

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 157
5638717

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

A N D NEW ZEALAND
 METROPOLITAN TROTting
 CLUB INC.
 Respondent

Member of Authority: Helen Doyle

Representatives: Claire English, Counsel for applicant
 Ashley-Jayne Lodge, Counsel for respondent

Investigation Meeting: On the papers – Joint memorandum of counsel lodged
 17 October 2018

Date of Determination: 30 October 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A I order New Zealand Metropolitan Trotting Club Inc. to pay to the Labour Inspector within 28 days of this determination a penalty of \$10,000 for transfer to the Crown Bank Account.**
- B By agreement costs shall lie where they fall.**

Employment Relationship Problem

[1] Counsel lodged a joint memorandum with the Authority.

[2] The parties have agreed on:

- (a) Steps to be taken by New Zealand Metropolitan Trotting Club Inc. (the Trotting Club) to remediate and update their payroll systems to ensure compliance in the future.
- (b) Steps to be taken by the Trotting Club to calculate and pay arrears owing to the employees.

[3] The Trotting Club has advised the Labour Inspector of progress toward the matters set out above and the Labour Inspector accepts that compliance has been or will shortly be achieved.

[4] The remaining matter between the parties is the Labour Inspector's claim for penalties for past non-compliance.

The issues for determination

[5] The issue for determination is whether a penalty should be imposed following an agreed breach of minimum employment standards.

[6] The Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Limited*¹ set out a four-step approach in assessing penalties.

Step one: Nature and Number of the Breaches

[7] The Trotting Club accepts that it has breached s 21 of the Holidays Act 2003 which provides for calculation of annual holiday pay. In this case the breach was a failure by the Trotting Club to correctly calculate and compare average weekly earnings and ordinary weekly pay and to pay the greater of these sums to the affected employees as required under s 21(2) of the Holidays Act. This is the only breach in issue.

[8] There are multiple breaches affecting more than fifty employees but because there are identical it is agreed that the Trotting Club should be liable for a single penalty.

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143.

[9] The Authority in assessing the appropriateness of a single penalty has had regard to the maximum penalty under s 135(2)(b) of the Employment Relations Act 2000 (the Act) for a body corporate which is a penalty not exceeding \$20,000.

[10] If the breaches are treated as multiple breaches then \$20,000 multiplied by 50 employees would provide a maximum penalty of \$1,000,000. That would have been an incorrect way to treat the breaches I find in the circumstances. The circumstances are the breaches were of an identical nature and they arose as a result of reliance on a payroll system that was incorrectly set up by the payroll provider.

[11] These circumstances mean it is appropriate to assess liability for a single penalty. That is therefore a maximum penalty of \$20,000 under s 135(2)(b) of the Act.

Step 2: Assessment and Severity of Breaches

[12] The breach is both a breach of employment standards and minimum entitlement provisions as defined in s 5 of the Act. The Labour Inspector says that this is an aggravating factor. I accept that and the further statement of the Labour Inspector that the “seriousness” falls at the lower end of the scale.

[13] The Trotting Club says the following are mitigating circumstances. It was cooperative and willing to engage in mediation and provide payroll calculations to the Labour Inspector. At an early stage the Trotting Club engaged a third party payroll consulting firm to review the payroll system and ensure compliance. I agree they are mitigating circumstances.

[14] I also take into account that the Trotting Club has taken steps to rectify its payroll settings to ensure better compliance in the future and that this has come at a cost of \$14,532 excluding GST to date. The Trotting Club initially engaged its payroll provider to conduct an audit and assist in resolving the issue at a cost of \$4,400.

[15] The Trotting Club has, or is in the process of, determining arrears owing to affected employees. It has undertaken to make arrears payments to all affected employees. The Trotting Club has not appeared before the Authority before for breaches of minimum employment standards and this breach was not deliberate but

inadvertent. The Trotting Club used a reputable payroll provider and the majority of underpayments are under \$100.

