

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 26
5638044, 3009532, 3009852

BETWEEN A LABOUR INSPECTOR
 Applicant in 5638044

AND SHUBHAM SHARMA
 Applicant in 3008532

AND JASPAL SINGH
 Applicant in 3009852

AND PEGASUS ENERGY LIMITED
 First Respondent

AND JAG MOHAN SINGH RAWAT
 Second Respondent

Member of Authority: M B Loftus

Representatives: Claire English, Counsel for Applicant
 Andrew Gallie, Counsel for Respondent

Investigation Meeting: 19 October 2017 at Napier

Submissions Received: 10 November and 11 December 2017 from Applicant
 6 December 2017 from Respondent

Determination: 3 April 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In the first application received, file 5638044, a Labour Inspector claimed the respondent, Pegasus Energy Limited (“Pegasus”) had failed to pay Messrs Sharma and Singh:

- (a) the minimum wage for hours actually worked;

- (b) annual holidays upon termination of employment; and
- (c) alternate public holidays on termination of employment,

[2] The Inspector also claimed Pegasus took unlawful premiums from the pay of Messrs Sharma and Singh contrary to s 12A of the Wages Protection Act 1983.

[3] The Inspector seeks the payment of monies owing as a result of the above infractions and the imposition of penalties.

[4] The Inspector was subsequently led to believe it was possible Jag Rawat, Pegasus' sole Director and one of its shareholders, was trying to sell the company to someone with whom he had a close association. Fearing an attempt to avoid the consequences of this claim the Inspector filed an amended statement of claim seeking penalties against Mr Rawat pursuant to ss 142X and 142Y of the Employment Relations Act 2000 (the Act).

[5] Pegasus denies the claims have validity. It says Messrs Sharma and Singh were paid appropriately for all hours worked. Essentially Pegasus is saying the evidence proffered by and on behalf of the employees is a fraudulent construct designed to improperly extract money from it.

[6] The Inspector's claims are based on minimum statutory standards and both employees subsequently filed separate claims seeking an additional sum being the difference between what might be owing pursuant to minimum statutory standards and what they say should have received pursuant to their individual employment agreements. Essentially the difference emanates from the fact the hourly rates expressed in those agreements is greater than the minimum wage.

Background

[7] Mr Sharma was employed by Pegasus at a petrol station it operated in Flaxmere. He commenced on 5 May 2013. Mr Singh was similarly employed and commenced in October 2014. The employment of both ended with their resignations in October 2015.

[8] Both employees had written employment agreements though subsequent events would suggest these were little more than fabrications designed to mislead immigration authorities.

[9] Both employees claim they were subject to working conditions that verged on slavery. Both say they were required to work hours considerably in excess of those Pegasus says they worked and which were recorded on their pay records. Both also claim to have been required to return part of their wages to the employer having ostensibly been paid said amounts. For example Mr Singh says notwithstanding the fact he was paid some \$550 a week gross he was required to reimburse the employer for the PAYE forwarded to the Inland Revenue along with further amounts to ensure he only received \$400 a week.

[10] Both employees also claim they were required to live in premises provided by Pegasus and pay an exorbitant rent which effectively constituted a further premium. They add the living conditions were poor and they were required to sleep on the floor.

[11] Both Mr Sharma and Mr Singh say they put up with these conditions as they were continuously receiving threats from Mr Rawat that should they not comply with his wishes he would ensure their visas were cancelled and they would be forced to return to India. There are also allegations Mr Rawat suggested he could use contacts in India to ensure there would be troubles after their return.

[12] Pegasus denies a premium was required and says a weekly payment of \$280 made by each employee was legitimate. It says \$130 covered rent and the other \$150 went toward various living expenses including power and the provision of all meals. There was no reply to the allegations concerning living conditions. There is also an attempt to legitimise some other deductions by saying they were justified by virtue of the fact the employees were undergoing training.

