

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 303
3021013

BETWEEN	LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
A N D	KUMAR HOLDINGS AND ASSOCIATES LIMITED First Respondent
AND	WORLD CLASS KIWI PARCEL LIMITED Second Respondent

Member of Authority: Rachel Larmer

Representatives: Rebecca Denmead, Counsel for Applicant
Preeya Reddy, Counsel for First and Second
Respondents

Investigation Meeting: On the papers

Affidavits and
Submissions Received: 02 July 2018 Affidavit of Mr Singh and Applicant's
submissions

20 July 2018 Affidavit of Mr Kumar and First and
Second Respondents' submissions

26 July 2018 Reply Submissions of Applicant

Date of Determination: 28 September 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] A Labour Inspector from the Ministry of Business Innovation and Employment conducted an investigation into the workplace practices of the first respondent Kumar Holdings and Associates Limited (Kumar Holdings) and the second respondent World Class Kiwi Parcel Limited (World Class Kiwi).

[2] The Labour Inspector's investigation was undertaken as a result of a complaint from the respondents' former employee, Mr Krishna Singh, who is an Indian national. Mr Singh came to New Zealand to study in October 2012.

[3] Mr Singh started working for Kumar Holdings in January 2013 and then (simultaneously) for World Class Kiwi on 13 March 2015.

[4] Mr Singh did not have any written employment agreement for his employment with Kumar Holdings from 16 January 2013 to 19 October 2016. Mr Singh's employment with World Class Kiwi ran from 13 March 2015 to 19 October 2016.

[5] Kumar Holdings operates a courier logistics business and a cleaning business which it operates across the Waikato region. World Class Kiwi operates a courier logistics business with premises based in Hamilton and Te Awamutu.

[6] Mr Singh received an individual employment agreement for his World Class Kiwi employment from Mr Nitesh Kumar who is the sole director and shareholder of both respondents.

[7] The World Class Kiwi employment agreement was provided to Immigration New Zealand who granted Mr Singh a work visa to work for World Class Kiwi as an Assistant Operations Manager. However Mr Singh never worked in that role, which is an issue that Immigration New Zealand may wish to investigate.

[8] Although Mr Singh's employment agreement with World Class Kiwi provided for him to be paid \$16.50 an hour for 40 hours work per week he was never paid that rate and his hours of work varied, with Mr Singh often working more than 40 hours a week.

[9] During Mr Singh's employment with Kumar Holdings and World Class Kiwi he held a number of different roles and carried out a variety of jobs for each company. These jobs included undertaking cleaning activities for Kumar Holdings, delivering

newspapers for Kumar Holdings and World Class Kiwi, doing mail runs for both respondents, undertaking food bag deliveries for both respondents and working as a courier. Mr Singh was not paid while he was being trained to work as a courier.

[10] On 12 April 2018 the parties attended mediation. The respondents accepted that they had both employed Mr Singh and both respondents accepted liability for wage arrears and breaches as outlined in the Labour Inspector's statement of problem.

[11] As a result of mediation, the respondents agreed to pay the minimum wages and holiday pay sought by the Labour Inspector in the Authority proceedings, with the specific amounts being as outlined in the record of settlement signed under s.149 of the Employment Relations Act 2000. These agreed terms of settlement were filed with the Authority on 23 May 2018.

[12] The Labour Inspector also advised the Authority that she was satisfied that the respondents have now paid the wage arrears that were owed to their former employee, Mr Singh.

[13] As part of their agreed settlement, the Labour Inspector agreed to seek only one penalty from Kumar Holdings for all of its record keeping breaches involving Mr Singh.

[14] That agreement meant there was a maximum potential penalty of \$20,000 for Kumar Holdings' failures to keep a wage and time record and holiday and leave records for Mr Singh.

[15] The Labour Inspector therefore seeks one penalty be imposed on Kumar Holdings pursuant to s.10 Minimum Wage Act 1983 (MWA) or s.75 Holidays Act 2003 (HA03) for failure to keep and maintain time records in accordance with the requirements of s.8A of the MWA for the period up until 31 March 2016 and s.130 of the Employment Relations Act 2000 (the Act) for the period from 1 April 2016, and the failure to keep and maintain holiday and leave records in accordance with the requirements of s.81 of the HA03.

