

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 166
3021734

BETWEEN A LABOUR INSPECTOR
 Applicant

A N D INDY SUPA STORE LIMITED
 Respondent

A N D KAVITA MAYURKUMAR TAILOR
 Second Respondent

A N D MAYURKUMAR MANILAL TAILOR
 Third Respondent

Member of Authority: Helen Doyle

Representatives: Ella Tait, Counsel for Applicant
 Bernie Chow, for First, Second and Third Respondents

Investigation Meeting: 13, 14 and 15 June 2018 in Christchurch

Submissions Received: 29 and 10 August 2018 from Applicant
 3 August and 17 August 2018 from Respondent

Date of Determination: 12 November 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Indy Supa Store Limited breached the Employment Relations Act 2000, the Minimum Wage Act 1983 and the Holidays Act 2003.**
- B Within 28 days of the date of this determination Indy Supa Store Limited is to either pay, or enter into a payment plan which is acceptable to the Labour Inspector, the sum of \$103,013.60 gross being minimum wage, annual leave,**

public holiday and alternative day arrears owing to its former employee Mr Y Patel.

- C Interest is ordered to be paid on the amount of \$103,013.60 gross from the date the original statement of problem was lodged with the Authority on 27 October 2017. That date is before the date of commencement of the Interest on Money Claims Act 2016 and therefore interest is calculated at the rate prescribed under s 87 (3) of the Judicature Act 1908. Interest to the date of this determination is \$5362.35 and will continue to accrue at a daily rate of \$14.11 until payment.**
- D Leave is reserved for the Labour Inspector to return to the Authority at the expiration of the 28 day period for further orders about arrears including under s142Y of the Employment Relations Act 2000.**
- E Within 60 days of the date of this determination Indy Supa Store Limited is to pay a penalty of \$61,600 to the Labour Inspector.**
- F Kavita and Mayurkumar Tailor are persons involved in the breaches of Indy Supa Store Limited.**
- G Within 60 days of the date of this determination Kavita Tailor is to pay a penalty of \$12,000 to the Labour Inspector.**
- H Within 60 days of the date of this determination Mayurkumar Tailor is to pay a penalty of \$12,000 to the Labour Inspector.**
- I From the penalties paid the Labour Inspector is to transfer \$20,000 to Mr Y Patel and the balance is to be paid into the Crown Account.**
- J Costs are reserved and a timetable set for an exchange of submissions.**

Employment Relationship Problem

[1] A Labour Inspector, Bridget Zonneveld, was advised of a complaint by an employee of the respondents' business Moko Price Cutter, which is a dairy on Marshlands Road in Christchurch, in or about February/March 2017. Ms Zonneveld duly investigated the complaint. When she went on parental leave in March 2018 the file was handed over to another Labour Inspector Zhe Higgins. I shall refer to the Labour Inspectors in this determination as the Labour Inspector.

[2] The Labour Inspector says that Indy Supa Store Limited (Indy Supa) has breached minimum standards law as below:

- (a) Section 6 of the Minimum Wage Act 1983 (MWA) by the failure to pay an employee Y Patel at no less than the minimum rate for all hours worked.
- (b) Section 130 of the Employment Relations Act 2000 (ERA) by failing to keep an accurate wage and time record for each worker.
- (c) The following sections of the Holidays Act 2003 (HA):
 - (i) Section 50 – failure to pay at least time and a half for working on a public holiday.
 - (ii) Sections 40 and 49 – failure to pay for public holidays that were otherwise working days.
 - (iii) Section 27 – failure to pay holiday pay on termination.
 - (iv) Section 60 – failure to pay alternative holiday pay on termination.
 - (v) Section 81 – failure to keep a holiday and leave record as required.

[3] The Labour Inspector claims arrears of minimum wages and annual holiday pay, unworked public holidays that were otherwise working days, the half-time component of worked public holidays and alternative days to Mr Patel in the combined sum of \$103,013.60 in accordance with a schedule which was amended and provided during the Authority investigation meeting and then at a later date in a finalised form.

[4] There is a claim for penalties to be awarded against Indy Supa for breaches of the MWA and for breaches of the ERA and the HA.

