IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 32
3011651

	BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
	AND	DHANOA TRANSPORT LIMITED First Respondent
	AND	ARVINDER SINGH DHANOA Second Respondent
Member of Authority:	Michele Ryan	
Representatives:	Claire English, Counsel for the Applicant Holly Struckman, Counsel for the Respondents	
Investigation Meeting:	On the papers	
Submissions Received:	10 November and 11 December 2017 for the Applicant 28 November 2017 for the Respondents	
Date of Determination:	30 April 2018	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector seeks penalties from Dhanoa Transport Ltd ("the company" or "DTL") and sole director and shareholder of DTL, Mr Arvinder Dhanoa, for multiple breaches of employment standards between 2015 and 2017.

Background information

[2] DTL is a relatively small courier business that operates in and around the southern portion of the Kapiti Coast.

[3] Between September 2016 and January 2017 Labour Inspectorate Ms Vanessa Webb investigated DTL's employment practices. Inquiries centred on the treatment of two current employees and one former. The investigation later extended to include three additional people which were said to have been engaged as subcontractors by DTL. Two of these no longer provided services to the company at the time of the Labour Inspector's inquiries.

[4] At the end of the investigation the Labour Inspector outlined a range of employment standards said regarded as having been breached including that the subcontractors were more likely to be have been employees of DTL.[1] At that stage the Labour Inspector estimated arrears of wages of $8,246.97 were owed to the three employees initially identified. Mr Dhanoa, on behalf of the company, acknowledged the faults and offered to pay the outstanding arrears.

[5] Between receipt of the parties' initial pleadings and the filing of final information the parties have reached agreement as to the sum of arrears owed to all employees. It is therefore not necessary to determine claims for recovery of minimum wages and holiday pay where those matters have been settled. It is common ground that arrangements have been made for payment of $21,640.06 in total.[2]

[6] The company accepts that penalties should be paid. Mr Dhanoa does not challenge the Labour Inspector's assertion that as sole director and manager of the company, he is a person involved in a breach, as defined by the Employment Relations Act, and therefore has personal liability.[3]

[7] The parties have been unable to reach agreement on an appropriate quantum of penalties. This determination decides those matters.

The legislative framework regarding penalties

[8] Section 133 empowers the Authority to recover penalties for a breach of a provision of the Employment Relations Act (the Act) where the provision provides for it. A claim for penalties may also be brought under s 76 of the Holidays Act (HA) and s 10 of the Minimum Wage (MWA).

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1 Investigation Report 2017

2 Comprising minimum wage payments, annual holiday pay, public holiday pay and interest

3 Sworn Affidavit of Vanesssa Webb, Labour Inspector, dated 3 November 2017 at para. 11 - unchallenged by the second respondent

[9] Section 142X of the Act allows for the imposition of a penalty on a person who may not be an employer but is "involved in a breach" as a consequence of personal actions (described at ss (1(a)-(d) at s 142W), where the breach concerns a breach of an employment standard.

[10] Each of the acts relevant to this matter set the same penalty rate. The maximum penalty for a single breach by a company is $20,000. By an individual it is $10,000.

[11] Section 133A of the Act sets out a number of factors the Authority or Court must consider when contemplating penalty orders. In *Borsboom v Preet PVT Ltd* the Court provided guidance as to how those matters should be weighted when determining whether or not penalties should be awarded, and if so, the quantum.[4] I have adopted the four step process set out in *Preet* when assessing the various factors.

Step One – identify the nature and number of statutory breaches.

[12] The Labour Inspector identified 31 breaches of the Act, the HA, and the MWA by DTL. It is acknowledged that one employee was impacted by two separate breaches regarding the content of a written employment agreement. The Inspectorate says those omissions should be viewed as a single breach. In total, 60 separate penalty awards are sought; 30 against DTL, and 30 against Mr Dhanoa as a person involved in a breach, as follows:

(1) failure to pay 4 employees minimum wages in breach of s 6 of the MWA;
(2) failure to keep wage and time records concerning 5 employees in breach of s 130 of the Act;
(3) failure to correctly calculate and pay annual holiday pay for 5 employees in breach of s 23 of the HA;
(4) failure to pay for public holiday to 5 employees which would have otherwise been a working day in breach of s 49 of the HA;
(5) failure to keep and maintain holiday and leave records regarding 5 employees in breach of the s 81 of the HA;
(6) failure to provide valid individual employment agreements to 6 employees in breach of s 64,or s 65 and s 69OJ of the Act.

[13] Not every breach attracts a penalty however.[5] Four penalties involved the content of two employment agreements. The company had failed to include employment protection provisions pursuant to s 69OJ of the Act, and, additionally, in

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4 [2016] NZEmpC 143
5 Section 133(1)(b)

one agreement it did not indicate where the employee is to perform the work pursuant the requirements of s 65(2)(a)(ii) of the Act.

[14] Section 69OJ does not provide for a penalty where the provision has been breached. It follows that no penalties can be awarded for a breach of s 69OJ in any event.

[15] Section 65 does not fall within those provisions classified at s 5 of the Act as employment standards. As noted, liability of a person 'involved of a breach' requires the breach to be of employment standards. In the absence of a breach of that nature a penalty against Mr Dhanoa is not available. I further consider the breach of s 65, as it involves the company, as minor and technical. There is no evidence that the employee concerned was unaware of his location of work or that he was negatively impacted by the omission. The penalties sought for breaches to s 65 and s 69OJ are in relation to the content of the two employment agreements are dismissed.

[16] A further 17 penalties sought from Mr Dhanoa personally under s 142X of the Act concern breaches involving three employees who were no longer employed by DTL by 1 April 2016.[6] Section 142X came into force on 1 April 2016.[7] There are no transition provisions in the Employment Relations Amendment Act 2016 - the amending legislation in this instance - which permit the application of s 142X retrospectively. Further, cl 3(1) of Schedule 1AA of the Employment Relations Act provides that amendments made by the 2016 Act do not apply to conduct that occurred before the commencement of the Act. Given the breaches concerning these employees predated the legislation on which the Labour Inspector relies, these claims are also dismissed.

[17] Applying the maximum penalty against DTL for the remaining 28 breaches for which a corresponding penalty is available equates to a possible total penalty of $560,000.[8] The maximum penalty that may be attributed against Mr Dhanoa for each

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6 I have identified the three employees by their respective initials" GS, KS and AP

7 Employment Relations Amendment Act 2016

8 A breach of a provision which provides for a penalty against a company under; s 10 of the Minimum Wage Act; s 135(2)(b) of the Employment Relations Act; s 75(1(b) of the Holidays Act is $20,000.

of the 11 breaches for which a penalty is also available equates to a possible overall penalty of $11,000.[9]

[18] In *Preet* the Court held the Authority should give consideration as to whether global penalties were appropriate is some cases including where the breaches are part of a consistent pattern of breach of a particular statutory requirement. It further noted the Authority should be careful to ensure that globalisation of a penalty does not diminish the significance of a repeated and/or long running series of breaches.[10]

[19] Counsel for the applicant submits urged the Authority not to globalise penalties. She says each of the six categories listed seek to ensure compliance of a separate and discrete employment standard. I agree it would be inappropriate to globalise across separate enactments or standards.

[20] I consider however the omission to provide: (a) provide employment agreements; and to keep compliant (b) compliant wage and time, and (c) holiday and leave records, reflect three separate administrative failures. In the circumstances of this application, breaches to each of these standards may be viewed as a single course of conduct according to the administrative failure.

[21] Having assessed the number and nature of breaches I find the total number of breaches by the company is 17. Those omissions attract a potential total liability of $340,000 (17 x 20,000). The globalisation of breaches where a single course of conduct has been identified now reduces the number of breaches by Mr Dhanoa to 9. His potential total liability is $90,000.

Step two - severity of the breaches

[22] Step two requires consideration to be given as to the severity of the breaches and any aggravating or mitigating factors involved.

Aggravating factors

[23] With the exception of one individual who did not wish to engage with the Labour Inspector, the information obtained by her allows for a conclusion that the

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9 A breach of a provision of the Minimum Wage Act and/or the Employment Relations Act for which a penalty is available against an individual is $10,000 under s 135(2)(a) Employment Relations Act. Similarly a breach of the Holidays Act for which a penalty is available s 75(1(b) is $10,000.

10 Ibid n3 at [141]

remaining employees were likely to be vulnerable. Each of them appears to have arrived in New Zealand from India relatively recently and can be taken to be unfamiliar with employment entitlements under New Zealand legislation.

[24] DTL did not pay wages for time spent by the employee drivers to load vehicles in preparation for deliveries. That task could take up to 2 hours.

[25] Those deemed to be "subcontractors" were paid a fixed daily rate. If the subcontractor worked more than six hours per day the fixed rate did not meet minimum wage requirements. I agree the failure to pay minimum wage is particularly serious. The failure to pay minimum wages to each affected employee should be assessed at 75% of the maximum sum available.

[26] The omission to provide employment agreements, and maintain wage and holiday records precludes an employee's ability to; ascertain the scope of their employment, assess whether they have been paid properly, and examine leave entitlements. I assess the severity of the breaches regarding these claims as 50% of the total maximum.

[27] The failure to pay for public holidays not worked, or to properly calculate holiday pay deprived the employees from receiving their entitlements at the time they were due. I consider these failures also warrant a 50% assessment.

Mitigating factors

[28] The Companies Register reveals DTL is the only company Mr Dhanoa has held a position of director. It has not been difficult to form a view that, as the controlling mind of the company, he lacked experience in employment matters. He concedes he did not obtain relevant advice. I am not satisfied DTL deliberately attempted to avoid its obligations however ignorance of the law does not excuse a breach.

[29] As DTL's systemic failings became increasingly apparent over the course of the Labour Inspector's investigation, Mr Dhanoa engaged an accountant, instituted a compliant payroll system, and corrected its employment agreements. I note also that the breaches occurred over a relatively short period of time of 1 ½ years.

[30] It is clear Mr Dhanoa cooperated with the Labour Inspector, nor did he challenge her findings, and the company sought to pay all arrears.

[31] Taking the above factors into account I find that quantum ascribed to the severity of the breaches should be then should be reduced by 50%. The total provisional penalty against DTL is now $95,000. Against Mr Dhanoa personally it is $25,000.

Step 3 – the means and ability of DTL and Mr Dhanoa to pay penalties

[32] DTL furnished a statement of financial position, profit status, and the contents of the shareholders current account, each as at 31 March 2017. A letter dated 20 November 2017 written by DTL's accountant describes DTL's profit as minimal, noting it has debts that need to be managed. Mr Dhanoa takes a very modest shareholder salary. I find DTL is solvent, but barely.

[33] Counsel for the Labour Inspector acknowledges DTL is a small company and that the financial circumstances of both it and Mr Dhanoa warrant a reduction in the quantum of penalties awarded. She notes however, that DTL continues to trade, and that it must have some financial resources as demonstrated by its repayment of arrears, albeit those payments have been made by instalment.

[34] DTL and Mr Dhanoa each appear to have moderate to serious financial constraints. Those matters do not preclude the imposition of penalties entirely but an award at the current provisional rate, if made, has a real potential to result in insolvency for the company. The respondents do not challenge the Labour Inspector's contention that a 30% reduction is appropriate against both respondents. The quantum is provisional quantum of penalties against DTL and Mr Dhanoa is now $67,900 and $17,500 respectively.

Step 4 – proportionality of outcome

[35] This step involves considering whether the provisional penalty reached after the first three steps is proportionate to the seriousness of the breach(es) and harm occasioned by them.[11]

[36] The primary harm in the circumstances that led to the application before the Authority is that DTL's employees were deprived of wages and entitlements as they became due. As noted the sum agreed between the parties as owing to DTL's employees amounted to $21,640.06 in total. That sum has since been paid.

[37] The total current provisional penalty quantum recorded under step 3 is almost four times the rate of agreed arrears. Penalty orders of that amount in this matter would be exceptionally punitive, particularly where the failings appear to have arisen largely as a consequence of an inexperienced new employer and a first time director. Such an award would like disincentivise the respondent from compliance with the Authority's orders.

[38] DTL's failure to properly inform itself of its obligations regarding employment standards and implement those is unacceptable. A penalty of $12,000 against DTL and $4,000 against Mr Dhanoa is proportional to the seriousness of the breach(es) and harm occasioned by them.

[39] The Labour Inspector does not oppose the respondents' request that any penalty orders allow for payment to be made by way of instalment. I agree the financial position of each of the respondents leads me to conclude that instalment payment would best achieve compliance.

Orders

[40] Dhanoa Transport Limited is ordered to pay 4 payments of $3,000 to the Labour Inspector. The first payment must be paid on or before 1 June 2018, the second payment on or before 1 July 2018, the third payment on or before 1 August 2018 and the fourth payment on or before 1 September 2018.

[41] Arvinder Dhanoa is ordered to pay 4 payments of $1,000 to the Labour Inspector. The first payment must be paid on or before 1 June 2018, the second payment on or before 1 July 2018, the third payment on or before 1 August 2018 and the fourth payment on or before 1 September 2018.

Costs

[42] Costs are reserved.

[43] This determination has been issued outside the timeframe set out at s 174C(3)(b) where the Chief of the Authority has decided exceptional circumstances exist.[12]

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[11] Ibid n.3 at [147]

[12] Pursuant to s 174C(4)

Michele Ryan
Member of the Employment Relations Authority

CALCULATIONS APPENDIX

PENALTY CLAIM	ORIGINAL NUMBER OF PENALTY CLAIMS	NUMBER OF PENALTY CLAIMS FOLLOWING DISMISSAL OF CLAIM WHERE NO PENALTY AVAILABLE	AGGRAVATED	MITIGATING	FINANCIAL
FAILURE TO PAY MINIMUM WAGE	1st R 4 x $20,000	4 x $20,000	80% = $64,000	-50% = $32,000	-30% = $22,400
	2nd R 4 x $10,000	2 x $10,000	80% = $16,000	-50% = $8,000	-30% = $5,600
FAILURE TO KEEP WAGE & TIME RECORDS	1st R 5 x $20,000	1 x 20,000	50% = $10,000	-50% = $5,000	30% = $3,500
	2nd R 5 x $10,000	1 x $10,000	50% = $5,000	-50% = $2,500	30% = $1,750
FAILURE TO PAY ANNUAL LEAVE	1st R 5 x $20,000	5 x $20,000	50% = $50,000	-50% = $25,000	30% = $17,500
	2nd R 5 x $10,000	2 x $10,000	50% = $10,000	-50% = $5,000	30% = $3,500
FAILURE TO PAY PUBLIC HOLIDAY	1st R 5 x $20,000	5 x $20,000	50% = $50,000	-50% = $25,000	30% = $17,500
	2nd R 5 x $10,000	2 x $10,000	50% = $10,000	-50% = $5,000	30% = $3,500
FAILURE TO KEEP HOLIDAY RECORDS	1st R 5 x $20,000	1 x $20,000	50% = $10,000	-50% = $5,000	30% = $3,500
	2nd R 5 x $10,000	1 x $10,000	50% = $5,000	-50% = $2,500	30% = $1,750
FAILURE TO PRODUCE VALID EMPLOYMENT AGREEMENTS	1st R 6 x $20,000	1 x $20,000	50% = $10,000	-50% = $5,000	30% = $3,500
	2nd R 6 x $10,000	1 x $10,000	50% = $5,000	-50 = $2,500	30% = $1,750
TOTAL MAXIMUM PENALTY	1st R $600,000	$340,000	$194,000	= $97,000	= $67,900
	2nd R $300,000	$90,000	$51,000	= $25,500	= $17,850