

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 173
3029091

BETWEEN A LABOUR INSPECTOR
Applicant

AND HAI UNG IN PARTNERSHIP WITH
VUOCHHUOR UNG trading as SOUTH
DUNEDIN SATAY HOUSE
First Respondent

AND VUOCHHUOR UNG IN PARTNERSHIP
WITH HAI UNG trading as SOUTH
DUNEDIN SATAY HOUSE
Second Respondent

Member of Authority: Andrew Dallas

Representatives: Alastair Miller, counsel for the Applicant
John Farrow and Fiona McMillian, counsel for the Respondents

Investigation Meeting: On the papers

Date of Determination: 28 November 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Sacha Hodgson, lodged proceedings in the Authority against Hai Ung and Vuochhuor Ung trading as the South Dunedin Curry House alleging breaches of minimum employment standards in respect of two employees.

[2] At the request of the parties, a consent determination resolved the factual dispute between them.¹ The resolution of such cleared the way for consideration by the Authority of the potential imposition of penalties on Mr Ung and Ms Ung without recourse to an investigation meeting.

¹ *A Labour Inspector v Hai Ung in partnership with Vuochhuor Ung trading as Dunedin Satay House and Vuochhuor Ung in partnership with Hai Ung trading as Dunedin Satay House* [2018] NZERA Christchurch 112

[3] This determination now deals with the remaining matter of penalties.

Issues for determination

[4] The issues for determination are:

- (i) Whether penalties should be imposed on Mr Ung and Ms Ung for failure to keep full and accurate wage and time records for Ms Vong in breach of section 130 of the Employment Relations Act (the Act);
- (ii) Whether penalties should be imposed on Mr Ung and Ms Ung for failure to keep full and accurate holiday and leave records for employee Ms Vong in breach of section 81 of the Holidays Act 2003;
- (iii) Whether penalties should be imposed on Mr Ung and Ms Ung for failure to keep full and accurate holiday and leave records for employee Sy Dung Tran in breach of section 81 of the Holidays Act; and,
- (iv) Should either party contribute to the costs of representation of the other party?

The Labour Inspector's claim for penalties

[5] Having considered the consent determination, the Labour Inspector's evidence and the submissions of the parties on penalties, I find it is appropriate in the all the circumstances to impose penalties on Mr Ung and Ms Ung for breaches of the Act and minimum standards.

[6] The Authority has jurisdiction to hear and determine an application by a Labour Inspector for recovery of penalties under the Act and Holidays Act.² The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.³ The Labour Inspector submitted that while a partnership, the maximum penalty Mr Ung and Ms Ung could be found liable for was \$10,000 per breach.⁴ That is, the same as for individuals. Mr Ung and Ms Ung agreed with this approach.

² Employment Relations Act 2000, s 161(m)(iii) and s 161(m)(iv)

³ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁴ Employment Relations Act, s 135(2)(a); Holidays Act, s 75(1)(a)

[7] The decision of the Court in *Borsboom v Preet PVT Limited*⁵ identified a four step process to be taken in the assessment of penalties.

Nature and number of breaches

[8] There were two employees of Mr Ung and Ms Ung affected by its breaches of the Act and Holidays Act. Within the framework provided by *Preet*, the Labour Inspector said they were liable for a maximum penalty of:

- (i) \$10,000 for one breach of s 130 of the Act;
- (ii) \$20,000 for two breaches of s 81 of the Holidays Act (in respect of two employees).

[9] Mr Ung and Ms Ung said the maximum penalty they were liable for was \$10,000. They said the two breaches of the Holidays Act were identical and the breach of the Act was materially similar to one of the breaches of the Holidays Act and it related to the same employee.

[10] The Labour Inspector said this was not a case where “globalisation” of penalties was appropriate because the breaches related to different statutes. The Labour Inspector also said the record keeping requirements of the Act and Holidays Act, while similar, related to different types of minimum employment standards: wages and holidays, which also made globalisation inappropriate. I accept these submissions. There is to be no globalisation of penalties.

Seriousness of the breaches

[12] The Labour Inspector submitted in respect of one breach of s 130 of the Act, the starting point based on the severity of the breach should be assessed at 50 percent of the maximum penalty or \$5,000. The Labour Inspector submitted the two breaches of s 81 of the Holidays Act should also be assessed at 50 percent of the maximum penalty or \$5,000 per breach.