[5] The Labour Inspector says that Mrs Taylor, who was the sole director of Indy Supa at the time of the breaches, and Mr Taylor, who is the spouse of the second respondent, are persons involved in the breaches under s 142W of the ERA. It is said that this is because Mrs Taylor is a director and Mr Taylor is a person in a position to exercise significant influence over the management or administration of the person in breach.

[6] The Labour Inspector seeks penalties against Mr and Mrs Taylor as persons involved in the breaches.

[7] Enforcement action against Mr and Mrs Taylor as persons in connection with the breaches under s 142Y of the ERA is sought to the extent that Indy Supa is unable to pay the arrears owed.

[8] Indy Supa does not accept that there has been a breach of s 6 of the MWA. It does accept that Indy Supa has committed the following breaches:

- (a) Breaches of s 130 of the ERA by failing to keep inaccurate wage and time record of each worker.
- (b) Breaches of ss. 27, 40, 49, 50, 60 and 81 of the HA.
- (c) Mr Chow in submissions accepted that Mr and Mrs Taylor may be persons involved. He says that Mr Patel was also involved in the breaches. Submissions are made in response by the three respondents' about the quantum of and liability for penalties particularly in light of the denial that there was a failure to pay minimum wages.

The Issues

[9] The Authority needs to determine the following issues:

Claims for arrears and an assessment as to breaches

- (a) What is the evidence about hours of work including company records, WhatsApp and text messages and the food diary?
- (b) Who else worked in the dairy?
- (c) When did Divyang commence his employment and were his hours worked taken into account appropriately?
- (d) Did Prakruti actually work at the dairy or was she simply on the company record and required to reimburse money paid to her?
- (e) Did Mr and Mrs Tailor work in the dairy and if so when?
- (f) Did Savita work at the dairy before Mr Patel for longer than a week?
- (g) If so does her statement about her employment conditions lend weight to Mr Patel's claims that he worked up to 92 hours a week in the dairy?
- (h) Have the respondents proved that the claims by the Labour Inspector for minimum wage arrears based on hours, days and time worked are incorrect.
- (i) It is accepted no holiday and leave record was kept. Is there evidence contrary to the evidence of Mr Patel and the Labour Inspector about what period of leave was taken and what public holidays were worked?
- (j) If the Authority accepts as proved the claims for minimum wage and annual leave and public holidays then what arrears are owed?
- (k) Should there be an award of interest and if so from what period?
- (l) What breaches are made out?

Penalties

- (a) Are Mr and Mrs Tailor persons involved in the breaches assessed from 1 April 2016 under s 142W of the ERA?

- (b) If so what penalties should be awarded and should a portion of the penalties be paid to Mr Patel?
- (c) What should happen with the claim under s 142Y of the ERA?
- (d) What final orders are made?

What hours are said to have been worked and what records are relied on by Indy Supa?

[10] Where a claim is brought before the Authority to recover wages or other money payable to an employee, the employee may call evidence to show that the employer has failed to keep or produce a time and wage record in respect of that employee as required – s 132 of the ERA. Evidence may be called that that failure prejudices the employee’s ability to bring an accurate claim under s 131 of the Act.

[11] Where evidence of this nature is given then the Authority may, unless the employer proves the claims are incorrect, accept as proved all claims made by the employee in respect to wages actually paid and hours, days and time worked by the employee.

[12] The respondents say that Mr Patel worked 40 hours per week in the dairy from 29 July 2013 although they accept that he had worked for two and a half days training in late March 2013. He was paid initially \$14 per hour and then \$19 per hour in accordance with written employment agreements for 40 hours per week. The issue as to what wages Mr Patel was actually paid has not caused difficulties in this matter. The issue in dispute is whether Mr Patel worked hours over and above what he was paid.

[13] On 11 June 2018 shortly before the investigation meeting Mr Chow provided to the Authority on behalf of the respondents four documents being hours/days worked by company employees, a schedule of public holidays, a summary of leave for Mr Patel and a timeline of work and holidays of company employees. I shall refer to these as the reconstructed records.

[14] Mr Chow submits that the reconstructed record of hours and days worked by company employees for the entire employment period that Mr Patel worked for Indy Supa from 29 July 2013 to 26 February 2017 is the “most reliable and safe source of actual hours.” He submits that this

reconstructed record is based on all the available information the company managed to piece together including the rosters and employee working hours at Tab 11¹.

