



- D. Jagendra Prasad is to pay a penalty of \$12,500.00 to the Labour Inspector within 28 days of the date of this determination.**
- E. From the sums paid, the Labour Inspector is to transfer \$5,000.00 to the employee identified in this determination as Employee F, and transfer the remainder to the Crown Account.**
- F. Jagran Property Services Limited and Mr Prasad are jointly and severally liable to pay a total contribution of \$900 to the Labour Inspector's costs, along with paying \$71.56 for the filing fee. These amounts are to be paid within 28 days of the date of this determination.**

### **Employment relationship problem**

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment (MBIE), Clare Lyons-Montgomery, brings a claim against Jagran Property Services Limited (Jagran or the company) and Jagendra Prasad. Mr Prasad is the sole director and one of the two shareholders of the company.

[2] The claim against Jagran concerns six employees, whom I will refer to as employees A to F.<sup>1</sup> The claim covers breaches of the Employment Relations Act 2000 (the ER Act), the Minimum Wages Act 1983 (the MW Act), the Holiday Act 2003 (the H Act) and the Wages Protection Act 1983 (the WP Act). Some claims concern all the employees and some a lesser number. The claim against Mr Prasad is that as director of Jagran he was directly or indirectly involved, knowingly concerned in or party to the alleged breaches committed by Jagran.

[3] The Respondents in their statement of reply indicated that they agreed to pay arrears of holiday pay and public holiday entitlements but disagreed with an aspect of one of the claims.

[4] The parties then attended mediation and were able to resolve the arrears issues between them. This resulted in a Record of Settlement (the Settlement Record), which includes a provision that the terms of settlement are not covered by the confidentiality clause and can be disclosed, including to the Authority.

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<sup>1</sup> The employees are listed from A to F in the order in which their names appear in para 1.2 of the statement of problem

[5] Under the Settlement Record Jagran agreed to pay sums to employees, however it was agreed that the Settlement Record is a full and final settlement of the arrears claim only, with the Authority to determine penalties.

[6] At the case management conference, it was indicated for the Labour Inspector that no additional evidence would be provided. The Respondents sought to file evidence. An investigation meeting was set down in Hamilton for 27 July 2018. However, as the Respondents later decided to rely on documentary evidence and not call any witnesses, the parties agreed that this matter could be dealt with by telephone. The Authority convened the investigation meeting by telephone on 27 July 2018 with the representatives and Mr Prasad attending.

[7] As permitted by s 174E of the ER Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Jagran**

[8] Jagran trades in the Waikato as Crew Care Commercial Cleaning and Green Acres Mobile Car Valet.

[9] In May 2017 Employee F contacted the MBIE service centre to lodge a complaint against Jagran regarding non-payment of wages and a requirement to make a payment to support her work visa. Employee F also mentioned that other employment standards had been breached in relation to two former employees of Jagran.

[10] The Labour Inspector sought from Jagran a list of current and former employees for the prior 24 months. A Notice of Supply was later issued requiring copies of all wages, time, holiday and leave records and any other documentation for six employees. Some documents were provided but the Labour Inspector did not consider that Jagran had fully complied. The Labour Inspector proceeded to investigate. This included interviewing employees and others, including Mr Prasad.

[11] In the Settlement Record Jagran accepts liability for the breaches alleged and for arrears. The breaches are set out below.

## **Employment agreements and time and wage records**

[12] I firstly outline the breaches under the ER Act. As the employer of Employees A, E and F, Jagran failed to retain individual employment agreements (IEA's) as required by s 64(1) of the ER Act and penalties are thus sought under s 64(4) of that Act.

[13] Jagran also failed to supply the Labour Inspector with a copy of Employee A's IEA as required by s 229(2) of the ERA Act and she seeks a penalty under s 229(3) of that Act.

[14] Also, under the ER Act, Jagran failed to keep compliant time and wage records for all six employees as per s 130(1) and penalties are sought under s 130(5).

## **Minimum wage payments**

[15] Jagran failed to pay Employees A, C, D, E and F the minimum wage as required by s 6 of the MW Act and penalties are sought under s 10 of that Act.

