the respondent breached s 5 of the WPA, for which a penalty can be imposed under s 13 of the WPA.

⁸ Ibid, at [50].

⁹ Ibid, at [53] – [54].

Should the respondent pay Mr Kakaraliya the amount it incorrectly withheld.

[58] Ordinarily, any amount incorrectly withheld from an employee should be paid to the employee. Mr Kakaraliya has not claimed the incorrectly withheld wages from the respondent, and the Labour Inspector has not claimed that amount on his behalf either. That was, no doubt, an oversight.

[59] On 17 February 2016, Mr Nation wrote to Mr Lakhera stating that the respondent was “making arrangements to repay the sum of \$2,461.56 to Mr Kakaraliya.” It appears that this has not happened perhaps because the respondent could not locate Mr Kakaraliya.

[60] When I come to consider penalty quantum for the breach of s 5 of the WPA, there are two factors that I need to consider in relation to how blameworthy the respondent’s actions have been. The first is a mitigating factor in the respondent’s favour; it did attempt to get accurate advice and followed that advice, as far as it was accurate, by getting Mr Kakaraliya’s signed agreement. However, that advice turned out not to be correct because the people giving it did not have a full understanding of employment law.

[61] However, the second factor could be seen as an aggravating feature demonstrating a lack of remorse. The Labour Inspector told the respondent in 2015 that it was not entitled to withhold Mr Kakaraliya’s wages. I need to know what the situation was in relation to the payment back to Mr Kakaraliya. If that payment has not been possible then the following paragraph applies.

[62] I am not determining the quantum of penalties in this preliminary determination because the applicant wishes to make submissions taking into account the respondent’s financial circumstances. Therefore, the respondent has an opportunity to make arrangements, voluntarily, to repay Mr Kakaraliya his wages, less the cost of the uniform, if he has not returned that, and less the cost of the mobile phone SIM card and top-up. If Mr Kakaraliya returned the uniform, it was not reasonable to withhold that cost from him, as it was properly a cost the employer should bear.

[63] The respondent may make voluntary arrangements to pay the Labour Inspector what it owes Mr Kakaraliya. The Labour Inspectorate would hold that money for Mr Kakaraliya's benefit until it can re-establish contact with him to pay him what he is owed.

[64] If that arrangement is made, I can consider it in making my determination on penalties.

Jatinder Pal Singh Kaira

[65] Mr Kaira worked part-time from February 2013 to November 2013. There was no written employment agreement. The respondent says that Mr Kaira's student visa permitted him to work 20 hours a week. It says he was a casual employee, who worked on an on call basis only, with no fixed hours. It says that it understood that it could pay him his annual holiday entitlement by paying 8% of his pay per hour he worked. It says it paid him \$16.20 per hour, which included 8% holiday pay.

[66] Therefore, it agrees it did not pay him any final holiday pay when he left his employment.

[67] The Holidays Act 2003 (the HA) requires annual holiday pay to be paid either when the employee takes their annual holidays or at the end of their employment¹⁰, except in limited circumstances. One of the exceptions, allows holiday pay of 8% to be paid with the employee's pay if the employee:

works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays¹¹

[68] According to the pay records kept by the respondent, Mr Kaira never worked for less than 12.5 hours per week. I do not consider that he fell within any of the exceptions under the HA. Therefore, the respondent did breach its obligation to pay Mr Kaira final holiday pay. However, the applicant does not seek any further payment to him, being satisfied that although paid wrongly he has not been underpaid.

¹⁰ Section 27 of the HA.

¹¹ Section 28 of the HA.

Did the respondent fail to pay time and half and provide an alternative day to employees who worked on public holidays?

[69] One of the requirements of the Improvement Notice was that the respondent had to conduct a review of all worked and unworked public holidays for all past and current employees from 1 January 2013 and pay or credit arrears where necessary in line with ss 49, 55, 56 and 60 of the HA.

[70] The date for compliance with the Improvement Notice was initially 10 August 2016. Mr Lakhera and Mrs Chand entered into correspondence and Mr Lakhera granted a number of extensions along with advice about whether information Mrs Chand provided met the Improvement Notice requirements or not. On 24 August 2016, Mr Lakhera accepted that the respondent would make its final payment to Amandeep Singh, covering some pay for public holidays, in December.

[71] On 5 September 2016, Mr Lakhera thanked Mrs Chand for the information she had provided but told her it did not comply with the requirements of the Improvement Notice. He wrote that the respondent remained non-compliant by:

- (i) failing to provide evidence that Amandeep Singh had received alternative holidays, and that any he had not taken at the end of his employment he had been paid for; and
- (ii) failing to provide evidence of final holiday pay being made to Amandeep Singh.

[72] By the time of the investigation meeting on 1 December 2016, the Labour Inspector accepted that the respondent had complied with those two requirements.

Was the Improvement Notice breached and should a penalty be imposed?

[73] The respondent, through Mrs Chand and the respondent's counsel remained actively in contact with Mr Lakhera both before and after the Improvement Notice was issued.

[74] One of the issues for which it was difficult to demonstrate sufficient compliance was the matter of public holidays, specifically ensuring the respondent adequately demonstrated that it had paid its employees appropriately and credited them with the appropriate number of alternate days.