[15] Mr Chow submits that Mr Patel could only find one error for the whole period of the reconstructed records when he produced a police complaint acknowledgement after he reported a shoplifting incident on 7 July 2014. That was a day the reconstructed records show Mr Patel on annual leave. In accordance with the police records he was not. Mr Patel's handwritten records at tab 11 of the bundle are blank for the period of 7 July 2014 to 27 July 2014. To deal with that issue Mr and Mrs Tailor have put down leave in circumstances when it is not accurate to do so at least for 7 July 2014. Further for that period 7 July to 27 July 2014 there are no records in Mr Patel's handwriting of anyone else working either for that period. The reconstructed records show Mr and Mrs Tailor and two other people working over for that period.

[16] There is also the food diary in which Mr Patel said he wrote down as instructed by Mr Tailor the food he consumed from the dairy whilst working and the price of each item and then added up the amount to reimburse the business. From 7 July 2014 to 27 July 2014 that diary shows he recorded food consumed on nearly every day for that period. The days where the food diary did not show food was consumed the Labour Inspector treated that day as not worked and accordingly reduced working hours for that week.

[17] Whilst Mr Chow's submission was that only one error could be found it is important to record that before the reconstructed records were prepared there were other periods in the company rosters where there was no record of hours worked. There are also rosters that show Mr Patel working for 8 hours a day but there are no records for who worked the rest of the time the dairy was open. Mr and Mrs Tailor suggested to the Labour Inspector at the time of her investigation that Mr Patel was either on leave for those periods and/or they worked or their son worked. The reconstructed records deal with those issues by showing other employees or Mr and Mrs Tailor working for varying periods and/or have Mr Patel on leave.

[18] Ms Tait in her submissions has broken down the range of hours that the Labour Inspector says that Mr Patel worked at various stages of employment. It is helpful to set that out below.

¹ Common bundle of documents, Tab 11

What becomes apparent is that the Labour Inspector says the hours worked by Mr Patel were very different to the respondents' view that he worked 40 hours per week.

Dates	Weekly Hours	Comments
27 March 2013 -25 June 2013	11	The Labour Inspector says after an initial 2.5 days of paid employment, Mr Patel worked at the dairy on Sundays, for no pay while awaiting the grant of his visa.
26 June 2013 – 13 July 2014	92	The Labour Inspector says Mr Patel generally operated the dairy on a sole-charge basis during its opening hours 6:00 am to 8:00 pm Monday to Friday and 8:00am to 8:00 pm. on Saturday and Sunday for this period.
14 July 2014 – 10 December 2014 (approx)	81 – 92	The Labour Inspector has taken into account other employees worked at the dairy on a casual basis over some of this time resulting in fluctuations in Mr Patel's hours.
10 December 2014 – 7 August 2015 (approx)	50 – 72	The Labour Inspector has taken into account that another employee Divyang was employed and worked at least 20 hours per week Monday to Friday 4:00 pm to 8:00 pm. He sometimes worked on the weekends and Mr Patel's hours accordingly reduced.
8 August 2015 – 15 January 2016	92	The Labour Inspector has concluded Mr Patel worked sole charge again.
16 January 2016 – 3 April 2016	0	Mr Patel was on annual leave for this period while he travelled to India to get married.
4 April 2016 – 25 February 2017	57	The Labour Inspector says Mr Patel's hours reduced following his return from India and he finished at 4:00 p.m. daily and generally had Sundays off.
26 February 2017	0	Mr Patel resigned

[19] The Labour Inspector says that the company records that exist are inaccurate and cannot be safely relied on to determine who worked in the dairy and for what hours.

[20] The Labour Inspector provided an amended schedule as the basis for an assessment of minimum wage and holiday entitlements on the third day of the investigation meeting. This schedule was finalised and slightly amended again after the investigation meeting.

[21] I accept that the amendment was necessary because the original method of calculation had the unintentional effect of averaging the wages received. The new calculation avoids averaging.

An error was also identified with respect to the holiday pay entitlements and I accept the appropriate method for those is using the contractual rate of the employee.

