

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 149
3020073

BETWEEN A LABOUR INSPECTOR
Applicant

A N D SAMPAN RESTAURANT
LIMITED
First Respondent
A N D YU OUYANG
Second Respondent

Member of Authority: David Appleton

Representatives: Jodi Ongley, Counsel for applicant
 Rob Davidson , Counsel for respondents

Investigation Meeting: Determined by consideration of the papers

Submissions Received: 2 August 2018 from Applicant
 5 September 2018 from Respondent

Date of Determination: 11 October 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] The Labour Inspector (Ms Wendy Higgins) seeks the imposition of a penalty against the first respondent pursuant to s.75 of the Holidays Act 2003 for its failure to keep holiday and leave records for each of its employees in accordance with the requirements of s.81(2) of the Holidays Act.

[2] The Labour Inspector also seeks the imposition of a penalty against the second respondent pursuant to s.75 of the Holidays Act and s.142X of the Employment Relations Act 2000 (the Act) for his involvement in the first respondent's breach of s.81(2) of the Holidays Act.

[3] The first respondent accepts the applicant's claim that it breached s.81(2) of the Holidays Act and the second respondent accepts that he was a person who was involved in the first respondent's breach. The first and second respondents accepted in their statement in reply that a penalty or penalties may be imposed upon them, but moved away from that concession in Mr Davidson's submissions.

A brief account of relevant matters and events

[4] The respondent operates Chinese restaurants in Christchurch and Greymouth. On 1 March 2017 Ms Higgins visited the Greymouth restaurant and interviewed four employees and one of the respondent's directors, the second respondent's wife.

[5] On 3 March 2017 Ms Higgins requested information from the second respondent relating to the current employees, including copies of their employment agreements, copies of wage and time records and holiday and leave records.

[6] At a meeting with the second respondent on 10 March, the second respondent acknowledged that the first respondent did not keep holiday and leave records for its employees.

[7] On 30 May 2017 Ms Higgins emailed the second respondent setting out the requirements for record keeping under the Act and the Holidays Act. Minimum employment rights and responsibilities were also explained to the second respondent in Mandarin.

[8] On 9 June 2017 the second respondent provided holiday records in respect of three former employees which did not include all the information specified in s.81(2) of the Holidays Act. On 12 June 2017 Ms Higgins requested further information from the second respondent. The second respondent replied saying that he would ask someone else to respond due to his limited English.

[9] On 13 June 2017 Ms Higgins emailed the second respondent in Mandarin and English informing him that compliant holiday and leave records had not been provided and that, in 2013, a Labour Inspector had provided advice to the first respondent relating to his record keeping. In light of this previous interaction involving the same kinds of breaches, the Labour Inspector was now considering seeking penalties.

[10] On 27 June 2017 Ms Higgins wrote to the second respondent in Mandarin attaching her investigation report. Ms Higgins encouraged the second respondent to provide any further records or feedback it wished her to consider before 4 July 2017. The investigation report sent to the second respondent concluded the following:

- (a) Holiday and leave records were not established, even after the employer had been advised by a Labour Inspector in 2013 of the requirement to keep them;
- (b) The employer did not comply with advice from the Labour Inspector in 2013 that payment at time and a half should be recorded and provided to its employees when they work on public holidays;
- (c) The employees are Chinese migrant workers, some of whom are on work visas sponsored by the employer, and so are vulnerable and had to rely in good faith on the employer to provide the minimum employment standards;
- (d) The breaches identified in 2017 by Ms Higgins were almost identical to those identified in 2013. Ms Higgins stated that the employer chose to remain ignorant of the law and had made no improvement to its employment practices in the four years following the 2013 investigation.

[11] The second respondent replied on 4 July saying that the Labour Inspector in the 2013 inspection did not tell him about keeping records; that he had limited knowledge of English; that he had suffered big losses to his restaurants as a result of the 2011 Christchurch earthquakes; that none of his employees complained that he had been paying them incorrectly and taking exception to the comment about his workers being vulnerable.

[12] The Labour Inspector identified thirteen employees affected by the failure to keep holiday and leave records. Ten were current at the time of the investigation and three were former employees.

Analysis

[13] Section 81 of the Holidays Act provides that an employer must at all times keep a holiday and leave record showing, in the case of each employee employed by

the employer, an express list of information. Information entered in the holiday and leave record must be kept for not less than 6 years after the date on which the information is entered.

