

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 121  
3023307

BETWEEN	A LABOUR INSPECTOR Applicant
A N D	SETIA CONSTRUCTION (2013) LIMITED First Respondent
A N D	Yee Bing Chang Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Marija Urlich, Counsel for Applicant  
Eva Ho, Counsel for Respondent

Date of Determination: 18 April 2018

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**CONSENT DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] By way of a joint memorandum the parties advised the Authority that they had reached a settlement of all employment relationship issues between them.

[2] The parties have reached agreement as to the number of breaches of minimum employment standards by the first and second respondent and appropriate level of penalty.

[3] The parties agree that the below statutory penalties sought are primarily penal as opposed to compensatory in that they are intended to mark the community's disapproval of the conduct that amounts to a breach of the minimum employment standards.

[4] The parties request that the Authority issue a Consent Determination that:

- (a) The first respondent accepts 17 breaches of employment standards as claimed in the Statement of Problem dated 14 December 2017.
- (b) The second respondent accepts 1 breach of employment standards as claimed in the Statement of Problem dated 14 December 2017;

- (c) The four step analysis of these breaches per *Borsboom (Labour Inspector) v Preet PTY Limited & Anor*<sup>1</sup> (*Borsboom v Preet*) is:

**Step 1: Nature and number of breaches:**

- (i) That the first respondent accepts 17 individualised breaches per paragraph 3.1 to 3.5 Statement of Problem dated 14 December 2017; and
- (ii) that the second respondent accepts 1 breach per paragraph 3.5 Statement of Problem dated 14 December 2017.

**Step 2: Assessment of the severity of the breaches:**

Aggravating factors

- (i) Minimum code employment entitlements and standards are universally known (*Labour Inspector v Cyprus Villas Limited*<sup>2</sup>;
- (ii) The applicant's view is that the affected employees were vulnerable to the extent that they were migrant workers, visa dependent on the first respondent;
- (iii) The applicant's view is the breaches are serious and significant, particularly the failure to provide compliant employment agreements with respect to 7 employees, and failure to provide compliant wage, time and holiday records; and
- (iv) The applicant's investigation was impeded because the first respondent failed to maintain compliant employment agreements and wage, time and holiday records.

Mitigating factors

- (i) that the first and second respondents accepted liability as early as their submission of Statement in Reply dated 16 January 2018 (in paragraph [177] to [180] of *Borsboom v Preet*;
- (ii) that the financial sum involved in all 17 breaches is approximately \$4,000 and any affected current and past employees have been compensated reasonably promptly;
- (iii) the first and second respondents have cooperated with the applicant, accepted all its findings, and cooperated with Authority directions, at the earliest opportunity after consultation with its legal advisor;

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<sup>1</sup> [2016] NZEmpC 143

<sup>2</sup> [2015] NZEmpC 157

- (iv) that the first respondent is a small local business (with only around 8 employees) where the second respondent (as the sole director) has the full responsibility of managing all facets of the business from marketing to operation to human resource to accounting;
- (v) that the first and second respondents' breaches were as a result of their ignorance of their legal obligations as employers and have sought appropriate legal clarification to better understand their legal obligations as an employer (in particular, from Michael Kan Law and Focus Law); and
- (vi) neither the first nor the second respondent have 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.

**Step 3: Respondent's ability to pay:**

- (i) The first respondent submits that it is able and willing to pay the penalty of \$5,000 in one lump sum in the business's current financial state, however, anything above such amount the first respondent is likely to have difficulty paying in one lump sum;
- (ii) the second respondent submits that he is able and willing to pay the penalty of \$14,000.00 in one lump sum.

**Step 4: Proportionality:**

- (i) The parties agree globalisation and level of penalty appropriate to the breaches, taking into account the following factors:

**First respondent**

Failure to pay minimum wage x 1 breach (1 worker, arrears paid) - \$2,000.00

Failure to pay public holiday x 1 breach after globalisation (3 workers, arrears paid) - \$3,000.00

Failure to pay holiday pay and termination x 1 breach after globalisation (4 workers, arrears paid) - \$3,000.00

Failure to provide compliant employment agreements x 1 (all 8 casual employment agreements failed to meet statutory requirements) - \$5,000.00

Insufficient holiday and leave records x 1 (1 employee affected) - \$1,000.00.

**Second respondent**

The second respondent being the person involved in the breaches committed by the first respondent - \$5,000.00

- (d) the parties have agreed level of penalties of \$19,000.00 (\$14,000.00 first respondent, \$5,000.00 second respondent) is appropriate for all breaches;
- (e) the penalty sums to be paid within five working days of the date of Determination;
- (f) that the Authority exercise its discretion to award some or all of the penalty sums to the workers.

### **Consent**

[5] By consent, the terms recorded in the joint memorandum which are agreed to and signed by counsel for the parties now become orders of the Authority. As orders of the Authority, the orders of the joint memorandum are final, binding and enforceable.

[6] By consent I order that 65% of the penalty sums awarded to be paid to the individual employees affected by these breaches in the appropriate proportional amounts as are determined by agreement between the parties.

[7] I order that 35% of the penalty sums awarded to be paid to the MBIE Trust Account.

### **Costs**

[8] Costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**