[22] Mr and Mrs Tailor say that the record keeping was Mr Patel's responsibility. Mr Patel however does not accept that the company records at Tab 11 are a true record. Mr Patel's oral evidence was that the records, including those in his own handwriting and some that were typed, were entirely made up at the request of his employer in the event that they were requested by Immigration New Zealand. Mr Patel was seeking residency under the skilled migrant category however his application was declined in May 2015 on the basis that his role in the dairy did not meet the requirement for skilled employment.

[23] Mr Tailor said in his evidence that the roster records written in Mr Patel's handwriting are an accurate record of the hours worked by each employee but not of the days or times worked. Mr Tailor when asked why Mr Patel would do that said he believed that this was a deliberate choice by him to enable him to support a claim against the employer. I agree with Ms Tait's submission that does not sound particularly plausible because Mr Patel would have kept a record of his actual hours if he wanted to support a claim.

[24] Mrs Tailor said to the Labour Inspector during her investigation that Mr Tailor and Mr Patel kept the records so she was not aware if they were accurate

[25] I find it is necessary to look at evidence beyond the company records at tab 11 and the reconstructed records based on those at tab 11. I'll start with the WhatsApp messages and texts. There are quite a few messages that the Labour Inspector found inconsistent with the company records. In order to manage the length of this determination I will not refer to all of them.

WhatsApp and text messages

[26] In or about mid May 2017 the Labour Inspector emailed the then legal representative of Indy Supa copies of WhatsApp and text messages provided by Mr Patel. The Labour Inspector asked for comments about messages she had highlighted and asked questions alongside the messages. The questions for answering included days where the messages potentially showed Mr Patel working at times inconsistent with the company records and there were some other issues that concerned the Labour Inspector.

[27] The response from Indy Supa's then representative was that the conversations with Mrs Tailor are "a fiction" and "fake." The questions asked by the Labour Inspector of various messages were not answered before the Authority investigation. At the Authority investigation it was accepted by Mr and Mrs Tailor that the WhatsApp conversations did take place. Mrs Tailor said in evidence, as to why it would be said during the investigation that the conversations were "fake and a fiction", that she was stressed over that period of time. Whilst Mrs Tailor may have been stressed it does not really explain the response that the messages were "fake" particularly where they had been supplied and could be read. It does not explain the additional response from the then representative that Mrs Tailor only started using WhatsApp in 2016 and her number is the same as her cell phone number which was stated not to be the number recorded in some of the conversations provided by Mr Patel.

[28] Credibility is an issue in this case. The Authority ultimately needs to assess on the balance of probabilities what evidence is more likely than not in order to determine where the truth lies.

9 December 2014

[29] On 9 December 2014 there is a WhatsApp message at 5.47 p.m. where Mrs Tailor asked Mr Patel if he is going to deposit money in the bank and Mr Patel replies that he can't as he doesn't have anyone there and that "I have to send my friend to do it...maybe tomorrow." The company roster at tab 11 in Mr Patel's handwriting shows Mr Patel finishing at 4:00 pm and another employee Divyang as working 4 – 8pm. The reconstructed records show another person Prakruti working from 4pm – 7pm that day and not Divyang. Perhaps that was because there is a text message from Divyang to Mr Patel² that he could not work that day. I will refer more to Divyang later in this determination.

13 December 2014

[30] On 13 December 2014 when the employer's records show Mr Patel did not work that day Mrs Tailor asks Mr Patel to enter the details of eftpos and cash. Mr Patel replies with a photo of the records at 5:33 p.m.

² Refer Tab 17 common bundle under Divyang's text messaging

[31] Mr Chow submits that the Tailors were in India at this stage and Mr Patel sent a photo of the period from 24 November to 30 November 2014. He submits that this is not evidence that Mr Patel was in the shop at that point in time when he took the photo.

2 February 2015

[32] There is a message at 5.47pm on 2 February 2015 from Mrs Tailor to Mr Patel asking for him to send some details and to call Mr and Mrs Tailor if the landlord comes to the shop. The information is sent by Mr Patel at 8.17 pm that same day with advice that the landlord did not come. The roster record at tab 11 records a finish time for Mr Patel of 4 pm that day and Prakruti working 12 to 4 and Divyang working 4 to 8pm. The reconstructed records show only Mr Patel and Divyang working that day. I find that casts doubt on the reliability of the company and reconstructed records.

6 April 2015

[33] On 6 April 2015 Mrs Tailor requested Mr Patel to send details for “bat, fs and lotto” at 5:38 pm but the reconstructed records state Mr Patel was on holiday leave this day. The records in tab 11 were blank for this period. Mr Chow’s response to this in his submissions seems to be a new explanation that Mr Patel was on leave but could still be asked for emails from suppliers.

7 August 2015

[34] On 7 August 2015 Mr Patel messaged Mrs Tailor:

...Can we please give some hours to Divyang. I am unable to work 14 hours a day in shop. It’s better that I can finish at 4:00 and do cleaning somewhere.

Mrs Tailor responds as follows:

No we can’t because u see what happened when he was at the shop

Nd you committed with mayur to do this job untill u get residence...nd if you want I can ask mayur nd if he say yes then I might work at the shop nd I will deduct money from your salary if you like...

[35] The company records for this day show that Mrs Tailor was already working at the shop 10:30 to 4:30pm which based on this message cannot be correct.

[36] Mr Chow in his submissions says that the longer hours to be worked on this day were in relation to Mr Patel not turning up for work on 5 August 2015 because of his car problems in the snow. Putting aside the concern that this is a new explanation I am not satisfied that explains a message of a general nature and the response from Mrs Tailor. Mrs Tailor does not respond to Mr Patel to the effect that he is not working 14 hour days instead she talks about a commitment to do this job until he gets residence. There is a somewhat troubling reference in the message to a deduction from Mr Patel's salary seemingly if Mrs Tailor works at the shop.

[37] Mr Patel in his evidence said that he was told by Mr Tailor that when he complained about the long hours in or about June or July 2014 Mr Tailor told him that he could not afford to employ staff. Mr Patel said he was told he could either leave and Mr Tailor would cancel his visa or that Mr Patel could pay staff to work in his place out of what he was paid.

[38] Mr Patel in his evidence said that he had had to pay staff who worked during dairy opening hours himself although their payments on bank statements were shown as having been made by Indy Supa. He says that the money was returned to the company and he would pay the staff member himself. He also said in his evidence that he had to pay a percentage of his wages back after April 2016 when he worked reduced hours so that he would only get \$10 per hour.

[39] The Labour Inspector in her evidence noted that one aspect of Mr Patel's complaint was that he had had to pay back a portion of his wages to the Tailors. Due to the complexity of the case she decided to put that issue to one side and focus instead on whether there was underpayment. There was inadequate evidence to determine whether payments of this nature were made. It does however go to the credibility of Mr Patel's evidence if there is or is not some evidence to support that may have occurred. I will refer more to this under consideration of who else worked at the dairy.

16 October 2015

[40] Reliance was also placed on a WhatsApp message on 16 October 2015. There is an email from Mr Patel to Mrs Tailor. It provides as follows:

Hi Kavitaabhabhi

Just wanna let you know that from
next week I'm not gonna work every day.

It's more than 2 years I have been working every day on my own, Monday to Friday
14 hours, Saturday 11 hours and Sunday 11 hours without any break in a day so

without break I can't use washroom or can't even have meal properly and I take shower only once in a week and not getting enough sleep and rest to.

I'm having headache since last 2 weeks so considering my health I won't work on Sunday.

I will pay you as much as I am getting paid \$6.875 per hour so it becomes \$75.625 for Sunday 11 hours.

And so in future if I think my health is not good and I can't work more hours, I will let you know.

And also tell your husband (Mayur tailor) to stop bullying me and forcing me to work hard, he is here in New Zealand now he can come and help me rather than forcing me. I alone cannot do everything.
I AM NOT YOUR SERVANT,
BE HUMAN PLEASE.

[41] There is no response to that message from Mrs Tailor. Mr Patel's evidence is that Mr Tailor forced him to retract the message writing down on a piece of paper what he had to write to do so. Mr Patel says that he was told that if he complained by message again he would be fired and his visa would be cancelled. Mr Tailor denies that and says that Mr Patel was simply apologising of his own accord.

[42] The retraction message written on 17 October 2015 by Mr Patel is:

This is purely I have written in frustration and no other intention. It has nothing to do with truth.

Please don't take it seriously as I said it has nothing to do with re...

[43] There were very specific details in the message from Mr Patel about hours worked and pay. This included for working 11 hours on a Sunday an amount of \$75.625 based on an hourly rate of \$6.87. There is reference to not being able to use the washroom and issues with sleep and showering. There was no response to the message. Mr and Mrs Tailor simply rely on the retraction as evidence that it was not true. Given the very specific and personal issues raised I find it more likely than not that Mr Patel was setting out what the nature of his employment was.

[44] In those circumstances I prefer Mr Patel's evidence as more likely than not that he was placed under pressure to send the later message on 17 October 2015. As to why he may have

responded to pressure I do place reliance on his evidence that he was concerned that Mr Tailor could cancel his visa.

Text message providing resignation - 26 February 2016

[45] Ms Tait also refers to a WhatsApp message dated 26 February 2016 when Mr Patel advised Mr and Mrs Tailor that he was resigning. In that message Mr Patel said that he was tired of working long hours without any breaks and was in so much depression he was having thoughts of ending his life.

[46] The only response by Mr and Mrs Tailor was that they respected Mr Patel's decision but that he had to give them fifteen days' notice and an official resignation letter.

[47] There are other messages that contain information contradictory to the company records about working hours and leave. Mr Chow submits that the messages and conversations support that Mr Patel was employed to do a 40 hours per week job. He submits that Mr Patel was given very flexible working hours and conditions.

[48] I do not accept that submission. The messages do not reassure the Authority about the accuracy of the company records including the reconstructed records. I will go onto consider and weigh the messages with other evidence.

The Food Diary

[49] Mr Patel gave evidence that he kept a record in a diary of food he consumed from the dairy when he worked. He had photocopied most pages from the diary and provided these to the Labour Inspector but he left the actual diary at the dairy when he resigned from his employment.

[50] He also says that from his return from India in April 2016 he kept a record of the hours he worked in the diary. The hours worked from that date appear in the diary. Mr Patel said that before he went to India he did not need to record his hours as he was either working all day every day or paying staff to work in his place. The Labour Inspector concluded that the record of hours for the period after 4 April 2016 was reliable because it was contemporaneous.

[51] Interestingly beside the hours worked from April 2016 until resignation are calculations with an amount added for food from the dairy purchased for the equivalent period. I accept Ms Tait's submission that that does appear to lend credibility to Mr Patel's evidence that he was required to pay back a portion of his wage as well as food consumed at that time.

[52] For the period prior to 4 April 2016 the pages from the diary were compared by the Labour Inspector with the company records. For example if it was concluded that there was food purchased on days the employer's record showed Mr Patel did not work the Labour Inspector concluded that was a day which Mr Patel worked. Mr Taylor's response to the Labour Inspector at the time of her investigation was that even when Mr Patel was not working he would go for a run and stop at the shop for a coffee or a V drink etc. He considered that therefore explained the entry. When the Labour Inspector put that explanation to Mr Patel he said that he did not run for exercise. In his evidence Mr Patel additionally said that he lived a long way from the dairy.

[53] A letter dated 19 June 2017 by Indy Supa's then representative to the Labour Inspector stated that the expense book belonged to Mr Patel and her client did not check the veracity of the entries. It was noted that there were entries recorded before the date that Indy Supa say Mr Patel started his employment and that Indy Supa believed the expense book is a "mere fiction".

[54] The diary was located by Mr and Mrs Taylor shortly before the Authority investigation at the dairy. The Authority is now in possession of the diary.

[55] Mr Chow submits that Mr Patel has deliberately chosen dates in the food diary to satisfy the Labour Inspector of his working hours and days. He submits that when the food diary was found in the stock room by Mr and Mrs Taylor it revealed that he had selectively photographed pages from his diary. Mr Chow has placed some emphasis on the fact that Mr Patel said to the Labour Inspector and in his evidence that he only worked Sundays in the period from April to July 2013. The food diary shows that he consumed products on more days over that period of time than simply Sunday.