⁵ [2016] NZEmpC 143 at [67] and [68].

[13] While their globalisation argument at Step One was rejected, Mr Ung and Ms Ung's general submission at this step was that penalties should be reduced by more than 50%.

[14] Consistent with *Preet*, the Labour Inspector and Mr Ung and Ms Ung's identified various "aggravating" and "mitigating" factors which were relevant to the assessment of penalties. The Labour Inspector said aggravating factors were the length of time Mr Ung and Ms Ung had been in business, previous intervention by the Labour Inspector and the withholding of relevant information. Mr Ung and Ms Ung took issue with some of the aggravating factors identified by the Labour Inspector and suggested they fall outside the scope of the consent determination.

[11] The Labour Inspector and Mr Ung and Ms Ung both identified mitigating factors were the acceptance of the breaches and the implementation of new systems to ensure future compliance.

[12] While noting the concerns expressed above by Mr Ung and Ms Ung about the aggravating factors, I also note the Labour Inspector's concession that penalties, notwithstanding, can be discounted by a further 10 percent. Mr Ung and Ms Ung did not specifically identify a further reduction percentage. I accept a further reduction of 10% at the point of the process. So then, at this point the proposed penalties to be imposed on Mr Ung and Ms Ung are:

- (i) \$4,500 for one breach of s 130 of the Act; and
- (ii) \$9,000 for two breaches of s 81 the Holidays Act;

Totalling: \$13,500

Financial circumstances of Mr Ung and Ms Ung

[13] The Labour Inspector said Mr Ung and Ms Ung had not provided any financial information despite an opportunity to do so. Relying on *Preet*, the Labour Inspector said there should be no discount due to financial circumstances in the absence of this evidence. However, the Labour Inspector said a discount of 10% could be given on the basis that Mr Ung and Ms Ung ran a "small business".

[14] Mr Ung and Ms Ung said consideration should be given to the fact they ran a small business comprising three part-time employees and a penalty would have a significant impact on financial position of the business, as it would with any small business.

[15] Having considered the respective positions of the parties, I accept the Labour Inspector's submission that financial information would need to be provided for a reasonable discount to apply at this step. However, I accept the submissions of the parties that as a general proposition a discount should be applied because Mr Ung and Ms Ung's business was a small one.

[16] So then, at this point the proposed penalties to be imposed on Mr Ung and Ms Ung are:

\$4,050 for one breach of s 130 of the Act; and

\$8,100 for two breaches of s 81 the Holidays Act:

Totalling: \$12,150

Proportionality of outcome

[17] In *Preet* the Court said the penalties imposed should, in effect, be proportionate to the wrongdoers level of mischief. The Labour Inspector accepted there would be a reduction based on a proportionality exercise but suggested this should only result in a rounding down to \$12,000.

[18] Mr Ung and Ms Ung said the proportionality test required, among other things, the Authority to take into account the orders for penalties made in relevant cases. Mr Ung and Ms Ung, referring to another case involving a partnership, said a proportionate outcome for them would be \$1000.⁶

[19] The Labour Inspector said the test did not mandate such an approach and that the test was directed at ensuring a penalty was in proportion to the seriousness of the default. The Labour Inspector questioned whether Mr Ung and Ms Ung had correctly undertaken a *Prett* analysis by arriving at a penalty of \$1000.

⁶ *Harrison v Boyle and AG & VM Boyle Partnership* [2017] NZERA Auckland 222

Result

[20] Taking the submissions of the parties into account, and having regard to all the circumstances of the case, it is appropriate to impose significant, but proportionate, total penalties of \$11,500 on Mr Ung and Ms Ung.

[21] Mr Ung and Ms Ung must pay the Authority total penalties of \$11,500, which will then be pay into a Crown bank account, within 28 days of this determination.

Costs

[22] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 28 days from the date of this determination in which to file and serve a memorandum on costs. Mr Ung and Ms Ung have a further 14 days in which to file and serve a memorandum in reply.

[23] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.⁷

Andrew Dallas
Member of the Employment Relations Authority

⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.