IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 89
5647017

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	KARAMEA HOLIDAY HOMES LIMITED (in liquidation) First Respondent
		ROBINWOOD FARMS LIMITED Second Respondent
		JULIA OSSELTON Third Respondent
Member of Authority:	Andrew Dallas	
Representatives:	Claire English, counsel for the Applicant Tiffany McRae, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions and other information received:	21 February 2018, 14 March 2018 and 30 April 2018 for the Applicant 7 March 2017 and 14 June 2018 for the Respondent	
Determination:	15 June 2018	

DETERMINATION OF THE AUTHORITY No.2

Employment relationship problem

[1] By determination issued by the Authority on 22 December 2017, various findings and orders were made.[1] This followed an earlier consent determination issued on 26 April 2017 disposing of matters relating solely to Karamea Holiday Homes Limited.[2]

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[1] *A Labour Inspector v Karamea Holiday Homes Limited (in receivership)* [2017] NZERA Christchurch 226
[2] *Labour Inspector v Karamea Holiday Homes Limited* [2017] NZERA Christchurch 58

The Authority's investigation

[2] As this matter was, in effect, a penalty hearing arising out of the Authority's earlier factual findings, by agreement with the parties it was heard "on the papers". Based on those findings, any penalties imposed by the Authority will lie against Robinwood Farms Limited and not Karamea Holiday Homes Limited, which is currently in liquidation, or Ms Osselton, personally.

[3] For completeness, a review of the Companies Office website conducted by the Authority discloses that Ms Osselton, as sole director of Karamea, has applied to the High Court to have the liquidation terminated. According to the liquidators' report, funds have been provided by the director which are sufficient to repay creditors in full. As at the date of this determination, it appears the liquidators are in the process of handing control of Karamea back to its director and terminating the liquidation.

Issues

[4] This issues for determination are:

(i) Whether penalties should be imposed on Robinwood for breaches of s 6 of the Minimum Wage Act 1983 in respect of Rachael Mcgowan and if so, in what amount?;

(ii) Whether penalties should be imposed on Robinwood for a breaches of s 6 of the Minimum Wage Act 1983 in respect of Huikan Quan and if so, in what amount?;

(iii) Whether penalties should be imposed on Robinwood for breaches of s 23 of the Holidays Act in respect of Rachael Mcgowan and if so, in what amount?;

(iv) Whether penalties should be imposed on Robinwood for breaches of s 23 of the Holidays Act in respect of Huikan Quan and if so, in what amount?; and

(v) Whether either party should contribute to the costs of representation of the other?

The Labour Inspector's claim for penalties

[5] Having fully considered the factual findings made by the Authority in its determination of 22 December 2017, the evidence supporting those findings and the submissions of the parties on penalties, I find it is appropriate in the all the circumstances to impose penalties on Robinwood for breaches of minimum standards.

[6] The Authority has jurisdiction to hear and determine an application by a Labour Inspector for recovery of penalties under the Holidays Act and Minimum Wage Act.[3]

[7] In determining the quantum of penalties to be imposed, if any, s 133A of the Employment Relations Act 2000 (the Act) sets out the relevant matters the Authority is to have regard to. In addition, the decisions of the Employment Court in *Borsboom v Preet PVT Limited*[4] and *Lumsden v SkyCity Management Limited*[5] provide useful guidance. In *Preet* the Court identified the four steps to be taken in the assessment of penalties.[6]

[8] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.[7] The maximum penalty Robinwood could be found liable for is $20,000 per breach.[8]

Nature and number of breaches

[9] There were two employees of Robinwood affected by its breaches of the Minimum Wage Act and Holidays Act. Within the framework provided by *Preet*, the Labour Inspector said Robinwood was liable for a maximum penalty of:

(i) $40,000 for two breaches of s 6 of the Minimum Wage Act in respect of two employees;

(ii) $40,000 for two breaches of s 23 of the Holidays Act in respect of two employees.

[3] Employment Relations Act 2000, s 161(m)(iii) and s 161(m)(iv)
[4] [2016] NZEmpC 143 at [67] and [68].
[5] [2017] NZEmpC 30
[6] *Borsboom* at [151].
[7] *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].
[8] Employment Relations Act, s 135(2)(b); Holidays Act, s 75(1)(b)

[10] Robinwood did not dispute the number of breaches identified by the Labour Inspector nor the maximum penalties that could be imposed.

[11] The Labour Inspector said this was not an appropriate case where "globalisation" of penalties was appropriate because the breaches related to different statutes and were minimum entitlement breaches. I accept this submission. There is to be no globalisation of penalties.

Seriousness of the breaches

[12] The Labour Inspector submitted in respect of the two breaches of s 6 of the Minimum Wage Act that the starting point based on severity of the breach should be assessed at 80 percent of the total penalty ($32,000). The Labour Inspector submitted in respect of the two breaches of s 23 of the Holidays Act, based on the severity of the breaches they should be assessed at 70 percent of the total penalty ($28,000).

[13] Robinwood said the breaches were not deliberate and the company did not intend to breach the law. However, it did not provide an assessment as to severity in the way the Labour Inspector did, rather Robinwood sought to re-litigate arguments about the legitimacy of its understanding of "Wwoofing", a commonly understood acronym for "willing workers on organic farms".

[14] Consistent with *Preet*, the Labour Inspector and Robinwood identified various "aggravating" and "mitigating" factors which were relevant to the assessment of penalties.

[15] The Labour Inspector identified a number of aggravating factors associated with Robinwood's breaches. These included:

(i) Robinwood kept no records of time, wage, holiday or leave for employees, despite telling the Labour Inspector and the Authority that it consistently used the services of many workers, over many years;

(ii) Robinwood did not offer employment agreements to any employee despite constant advertising and making offers of visa sponsorship;

(iii) The systematic use of migrant labour for many years;

(iv) The persistent and deliberate underpayment of migrant workers by requiring them to work between 20 and 30 hours a week but capping their weekly wage at $120.

(v) The business motives of Robinwood and its director were profitmaking rather than for charitable purposes; and

(vi) The relative vulnerability of the affected employees in the labour market.

[16] In addition, despite begrudging compliance with the Authority's arrears orders, I would add there was a complete lack of remorse by Robinwood. Even as late as its submissions in this penalty proceeding, it was still attempting to argue Mr Quan and Ms Mcgowan were "Wwoofers" or "volunteers".

[17] Conversely, Robinwood identified several "mitigating" factors which it said assisted its position in the assessment of penalties. It said the payment of the arrears of wages to Mr Quan and Ms Mcgowan was a mitigating factor. Robinwood also raised the difficulties encountered by Karamea in seeking to comply with the Consent Determination due to its accounts being frozen by the liquidation process. However, that is an irrelevant matter as to Robinwood's liability for penalties. However, the Labour Inspector acknowledged the payment of the arrears was a mitigating factor.

[18] Balancing these factors, which are relevant to all breaches, the Labour Inspector submitted the penalties could be discounted by a further 20 percent. Robinwood said the discount should be 40 percent based on the mitigating factors it identified. In my view, the aggravating factors carry, and should therefore be afforded significantly more weight that those proffered in mitigation. I generally accept the submission of the Labour Inspector but find the discount at this step should be 10 percent.

[19] So then, at this point the proposed penalties to be imposed on Robinwood are:

(i) $28,800 for breaches of s 6 of the Minimum Wage Act; and

(ii) $25,200 for breaches of s 23 the Holidays Act;

Totalling: **$54,000**

Financial circumstances of Robinwood

[20] The Labour Inspector accepted Robinwood was a small business but noted it had made good on arrears owed to former employees. The Labour Inspector said there was nothing to suggest Robinwood could not meet any penalties.

[21] The Labour Inspector also said any penalties needed to be significant enough to ensure Robinwood did not benefit from not meeting minimum employment standards and effectively using employee entitlements as a "bank" or informal line of credit. That said, the Labour Inspector suggested a further discount of 30 percent could be entertained by the Authority.

[22] Robinwood said it was not generating any significant income. Robinwood said the position was complicated by its sole director, Ms Osselton, seeking to terminate the liquidation of the first respondent, Karamea. I have previously found the issues surrounding Karamea are irrelevant to the liability of Robinwood for penalties. Robinwood said regardless of the outcome, it sought a time payment arrangement for any penalties imposed.

[23] Having considered the respective positions of the parties, I prefer the slightly lesser discount than that proposed by the Labour Inspector. The discount at this step is 15 percent.

[24] At this point then, the proposed penalties to be imposed on Robinwood are:

(i) $24,480 for breaches of s 6 of the Minimum Wage Act; and

(ii) $21,420 for breaches of s 23 the Holidays Act;

Totalling: **$45,900**

Proportionality of outcome

[25] In *Preet* the Court said the penalties imposed should, in effect, be proportionate to Robinwood's level of mischief. Unfortunately, due to the paucity of Robinwood's records its true level of mischief as an exploiter of migrant and other labour will never be fully known. This is an intolerable situation. The Labour Inspector correctly submitted proportionality of penalties and the possible risk of their non-payment by Robinwood were relevant considerations for the Authority. However, deterrence is a very big factor in this case. Ultimately, this was found by the Authority to be a clear and unequivocal case of worker exploitation under the guise of "Wwooferism".

[26] Those seeking to avail themselves of the obvious benefits of the cultural exchanges envisaged by the theory of Wwooferism, should be wary of the findings in this case and prudently seek advice about the bona fides of the arrangements they have entered into. Workers have a fundamental right to be paid for all the work that they perform, and accrue leave entitlements in respect thereof, in the absence of mutually agreed, easily discernible, and objectively verifiable voluntarist arrangements.[9]

Result

[27] Taking the submissions of the parties into account, and having regard to all the circumstances of the case, it is appropriate to impose significant, but proportionate, total penalties of $45,900 on Robinwood.

[28] The Labour Inspector said it is neutral as to whether part or all of the penalties should be paid the affected workers, but offered no further submissions or other relevant information on the issue. Robinwood did not provide any submissions on this issue. In the circumstances, I have decided the penalties should be paid equally to the Crown and Ms Mcgowan and Mr Quan.

[9] Employment Relations Act, s 6(c)

[29] Robinwood must pay the Authority penalties of $45,900. Fifty percent ($22,950) will be pay into a Crown bank account and the remaining 50 percent ($22,950) will be paid in equal amounts of $11,475 to Ms Mcgowan and Mr Quan.

[30] Robinwood requested that any penalties imposed be paid in instalments. The Labour Inspector was silent on this course. The parties are directed to use their best endeavours to agree upon a payment schedule and submit this to the Authority for approval. If agreed, the first 50 percent of the recovered penalties are to be paid to Ms Mcgowan and Mr Quan.

Costs

[31] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 28 days from the date of this determination in which to file and serve a memorandum on costs. Robinwood has a further 14 days in which to file and serve a memorandum in reply.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.[10]

Andrew Dallas
Member of the Employment Relations Authority

[10] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.