[13] In May 2015 the Inspector visited Pegasus having received a complaint from another employee. As part of his process he got various employees, including Messrs Sharma and Singh, to fill out questionnaires. Both denied there were issues at the time. They explain this by saying they were told the Inspector was coming a day earlier and threatened about their future should they not comply with Mr Rawat's instruction they confirm all was well.

[14] That said, and having considered the situation with which both were growing increasingly disgruntled, they decided the Inspector's visit opened an opportunity. As a result, and over the ensuing month, they downloaded copies of rosters and extracts

from video surveillance equipment to confirm their presence in the workplace at various times.

[15] The employees then approached Immigration New Zealand who in turn involved the Inspector. They also resigned on the advice of Immigration New Zealand.

[16] Subsequent inquiries by Immigration New Zealand led to multiple charges being laid against both Pegasus and Mr Rawat. On the basis of an agreed statement of facts Mr Rawat subsequently pleaded guilty to eight charges in the District Court. These related to falsifying documents and lying to Immigration New Zealand, failing to pay wages in accordance with the Wages Protection Act 1983 and seeking and receiving premiums.

[17] In his sentencing notes the Judge states:

[4] In the end you were operating in a way where you had indicated to Immigration that your two employees were only working a certain number of hours when in fact they were working a lot more than that but not getting paid what they were entitled.

[5] Also it seems very clear to me that you were holding over them the fact that if they complained in any way at all you were in a position, essentially, to have them sent back overseas to where they had come from. In other words you were a person who was in a position of considerable power, over not only their residence, but also their economic future and it would seem, from your plea of guilty to these charges, that you had no hesitation in improperly using that power to benefit yourself and indirectly your family as well.

[6] You were getting service from these employees over a period of time and a rate that was illegal and you were lying to Immigration about it.

[18] Subsequent to that Mr Rawat paid each of the employees a sum relating to the arrears attributable to the period for which the charges applied. That was a narrow period of some ten weeks between 7 May and 1 September 2015 and for which unequivocal supporting evidence had been obtained.

[19] Mr Rawat now says that was the only period during which the claimed transgressions occurred. He denies any wrongdoing in respect to the rest of the period of employment and to which the current claims apply.

Determination

[20] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[21] It is the employees' position that while colleagues of New Zealand descent were only employed to work eight hours a day they had to work extended shifts. They say their normal shift was ten hours but there were ones of twelve and occasionally sixteen hours. They also say no New Zealander was required to work on public holiday which they were required to cover. They say that would occasion extended hours and they were not paid appropriately or receive statutory entitlements such as a day in lieu.

[22] Pegasus, through Mr Rawat, essentially says the claims are inflated and fraudulent. They say these employees filled out time sheets recording their shifts, which were normally of seven hours duration, on days they worked. It says the timesheets correctly reflect the hours worked and that the employees were paid for those hours at the rate specified in their employment agreements.

[23] For a multiplicity of reasons I consider the evidence Messrs Sharma and Singh tendered in support of their claims to be far superior to Mr Rawat's offering.

[24] Most importantly their claims were supported by the rosters they extracted from Pegasus' computer system. Mr Rawat's response is these are capable of manipulation and while he implies that has undoubtedly occurred he could offer absolutely no evidence which might support his contention. To the contrary I noted a spectator at the investigation who also appeared in some of the surveillance camera footage I had been presented. I chose, of my own volition, to ask if he would give evidence. He agreed. It transpired he was an ex-employee of Pegasus and his evidence strongly corroborated that Mr Sharma and Singh gave about the hours they worked. I also note Pegasus portrayed him as a credible witness and it was the company which extracted answers which established he had no reason to be improperly critical of Pegasus and had left for legitimate reasons in a way acceptable to both parties. While the witness could give evidence about the hours Messrs Sharma and Singh worked he knew nothing about their terms or pay.

[25] There is also a detailed analysis completed by the Inspector tendered in support of the claims.