[75] The only outstanding matters at the time the applicant made its second application to the Authority were Amandeep Singh's correct payments for money withheld and for working on public holidays. Mr Lakhera had already agreed with the respondent that money would be paid in full by a certain time. He had evidence the respondent had started to pay Amandeep Singh and by the time of the investigation meeting Mr Lakhera had evidence that respondent had paid in full.

[76] Mr Lakhera was aware that the respondent had not kept holiday and leave records and that Mrs Chand was having to re-examine how the public holidays over the time since 1 January 2013 had been handled in relation to all of the employees. That was made difficult by the lack of records. There also appeared to be some misunderstanding on Mrs Chand's part about days off that Amandeep Singh took, which Mrs Chand thought were alternative days taken.

[77] I am satisfied that the respondent complied in good faith and to the best of its ability with the Labour Inspectorate's requirements. In all the circumstances, I do not consider that the imposition of a penalty for non-compliance with the Improvement Notice is necessary as a punishment of the respondent or as a deterrent to other employers.

[78] However, I consider the other penalty claims below.

Penalty consideration

[79] Penalties are quasi-criminal and are imposed to punish the wrongdoer and deter others, rather than to compensate the party that has been wronged.

[80] Section 135 of the Employment Relations Act 2000 gives the Authority jurisdiction to deal with actions for recovery of penalties. Section 135 provides that a company is liable to penalty not exceeding \$20,000, for each breach.

[81] The factors I need to consider when determining whether to impose penalties have been usefully summarised in the recent Employment Court case of *Lumsden v SkyCity Management Limited*¹²

¹² [2017] NZEmpC 30.

Section 133A¹³ sets out a number of factors which the Court must have regard to in determining an appropriate penalty. It is a non-exhaustive list and was not in force at the time the breaches in this case occurred. However, as a full Court has recently confirmed, the provision essentially confirms earlier case law and may be applied as a useful guide in the present case. The factors are:

- The object stated in s 3;
- the nature and extent of the breach or involvement in the breach;
- whether the breach was intentional, inadvertent, or negligent;
- the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;
- whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

As I have said, the above list is not exhaustive. In the present case I consider that two other matters are relevantly considered in terms of assessing the appropriateness of a penalty, and its quantum. The first is the need for general and particular deterrence. The second is the desirability of broad consistency with other penalties imposed in similar cases.¹⁴

[82] In addition, the Full Court of the Employment Court's decision in *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited*¹⁵ sets out a four-step method for assessing how to set penalties at the appropriate level.

[83] One of the discretionary decisions I need to make in determining penalties is whether to globalise penalties for some breaches, or treat them as part of a single course of conduct.¹⁶

Step 1 - what is the nature and number of breaches for statutory penalty purposes?

[84] The following breaches, for which the applicant seeks penalties, are proved:

- Incorrectly withholding pay in breach of s 5 of the WPA – two employees and two breaches;
- Failure to pay the minimum wage in breach of s 6 of the Minimum Wage Act 1983 (the MWA) for one employee;

¹³ Of the Employment Relations Act 2000.

¹⁴ At paragraphs [53] – [55].

¹⁵ [2016] NZEmpC 143 at [137]-[148].

¹⁶ *Boorsboom* at paragraph [139].

- Failure to keep holiday and leave records in breach of s 81 of the HA, including a failure to record public holidays worked and not worked – one course of conduct;
- Failure to make annual holiday payments in line with ss 27 and 28 of the HA, for one employee;
- Failure to pay time and a half and alternative holiday pay for work carried out on public holidays in line with ss 50, 56 and 60 of the HA – one course of conduct.

[85] I attach the draft table that I have created to demonstrate how I will apply the further steps.

[86] I now need further submissions from the parties as set out in the Orders above.

Costs

[87] The applicant should include its costs submissions with its further submissions above.

[88] The respondent should reply to the costs submissions in indicating its agreement or disagreement with the amount sought. If it disagrees with the amount sought, it should give reasons.

Christine Hickey
Member of the Employment Relations Authority

<i>Step 1: Nature and number of breaches</i>		
WPA ¹⁷ – incorrect deductions	2 employees	\$ 40,000
MWA ¹⁸ breach	1 employee	\$ 20,000
Section 81 (records) HA ¹⁹	4 employees but 1 course of conduct	\$ 20,000
Section 28 HA	One breach/one employee	\$ 20,000
Breach of HA – re public holidays	4 employees but one course of conduct	\$ 20,000
Subtotal		\$ 120,000
<i>Step 2: Aggravating factors as a proportion of the maxima in Step 1</i>		
WPA (?%)		
MWA (?%)		
s 81 HA (?%)		
s 28 HA (?%)		
Subtotal		?
<i>Step 2: Ameliorating factors (reducing aggravating factors subtotal)</i>		
Less ?% of the above subtotals	Subtotal	?
<i>Step 3: Defendant's financial circumstances</i>		
Less ?% of the above subtotals	Subtotal	?
<i>Step 4: Proportionality/totality test</i>		
Reduce?	TOTAL	?

¹⁷ Wages Protection Act 1983

¹⁸ Minimum Wage Act 1983

¹⁹ Holidays Act 2003