[14] Section 75 of the Holidays Act provides that an employer who fails to comply with, inter alia, section 81 of the Holidays Act, and any person who is involved in the failure to comply, is liable to a penalty not exceeding \$10,000 in the case of an individual and \$20,000 in the case of a company or other body corporate.

[15] Section 142W of the Act provides as follows:

142W Involvement in breaches

(1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—

- (a) has aided, abetted, counselled, or procured the breach; or
- (b) has induced, whether by threats or promises or otherwise, the breach; or
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
- (d) has conspired with others to effect the breach.

(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:

- (a) a person occupying the position of a director of a company if the entity is a company;
- (b) a partner if the entity is a partnership;
- (c) a general partner if the entity is a limited partnership;
- (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership;
- (e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

(4) This section does not apply to proceedings for offences.

[16] Section 5 of the Act defines “employment standards” as including “the requirements of ss.81 and 82 of the Holidays Act 2003.”

[17] Section 142X of the Act provides as follows:

142X Person involved in breach liable to penalty

(1) A person involved in a breach is liable to a penalty under this Act if—

- (a) the person is involved in the breach within the meaning of section 142W; and

- (b) this Act provides a penalty for the breach.
- (2) An application for a penalty against a person involved in a breach may be made only by a Labour Inspector.

[18] Both parties agree that the principles of *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*¹ should be applied. These principles, and the resultant steps for assessing penalties, are by now very well-known and I shall not therefore repeat them in detail here.

[19] However, as the Labour Inspector is seeking penalties both against the employer and a director of the employer pursuant to s.142W of the Act, it is necessary to refer to the judgment of His Honour Judge Perkins in *A Labour Inspector v Sampan Restaurant Limited and Yu Ouyang*.² This judgment was issued following referral by me to the Employment Court of two questions of law in relation to the methodology to be adopted when the Labour Inspector seeks the imposition of penalties for a breach of employment standards against both an employer and a person involved in the same breach.

[20] The two questions were formulated as follows:

- (a) When the Labour Inspector seeks the imposition of a penalty against an employer for a breach of employment standards (as defined in s 5 of the Act) and also seeks the imposition of a penalty against a person involved in the same breach, should the Authority assess the respective liabilities of the employer and the person involved in the breach:
- (i) Separately, by reference to their own separate liability and without reference to the liability of the other; or
 - (ii) By reference to the breach, then apportioning the resultant penalty between the employer and the person involved in the breach; or
 - (iii) In some other way?
- (b) Whichever approach is to be taken, what factors should the Authority apply when carrying out the exercise?

[21] At paragraph [48] of Judge Perkins' judgment, His Honour states as follows:

Nevertheless, the answer to the first question does not necessarily require a narrow choice between two options. Indeed, the question itself asks whether there may be a third approach. The answer to the first part of the first question is that the Authority, in assessing the respective liabilities of the employer and the person involved, must

¹ [2016] NZEmpC 143.

² [2018] NZEmpC 69.

commence the exercise by reference to their own separate level of culpability. However, regarding whether there should be no reference at all to the liability of the other, the authorities and materials considered earlier in this judgment show that the position is not black and white and is considerably nuanced. The New Zealand Law Commission's view points to this. Chisholm J in *Moir Farms*, while stating that individual culpability must be considered, nevertheless reduced the penalty imposed on the company because it was disproportionately high having regard to fairness and justice. Authority Members, when dealing at the same time with applications for the imposition of penalties against employers and persons involved, will obviously be aware of the respective positions of and consequences on both. This cannot be approached in a formulaic way, but by exercising the discretion having regard to proportionality, fairness and justice. This would also be in keeping with the fourth step outlined in *Preet*. Hopefully, these comments will also assist the Authority with the second question posed, which I now turn to.

[22] This statement by the Court makes it clear that, whilst the starting point for the Authority is to commence the exercise of assessing liability for penalties by reference to the first and second respondents' respective separate levels of culpability, the Authority is not prohibited from also cross-referring to the liability of the other. In a case such as this, where the second respondent is the 'controlling mind' of the first respondent, it would be artificial not to do so.

[23] In his answer to the second question, Judge Perkins directed the Authority to *Preet*, and the statutory schemes set out in the Holidays Act, especially at s.3, and s.76A, and in the Act, at s.3 (especially s.3(ab)), and s.133A.