[26] There are than a number of factors that reflect badly upon Mr Rawat and his evidence. This is not the first time he has been involved in a company which has found itself in a similar situation. On 17 February the Authority issued its decision in the matter of *Singh v Corporate Energy Limited (in liquidation)*.¹ Mr Rawat had been a director and shareholder in Corporate Energy Limited and notwithstanding the fact the claim involved one of unjustified dismissal there were also a number of unfortunate similarities regarding Mr Singh's immigration status and payments he received. Mr Rawat takes exception with the fact that case was raised and states:

It is a matter of public record that I was neither a director or shareholder of Corporate Energy at any time relevant to the issued traversed in the case.²

[27] That is not correct. The issues complained of in *Corporate Energy* occurred between April and October 2012 and Mr Rawat did not cease being either a director or shareholder until the end of October 2012. Notwithstanding that, and when this was put to him, he continued to maintain he was not an office holder at the relevant time. Maintaining such a provably false position did nothing for his credibility.

[28] There are then Mr Rawat's guilty pleas in the District Court. He attributes those to what he suggests was poor advice from his then lawyer and says that if he had known they would cause difficulties in these proceedings they would never have been made. He asserts the behaviour to which he pleaded guilty was an aberration limited to the short period covered by the charges. When asked to explain what appeared to be possible inconsistencies in his statements he failed to elaborate and his answers devolved into ones I can only label incoherent. I also note Mr Rawat's position the admissions made in the District Court related to conduct limited to a short period in 2015 is, again, clearly incorrect. It is undermined by the fact two of the charges relate to the falsification of employment agreements which occurred somewhat earlier. Mr Rawat was also unable to explain why he would falsify these documents if there was no nefarious purpose.

[29] Pegasus also raised an argument the wages payable should be less than claimed in order to recognise and reimburse it for training it provided the employees.

¹ [2017] NZERA Auckland 39

That argument also fails for various reasons. It was not adequately evidenced and I remain bereft of any knowledge as to what form the training took. In any event it is conceded that at all times the employees were undertaking productive work. Any training, such as it may have been, was performed on the job and as such it was work and should be paid as such.

[30] There were also Mr Rawats' attempts to portray the applicant negatively through various allegations. These fail for a variety of reasons. Some, such as allegation of drunkenness, I consider little more than attempts to besmirch the applicants given they are irrelevant to the claims I must consider while others such as claims a petrol card was used fraudulently were not proven.

[31] Having considered the evidence I have no qualms in concluding Mr Rawat's evidence lacks credibility and his denials of impropriety are implausible. Such impropriety was admitted in the District Court and the applicants claims the issues were ongoing for the entire period of employment were supported by what can only be considered an independent witness.

[32] That then leads to the question of what is payable. The simple fact is I cannot rely on the official timesheets. They are clearly false and that has been confirmed by both the District Court action and the evidence proffered here.

[33] I also discount more recent documents offered by Pegasus While Pegasus now offers additional documents in support of its position the applicant's claims are inflated I conclude these also have no probative value. They were prepared for the purposes of this litigation. They are not contemporaneous and their accuracy cannot be evidenced or established. Indeed the evidence of the spectator I called would again lead to a conclusion they lack accuracy.

[34] The reliable documentary evidence appears limited those used by the Inspector to base his claims and, in particular, the rosters. I also note that notwithstanding the conditions in which they lived the applicants accepts the assertion regarding rent and that is recognised when calculating the claim.

² Brief of evidence at [11]

[35] I conclude this is a situation akin to that canvassed by s.132 and find that where the employer has failed to keep or produce reliable or accurate wage records I should accept the applicants' claims.

[36] Finally it should be noted that after discussion during the investigation part of the claim was recalculated. That saw small increase (\$38,50) but given the amount involved the applicant concluded he would not increase the amount claimed.³

[37] To that end the applicants shall be awarded what they seek in full. That means there will be an order for the payment in respect to Mr Sharma of \$67,489.50. Mr Singh shall receive \$47,858.85.

