

2. **with the rest of the \$6,000 to be paid in equal monthly instalments of \$500 per month beginning on 25 August 2017 and ending on 25 November 2017.**

Any late or short-paid instalments mean the full amount outstanding becomes due and payable immediately.

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 an audit of the Tandoori King. The purpose of the audit was to check compliance with employment legislation.

[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.

[6] Mr Lakhera 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. 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.

[9] As at the date of this determination, the respondent has paid the affected employees all amounts owed.

The claims and remedies sought

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.

Issues to be resolved

[12] I issued a preliminary determination on 28 March 2017 and sought further submissions and evidence in relation to penalties. I am satisfied that the issues I now need to determine are:

- (i) Can the Labour Inspector seek a penalty in relation to Amandeep Singh's withheld wages, or did he commence the proceedings for the penalty out of time?
- (ii) If the penalty claim was lodged within time, should I impose a penalty?
- (iii) Should I impose a penalty for the failure to pay Madan Kakaraliya his final pay?
- (iv) Should I impose a penalty for the respondent's failure to pay Anand Singh the minimum wage for every hour worked?
- (v) Should I impose a penalty for the respondent failing to pay Jatinder Singh Khaira his final holiday pay?
- (vi) 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)?
- (vii) Did the respondent fail to pay T1.5 for employees who worked on public holidays and give an alternative holiday for those employees?
- (viii) If so, should I impose a penalty for that failure?

- (ix) If the respondent did not comply with the Improvement Notice should I impose a penalty for that?

Is the Wages Protection Act penalty claim in relation to Amandeep Singh out of time?

[13] In April 2015, Mr Singh complained to the MBIE Outbound and Compliance Services team about the amount withheld from his final wages. MBIE did not pursue this further at the time because the respondent appeared to disagree. That is, Mrs Chand said Mr Singh knew it would cost him \$180 per week to board.

[14] On 6 May 2015 Tahnee Campbell, a Client Service Advisor from MBIE's Outbound and Compliance Team, emailed Mrs Chand noting that keeping accurate time, 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 the respondent should keep.

[15] 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.

[16] Section 135 of the Act says that actions for a recovery of a penalty must be commenced within 12 months after the earlier of when the cause of action first became known to the person bringing the action, or when the cause of action should reasonably have become known to the person bringing the action. I had a question about when the penalty cause of action should reasonably have become known to Mr Lakhera, the Labour Inspector.

[17] Mr Lakhera's evidence establishes that at the relevant time Outbound and Compliance Services, to whom Mr Singh made his complaint, was a separate branch from the Labour Inspectorate, within the Market Services Group of MBIE.

[18] Not all queries or complaints to Compliance Services are passed on to the Labour Inspectorate. In May 2015, Compliance Services referred a complaint to Mr Lakhera's manager from an unnamed ex-employee to the effect that the respondent was holding the current chef's passport and that he may not be being paid the minimum wage.

[19] Mr Lakhera's manager allocated the complaint to Mr Lakhera on 7 July 2015. On 17 July 2015, Mr Lakhera began investigating the complaint by visiting the respondent's business premises.

[20] Submissions on behalf of the Labour Inspector say that the issue first came to his notice on the day of the audit visit to the premises, on 17 July 2015, when his investigation into the respondent's employment standards began.

[21] Mr Lakhera says that all the facts he relies on to establish breaches of minimum employment standards are based on information provided to him by the respondent after his investigation began on 17 July 2015. He says he also contacted Mr Singh after 17 July 2015 to establish if the respondent still owed him wages.

[22] I accept his evidence. The penalty action was lodged on 16 June 2016, within 12 months of the cause of action coming to Mr Lakhera's notice. The cause of action should not have reasonably come to his notice at any time prior to 17 July 2015. Therefore, the penalty claim is within time.

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

[23] 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.

[24] 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.

[25] 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.

[26] 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 an 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 in December 2016, and it did so. The payments included pay for working on public holidays.

[27] 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 paid to Amandeep Singh.

[28] 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.

[29] 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.

[30] By the time of the investigation meeting on 1 December 2016, the Labour Inspector accepted that the respondent had complied with the two outstanding requirements he identified on 5 September 2016.

[31] 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 and as a deterrent to other employers.

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

Penalty consideration

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

[34] 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 a penalty not exceeding \$20,000, for each breach.

[35] The factors I need to consider when determining whether to impose penalties have been usefully summarised in the Employment Court case of *Lumsden v SkyCity Management Limited*¹

Section 133A² 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.³

¹ [2017] NZEmpC 30.

² Of the Employment Relations Act 2000.

³ At paragraphs [53] – [55].

[36] The Full Court of the Employment Court's decision in *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited*⁴ sets out a four-step method for assessing how to set penalties at the appropriate level.

[37] 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.⁵

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

[38] 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;
- 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.

[39] I consider that the six breaches should attract penalties in order to punish and deter the respondent from any further breaches to minimum standards. The imposition of penalties is also necessary to deter other employers.

[40] In considering whether penalties would meet the objects of the Act I specifically consider the s 3 objects to:

- acknowledge the mutual obligations of employers and employees,

⁴ [2016] NZEmpC 143 at [137]-[148].

⁵ *Boorsboom*, above, at paragraph [139].

- acknowledge and address the inherent inequality of power in employment relationships, and
- promote the effective enforcement of employment standards.⁶

[41] I consider those objects of the Act require me to impose penalties.

Step 2 – severity of breach, starting point and mitigating factors

[42] This step requires me to assess aggravating and ameliorating factors of each breach in order to set an amount, being a percentage of the full possible penalty for each breach.

[43] The starting point for each of the six breaches is \$20,000 being the maximum statutory limit for a penalty on a corporation, being a maximum possible total of \$120,000.

[44] Overall aggravating factors for all the breaches are the fact that all employees were new migrants with very little knowledge of their employment rights and their employer's obligations in New Zealand.

[45] Although the directors of the respondent are also migrants to New Zealand, they had been in business about ten years and should have been well aware of their obligations as employers.

[46] Ignorance of the law is not a defence to breaches of minimum labour standards.

WPA breach – Amandeep Singh

[47] 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.

[48] 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

⁶ Section 3, Employment Relations Act 2000.

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.

[49] 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.

[50] The respondent was aware that Mr Singh did not agree to it deducting accommodation costs from his final pay. However, the respondent has paid all the money it withheld.

[51] I consider the appropriate level of penalty considering aggravating factors alone to be 50% of the maximum, being \$10,000.

WPA breach – Madan Kakaraliya

[52] The respondent did not repay this amount at the first opportunity. However, Mr Kakaraliya signed an acknowledgement the amount could be withheld. The respondent was given information from what it considered credible sources that it was entitled to withhold the money and it has now been paid to the Labour Inspector in full.

[53] I consider the appropriate level of penalty considering aggravating factors alone to be 50% of the maximum, being \$10,000.

MWA breach – Anand Singh

[54] Mr Singh as not paid the minimum wage for all hours he worked and his wage was not immediately increased once the minimum wage itself increased.

[55] However, as soon as the respondent was made aware it had not been paying at the correct rate it paid back-pay and began paying the applicable rate. The latest failure to pay for the number of hours worked was in dispute and was determined only on 28 March. All outstanding amounts have now been paid.

[56] I consider the appropriate level of penalty considering aggravating factors alone to be 50% of the maximum, being \$10,000.

Section 81 Holidays Act – no records

[57] The respondent declined or failed to keep accurate holiday and leave records. This failure impacted on its ability to prove that it had made adequate annual holiday payments or paid time and a half to employees for working on public holidays, or allowed employees to accrue alternative days off. The lack of records contributed to its inability to provide proof within the required timeframe to the Labour Inspector.

[58] An aggravating factor is that in April 2015 the respondent was informed by MBIE about what kind of records it should be keeping. However, it did not start keeping those records until after the audit was undertaken in December 2015.

[59] I consider the appropriate level of penalty considering aggravating factors alone to be 50% of the maximum, being \$10,000.

Holidays Act – failure to pay T1.5 for public holidays

[60] No employees were paid their due for time worked on public holidays while they were working and some had to wait a considerable time to be paid.

[61] I consider the appropriate level of penalty considering aggravating factors alone to be 70% of the maximum, being \$6,000.

Section 28 Holidays Act – failure to make annual holiday payments at the end of employment

[62] This affected one employee. However the respondent did not owe him any money at the end of his employment.

[63] I consider the appropriate level of penalty considering aggravating factors alone to be 70% of the maximum, being \$6,000.

Overall ameliorating factors

[64] All payments owed to former employees have been made. That demonstrates remorse. I am also satisfied that the two directors are personally remorseful. Currently no employees are working for the business and I am confident that the respondent will make sure it has the correct systems in place when it next employs anyone. Some of the breaches were caused by the fact the directors were under stress

in their family life due to Mrs Teli's ill health. The breaches were largely inadvertent, rather than deliberate.

[65] I consider that there was substantial co-operation with the Labour Inspector's investigation. In that, I differ from counsel for the Labour Inspector.

[66] Taking into account all mitigating factors and those applicable to each individual claim for a penalty, I consider it just to reduce the amounts attributable to mitigating factors by 70% in each case, to a total of \$15,600.

The respondent's financial situation

[67] I have a copy of the respondents' 2016 financial statements dated 15 November 2016. I accept Labour Inspector's counsel's point that the accounts have not been audited. I also acknowledge that they are for the year ended 31 March 2016, now over a year ago. However, I held my investigation meeting in December last year and heard oral evidence from Mr Teli and Mrs Chand that the business was surviving but not thriving financially.

[68] The accounts show the business made a very modest profit and I do not consider that it has great cash reserves or valuable assets it could sell.

[69] However, I do consider the respondent can afford to pay some penalties. I acknowledge that both parties consider it will be more able to do so if I order payment by instalments.

[70] I consider it reasonable to reduce the overall penalty amount by 50% because of the respondent's modest financial circumstances.

Proportionality

[71] The final step in my assessment of how much penalties should be is to assess this determination against other similar cases to ensure the penalties are generally in line with one another.

[72] Having made such a comparison, I consider the amount should be reduced modestly. I take into account that the amounts have been paid in full and that the respondent has acknowledged the inevitability of having to pay a penalty amount. It has outlined its ability to pay an amount between \$2,000 and \$4,000 immediately, but

submits that any greater amount would have to be paid by instalment. It offers payments at the rate of \$500.00 per month.

[73] In all the circumstances, I consider a combined total of the penalties of \$6,000 and payments by instalments to be reasonable.

Costs

[74] Costs are reserved. Counsel for the respondent considers costs should lie where they fall. If counsel for the Labour Inspector wishes to claim costs he should attempt to settle costs directly with the respondent's counsel. Counsel for the respondent has 14 days to respond in writing after it receives any submissions from the Labour Inspector's counsel.

Christine Hickey
Member of the Employment Relations Authority

<i>Step 1: Nature and number of breaches</i>		
WPA ⁷ – incorrect deduction	2 employees and 2 breaches	\$40,000
MWA ⁸ breach	1 employee	\$20,000
Section 81 (records) HA ⁹	4 employees but 1 course of conduct	\$20,000
Section 28 HA – JPS Kaira	1 breach/1 employee	\$20,000
Breach of HA – re public holidays	4 employees but 1 course of conduct	\$20,000
Subtotal		\$120,000
<i>Step 2: Aggravating factors as a proportion of the maxima in Step 1</i>		
WPA – Amandeep Singh	50%	\$10,000
WPA – M Kakaraliya	50%	\$10,000
MWA – Anand Singh	50%	\$10,000
s 81 HA	50%	\$10,000
s 28 HA – JPS Kaira	70%	\$ 6,000
HA – public holidays	70%	\$ 6,000
Subtotal		\$52,000
<i>Step 2: Mitigating factors (reducing aggravating factors subtotal)</i>		
WPA – Amandeep Singh	70%	\$3,000
WPA - M Kakaraliya	70%	\$3,000
MWA – Anand Singh	70%	\$3,000
s HA – s 81	70%	\$3,000
HA - s 28 – JPS Kaira	70%	\$1,800
HA - public holidays	70%	\$1,800
Subtotal		\$15,600
<i>Step 3: Defendant's financial circumstances</i>		
Less 50% of above subtotals	Subtotal	\$7,800
<i>Step 4: Proportionality/totality test</i>		
Reduce modestly	TOTAL	\$6,000

⁷ Wages Protection Act 1983

⁸ Minimum Wage Act 1983

⁹ Holidays Act 2003