[24] Section 3 of the Holidays Act provides:

The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—

- (a) annual holidays to provide the opportunity for rest and recreation:
- (b) public holidays for the observance of days of national, religious, or cultural significance:
- (c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:
- (d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement.

[25] Section 76A of the Holidays Act provides:

76A Matters Authority to have regard to in determining amount of penalty

In determining an appropriate penalty under section 76, the Authority or the court (as the case may be) must have regard to all relevant matters, including—

- (a) the purpose stated in section 3 and, to the extent relevant, the object stated in section 3 of the Employment Relations Act 2000; and
- (b) the matters referred to in section 133A(b) to (g) of the Employment Relations Act 2000.

[26] Section 3(ab) of the Act provides:

The object of this Act is—

...

(ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court.

[27] Section 133A of the Act provides:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) 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; and
- (e) 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; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[28] These factors set out in s.133A were incorporated into the guidance contained in the *Preet* judgement³.

³ See the commentary at paragraph [68] of *Preet*, for example.

The Labour Inspectorate's submissions

[29] Adopting the *Preet* four step analysis, Ms Ongley submits that there were thirteen breaches of s.81(2) of the Holidays Act by both the first and second respondents and that it is not appropriate to globalise the breaches in this case. Accordingly, the maximum penalty at step one is \$260,000 in respect of the first respondent and \$130,000 in respect of the second respondent.

[30] With respect to step two, which examines the severity of the breaches, including aggravated and mitigating factors, Ms Ongley submits that the record keeping breaches were moderate as records were kept but they were non-compliant. However, Ms Ongley says that the breaches were intentional. Furthermore, she submits that Mr Yu Ouyang, albeit not speaking English as a first language, has been operating in New Zealand as an employer for over ten years, and that he was provided with every opportunity to comply with his obligations. She also submits that there are no mitigating circumstances.

[31] Ms Ongley referred to *Preet* noting that the Court considered an intentional record keeping breach should attract a provisional penalty of 50% of the maximum, and that there was nothing to distinguish the first respondent from the second in this respect. Therefore, provisional totals at step two are a penalty of \$130,000 for the first respondent and \$65,000 for the second respondent.

[32] With respect to the third step of the *Preet* analysis, in which the financial circumstances of the respondents have to be taken into account, Ms Ongley submits that the financial accounts for the year ended 31 March 2017 provided by the first respondent indicate that both restaurants have a good cash flow with sales of \$490,000 in Greymouth and \$311,294 in Christchurch. The net operating profit for the Greymouth restaurant for the year ended 2017 was \$30,011 and for the Christchurch restaurant \$8,491.

[33] Ms Ongley suggests that profits would likely increase this year in the Christchurch restaurant as patronage of the city centre improves.

[34] Ms Ongley submits that the first respondent is in a position to pay a penalty and that the penalty would act as a deterrent in preventing continuing breaches. Ms Ongley submits that, taking into account the fact that neither Christchurch or

Greymouth businesses could be said to be financially thriving, the penalty to be imposed on the first respondent should be in the region of \$20,000 to \$40,000.

[35] With respect to the second respondent, Ms Ongley surmises that the second respondent lives in a home owned by a family trust which runs three accounts, two of which appear to be loan accounts (with a not insignificant debt), which are presumably linked to a mortgage secured against the trust property. The second respondent has not provided updated information requested by the Authority showing transactions for the months of April, May and June 2018.

[36] Ms Ongley submits that the second respondent likely has access to funds to pay a penalty and that it is possible that the family trust has assets and that a distribution could be made to the second respondent to pay a penalty. She surmises that it is also likely that the second respondent's wife has access to funds which Mr Ouyang might also have access to. Ms Ongley suggests that the second respondent should be required to pay a penalty of between \$15,000 and \$25,000 to meet the purpose of deterrence.

[37] Turning to the fourth and final step outlined in *Preet*, in which the Authority must step back and consider what would be proportionate in terms of the penalty to be imposed, Ms Ongley accepts that the proportionality test would possibly lead to some reduction in penalties but that the Authority should exercise caution and not to take into account circumstances that have already been accounted for. Ms Ongley does not suggest a final penalty figure at step four.

The respondents' submissions

[38] In a movement away from the position adopted in the statement in reply, Mr Davidson in his written submissions opposes the imposition of penalties on the first and second respondents on the basis that they did not knowingly and/or with intention commit the offending or, in the alternative, they oppose the quanta of penalties sought by the Labour Inspectorate claiming that they are excessive in all the circumstances of the first and second respondents' offending.

[39] Mr Davidson makes mention of various difficulties encountered by the second respondent following the Christchurch earthquake in 2011, including a fatal accident, and refers to evidence from the second respondent that the Labour Inspector he dealt

with in 2013 did not explain to him that his wage, time and holiday recording practices were deficient or unlawful.

[40] Mr Davidson submits that the second respondent co-operated fully with Ms Higgins in 2017 and that his admission that he had not kept records up to the required standard was because he had been ignorant of his obligations. He also says that, whilst he was given fact sheets by Ms Higgins in relation to his legal requirements in both English and Mandarin, he found them difficult to understand and that, despite requesting training and/or practical examples of how to keep proper records, that was never provided to him. He had also never received an improvement notice or an enforceable undertaking.

[41] Mr Davidson submits that Mr Ouyang did not intend to act in breach of the obligations contained in s.81 of the Holidays Act and that, as s.142W of the Act requires proof of intentional, purposeful actions on the part of the person accused of being involved in the breach⁴, neither the second respondent nor, by extension, the first respondent can have a financial penalty imposed upon them.

[42] Mr Davidson accepts that the maximum penalties that could be imposed at step one are \$260,000 and \$130,000 respectively for the thirteen breaches of the Holidays Act and he does not argue that the thirteen breaches should be globalised. However, Mr Davidson says that the second respondent was “completely unaware of all of the obligations contained in s.81 of the Holidays Act” and says that a major contributing factor in the respondents’ failures was “the fact that the Labour Inspectorate has been largely invisible to businesses for the past seventeen years and has only recently begun performing its statutory functions in a meaningful manner.”

[43] Despite these submissions, Mr Davidson also accepts that “ignorance of the law is not a defence.”

[44] Mr Davidson also submits that Mr Ouyang did everything possible to comply with the Labour Inspector’s requests for documentation and that everything possible was done to meet the Labour Inspector’s requirements. Accordingly, Mr Davidson argues that the first and second respondents’ breaches were minor in nature, amounting to errors in administration and record keeping which had not led to any of the respondent employees being disadvantaged.

⁴ Paragraph [46] of Judge Perkins’ judgment in *Sampan Restaurant*.

[45] With respect to the financial circumstances of the respondents, Mr Davidson submits that the financial resources of the company are not strong and that it is appropriate to impose only a very modest penalty. He also argues that the second respondent is “a person of extremely modest means” and does not have any funds invested and/or in his bank accounts.

[46] With respect to the issue of proportionality, Mr Davidson submits that, having regard to the facts of the case, and to ensure that a final result is not inconsistent with other recent cases, the Authority should impose a penalty “at the significantly lower end of the scale.” He suggests that the first respondent should pay a penalty of no more than \$5,000 and the second respondent no more than \$2,000.

Analysis

Step One

[47] I agree with the analysis undertaken by Ms Ongley that the starting point in terms of penalties to be imposed respectively upon the first and second respondents is the sum of \$260,000 for the first respondent and \$130,000 for the second respondent. I also agree that it is not appropriate to globalise across the breaches for the reason that a failure to keep holiday records can impact upon different employees in different ways. To lump these breaches altogether as one breach would significantly underplay the potential impact upon each employee of the breach.

Step Two

[48] Whilst it may be the case that Mr Ouyang did not deliberately set out to fail to keep holiday and leave records in accordance with the first respondent’s obligations, the best that can be said is that he deliberately shut his eyes to the company’s obligations. I say this for two reasons. The first is that, having been an employer in New Zealand for ten years at least, he would have been fully aware that a number of legal obligations are imposed upon employers with respect to their employees. It is incumbent upon all employers in New Zealand to ensure that they familiarise themselves with such obligations. Simply shutting his eyes to his obligations does not exonerate him.

[49] The second reason is that Mr Ouyang had direct contact with a Labour Inspector with respect to the first respondent’s obligations in 2013, and therefore was

well aware not only that there were minimum standards to be adhered to, but also that they would be enforced by the Labour Inspectorate. I can only conclude that failing to ensure that the first respondent's practices were wholly in compliance with minimum standards was a deliberate decision on his part.

[50] Whilst the Authority must consider separate liabilities of the two respondents, I cannot ignore the fact that, as the first respondent is wholly and exclusively operated by the second respondent, the "intention" of the first respondent is just a function of the intention of Mr Ouyang. Therefore, I must find that the first respondent, as a function of the actions and omissions of the second respondent, also deliberately failed to ensure that all of its obligations as an employer, and in particular its obligations under the Holidays Act, were being complied with.

[51] Whilst I do not go so far as to find that there was a deliberate attempt to disadvantage the employees by reference to their rights under the Holidays Act by failing to keep compliant holiday and leave records, I do find that there was a reckless ignoring of those employee's rights. To deliberately set out to disadvantage employees would be seen as a serious breach and would, in my view, attract an adjustment under step two in a range from 70% to 100% of the penalties reached under step one. This is not the case here, and it is my view that both the first and the second respondents' breaches were serious enough to justify a reduction of 50% from the starting point of step one in both cases.

[52] I agree with Ms Ongley that there appear to be no mitigating factors to further reduce liability. I do not accept that a limited knowledge of English is a mitigating factor. Not only has Mr Ouyang been in the country for many years, but he has chosen to be an employer and so must ensure that he understands the obligations of being an employer under New Zealand employment law. Furthermore, Ms Higgins even communicated with him in Mandarin to help him.

[53] At step two the first respondent is potentially liable for a penalty in the sum of \$130,000 and the second respondent in the sum of \$65,000.

Step Three

[54] I largely agree with the analysis carried out by Ms Ongley in her submissions with respect to the first respondent. It is clear that, whilst the first respondent is not

making significant profits, it is still operating at a profit overall. I hesitate to agree, however, with Ms Ongley's submission that the profits for the Christchurch restaurant are likely to increase in 2018 as patronage of the city centre improves given that there have been a relatively large number of hospitality outlets which have opened within central Christchurch during 2018, and a not insignificant number of them are failing, presumably due to lack of sufficient patronage. I therefore do not underestimate the difficulties encountered by businesses operating in the hospitality field within central Christchurch in 2018.

[55] With respect to the first respondent, I believe that it is appropriate to reduce the potential penalty to the sum of \$20,000 to take into account its financial situation, and its likely ability to pay without endangering the stability of the business overall.

[56] Turning to the second respondent, because of a paucity of information from him, I am unable to reach a firm view as to his ability to pay a penalty. Ms Ongley has speculated that Mr Ouyang is likely to have access to funds but it really is no more than speculation. However, it is not appropriate to exculpate Mr Ouyang entirely. It is not likely that Mr Ouyang has absolutely no assets available to him on a personal level, and so I shall reduce his potential liability to the sum of \$5,000.

Step Four

[57] In considering whether the resultant penalties of \$20,000 and \$5,000 respectively are proportionate in all the circumstances, taking into account the nature of the offending, and the failure over several years to ensure that correct holiday and leave records have been kept for a number of employees, I do not believe that either penalty is disproportionate.

[58] There has been only one other matter before the Authority involving a separate assessment of a breach of s.81 of the Holidays Act, as far as I can ascertain, and that case⁵ attracted a penalty of \$45,000 for 9 breaches, although there was no adjustment in respect of the respondent's ability to pay. A penalty of \$20,000 for the first respondent in this matter, after adjusting downwards at step 3, is not wholly disproportionate by comparison.

⁵ *A Labour Inspector v KRSVP Limited and Sanjhe Prasad* [2017] NZERA Christchurch 93.

[59] I therefore confirm that the penalty to be imposed upon the first respondent is the sum of \$20,000 and that the penalty to be imposed upon the second respondent is a sum of \$5,000.

Orders

[60] I order Sampan Restaurant Limited to pay to the Authority within twenty one days of the date of this determination the sum of \$20,000, which will then be paid by the Authority into a Crown bank account.

[61] I further order Yu Ouyang to pay to the Authority within twenty one days of the date of this determination the sum of \$5,000, which will then be paid by the Authority into a Crown bank account.

Costs

[62] I reserve costs. The parties should seek to agree how costs are to be dealt with between them. However, if they are unable to agree within fourteen days of the date of this determination, any party seeking a contribution towards its costs should serve and lodge a memorandum of counsel within a further fourteen days and any response must be served and lodged within a further fourteen days thereafter.

David Appleton
Member of the Employment Relations Authority