[38] Turning now to the claims brought by Messrs Sharma and Singh personally. They are based on the same facts considered and determined above but the amounts are inflated by virtue of each applicant having used the contractual hourly rate as opposed to that specified under the Minimum Wage Act. The fact the agreements in which these rates are specified were created for what must now be considered improper purposes does not change the fact they are the agreements the parties entered into and there is no evidence the rates specified there-in were not the rates payable. Indeed Pegasus' defence is predicated on an assertion they were the applicable rates and were actually paid. They should, I conclude be applied as such and therefore these claims also succeed. That means Mr Sharma should receive a further \$9,479.85 and Mr Singh a further \$7,974.

[39] There is also a claim for interest pursuant to the Interest on Money Claims Act 2016. This claim first appeared in the Applicant's submissions and for that reason it will be taken no further as it does not appear to comply with the requirements of s 25 of the Interest on Money Claims Act 2016.

[40] The Inspector also seeks the imposition of penalties:

- a. pursuant to s 10 of the Minimum Wages Act 1983 for failing to pay the minimum wage as required by s 6 of the same act;
- b. pursuant to s 75 of the Holidays Act 2003 for failing to pay both annual holidays and alternate public holidays upon termination;⁴ and

³ E-mail dated 10 November 2017

- c. pursuant to s 13 of the Wages Protection Act 1983 for charging a premium contrary to s 12A of the Act.

[41] The above penalties are sought in respect of each employee on the basis each has been adversely affected.⁵

[42] It goes without saying my conclusions regarding the arrears claim and the reasons for reaching them mean I am satisfied neither Mr Sharma nor Mr Singh received the minimum wage, their holiday records were deficient with amounts due not being paid and each was charged a premium. The alleged breaches have occurred and the circumstances, best summarised by the District Court Judge, strongly indicate penalties are warranted.

[43] Guidance as to calculating amounts is given by the Court in its decision in *Borsboom v Preet*.⁶ In essence a four step process is required in which I identify the nature and number of breaches and the possible penalty which may result; assess the severity of the breaches; consider means to pay and apply a proportionality test.

[44] As the Labour Inspector identified in his submissions the result is a total of eight breaches with each carrying a maximum penalty of \$20,000 at least in respect to failure by a company. The total is \$160,000 with a further \$80,000 being sought against Mr Rawat pursuant to the amended statement of claim.

[45] The applicant submits globalisation is not appropriate given three different acts have been breached and each serves its own protective purpose. In respect to the two breaches of a single act it is again submitted globalisation is not appropriate as two very different types of leave are involved – annual leave and alternate public holidays. Having considered the submissions and the case law including Authority determinations issued subsequent to *Preet* such as *A labour Inspector v Bahn Thai Restaurant Limited*⁷ I agree.

[46] With respect to severity the Inspector is suggesting penalties toward the upper end of the spectrum are warranted. Again I agree. There can be little doubt, given the amounts outstanding, the offending was severe and the effect on the employees

⁴ Sections 27 and 56 of the Holidays Act 2003

⁵ Paragraph 6(b) of the Applicants submission on penalties

⁶ *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁷ [2016] NZERA Christchurch 222

significant. Not only that, the evidence supports a conclusion the breaches were premeditated with this being exhibited by the preparation and supply of inaccurate employment agreements to Immigration New Zealand and that they were facilitated and perpetuated by threats and misrepresentations to relevant authorities.⁸ There are further aggravating factors given Mr Rawat is an experienced businessman who should have been well aware of the requirements. I also note this is not the first time a business in which he has been involved has been the subject of such investigations and I further note his attempt to distance himself from these events. The only mitigating factor is the part payment made but this is of little assistance to the respondent. It was essentially forced as a result of the guilty pleas in the District Court and even then the breadth of the offending was not acknowledged with Mr Rawat now trying to portray those events as a time limited aberration.

[47] Having considered these factors I again agree with the Inspector and conclude penalties of the magnitude sought are warranted. He seeks 80% in respect to the failure to pay the minimum wage; 70% in respect to the failures to properly record and pay holidays and 80% in respect to the premiums. The total is \$120,000.