## **Holidays**

[16] There are four aspects of the H Act which the Labour Inspector seeks penalties under s 75 for:

- (i) Jagran failed to provide Employee A with annual holidays as required by s 16 of the H Act;
- (ii) Employees B, C, D, E and F were not paid holiday pay on termination in breach of Jagran's obligations under ss 23, 24 and 26 of the H Act;
- (iii) All six employees were not paid for public holidays that would otherwise have been working days, as required by s 49 of the H Act;  
and
- (iv) A holiday and leave record was not kept for any of the six employees, in breach of s 81(2) of the H Act.

## **Premium**

[17] Under s 12A(1) of the WP Act no employer shall seek or receive any premium in respect of the employment of any person. A penalty may be imposed if any payment is made in contravention of the Act or any employer contravenes or fails to comply with any provision of the Act.<sup>2</sup>

[18] Employee F claims that she was asked to pay \$10,000 to Jagran to support her work visa and that she paid \$3,000 towards this. However, the Labour Inspector could only be satisfied that a premium was sought, not that it was actually paid. Therefore the penalty claim only concerns a payment being sought, rather than one being received.

## **Mr Prasad**

[19] When interviewed by the Labour Inspector, Mr Prasad said that he was not aware of the company's obligations regarding holiday pay or public holidays. He originally had time records but lost these in his recent house move. He said that he had not kept leave and holiday records as he had not had employees go on holidays, although when questioned he admitted that one employee had gone on an unpaid six week holiday to India. Mr Prasad had recently attended a contractors/workers seminar where minimum entitlements, such as for public holidays, were discussed and so was more knowledgeable about the requirements.

[20] Mr Prasad's position regarding the premium issue was that the money sought was a bond so Employee F would not leave employment as a previous employee had done soon after being trained. His expectation was that Employee F would work for Jagran for two years. The intention had been to deposit \$3,000 with a solicitor to be repaid to the employee after that period. It was not intended to be paid to Jagran. In any event the employee did not pay any money.

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<sup>2</sup> s 13(1) of WP Act

[21] Mr Prasad did not dispute that he was the person responsible for the calculation and payment of Jagran's employees' wages. Instructions to employees were given by Mr Prasad.

### **Penalties against a company and its director**

[22] The penalty claims against Mr Prasad are based on him being a person involved in Jagran's breaches, in accordance with s 142W of the ER Act. Where the person in breach is a company, as is the case here, only officers of the company may be treated as a person involved in a breach.<sup>3</sup> As the director of Jagran, Mr Prasad is an officer of Jagran.<sup>4</sup>

[23] I am satisfied from the evidence that Mr Prasad was directly involved in the breaches, by aiding and abetting Jagran, in terms of the failures to retain and supply employment agreements, keep compliant wage and time records, pay the minimum wage, provide annual holidays and holiday pay on termination, pay for public holidays and keep holiday and leave records. I am also satisfied that Mr Prasad was knowingly concerned in the seeking of a premium from Employee F.

[24] As Mr Prasad was a person involved in Jagran's breaches, he is thus liable to penalties under s 142Y of the ER Act on application of the Labour Inspector.

[25] The issue of the liability of a person involved in a breach under s 142W of the ER Act was considered recently by the Employment Court in *A Labour Inspector v Sampan Restaurants Ltd and Yu Ouyang*.<sup>5</sup> His Honour Judge Perkins considered it a mistake to conclude that the actions of an employer and the person involved are the same.<sup>6</sup> The employer is liable for a breach of the relevant employment standard itself, whereas the actions of the person involved are collateral to the breach.

[26] Therefore, even though it can be difficult to differentiate in cases such as this where the sole director can be perceived as being the company, I must consider the company's actions separately from Mr Prasad's actions.

[27] Whilst recognising the *Sampan* decision, the Labour Inspector sought a total penalty of \$40,000, and given that Mr Prasad was the sole director, considered that

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<sup>3</sup> S 142W(2) of the ER Act

<sup>4</sup> S 142W(3)(a) of the ER Act

<sup>5</sup> *A Labour Inspector v Sampan Restaurants Ltd and Yu Ouyang* [2018] NZEmpC 69

<sup>6</sup> Above n 4 at [17]

orders of \$20,000 against the company and \$20,000 against him personally were appropriate. The Respondents did not have a position on whether Jagran and Mr Prasad should be equally liable or not but saw \$25,000 as an appropriate total amount of penalties.