[16] The Labour Inspector also seeks one penalty for Kumar Holdings' breaches of ss.6 and 10 of the MWA arising from its failure to pay Mr Singh's wages in accordance with the requirements of the MWA.

[17] Kumar Holdings admitted owing Mr Singh total wage arrears of \$20,934.10. This consisted of minimum wage arrears of \$9,837.12 (for its failure to pay at least the minimum wage for all hours worked), time and half public holiday pay arrears of \$553.25 for failing to pay public holiday rates, unpaid public holiday pay of \$325.77, unpaid alternative holiday pay entitlements of \$2,019.55, 8% percent annual holiday pay upon termination of \$1,287.16 and other annual holiday pay arrears of \$6,911.25.

[18] In support of the penalty orders being sought, the Labour Inspector filed an affidavit together with an affidavit sworn by Mr Singh on 28 June 2018.

[19] The Labour Inspector seeks penalties from World Class Kiwi for failures to pay Mr Singh's annual holiday and public holiday entitlements in accordance with the requirements of HA03.

[20] World Class Kiwi admitted that it owed Mr Singh wage arrears of \$6,268.19 as a result of its failure to pay Mr Singh his correct HA03 entitlements. These arrears consisted of unpaid time and half for hours Mr Singh worked on a public holiday consisting of \$666.56, public holiday pay arrears of \$594.72, alternative holiday pay arrears of \$2,035.01, unpaid sick leave entitlements of \$309.72 and unpaid annual holiday pay of \$2,662.17.

Statutory provisions

[21] The following statutes apply.

Holiday Act 2003

[22] Section 16 of HA03 provides that after each completed 12 months of continuous employment, an employee is entitled to not less than four weeks' paid annual holidays.

[23] Section 27(1) of HA03 requires an employer to pay an employee annual holiday pay before a holiday is taken unless the agreed payment will be paid in the period that relates to the period during which the holiday is taken, or upon termination of employment.

Public holiday pay

[24] Section 49 of HA03 provides that if an employee does not work on a public holiday that would otherwise be a working day for the employee, the employer must pay the employee for that day.

[25] Section 50 of HA03 provides that an employer must pay an employee at least time and a half for working on a public holiday.

[26] Section 56 of HA03 provides an employer must pay an employee with an alternative holiday if the employee works on a public holiday.

Holiday and leave record

[27] Section 81 of HA03 requires an employer to keep holiday and leave records that contain specified information in respect of each employee. An employer is required to provide a copy of the holiday and leave record to specified persons (including a Labour Inspector) upon request (s.82 HA03).

[28] Section 75 of HA03 provides that an employer company who fails to comply with ss.28, 50, 81 (among others) of HA03 is liable to penalties.

Minimum Wage Act 1983

[29] Section 6 of the MWA states that every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under the MWA, is entitled to receive payment for their work at not less than that minimum rate.

[30] Section 8A of the MWA requires every employer to keep a wage and time record showing, in the case of each employee, specified information (see s 8A(1)) MWA.

[31] Every employer who failed to comply with that obligation was liable to a penalty (see s.10).

[32] Section 8A applied to both respondents up to 31 March 2016 when that section was repealed. From 1 April 2016 onwards s.130 of the Act applied.

[33] If an employer company fails to comply with its obligations under the MWA it is liable to a penalty not exceeding \$20,000, recoverable by a Labour Inspector, in accordance with s.10 of the MWA and s.135 of the Act.

Employment Relations Act – wages and time records

[34] An employer must at all times keep a record (called a wage and time record) showing, in the case of each employee, specified information (s.130(1)) of the Act.

[35] Every employer who fails to comply with any requirement of s.130 of the Act is liable to a penalty imposed by the Authority.

[36] From 01 April 2016 that penalty could be sought by a Labour Inspector (see s.130(5)). Prior to 01 April 2016 s.8 of the MWA applied.

Employment Relations Amendment Act 2016

[37] Some of the conduct which breached the legislation identified above in this case occurred before the commencement of the Employment Relations Amendment Act 2016 and some of the breaches occurred afterwards.

[38] Amendments made to the Act, in particular s.133A of the Act, outline the matters that the employment institutions must have regard to when determining penalties. These are:

- (a) the object stated in s.3; and
- (b) the nature and extent of the breach of 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 of 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 is 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 employment institutions in proceedings under the Act, or any other enactment, to engage in any similar conduct;
- (h) the Authority has complete discretion to give judgment for the total penalties applicable to all the breaches or any other amount not exceeding the maximum, or it may dismiss the claim (s.135(4) of the Act).

[39] The Authority has had regard to all of these factors when assessing the level of penalties to be imposed for the admitted breaches.

Relevant case law

Preet Employment Court decision

[40] The decision of the Employment Court in *Borsboom v Preet PVT Limited*¹ is the leading authority on penalty claims brought by a Labour Inspector.

[41] The Employment Court in *Preet* endorsed its decision in *Tan v Yang*² which provided a non-exhaustive list of factors that could usefully be considered when assessing penalties. These include:

- seriousness of the breach;
- whether the breach is one-off or repeated;
- the impact, if any on the employee/prospective employee;
- the vulnerability of the employee/prospective employee;
- the need for deterrents;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases

¹ [2016] NZEmpC 143.

² [2014] ERNZ 733.

[42] The Employment Court in *Preet* also stated that appropriate factors to be considered by the employment institutions included:

- an assessment of deterrents both in relation to the particular party being penalised and also to the wider community of employers;
- the degree of culpability of the person in breach is to be considered when the employment institutions are considering the seriousness of the breach;
- the general desirability for consistency and penalty decisions by the employment institutions; and
- when assessing a penalty of penalties there was a need to stand back and evaluate whether an anticipated outcome was one which was proportionate to the breach or breaches for which the penalty is imposed.

[43] *Preet* required a four step process to be applied by the employment institutions. That process is set out below.

Step One – Identify nature and number of breaches

[44] The Labour Inspector claimed penalties for the following;

Kumar Holdings:

- (a) failure to pay minimum wage at all times; and
- (b) record keeping breaches - failure to keep a wages and time record, and failure to keep holiday and leave record.

World Class Kiwi:

- (a) failure to pay annual holiday pay – failure to pay annual holiday pay while employed and failure to pay annual holiday entitlements upon termination; and
- (b) Failure to pay public holiday entitlements – failure to pay public holiday pay, time and half for hours worked on a public holiday and failure to pay alternative holidays upon termination.

[45] The Labour Inspector's approach to these breach claims is that they have already been assessed on a "*per capita*" basis as applied by the Employment Court in *Preet*.

[46] This involves the Employment Court's indication to the employment institutions that they may impose "*global penalties*" in appropriate cases. This involves the Authority in a situation like this, where there have been multiple breaches of several statutory provisions, to assess a single penalty in respect of all of those.

[47] It is clear from the information, evidence and submissions provided that the breaches for which the Labour Inspector now seeks penalties are representative breaches and therefore have already been globalised.

[48] While there were multiple breaches of the Act, the HA03, and the WPA, the parties as a result of attending mediation agreed to effectively 'globalise' these breaches into one representative breach of record keeping and wage arrears for Kumar Holdings and one representative breach of failure to pay holiday pay and failure to pay public holiday entitlements for World Class Kiwi.

[49] Accordingly, the total maximum potential penalty for the two breaches identified at step one for Kumar Holdings is \$40,000 (being a maximum of \$20,000 per breach for each representative breach claim).

[50] The maximum potential penalties against World Class Kiwi for the two breaches that the Labour Inspector seeks penalties for is \$40,000 (being a maximum of \$20,000 for the two representative breaches identified).

Step Two – Assessment of severity of the breaches

Aggravating factors

[51] I do not accept Kumar Holdings claim that the breaches of record keeping that occurred were inadvertent. The information available shows a pattern of continual breaches of the minimum statutory requirements regarding record keeping, in terms of the Act, the MWA and the HA03.

[52] It is clear that Kumar Holdings engaged in deliberate sustained and on-going failure regarding record keeping involving Mr Singh's entire period of employment (3 years and 9 months).

[53] The respondents have pointed to Mr Singh's employment agreement dated 13 March 2015 as an example of keeping appropriate records. I do not accept that.

[54] The role identified in that employment agreement was "*Assistant Operations Manager*" for 35-40 hours a week at a pay rate of \$16.50 per hour to be paid fortnightly on Wednesdays. None of that occurred.

[55] The stated role of Assistant Operations Manager did not bear any relation to Mr Singh's actual work as a cleaner, courier driver, food bag delivery driver, or newspaper driving, or to the rate or timing of his pay, or to the number of hours that he worked.

[56] Both respondents exclusively employ workers who are on work visas. The failure by both respondents to comply with the employment agreement provided to Immigration New Zealand should be of concern to Immigration New Zealand.

[57] It is clear that Mr Kumar, as the sole director and shareholder of Kumar Holdings and World Class Kiwi, supported Mr Singh's immigration application by providing a written employment agreement to Immigration New Zealand that didn't bear any relation to the way in which the parties managed their employment relationship.

[58] The lump sums that Kumar Holdings and World Class Kiwi paid Mr Singh for the work he undertook for those entities did not bear any relation to the hours he actually worked or to the appropriate minimum wage rate at the time. That is a serious matter.

[59] The written employment agreement provided to Immigration New Zealand set out World Class Kiwi's obligations in terms of the payments it was required to make to Mr Singh regarding his public holiday entitlements, his annual holiday entitlements and his sick leave entitlements under HA03. These specified obligations were not complied, meaning the breaches that occurred were deliberate.

[60] In terms of the failure to pay annual holiday in accordance with the provisions of the Holidays Act, Mr Singh did not receive any paid annual holiday for the first three years of his employment with Kumar Holdings. Mr Singh was first paid annual holiday by Kumar Holdings during the last year of his employment, being 2016.

[61] This indicates that Kumar Holdings and/or World Class Kiwi were aware of their legal obligations to pay annual holidays prior to the Labour Inspector's investigation. That knowledge indicates that the failure to pay Mr Singh annual holiday pay was intentional.

[62] It is also clear that there were significant failures in respect of World Class Kiwi's statutory obligations to pay Mr Singh public holiday entitlements. Mr Singh worked on numerous public holidays during the course of his employment and with Kumar Holdings and World Class Kiwi but was not paid time and a half for the hours he worked.

[63] Nor was Mr Singh ever given an alternative paid day's holiday off for each public holiday that he worked. In addition to those breaches Mr Singh also was not paid when a public holiday fell on a day which would otherwise have been a working day for him.

[64] Mr Singh's evidence to the Authority was that Kumar Holdings and World Class Kiwi did not pay him if he did not work. This evidence is supported by the failures that the Labour Inspector identified regarding the failure by Kumar Holdings and World Class Kiwi to pay annual holiday pay, public holiday entitlements or sick leave entitlements.

[65] The statutory requirement on an employer to keep wage and time records and holiday and leave records for all employees is a longstanding basic provision of New Zealand employment law.

[66] Kumar Holdings' and World Class Kiwi's failings in regard to their record keeping were significant. The Labour Inspector in her affidavit described the record keeping by Kumar Holdings and World Class Kiwi as "*woeful*" which caused her "*extreme difficulty in establishing whether minimum code breaches had occurred and the extent of those breaches*".

[67] The Labour Inspector's affidavit stated that she had spent enormous amounts of time working out the arrears owed to Mr Singh in attempting to identify which entity or person was responsible for those arrears. She said the time and resources expended meant she was not in a position to continue inquiring into the situation with other employees, apart from Mr Singh. That is very concerning.

[68] The Labour Inspector described how difficult her investigation process was because of the number of different jobs Mr Singh held, the length of time he was employed by each entity, the failure of both respondents to pay Mr Singh regularly, the different rates of pay, and the number of hours he worked in each job and the fact that for a significant period of Mr Singh's employment there were two separate legal entities (both solely under the exclusive control of Mr Kumar) which employed Mr Singh and which both did not keep separate or distinct employment records.

[69] The Labour Inspector described this as one of the most serious failures in respect of record keeping and submitted that it should be assessed at 90% of the maximum available penalty.

[70] It is vital for Labour Inspectors to be able to obtain and review copies of accurate wage and time records, and holiday and leave records, along with employment agreements so that they can undertake their inspections regarding minimum employment standards to ensure that employees (both current and previous) are receiving and have received the minimum statutory entitlements.

[71] The Labour Inspector in her affidavit stated that the failure in this case for Kumar Holdings and World Class Kiwi to keep and maintain any wage and time records or any holiday and leave records "*very significantly*" hindered her ability to properly investigate Mr Singh's complaint.

[72] The Labour Inspector described how she spent many hours trying to obtain information to ensure she had an accurate picture of Mr Singh's actual hours and days of work, given that they were so different than what was recorded in the employment agreement provided to Immigration New Zealand.

[73] This was a case where Mr Singh had been performing five different jobs for two different employers which both involved working variable hours and work patterns each day of the week with variable rates of pay for each job he was

undertaking for each employer. This made the failure to keep records a very serious issue compared a case in which there was a standard or normal work pattern.

[74] The Labour Inspector described the many hours she spent reviewing carefully information to determine the most accurate possible account of hours of work and rates of pay for each day that Mr Singh had worked for Kumar Holdings and for World Class Kiwi, and then to determine what other entitlements Mr Singh was entitled to but had not been paid, such as public holidays, annual holiday and sick leave.

[75] The Labour Inspector noted that although she had reservations other employees may not have received their minimum entitlements given the time, effort and resources that had been invested into Mr Singh's claims she was not in a position to continue investing further time in investigating the other employment relationships that Kumar Holdings and/or World Class Kiwi had with its employees, all of whom were on work visas.

[76] I accept the Labour Inspector's submission that Mr Singh was a vulnerable worker. He was a recent migrant who arrived in New Zealand in October 2012 and commenced work with Kumar Holdings in January 2013. He required a work visa to work in New Zealand.

[77] Mr Singh in his affidavit said that he did not have a good understanding of New Zealand employment law so he just did what he was told by Mr Kumar, the director and sole shareholder of both respondents. Mr Singh was also dependent upon World Class Kiwi to support him to obtain a work visa because of his immigration status.

[78] World Class Kiwi's support for Mr Singh's work visa meant that it was not until his employment ended that Mr Singh felt able to approach the Labour Inspector for help regarding his wage arrears concerns involving Kumar Holdings and World Class Kiwi.

[79] The full Employment Court in *Labour Inspector v Cypress Villas Limited*³ observed that minimum wages have been a feature of New Zealand Employment Law and well known or ought to be to all employers.

[80] The Court in *Cypress* further stated that “*minimum holidays and holiday pay, like minimum wages are long established features of the employment law landscape in New Zealand and cannot be unknown to employers or those who advise and represent them*”.

[81] The breaches by Kumar Holdings were minimum standards breaches which involve breaches of the Act, the HA03 and the WPA.

[82] In assessing the seriousness of the breaches I have regards to the total arrears Mr Singh was owed by Kumar Holdings and World Class Kiwi which was \$27,202.29.

[83] This is a significant amount for an employee who did not earn much more than the minimum wage rate. It is also necessary to consider that Mr Singh did not receive the money owed to him by Kumar Holdings and World Class Kiwi until May 2018, so some of his wage arrears had been outstanding for up to five years.

[84] Mr Singh’s complaint to the Labour Inspector was made on 10 October 2016. If the Labour Inspector had not become involved Mr Singh most likely would not have bene paid his wage arrears.

[85] These were serious breaches which were repeated over many years and they had the effect of depriving Mr Singh (a low paid employee) from money he had earned over a number of years.

[86] I also recognise that Kumar Holdings and World Class Kiwi both benefited financially by depriving Mr Singh of the money that he had earnt.

[87] The financial records presented to the Authority for the relevant periods show that the respondents were doing very well, meaning they derived an identifiable financial benefit through their breaches that was not available to other employers.

³ [2015] NZEmpC 157.

[88] Kumar Holdings' penalty for failing to pay Mr Singh his wages in accordance with the MWA is set at \$12,000 being 60% of the potential maximum penalty and \$14,000 being 70% of the potential maximum penalty for its record keeping failures.

[89] World Class Kiwi's penalty for failing to pay Mr Singh his annual holiday pay is set at \$10,000 being 50 % of the potential maximum penalty of \$20,000 and at \$12,000 being 60% of the potential maximum penalty of \$20,000 for its failure to pay public holiday entitlements.

Ameliorating factors

[90] Mr Kumar made claims in his affidavit dated 20 July 2018 about Mr Singh's alleged breaches of his visa requirements. While that matter is not before the Authority for investigation, Mr Kumar attempted to reply on it to persuade the Authority that Mr Singh was not a vulnerable employee because he (Mr Singh) was aware of his legal obligations regarding his student work visa which he then (allegedly) deliberately breached in order to obtain a financial advantage.

[91] Mr Kumar's claims about Mr Singh's alleged breaches are not relevant to the Authority's assessment of the level of penalties to be imposed in respect of the various breaches which have been acknowledged by Kumar Holdings and World Class Kiwi.

[92] The fact that Mr Singh may have deliberately breached the terms of his work visa (which I note that is a mere allegation and not a proven fact) is not a factor which I consider is relevant to an assessment of the level of penalties that should be imposed on Kumar Holdings and World Class Kiwi for their admitted (representative) breaches.

[93] It is however information that should be of interest to Immigration New Zealand, particularly in light of the misleading information that World Class Kiwi gave to Immigration New Zealand about Mr Singh's employment.

[94] If Mr Kumar had genuine concerns about Mr Singh breaching his work visa obligations then he should have raised those with Immigration New Zealand and/or the Labour Inspector when he (Mr Kumar) became aware of such information.

[95] The affidavits provided by Jeshika Kumar dated 24 January 2018, Rakesh Kumar dated 30 January 2018, the affidavit provided by Mohammed Siddique dated 30 January 2018, and the affidavit of Sobina Gurung dated 24 January 2018 all make adverse comments about Mr Singh's work ethic and/or the quality of the work he performed.

[96] I do not consider such claims are relevant to an assessment of the level of penalties to be imposed on the respondents.

[97] If Kumar Holdings and/or World Class Kiwi had genuine concerns about the quality of Mr Singh's work then they needed to raise that with him while he was still employed. The fact that they may have been unhappy with his work does not absolve them from their legal responsibility to comply with the minimum code protections contained in the legislation which Kumar Holdings and World Class Kiwi both admit to breaching.

[98] Mitigating factors include:

- (a) that Kumar Holdings and World Class Kiwi have not appeared before the Authority before for breaching minimum code obligations;
- (b) Mr Kumar in his affidavit demonstrated remorse for the breaches that occurred;
- (c) The respondents accepted responsibility for their breaches;
- (d) Mr Singh has now been paid all of the wage arrears he was owed;
- (e) The respondents also reached agreement with the Labour Inspector at mediation which has avoided the need for time and resources to be expended on an investigation meeting.

[99] Ameliorating factors for Kumar Holdings should result in a 40% reduction for repaying Mr Singh the amounts he is owed and for agreeing on those amounts with the Labour Inspector.

[100] It is not appropriate to give Kumar Holdings a greater than 40% reduction because the Labour Inspector's evidence was that she had been given contradictory and misleading information by Mr Kumar during her investigation.

[101] Ameliorating factors for World Class Kiwi should result in a 40% reduction for paying Mr Singh's wage arrears in full in April 2018 and for agreeing on the amounts of wage arrears with the Labour Inspector.

[102] Step two – Kumar Holdings \$12,000 (60% of maximum penalty) less \$4,800 (being 40% reduction for ameliorating factors) = \$7,200 for one representative MWA breach.

[103] Step two – Kumar Holdings \$14,000 (70% of maximum penalty) less \$5,600 (40% reduction for ameliorating factors) = \$8,400 for one representative record keeping breach.

[104] Step two – World Class Kiwi \$10,000 (50% of maximum penalty) less \$4,000 (40% reduction for ameliorating factors) = \$6,000 for failure to pay HA03 annual holiday entitlements.

[105] Step two – World Class Kiwi \$10,000 (50% of maximum penalty) less \$4,000 (40% reduction for ameliorating factors) = \$6,000 for failure to pay HA03 public holiday entitlements.

Step three – Respondents' financial circumstances

[106] The Labour Inspector presented information to the Authority to establish that Kumar Holdings and World Class Kiwi had both done well financially in 2016 and 2017. Kumar Holdings' profit from 2016 – 2017 increased by over \$300,000.

[107] World Class Kiwi's financial information was not available before 2017. But information from 2015 and 2016 showed an increase in its profit between 2015 and 2016 of over \$170,000.

[108] Mr Kumar in his affidavit did not address the financial circumstances of Kumar Holdings or World Class Kiwi.

[109] Ms Reddy, submitted that World Class Kiwi is no longer trading and that it ceased trading over a year ago and is no longer in a strong financial position. She submitted that there should be a 40 percent reduction in the penalties imposed on World Class Kiwi to reflect that.

[110] This submission was unsupported by financial evidence. Nor did Mr Kumar address financial information in his affidavit.

[111] In the absence of any evidence, other than that provided by the Labour Inspector, about the financial circumstances of the respondents it is not appropriate to reduce the penalties to be imposed on the grounds of financial circumstances.

Step four – Proportionality of outcome/totality test

[112] Penalties must be imposed at a level that signals strong disapproval of an employer's conduct that breaches minimum code protections for employees. Penalties must act as a deterrent not just to these two employers but to all employers who may be minded not to meet their legal obligations to employees.

[113] The penalties imposed should also be proportionate to the severity of the breaches and the harm caused by the breaches as well as to the amount of money withheld.

[114] Penalties must be high enough to act as a real deterrent but not so high that they cannot be paid by the employer. Penalties must also be set at a level that is sufficient to prevent employers who exploit their employees from deriving a competitive advantage over law abiding employers.

[115] In terms of Kumar Holdings the potential maximum penalty for both admitted representative breaches was \$40,000.

[116] After the appropriate adjustments have been made Kumar Holdings has had total of \$14,400 penalties imposed on them, which was equally apportioned between the two representative breaches it accepted liability for.

[117] The penalty imposed for each representative breach was therefore \$7,200.

[118] This amount is to be assessed against the total outstanding wage arrears of \$20,934.10 which Kumar Holdings repaid Mr Singh.

[119] I do not consider that any further adjustment needs to be made on the grounds of proportionality.

[120] Kumar Holdings obviously obtained a significant financial windfall and unfair competitive advantage in the labour market by its decision not to pay Mr Singh his minimum code entitlements. That type of conduct needs to be punished and strongly discouraged.

[121] The Labour Inspector has also already effectively dealt with proportionality by agreeing to bring only two representative penalty claims against Kumar Holdings instead of pursuing each multiple breach as discrete breaches.

[122] I am therefore satisfied that no further adjustment needs to be made to the penalties imposed on Kumar Holdings under the heading of proportionality.

[123] In terms of World Class Kiwi, it has had \$12,000 in total penalties imposed on it for two representative breaches of HA03 involving wage arrears. The first representative breach involved failure to pay annual holiday entitlements with the second representative breach relating to failures to pay public holiday entitlements.

[124] World Class Kiwi agreed to pay Mr Singh \$6,268.19 in wage arrears arising. I therefore consider that there needs to be some reduction to reflect proportionality.

[125] The penalties imposed on World Class Kiwi are therefore reduced to \$6,000 in total being \$3,000 for each representative breach, to reflect proportionality against the wage arrears that were paid.

[126] I am satisfied that the penalties imposed on each respondent accord with the objects of the Act.

[127] Consistency with other cases is a relevant factor for the Authority to consider when assessing proportionality. However each case will stand on its own established fact.

[128] It is now necessary to stand back and assess the overall penalties imposed in this case against other cases to ensure there is not an inconsistency in the level of penalties previously imposed on other employers to the extent that further adjustments are required in this case.

[129] A review of the employment database of penalties imposed on other employers for breaches of minimum standards legislation does not suggest that the

penalties imposed in this case on each of the respondents are inconsistent with the approach taken by the employment institutions in other cases.

Orders

[130] Kumar Holdings is ordered to pay total penalties of \$15,600 consisting of:

- (a) a penalty of \$7,200 for its breaches of MWA.
- (b) a penalty of \$8,400 for breaches of its recording keeping obligations under the Act and HA03.

[131] World Class Kiwi is ordered to pay total penalties of \$6,000 consisting of:

- (a) a penalty of \$3,000 for failing to pay Mr Singh his annual holiday entitlements under the HA03.
- (b) a penalty of \$3,000 as a penalty to reflect its failure to pay Mr Singh his public holiday entitlements under the HA03.

[132] Each respondent is ordered to pay the full amount of the penalties imposed to the Crown bank account within 28 days of the date of this determination.

What if any costs should be awarded?

[133] The Labour Inspector is entitled to costs on this application. The parties are encouraged to resolve costs by agreement. If that does not occur, then the timetable below applies.

[134] The Labour Inspector has 14 days within which to file a costs application. Kumar Holdings and World Class Kiwi then have 14 days within which to respond. The Labour Inspector then has a further 7 days within which to file any reply submissions.

Rachel Larmer
Member of the Employment Relations Authority