[16] The parties have agreed, taking the aggravating and mitigating factors into account relating to the breaches, that a starting point is in the region of 10 percent of the maximum. That is $\$20,000 \times 0.1 = \2000). I accept that is an appropriate starting point.

[17] In doing so I record that the Trotting Club had approximately 56 staff on permanent open tenure, salaried and waged, and approximately 850 casual staff. The casual staff are not affected as they are correctly paid holiday pay on a “pay as you go basis”. A representative number of affected staff is I accept appropriately set at 50. As referred to above there were multiple breaches because multiple employees were affected however they arose from the same problem being an incorrect payroll system. The Authority accepts a single penalty is appropriate under this step.

Financial Circumstances of the Trotting Club

[18] The Trotting Club continues to operate and to employ staff. It has the ability to pay arrears to affected employees.

[19] There has been a considerable length of time since the statement of problem was lodged in this matter and that has effectively allowed the Trotting Club to plan for the expenditure. The total amount of arrears payable is approximately \$6,111.08 which is to be paid in full during October 2018.

[20] The Trotting Club is a membership based incorporated society with a core purpose to support and nurture a sustainable harness racing industry in Canterbury. It employs a significant number of people in the region and pays as much as prudent back into the industry in the form of stakes on an annual basis. The Trotting Club is concerned that a large penalty will impair both its ability to continue to employ a large number of Cantabrians and its ability to reinvest in the industry.

Proportionality of Outcome

[21] There are different positions on the appropriate range of penalties.

[22] The Labour Inspector is of the view that the total maximum penalties are approximately \$100,000 being 50 affected employees multiplied by \$2,000 per breach. The Labour Inspector submits that in looking at the matter in the round a reduction of 70% should be given which would be in line with the Employment Court's analysis in *Preet* which considered a reduction of the level was potentially appropriate in record keeping matters. That would be a penalty of \$30,000.

[23] The Trotting Club says that taking all the circumstances into account there should properly be a starting point of a single penalty of \$20,000 as the breaches arose from the same issue and a small penalty of \$0 - \$5,000 is appropriate. It submits this particularly in circumstances where the Trotting Club continues to trade and has committed to paying arrears and continues to employ other staff who are unaffected by this issue.

[24] The appropriateness of a global penalty assessment under step one and two is subject to checking or even potential reconsideration under this step when applying the proportionality test to ensure the final penalty is fair and just.² The Labour Inspector has undertaken that assessment taking into account the number of affected employees.

[25] I accept that the large number of employees affected is a factor to consider when assessing proportionality because the harm done by the breaches although inadvertent is greater as a result. Unravelling errors in payment, identifying arrears and making payment require more extensive efforts and time. Whilst I accept that there was an issue with the use of and reliance on the payroll provider responsibility for the breach ultimately must fall to the Trotting Club as employer. I do not accept in those circumstances that it is appropriate to make no award at all or a token award.

[26] I have considered the database of case law but the circumstances of this matter with one breach but a large number of employees are reasonably unique.

[27] From the starting point of \$2000 I have taken into account the number of affected employees. In doing so I consider an award should not be disproportionate to the seriousness of the breach. I have considered the total amount of underpayment which is approximately \$6,111.08. I accept that will be paid. Most underpayments

² *Borsboom v Preet* above n 1 at [141]

paid or to be paid to each employee are under \$100. A penalty of \$30,000 would be about five times the level of underpayment and that I find would be disproportionate.

[28] I find that an increase from 10% to 50% of the \$20,000 is appropriate to reflect the number of affected employees and in line with what other cases have found to be a deterrent level of penalty. That is a penalty of \$10,000.

Costs

[29] The parties agree that costs shall lie where that fall.

Order made

[30] I order New Zealand Metropolitan Trotting Club Inc. to pay to the Labour Inspector within 28 days of this determination a penalty of \$10,000 for transfer to the Crown Bank Account.

Helen Doyle
Member of the Employment Relations Authority