### **Penalties against Jagran**

[28] Following the decision of Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd (Preet)*<sup>7</sup> I now use the four step test to assess the appropriate penalty. In doing so I will refer to factors from s 133A of the ER Act where relevant. Tables appended to this determination outline the workings of the penalties calculations against the company and Mr Prasad.

#### *Step One*

[29] Step one is to identify the nature and number of breaches. As detailed above there are failures to:

- (i) retain IEA's for three employees;
- (ii) supply the Labour Inspector with the IEA for one employee;
- (iii) keep compliant time and wage records for six employees;
- (iv) pay the minimum wage to five employees;
- (v) provide one employee with annual holidays;
- (vi) pay holiday pay on termination to five employees;
- (vii) pay for public holidays for all six employees;
- (viii) keep a holiday and leave record for all six employees; as well as
- (ix) the seeking of a premium from one employee.

[30] This amounts to 34 possible penalties before consideration of globalisation. The maximum penalty for a company under all four pieces of legislation is \$20,000.

[31] It is appropriate to globalise some of the failures by making the failures for a number of employees into one failure. This applies to failure to retain IEA's and failure to keep time and wage records. I do not globalise the non-payments of the minimum wage, failure to pay holiday pay on termination and failure to pay public holiday pay. These are individual payment issues. I also globalise the failure to

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<sup>7</sup> [2016] NZEmpC 143

retain the employment agreements with the failure to supply the agreement to the Labour Inspector.

[32] After globalisation, at the end of Step One, the total penalties are \$40,000 under the ER Act, \$100,000 under the MW Act, \$260,000 under the H Act and \$20,000 for the WP Act.

### *Step Two*

[33] Step two is to assess the severity of the breaches, including consideration of aggravating and mitigating factors.

[34] I regard the failure to pay the minimum wage as particularly serious, especially for Employee F who received only \$300 during approximately three months' work of 40 hour or more hours a week. Other employees were not so severely affected. I allocate 75% liability of the maximum penalty regarding these breaches.

[35] The H Act breaches are also serious, particularly for Employee A who worked for over three years without receiving any paid holidays. At the other end of the scale some employees were owed small amounts of holiday pay which were not paid on termination. I allocate 60% liability under this Act.

[36] The WP Act issue regarding premiums is also serious but given that no adequate proof of payment was found and the breach therefore relates only to seeking a premium. I allocate 60% here.

[37] The ER Act matters, while relating to record keeping and supply, are still important matters as they are part of the system aimed at ensuring that minimum entitlements are able to be recognised and paid. I provisionally allocate 50% of the maximum penalty.

[38] I now look at any aggravating factors. The breaches are spread over four years and so are not short term problems. They involve migrant workers who were vulnerable to being exploited.

[39] In terms of whether the breaches were deliberate, inadvertent or accidental, the evidence from Mr Prasad's interview was that he and the company were not aware of

any breach of obligations. The Labour Inspector disagrees and points to a deliberate pattern of paying those who were not dependent on Jagran for their immigration visa, and not paying those who were dependent. I consider that the patterns of payments or failure to pay indicate some degree of calculation.

[40] The evidence regarding Employee F is that she has had to return to her home country having lost her work visa. She suffered significant loss and hardship because of the company and Mr Prasad.

[41] There are some mitigating factors. Jagran had not been investigated by the Inspectorate previously. Jagran has shown co-operation through many parts of the Labour Inspector's investigation and the Authority process. Jagran expressed a willingness to go to mediation and once there, reached agreement that breaches had occurred and committed to pay the arrears owing. These have now been paid. Jagran deserves significant credit for eventually getting to that point.

[42] Taking into account I reduce the provisional penalties by 40%.

#### *Step Three*

[43] Step Three requires consideration of the means and ability to pay, which may result in a downwards adjustment.

[44] Financial and bank account statements were filed for Jagran. These show that the company made only a modest surplus in the year to 31 March 2018, having a somewhat reduced revenue from the previous year. The company's representative, who is also its accountant, informed the Authority that the company has suffered a decline in work since the 2018 annual report and so is making less money. From the information before the Authority I am satisfied that although Jagran's situation is not dire, it is not a well off business. There is some ability to pay.

[45] I make a 50% reduction for the company's financial position.

#### *Step Four*

[46] Step Four involves the proportionality or totality test; whether the provisional penalty after the first three steps is proportionate to the seriousness of the breach and harm occasioned by it. A consideration of other comparable cases can be undertaken at this point. Given that a comparison needs to be undertaken between the provisional

penalties for Jagran and Mr Prasad, I will leave this step until after I have been through the earlier steps for Mr Prasad.

### **Penalties against Mr Prasad**

[47] Most of the factors outlined above for Jagran's liability for penalties are equally applicable to Mr Prasad as he was the sole person running the company. I will emphasise in this section particular issues relating to Mr Prasad's culpability. There is a table annexed regarding his penalties.

#### *Step One*

[48] The Labour Inspector acknowledges that the failure to provide her with a copy of the IEA is only a matter which the company as the employer can be penalised for, not Mr Prasad as a person involved. It is not a minimum standards matter. This means that Mr Prasad may be penalised for one less matter than Jagran.

[49] The other difference for Mr Prasad as a person involved, is that some of the legislation states that such people are liable to a \$10,000 penalty, whereas the Holidays Act specifies \$20,000. The Labour Inspectorate considers that the inconsistency was likely not deliberate and so in this case only seeks penalties to a maximum of \$10,000 per breach.

[50] I globalise regarding some breaches in the same manner as was done for Jagran.

#### *Step Two*

[51] There was no indication of Mr Prasad coming to the Labour Inspector's attention previously. Very similar aggravating and mitigating factors apply to Mr Prasad as to Jagran. I make the same reductions in this step.

#### *Step Three*

[52] Step Three requires consideration of the means and ability to pay.

[53] In addition to the Jagran Property Services Ltd accounts, the Respondents filed accounts for Jagran Farms Ltd and for the rental property partnership of Mr Prasad and his wife. IRD income records were filed for Mr Prasad and his wife. Mr Prasad's income from Jagran was modest.

[54] Mr Prasad has borrowed money to enable Jagran to pay off the arrears and for penalties to be paid. There is some ability to pay.

[55] I make a deduction of 50% for this factor.

### **Proportionality test**

[56] The provisional penalties after Step Three are \$78,900 for Jagran and \$39,450 for Mr Prasad. I now consider whether the amounts are proportional, taking into account other decisions.

[57] One of the considerations at this stage is proportionality to the amount of money unlawfully withheld. A total amount of \$17,331.52 gross was repaid to six employees. This is not an insignificant sum. One employee was owed a minimum wage payment of a little under \$7,000. When comparing the arrears amount to the penalties, the penalties do seem too high and an adjustment down is needed.

[58] I now consider the objectives of penalty awards as outlined in *Preet*. There is a need for punishment and to ensure that Jagran and Mr Prasad improve their employment practices. In terms of the wider picture, the cleaning industry often employs vulnerable migrants and also needs to be deterred from non-compliance with employment obligations. The low levels of bargaining power of workers in this industry are recognised in Part 6A of the ER Act. An employer who is able to get away with not paying minimum entitlements has an unfair advantage against other employers who are compliant. This is particularly so in industries such as cleaning, where there are sometimes frequent changes in contractors.

[59] In terms of the third objective of compensation outlined in *Preet* there is evidence of loss which would not be entirely mitigated by the payment of arrears. Employee F has had to return to her home country due to her visa problems resulting from her dealings with Jagran.

[60] I now look at proportionality between Jagran and Mr Prasad. As Mr Prasad was the sole director and operator of the business he had a very high level of involvement in the company's actions. However, other than in one anomalous statute, Parliament has set these penalties for individuals at half the rate for companies and

those pursued under s 142 of the ER Act as persons involved, will always be individuals.

[61] Standing back and looking at all of the factors and considering whether penalties of \$78,900 and \$39,450 are right in all the circumstances, I find that a reduction is needed.

[62] The following penalties are ordered to be paid to the Labour Inspector within 28 days of the date of this determination:

- (i) \$25,000.00 by Jagran Property Services Limited; and
- (ii) \$12,500.00 by Jagendra Prasad.

[63] The Labour Inspector takes no position on whether some or any of the penalties should be paid to the employees under s 136 of the ER Act. I order that \$5,000.00 of the penalties received by the Labour Inspector shall be paid to Employee F. She is described as being singled out for particularly poor treatment. A premium for employment was sought from her and she has now had to return to her home land. These are not matters which are fully compensated by the payment of arrears. Employee F also had to survive for an extended period with very little earnings paid for the considerable hours of work which she was required to undertake.

[64] The Labour Inspector shall forward the remaining penalties received to the Crown Account.

### **Costs**

[65] The Labour Inspector has been successful in this case and has sought costs. Costs should follow the event. The investigation meeting lasted less than one and a half hours. On the basis of the \$4,500 notional daily tariff, I award the Labour Inspector \$900.00 as a contribution to her costs and \$71.56 for the filing fee. Jagran Property Services Limited and Jagendra Prasad are jointly and severally liable to pay these sums within 28 days of the date of this determination.

Nicola Craig  
Member of the Employment Relations Authority

## Penalties Table regarding Jagran Property Services Ltd

	ER Act	MW Act	H Act	WP Act
<b>Step 1:</b>				
<b>Nature &amp; number of breaches</b>				
Failure to retain IEA s 64	3 employees			
Failure to provide LI with IEA s 229(2)	1 employee			
Failure to keep time and wage records s 130(1)	6 employees			
Failure to pay minimum wages ss 6 and 10		5 employees		
Failure to provide annual holidays s 75			1 employee	
Failure to provide annual holiday pay on termination s 75			5 employees	
Failure to pay public holiday pay s 49 and 75			6 employees	
Failure to keep holiday and leave records s 81(2)			6 employees	
Sought a penalty				1 employee
Total individual breaches	10	5	18	1
Total penalties	\$200,000	\$100,000	\$360,000	\$20,000
Globalised to	2	-	13	-
Total new penalties	\$40,000	\$100,000	\$260,000	\$20,000
<b>Step Two:</b>				
Relative seriousness	50%	75%	60%	60%
New provisional total	\$20,000	\$75,000	\$156,000	\$12,000
Reduction for mitigating factors	40%	40%	40%	40%
Provisional total after Step Two	\$12,000	\$45,000	\$93,600	\$7,200
<b>Step Three:</b>				
Financial circumstances	50%	50%	50%	50%
Provisional total	\$6,000	\$22,500	\$46,800	\$3,600
<b>Step Four: Proportionality</b>				
<b>Total penalties</b>	<b>\$25,000</b>			

## Penalties Table regarding Jagendra Prasad

	<b>Employment Relations Act</b>	<b>Minimum Wage Act</b>	<b>Holidays Act</b>	<b>Wages Protection Act</b>
<b>Step One:</b>				
<b>Nature &amp; number of breaches</b>				
Failure to retain IEA s 64	3 employees			
Failure to keep time and wage records s 130(1)	6 employees			
Failure to pay minimum wages ss 6 and 10		5 employees		
Failure to provide annual holidays s 75			1 employee	
Failure to provide annual holiday pay on termination s 75			5 employees	
Failure to pay public holiday pay s 49 and 75			6 employees	
Failure to keep holiday and leave records s 81(2)			6 employees	
Sought a penalty				1 employee
Total individual breaches	9	5	18	1
Total penalties	\$90,000	\$50,000	\$180,000	\$10,000
Globalised to	2	-	13	-
Total new penalties	\$20,000	\$50,000	\$130,000	\$10,000
<b>Step Two:</b>				
Relative seriousness	50%	75%	60%	60%
New provisional total	\$10,000	\$37,500	\$78,000	\$6,000
Reduction for mitigating factors	40%	40%	40%	40%
Provisional total after Step Two	\$6,000	\$22,500	\$46,800	\$3,600
<b>Step Three:</b>				
Financial circumstances	50%	50%	50%	50%
Provisional total	\$3,000	\$11,250	\$23,400	\$1,800
<b>Step Four: Proportionality</b>				
<b>Total penalties:</b>	<b>\$12,500</b>			