[48] There was no evidence concerning inability to pay and the business remains operational. Indeed Mr Rawat's argument before the District Court in support of a sentence of home detention was that this was required to ensure the business remained viable.

[49] That then leaves proportionality. *Borsboom v Preet* is the prime source of guidance in respect to the calculation of penalties. There the penalties totalled approximately one and a third times the monetary value of the breaches. The proportions here, at least in respect of Pegasus, are less and a perusal of recent Authority determinations suggest those being suggested by the Inspector are not disproportionate to others now being imposed by the Authority.

[50] Finally there are the penalties sought against Mr Rawat. It seeks penalties in similar proportion to those sought against Pegasus though the amounts are, by operation of statute, halved. There can be no doubt he fulfils the definition of a person involved in a breach being the sole director.⁹ There can also be no doubt it was

⁸ Refer Judges notes cited at [17] above and the applicants evidence regarding the initial responses to the Inspectors first visit to Pegasus' premises

⁹ Sections 142W(2) and 142W(3)(a) of the Act

he who personally aided, abetted and procured the breaches¹⁰ and he did so knowingly by the use of threats.¹¹ That is confirmed by both the District Court Judges' notes and the evidence here which shows he personally ran the business and delegated none of the relevant functions.

[51] It is, however, the guilty plea that creates some issues in my mind. The imposition of penalties here raises the spectre of double jeopardy and the prospect Mr Rawat may be seen to be being punished twice for the same offending though that must be considered in light of the fact the guilty plea related to Mr Rawat's activities over a limited period of time. There is also the issue of proportionality. Were I to add penalties of \$60,000 against Mr Rawat to those awarded against Pegasus the proportionality vis-a vis the *Preet* decision would no longer appear reasonable. There is also the fact that should Pegasus default on the monies due to each of its ex-employees Mr Rawat may yet find himself liable for the arrears pursuant to s 142Y of the Act.

[52] Having considered the issue and to maintain the overall proportionality I consider Mr Rawat should incur penalties but while the methodology of imposition remains the same but the monetary amount should be one fifth of that incurred by Pegasus. The total payable is therefore \$24,000.

Conclusion and Costs

[53] For the above reasons I have concluded the first respondent, Pegasus Energy Limited, has failed to comply with various statutory obligations it owes its now ex-employees and to pay them in accordance with either minimum statutory standards or their employment agreements. I have also concluded the second respondent, Jag Rawat, is a person liable to penalties pursuant to ss 142W and 142X of the Act.

[54] As a result the first respondent, Pegasus Energy Limited is ordered to make the following payments no later than 4.00pm Tuesday 1 May 2018:

- a. \$115,348.35 (one hundred and fifteen thousand, three hundred and forty eight dollars and thirty five cents) gross being unpaid wages and holiday pay. Payment is to be made to the Ministry of Business,

¹⁰ Section 142W(1)(a) of the Act

¹¹ Sections 142W(1)(b) and () of the Act.

Innovation and Employment for disbursement to Messrs Sharma and Singh in the amounts specified in paragraph [36] above; and

- b. A further \$9,479.85 (nine thousand, four hundred and seventy nine dollars and eighty five cents) gross to Shubham Sharma being the additional amount underpaid according to his employment agreement; and
- c. A further \$7,974.00 (seven thousand, nine hundred and seventy four dollars) gross to Jaspal Singh being the additional amount underpaid according to his employment agreement; and
- d. A further \$120,000.00 (one hundred and twenty thousand dollars), being penalties pursuant to various acts identified in [39] above. Payment is to be made to the Crown via the Ministry of Business, Innovation and Employment; and

[55] The second respondent, Jag Rawat, is ordered, pursuant to s142X of the Employment Relations Act 2000, to pay penalties totalling \$24,000. Payment is to be made to the Crown via the Ministry of Business, Innovation and Employment no later than 4.00pm Tuesday 1 May 2018.

[56] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority