

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 195
3002511

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

A N D DIRECT AUTO IMPORTERS
 (NZ) LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Sarah Blick, Counsel for Applicant
 Ray Harris, Advocate for Respondent

Investigation Meeting: 22 and 23 May 2017 at Hamilton

Submissions Received: 30 May 2017 and letter on 16 June 2017 from Applicant
 9 June 2017 from Respondent

Date of Determination: 4 July 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Direct Auto Importers (NZ) Limited (DAIL) has breached various provisions of the Employment Relations Act 2000 (ERA), Holidays Act 2003 (HA), and Minimum Wage Act 1983 (MWA).**
- B. Mr Washim Akram was employed by DAIL, he was not an independent contractor.**
- C. Within 28 days of the date of this determination, DAIL must pay the Labour Inspector on behalf of and for the benefit of Mr Trevor Wood the sum of \$64 gross for the hours worked by him on four**

public holidays in 2016, and on behalf of and for the benefit of Mr Washim Akram the sum of \$662 gross for holiday pay owing at the termination of his employment.

D. Within 28 days of the date of this determination, DAIL must pay the Authority, for subsequent payment into a Crown bank account, a total of \$50,000 in penalties for its breaches of the ERA, HA and MWA in respect of Mr Turu, Mr Wood and Mr Akram.

E. \$5,000 of the total amount of penalties awarded (\$50,000) is to be paid by the Authority to the Labour Inspector for the use of Mr Wood and Mr Akram (\$2,500 each) pursuant to s.136(2) of the ERA.

F. Costs are reserved.

Employment relationship problem

[1] The Labour Inspector has brought various claims against DAIL arising out of its employment obligations in respect of Mr David Turu and Mr Trevor Wood, both of whom it is accepted were employed by DAIL. In respect of Mr Washim Akram, the Labour Inspector says he was employed by DAIL and DAIL breached its employment obligations to him.

[2] Alleged breaches of employment obligations by DAIL include:

- Not paying annual holiday pay and public holiday pay;
- Not providing, or producing, when sought by the Labour Inspector, written employment agreements;
- Not keeping a record of hours and days of work;
- Not keeping, or producing, when sought by the Labour Inspector, holiday and leave records.

[3] The Labour Inspector says these failures by DAIL breach the ERA, the MWA, and the HA.

[4] DAIL accepts some of the claims against it. However, it says those claims are explicable and any penalties should be reduced accordingly. DAIL denies other claims.

[5] In relation to Mr Akram, DAIL says he was not its employee, but rather an independent contractor. In those circumstances, DAIL says employment legislation does not apply and the Authority has no jurisdiction to investigate Mr Akram's issues.

Investigation Meeting

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

[7] The investigation of the matters in respect of both DAIL and Cheap Deals on Wheels Limited (Cheap Deals), the respondent in another matter (3002512) and heard contemporaneously, took two full days in the Authority.

[8] For the Authority's investigation in respect of DAIL the Labour Inspector filed a witness statement as did DAIL's director, Mr Vishal Sharma. DAIL's former employees, Mr Trevor Wood and Mr David Turu attended the investigation meeting pursuant to witness summonses as did Mr Akram.

[9] Each witness affirmed or swore on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

Relevant Facts

Direct Auto Importers (NZ) Limited (DAIL)

[10] Mr Vishal Kumar Sharma is the sole director and shareholder of DAIL. DAIL was incorporated on 20 March 2009 under the name of Auto Enterprise (2009) Limited. On 26 August 2009, the name was changed to Repozone Cars Limited and on 6 September 2011, the name again changed to Enterprise Traders (NZ) Limited (Enterprise). DAIL adopted its current name on 3 July 2014¹.

¹ Companies Office records, 4 May 2017

[11] DAIL imports cars into New Zealand. The cars are purchased overseas by finance companies including Venus Finance Limited, Vikom Finance Limited and Everest Finance Limited.

[12] Mr Sharma is a director of each of these finance companies.

[13] The imported cars are sold through an interrelated company². One such company is Cheap Deals. The Authority investigated claims brought by the Labour Inspector contemporaneously with this claim³.

[14] Mr Sharma is the sole director of Cheap Deals.

[15] DAIL operates its business from premises at 90 Avalon Drive, Nawton, Hamilton, which is also its registered office.

Complaint to Labour Inspector

[16] On 22 January 2016, Mr Suraj Sharma complained to the Labour Inspector. Mr Suraj Sharma said Cheap Deals owed him wages and holiday pay.

[17] The Labour Inspector visited Cheap Deals and DAIL on 27 January 2016.

[18] During this site visit, the Labour Inspector asked Mr Vishaal Sharma for a list of DAIL's employees and access to the time, wage and holiday records, including employment agreements. The Labour Inspector talked with employees of Cheap Deals and DAIL and took notes of his visit. The Labour Inspector asked for more information from Mr Vishaal Sharma and after receiving it completed his investigation and produced his report⁴.

[19] The Labour Inspector's report concluded that DAIL had breached its employment obligations to Mr David Turu and Mr Trevor Wood. The Labour Inspector concluded Mr Washim Akram was an employee and not an independent contractor and that DAIL had breached its employment obligations to him too.

The issues

[20] The issues for determination in respect of Mr Turu and Mr Wood are:

² NZERA [2016] Auckland 306

³ NZERA [2017] Labour Inspector v Cheap Deals on Wheels Limited Auckland 196

⁴ Labour Inspector's Investigation Report, 1 November 2016

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

[21] And in respect of Mr Akram are:

- (a) Was Mr Akram employed by DAIL?
- (b) If Mr Akram was employed by DAIL, did it fail meet minimum employment standards?
- (c) If minimum employment standards were breached, should penalties be imposed on DAIL and in what amount?

Mr David Turu

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

[22] The Labour Inspector says there were 5 breaches by DAIL of its employment obligations to Mr Turu. Those breaches were of the ERA, the MWA and the HA.

[23] The statement of problem filed by the Labour Inspector claims breaches by DAIL in respect of Mr Turu as follows:

- (a) Section 65 of the ERA, in not having an individual employment agreement with Mr Turu in writing prior to March 2006, or failing to comply with a requirement by the Labour Inspector to produce an agreement in writing for his earlier period of employment, pursuant to s.229(1) of the ERA;
- (b) Section 8A of the MWA, for not keeping a record of the hours between which Mr Turu was employed on each day, and the hours of his employment during each week for the period 6 March 2014 to February 2015;
- (c) Section 81 of the HA, for failing to keep the compliant holiday and leave records, or failing to comply with a requirement by the Labour

Inspector to produce holiday and leave records pursuant to s.229(1) of the ERA;

- (d) Section 28A of the HA, for paying \$1,412.42 gross annual leave pay on 24 December 2014 to Mr Turu in advance of his annual leave entitlement, and in excess of the maximum one week allowed in any entitlement year, for leave that was not physically taken;
- (e) Section 28A of the HA, for paying \$1,804.20 gross annual leave pay on 24 December 2015 to Mr Turu in excess of the maximum one week allowed in any entitlement year, for leave that was not physically taken⁵.

First alleged breach – ss.65 and 229 of the ERA

[24] The parties agree that Mr Turu worked for DAIL as a groomer. They disagree about when Mr Turu started work. Mr Turu's written employment agreement with DAIL is dated 2 March 2016. However, during his site visit to DAIL in January 2016, the Labour Inspector spoke to Mr Turu who told him he had been working for DAIL for three years. The Labour Inspector asked DAIL for its employment records. No earlier employment agreement was provided. A work training plan for Mr Turu dated 30 September 2013 was provided.

[25] From his investigations, the Labour Inspector concluded Mr Turu was a long term employee of DAIL and had started work for it in the week ending 6 March 2014⁶. At that time DAIL was known as Enterprise. There were no written employment agreements for Mr Turu's employment prior to March 2016. Therefore, the Labour Inspector concluded DAIL had breached its obligations under s.65 of the ERA, to provide a written employment agreement. Alternatively, if there were written employment agreements, DAIL had failed to provide them to the Labour Inspector when asked in breach of s229 of the ERA.

[26] When questioned at the Authority's investigation meeting, Mr Turu was unsure whether he had signed an earlier employment agreement than the one he signed with DAIL on 2 March 2016. Mr Vishal Sharma accepted that it was

⁵ Paragraph 2.16 of the statement of problem

⁶ Labour Inspector report p.12

coincidental that Mr Turu had signed a written employment agreement with DAIL following the visit from the Labour Inspector in late January 2016. Mr Vishaal Sharma says he wanted to ensure DAIL's employment records were correct.

[27] In his closing submissions for DAIL, Mr Harris enclosed a document entitled a "flexi wage subsidy agreement" concerning Mr Turu which had not been "discovered". Mr Harris submitted that this "flexi wage subsidy agreement" would have needed an employment agreement to support it.

[28] No supporting evidence was provided about where this document had come from, how or by whom it was created. I am not prepared to give any weight to the document.

[29] Mr Turu's pay records show that as at February 2014, DAIL's name was Enterprise. DAIL did not give the Labour Inspector an employment agreement for Mr Turu for his employment by it (in the name of Enterprise or in any other name), before 2 March 2016.

[30] It is more likely than not that Mr Turu was employed by DAIL (then known as Enterprise) from February 2014. Inland Revenue employer monthly schedules record Mr Turu as an employee of Enterprise and receiving income from it in May 2014. Mr Turu and Mr Vishaal Sharma were not clear about the length of Mr Turu's employment by DAIL. It is more likely than not that Mr Turu was employed by DAIL (then known as Enterprise) from about February 2014.

[31] There was no employment agreement in writing for Mr Turu with DAIL prior to March 2016. Accordingly, DAIL failed to comply with and breached s.65 of the ERA in respect of Mr Turu.

Second alleged breach – s.8A MWA

Did DAIL keep a record of Mr Turu's hours and days of work from 6 March 2014 to February 2015?

[32] DAIL accepts that during this time DAIL "may not have had an effective record keeping system for clocking in or out and the recording of days". However, in explanation DAIL says the issue was resolved, a log book was introduced in February 2015 and

Mr Turu suffered no prejudice⁷. DAIL accepts it breached s8A of the MWA. I will consider DAIL's explanation as to why when I consider penalty.

Third alleged breach – s.81 HA

Did DAIL fail to keep holiday and leave records as required by s.81 of the HA?

[33] DAIL accepts its holiday and leave records were not sufficient.

[34] In explanation, DAIL says it does not have an MYOB or similar software system. Holiday and leave records were the responsibility of a part time bookkeeper who was probably not aware of what was legally required and the work was too much for her⁸. DAIL accepts it breached s.81 of the HA. I will consider DAIL's explanation as to why when I consider penalty.

Fourth and fifth alleged breaches – s.28A HA

Did DAIL pay Mr Turu gross annual leave pay on 24 December 2014 and on 24 December 2015, in advance of his entitlement, and in excess of 1 week (for each year) for leave that was not physically taken?

[35] Section 28A of the HA allows employees to ask for a portion of their annual holidays to be paid out subject to certain conditions. Conditions include that the request must be in writing and for up to a maximum of one week of their annual holiday entitlement.

[36] When an employer is asked for annual holidays to be paid out to an employee, the employer must consider the request within a reasonable time, inform the employee in writing if the employer agrees to the request and if the employer does agree pay out holiday pay in accordance with s.28B of the HA⁹.

[37] Neither Mr Turu nor DAIL followed the prescribed steps. At the investigation meeting, Mr Turu stated he asked to be paid out his annual holidays in December 2014 and December 2015 because he had financial commitments that he needed to meet.

⁷ DAIL closing submissions para.56

⁸ DAIL closing submissions

⁹ Section 28A(3) HA

[38] DAIL accepts it did not comply with s.28A but says Mr Turu wanted to be paid out and it made the payments to him in good faith. Also, DAIL says s.28A of the HA is a difficult section to understand¹⁰.

[39] For the holiday pay payments made on 24 December 2014 and 2015, DAIL accepts that it did not comply with its requirements under s.28A of the HA when Mr Turu asked for his annual leave to be paid out.

[40] DAIL has breached s.28A on two occasions. I will take into account its reasons for doing so when I consider penalty.

Mr Trevor Wood

[41] The Labour Inspector claims DAIL breached three sections of the HA in respect of its employee Mr Trevor Wood.

First alleged breach – s.50 Holidays Act

Did Mr Wood work on four public holidays in 2016, namely the day after New Year's Day, Auckland Anniversary Day, Waitangi Day and Anzac Day?

[42] The Labour Inspector says that based on the timesheets provided by DAIL, Mr Wood worked on four public holidays in 2016. DAIL says he did not. Mr Wood was required by the Authority to attend the investigation meeting. At the investigation meeting he said he had not worked on the four public holidays. Mr Wood told the Authority that he filled out the time sheets and gave them to Mr Vishaal Sharma. Mr Wood was unable to explain why the timesheets recorded that he had worked for 3 hours on 4 January 2016, Day after New Year's Day, 1 hour on 1 February 2016, Auckland Anniversary, 1 hour on 8 February 2016, Waitangi Day and 2 hours on 25 April 2016, ANZAC Day.

[43] The daily timesheets for these days produced to the Authority were all in the same handwriting. At the investigation meeting Mr Vishaal Sharma took some time to identify whether he had filled out the timesheets. He did confirm to the Authority that he had filled out the timesheets. Mr Vishaal Sharma said the hours he recorded in Mr Wood's daily timesheets on the public holidays were an oversight. I do not accept this evidence to be credible. Mr Vishaal Sharma completed four separate timesheets for varying times and hours on each of the four public holidays.

¹⁰ DAIL submissions paras.58 and 59

[44] Mr Wood was apprehensive about giving evidence differing from that of DAIL. I conclude that Mr Wood did work on the public holidays and the record of his working on those public holidays is recorded in daily timesheets filled out by Mr Vishal Sharma. The Labour Inspector, Mr Darren Carr's evidence was that Mr Wood was not paid time and a half for the days worked. DAIL is in breach of s.50 of the HA. Mr Wood is owed \$64 gross by DAIL in holiday pay arrears.

Order

[45] Within 28 days of the date of this determination, DAIL must pay the Labour Inspector on behalf of and for the benefit of Mr Trevor Wood the sum of \$64 gross for the hours worked by him on four public holidays in 2016.

Second alleged breach – s.28(1) of the Holidays Act

Has DAIL paid eight percent holiday pay regularly with Mr Wood's pay? If so, did those payments comply with the requirements of s.28(1) of the HA

[46] An employer may pay annual holiday pay to an employee with his or her pay on certain conditions. One such condition is that the employee works for the employer on an irregular basis. In such a circumstance the employee must agree to holiday pay being paid with his or her pay in his or her employment agreement.

[47] DAIL accepts that it breached s.28(1) of the HA by making payments to Mr Wood of his holiday pay and not complying with the requirements of s.28(1). Upon being informed of this breach, DAIL arranged for an addendum to Mr Wood's employment agreement to be signed by him on 16 February 2017 which states "holiday pay will be paid out weekly with ordinary pay".

Third alleged breach – s.81 Holidays Act

[48] Section 81 of the HA requires employees to keep a holiday and leave record for each of its employees containing all the information set out in s.81(2) of the HA. Information to be kept includes the number of hours worked each day, pay for those hours, the date employment started and entitlement to holiday pay.

[49] DAIL's holiday and leave records did not include the date Mr Wood started employment with it. Once the breach was pointed out by the Labour Inspector, DAIL says it took steps to rectify the situation. Steps included ensuring each employee had

a written employment agreement and that there were records for each employee containing the information required by s.81 of the HA.

[50] DAIL accepts that it breached s.81 of the HA in respect of Mr Wood. The steps taken by it to rectify the situation will be considered when I consider a penalty.

Summary

[51] In summary, DAIL accepts that it has breached Mr Turu and Mr Wood's minimum employment entitlements. In addition to the reasons for the breaches, DAIL says it accepted it had breached the legislation at an early stage and took steps to ensure future compliance.

Mr Washim Akram

Was Mr Akram employed by DAIL?

[52] The Labour Inspector says he concluded that Mr Akram was employed by DAIL and was not an independent contractor to it as DAIL claimed. The Labour Inspector relies on the following information in support of his claim:

- (a) DAIL had payslips for Mr Akram with his IRD number and tax code recorded as "M";
- (b) The payslips identified Mr Akram as a sales consultant earning a retainer and commission with tax being deducted;
- (c) Mr Akram told the Labour Inspector he worked six days a week from 8.30am to 5pm.

[53] DAIL says Mr Akram was not employed by it. In support, DAIL says:

- (a) Mr Akram was engaged on a retainer plus commission;
- (b) He was not required to sign the login register as an employee;
- (c) He came and went as he pleased;
- (d) There was never an intention that he be employed by DAIL.

[54] DAIL and the Labour Inspector agree that Mr Akram performed work as a sales consultant at DAIL's car yard between January 2016 and May 2016 and he was paid a retainer and commission for the work he performed.

[55] Mr Akram was required by the Authority to attend the investigation meeting. Mr Akram stated that he was interviewed for the sales consultant position on 18 January 2016. Mr Akram was not provided with a contract of any type by DAIL. Mr Akram says he spoke with Mr Vishal Sharma's father, Prem (Kumar), about training in his first week on the job and that if it went well they would talk about an agreement. Mr Akram said he expected to receive an employment agreement for the sales role.

[56] Mr Akram worked from Monday to Sunday and part of Friday each week. It was clear that Mr Akram did not appear to understand the type of engagement. He told the Authority that there was no discussion about holidays and he was not sure whether he was paid when he was sick. Mr Akram did not issue GST invoices to DAIL, worked exclusively for DAIL and had tax deducted from his weekly pay. Mr Akram's duties included opening up the gates in the morning, moving cars, talking to customers, starting the cars up, checking to see what grooming if any was required and taking cars for test drives. Mr Akram said he received instructions directly from Mr Vishal Sharma or from Prem (Kumar) about the cars that needed testing, warrants of fitness and so forth.

[57] Mr Akram says he was sick for a few days in May 2016 and was told by Prem (Kumar) that if there was any further work for him he would be contacted by DAIL but he never received a phone call. Mr Akram's last pay was for work up to 24 May 2016.

[58] Mr Akram said that he received memoranda as did other staff giving instructions about their roles, duties, working times, sales and so forth.

[59] Mr Vishal Sharma talked about the car industry and that those sales staff who were employed by DAIL on a "retainer plus" were not regarded as employees and so did not get the usual benefits that employees did. Mr Vishal Sharma regarded sales consultants on a commission basis as independent sales agents who were responsible for their own tax. Mr Akram was regarded as an independent contractor as he was on a commission plus arrangement with DAIL.

[60] Mr Vishal Sharma pointed to long periods of time that Mr Akram was not at work which would not be the case if he was an employee. The document that the Authority was pointed to shows absences by Mr Akram over a number of days in late January and February 2016. It was accepted that at this time, Mr Akram took time off to get married.

The law

[61] Section 6 of the ERA states:

Meaning of employee

- (1) In this Act, unless the context otherwise requires, employee –
 - (a) Means – any person of any age employed by an employer to do any work for hire or reward under a contract of service;
 - ...
- (2) In deciding for the purposes of sub-section (1)(a) whether a person is employed by another person under a contract for service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of sub-section (2), the court or the Authority
 - ...
 - (b) Must consider all relevant matters including any matters that indicate the intention of the persons; and
 - (c) Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[62] The leading case on s.6 of the ERA is the Supreme Court decision of *Bryson v. Three Foot Six Limited*¹¹. Chief Judge Colgan in *Singh v. Eric James & Associates Limited*¹² states at para.16 that the inquiry in each case involving s.6 of the Act, is “intensely factual” and at para.17 sets out a number of principles derived from the *Bryson* decision.

[63] The Employment Court in *Poulter v. Antipodean Growers Limited*¹³ summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

- (1) The Court must determine the real nature of the relationship.
- (2) The intention of the parties is still relevant but no longer decisive.

¹¹ [2005] 3 NZLR 721

¹² [2010] NZEmpC 1

¹³ [2010] NZ EmpC 77, 17 June 2010 at para.[20]

- (3) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- (4) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the 'fundamental' test.
- (5) The fundamental test examines whether a person performing the service is doing so on their own account.
- (6) Another matter which may assist in the determination of the issue is industry practice although this is far from being determinative of the primary question.

[64] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court, to gain an overall impression of the underlying and true nature of the relationship between the parties.

Control test

[65] Mr Akram was subject to a high degree of control. Mr Akram was instructed in respect of his duties each day, what cars needed to be tested, and if they needed warrants of fitness, he was required to attend to that task. Further, sales staff such as Mr Akram received memoranda setting out from time to time their duties. Mr Akram worked six days a week and with DAIL's agreement left work early on Fridays.

Integration test

[66] I accept the submissions made on behalf of the Labour Inspector that the work performed by sales staff in DAIL's business, including Mr Akram, was an integral part of the business. Without having sales staff selling vehicles to customers, DAIL would have no business from which to derive revenue. Mr Akram was essential to the running of the business.

Fundamental test

[67] This test examines whether the employee is performing the services as a person in business on their own account. Mr Akram's job at DAIL was his first job in New Zealand. He is a young man and was a recent migrant. Mr Akram did not issue GST invoices for services rendered to DAIL, rather he went to work and was told what to do. I do not accept that the arrangement between Mr Akram and DAIL

constituted an independent contractor relationship. Rather, it had all the hallmarks of an employment relationship.

Overall impression

[68] There were some features which indicated the relationship was that of an independent contractor. However, there were significantly more features to indicate the relationship was that of employment.

[69] From the evidence, the overall impression gained by me of the underlying and true nature of the relationship between Mr Akram and DAIL was that it was one of employment.

[70] It must follow that DAIL owed obligations to Mr Akram as his employer including under the ERA, HA, and MWA.

If Mr Akram was employed by DAIL, did it fail to meet minimum employment standards?

[71] The Labour Inspector claims the following breaches by DAIL in respect of Mr Akram.

Section 65 of the ERA

Not having an individual employment agreement in writing for Mr Akram

[72] DAIL accepts that if Mr Akram is found to have been its employee, it has breached s.65 of the ERA in that it did not have an individual employment agreement in writing for Mr Akram. I will consider DAIL's reasons for breaching s.65 of the ERA when I consider penalties.

Section 8A of the MWA

Failing to keep records of hours Mr Akram worked each day and other details as required by s.8A of the MWA?

[73] DAIL accepts that if Mr Akram is found to be an employee, it has breached s.8A of the MWA. The reasons for doing so will be taken into account by me when I consider penalties.

Section 81 of the HA

Failing to keep holiday and leave records in accordance with s.81 of the HA in respect of Mr Akram?

[74] DAIL accepts that if Mr Akram is found to have been an employee, it has breached s.81 of the HA. The reasons and any matters in mitigation will be considered by me when I look at penalties.

Failing to pay annual holiday pay to Mr Akram upon termination of his employment in accordance with ss.23(2) and 27(2) of the HA?

[75] DAIL states that if Mr Akram was its employee, it has not breached either s.23(2) or s.27(2) of the HA because Mr Akram abandoned his employment. From the evidence, I am not satisfied that Mr Akram abandoned his employment. Rather I accept his evidence that following a short period of sick leave, he was told by Prem (Kumar) that he would be contacted if he was needed further. He was not contacted. In any event, even if Mr Akram did abandon his employment, this does not negate DAIL's obligation to pay him holiday pay due to him.

[76] DAIL is in breach of ss.23(2) and 27(2) of the HA. The Labour Inspector has calculated holiday pay owing to Mr Akram amounts to \$662 gross.

Order

[77] Within 28 days of the date of this determination, DAIL must pay the Labour Inspector on behalf of and for the benefit of Mr Akram the sum of \$662 gross in holiday pay arrears.

Penalties

[78] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities¹⁴.

[79] In *Borsboom v Preet Pvt Ltd*¹⁵, a Full Court of the Employment Court identified the factors for imposing a penalty for breach of minimum employment standards under the Act.

¹⁴ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29]

¹⁵ [2016] NZEmpC 143

[80] The Court considered earlier decisions and relevant factors for imposing a penalty. The Court then applied a four-step process for the Authority (and the Court) to follow when assessing penalties, for the purposes of consistency.

Step 1

Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or some stages of this stepped approach.

[81] The maximum penalty in respect of each breach claimed by the Labour Inspector against DAIL is \$20,000. A potential maximum total of \$260,000.

Mr Turu

[82] The Labour Inspector seeks the imposition of penalties against DAIL pursuant to s.133 of the ERA, s.75 of the HA and s.8 of the MWA for the following 5 breaches of employment legislation in relation to Mr Turu:

- (a) Not having a written employment agreement for Mr Turu between March 2014 and February 2015, pursuant to s.65(4) of the ERA;
- (b) Failing to keep holiday and leave records pursuant to s.81 of the HA;
- (c) Paying gross annual leave on two occasions, being on 24 December 2014 and on 24 December 2015 to Mr Turu in advance of his annual leave entitlement and in excess of the maximum one week allowed in each entitlement year for leave that was not physically taken, in breach of s.28A of the HA;
- (d) Failing to keep a record of the hours between which Mr Turu was employed on each day and the days of his employment from 6 March 2014 to February 2015, in breach of s.8 of the MWA.

[83] There are a total of five breaches in respect of Mr Turu, totalling a maximum of \$100,000 in available penalties.

[84] I agree with the Labour Inspector that it is permissible to consider the breaches of s81 of the HA and s8 of the MWA as part of a consistent pattern of a breach of a particular statutory requirement. A global penalty in relation to the repeated failure to

keep records of holidays, hours and days worked seems appropriate and in line with the discussion in *Preet* at [141] and [155]. It is in effect a single course of conduct by DAIL.

[85] Further, the breaches are similar in nature in my view and should be treated globally.

[86] The Labour Inspector does not consider the two breaches of s28A of the HA should be globalised, as they occurred a year apart. I do not agree. It is my view that DAIL was not aware of its obligations under s28A of the HA and in December 2014 and 2015 agreed to Mr Turu's request for his holidays to be paid out. I consider these breaches to be similar and should be treated globally. Following globalisation there are 3 breaches totalling a maximum of \$60,000 in available penalties.

Mr Wood

[87] In relation to Mr Wood, the Labour Inspector seeks the imposition of penalties as follows:

- (a) Failing to pay time and a half for the day after New Years Day, Auckland Anniversary Day, Waitangi Day and Anzac Day 2016 in breach of s.50 of the HA;
- (b) Paying 8% annual holiday pay regularly with Mr Wood's pay, despite there being no agreement in his employment agreement, in breach of s.28(1) of the HA;
- (c) Failing to keep holiday and leave records showing the date on which Mr Wood commenced employment and payments for public holidays on which he worked in breach of s.81 of the HA.

[88] I agree with the Labour Inspector that it is permissible to consider the s81 of the HA breaches as part of a consistent pattern of a breach of a particular statutory requirement to keep holiday and leave records. Similarly, the repeated failure to pay Mr Wood time and a half on the four public holidays he worked can be regarded as a "single course of conduct" constituting one breach, not four breaches.

[89] On this analysis, there are a total of three breaches in respect of Mr Wood, totalling a maximum of \$60,000 in available penalties.

Mr Akram

[90] In relation to Mr Akram, the Labour Inspector seeks the imposition of penalties as follows:

- (a) Not having an individual employment agreement with Mr Akram in writing, in breach of s.65(4) of the ERA;
- (b) Failing to keep a record of the hours Mr Akram was employed between each day, the days of his employment during each week, the wages paid to him each week and the method of calculation, in breach of s.8A of the MWA;
- (c) Failing to keep holiday and leave records, in breach of s.81 of the HA;
- (d) Failing to pay Mr Akram 8% of his gross earnings since the commencement of his employment as annual holiday pay upon termination of his employment in breach of s.23(2) of the HA;
- (e) Failing to pay annual holiday pay in the pay that related to Mr Akram's final period of employment in breach of s.27(2) of the HA.

[91] There are a total of five breaches in respect of Mr Akram, totalling a maximum of \$100,000 in available penalties.

[92] For the reasons given above, the breaches of s81 of the HA can be treated as a "single course of conduct", as can the breaches of s23 and 27 of the HA.

[93] The breaches of s81 of the HA and s.8A of the MWA relate to failures to keep employment records. The breaches are similar in my view and should be treated globally.

[94] Taking this global approach, there are a total of 4 breaches by DAIL in respect of Mr Akram, totalling a maximum of \$80,000 available.

Step 2

Assess the severity of the breach in each case to establish a provisional penalties starting point and consider both aggravating and mitigating features

[95] The Labour Inspector points out in closing submissions that DAIL's lengthy experience in running a car yard business means it ought to have known and applied

relevant laws in respect of its employees. With regard to its employee, Mr Akram, the Labour Inspector submits that it was Mr Akram's first job in New Zealand, he was a young migrant employee and was "inevitably vulnerable particularly as he was unfamiliar with his rights under New Zealand employment law".

[96] Mr Vishaal Sharma was largely left to run the car yard business following the insolvency of his parents. Clearly, the systems that should have been in place in relation to employees were not¹⁶.

[97] In *Preet*, the Court held the following features were present when they decided on the 50% deduction for ameliorating factors:

- (a) Compliance with the Labour Inspectorate investigation;
- (b) Only five of the 25 workers were affected;
- (c) Had confirmed liability and an arrears total thereby dispensing with the need for a full investigation meeting;
- (d) Acted reasonably and promptly in acknowledging the failures;
- (e) Had entered into an arrangement to pay arrears and/or payments were up to date so that victims were compensated;
- (f) All of these features demonstrated remorse.

[98] DAIL has accepted the majority of its breaches in respect of Mr Turu and Mr Wood and in the event the Authority finds Mr Akram to have been its employee, (as it has done) acknowledges it breached minimum employment standards in relation to him also.

[99] DAIL says in relation to Mr Turu that following the site visit by the Labour Inspector, a new employment agreement in writing was prepared and signed by Mr Turu and with regard to Mr Wood, an addendum to his employment agreement to comply with the HA was attended to.

[100] The Labour Inspector accepts some reduction in the amount of penalties to reflect what he considers minor responses by DAIL in respect of its breaches of minimum employment legislation. DAIL, on the other hand, seeks larger reductions.

The thrust of the submissions on behalf of DAIL are that the departures from minimum standards legislation in relation to Mr Turu and Mr Wood were not substantial but more administrative and that in relation to Mr Akram, there was a misapprehension in respect of the applicable law.

[101] The globalised penalties amount to \$200,000. The Labour Inspector considers a provisional penalty of \$63,000 in total appropriate. I agree some reductions are appropriate. A provisional penalty of \$59,000 is appropriate as set out at the end of Step 2 in Appendix 1.

Step 3

Consider the means and ability of the person in breach to pay the provisional penalty arrived at in step 2

[102] There was limited financial information provided to the Authority in relation to the means and ability of DAIL to pay any penalties. Submissions made on behalf of DAIL are that if the penalties are too high, then “there is a real possibility the business could be liquidated and those five employees could then lose jobs and become a charge on the State”¹⁷.

[103] Unfortunately, without financial accounts and information to support such a statement, it is hard for the Authority to assess DAIL’s ability to pay.

Step 4

Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances

[104] After further adjustment by 5%, to take into account ameliorating factors, the Labour Inspector has made a further reduction from the provisional penalty it seeks from the Authority from \$59,850 to \$55,000.

Orders

[105] Standing back and assessing the proportionality of the outcome for DAIL, I conclude an appropriate global figure for all penalties under the MWA, HA and the ERA to be \$50,000 in the circumstances. This assessment follows the four step

¹⁶ [2016]NZEmpC151 at [20]

¹⁷ DAIL closing submissions, para.89

approach and takes into account the Court's observations in *Preet*¹⁸ with regard to "proportionality and totality of outcome".

[106] This represents one-quarter of the global penalties of \$200,000 that could have been awarded and just over one-fifth of the maximum penalties of \$260,000 before globalising.

[107] The penalties of \$50,000 are to be paid by DAIL to the Authority, for transfer to a Crown bank account within 28 days of the date of this determination.

[108] \$5,000 of the total amount of penalties awarded (\$50,000) is to be paid by the Authority to the Labour Inspector for the use of Mr Wood and Mr Akram (\$2,500 each) pursuant to s.136(2) of the ERA.

Costs

[109] Costs are reserved. The Labour Inspector has 14 days from the date of this determination to file a memorandum as to costs. DAIL has 14 days from receiving the memorandum as to costs to file its memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

¹⁸ Ibid paras.[190] to [194]

APPENDIX 1

DIRECT AUTO IMPORTERS (NZ) LIMITED		
<i>Step 1: Nature and number of breaches – potential maximum penalties (following globalisation)</i>		
David Turu		
s.65 ERA or s.229 ERA	\$ 20,000	\$20,000
s.8 MWA(globalised)	\$ 20,000	\$20,000
s.81 HA (breaches globalised) and similar breach of s8 MWA globalised)	\$ 20,000	
s.28A HA (2 breaches globalised)	\$40,000	\$ 20,000
Trevor Wood		
s.50 HA	\$ 20,000	\$ 20,000
s.28(1) HA	\$ 20,000	\$ 20,000
s. 81 HA (globalised)	\$ 20,000	\$ 20,000
Washim Akram		
s.65 ERA	\$ 20,000	\$ 20,000
s.8A MWA (globalised)	\$ 20,000	\$ 20,000
s.81 HA (globalised)	\$ 20,000	\$ 20,000
ss.23 and 27 HA	\$ 20,000	\$ 20,000
	Subtotal	\$ 200,000
<i>Step 2(a): Aggravating factors as a proportion of maxima in Step 1</i>		
David Turu		
s.65 ERA or s229 ERA	20%	\$ 4,000
s.8A MWA	20%	\$ 4,000
s.81 HA (as above)		
s.28A HA	40%	\$ 8,000

Trevor Wood		
s.50 HA	5%	\$ 1,000
s.28(1) HA	20%	\$ 4,000
s. 81 HA	20%	\$ 4,000
Washim Akram		
s.65 ERA	50%	\$ 10,000
s.8A MWA	50%	\$ 10,000
s.81 HA	50%	\$ 10,000
ss.23 and 27 HA	20%	\$ 4,000
	Subtotal	\$ 59,000
<i>Step 2(b): Ameliorating factors (reducing aggravating factors subtotal)</i>		
less 5% of above	Subtotal	\$56,050
<i>Step 3: Respondents financial circumstances</i>		
No evidence provided	Subtotal	
<i>Step 4: Proportionality</i>		
Reduce modestly	Total	\$ 50,000