[56] The period that Mr Chow refers to is at the outset of the employment and it is helpful to set out some background to Mr Patel obtaining the role. Mr Patel had left his previous job in a petrol station at the suggestion of a friend of Mr Taylor's. He said that he was told by Mr Taylor the job in the dairy was for an assistant manager and that he would be working Monday to Friday 40 hours per

week. There is no dispute that Mr Patel worked at the dairy from on or about 27 March 2013 for two days for a training period.

[57] On 2 April 2013 Mr Patel received a call from the Immigration Department who advised that he could not work in the dairy because he would need to apply for a variation to his visa. Mr Patel applied for a variation to his visa but said he did not want to work until he had his visa. Mr and Mrs Taylor said that Mr Patel had not undertaken any work aside from the two days training until 29 July 2013

[58] The Labour Inspector has Mr Patel working on 12 Sundays during that initial period that he was without a valid visa and concluded it was without pay. When the food diary was provided it showed a full month of food being purchased for April 2013, sporadic records for May 2013 and a one month gap with no records from 26 May to 26 June 2013. Mr Patel said that he could not recall this but that the records were true and that he thought perhaps he only worked short hours during the April period, early mornings or evenings when immigration was unlikely to come and check who was working in the dairy. He could not recall in terms of the one month gap.

[59] Ms Tait submits that Mr Patel's statement that he worked Sundays is largely supported by the food records which include seven Sundays between 31 March and 26 May and that it is significant Mr Patel understated rather than overstated his hours compared to the record.

[60] Mr Chow refers in his submission to this as the "smoking gun that something is amiss in his [Mr Patel's] story." He submits that this failure to recall is not credible and that on this basis Mr Patel's claims for hours/days worked must fail. I have taken that to be in its entirety. He submits that it seemed to be accepted by the Labour Inspector that Mr Patel could not recall events from 2013 but the respondent was expected to recall each detail for the same relevant period.

[61] Mr Patel did not have the diary in his possession after he resigned from his employment but rather he had photocopied pages. It is understandable that in 2017/2018 memories of exact days worked in 2013 would be vague, whoever the evidence is from.

[62] I agree that it is significant that Mr Patel understated the times he was in the dairy rather than overstated the time. He was making purchases at the dairy, for example every day in April 2013. It may have been that he did not purchase food every time that he was working at the dairy.

The Labour Inspector has undertaken her assessment however on days worked by Mr Patel based in part on the entries for food consumed.

[63] I do not regard the diary as unreliable. There are other recordings that are less likely in a diary with fabricated entries. For example there is a recording of purchases by Divyang in his handwriting and agreement that Divyang worked there for a period.

[64] I find that the days for which purchases of food are recorded can be used to assess the accuracy of the employer's records and the likelihood that was a day on which Mr Patel worked. I conclude hours recorded after April 2016 can also be relied on in circumstances if it is concluded that the company records are unsafe to rely on as a contemporaneous record of hours worked.

Who else worked in the dairy?

[65] There was agreement that two employees Divyang and Kaushal worked at the dairy between mid-2014 to mid-2015.

Kaushal

28 July – 21 October 2014

[66] From Kaushal's bank account records the Labour Inspector was able to see that he was paid minimum wages for 10 hours per week between 28 July and 21 October 2014. For that period she reduced the hours Mr Patel worked to 81 per week.

Divyang Patel

[67] The written evidence on behalf of Indy Supa suggested that Divyang and Mr Patel were friends and "have many other business dealings together". Both Divyang and Mr Patel denied that. I am not satisfied that they had or have a close or business relationship.

[68] Divyang was a credible witness. One area of difference was the date he commenced working at the dairy. Mr Chow in his submission says that the start date was 24 November 2014 because that is what Mrs Tailor was told by Mr Patel and they paid him from that date. Mr Chow

suggests that either Mr Patel was overpaid or Mr Patel benefitted from the payment if indeed Divyang did not start work on that date.

[69] Divyang sent a text message on 8 December 2014 asking Mr Patel which bus to catch to the dairy. Mr Patel sent a message back and included the address of the dairy. I note a message from Divyang saying that he cannot work on 9 December 2014 yet the company records as stated earlier have him working on those days. I find that Divyang started after that date and in all likelihood on 10 December 2014. The company and reconstructed records show Divyang working from Tuesday 25 November and I do not find they can be safely relied on.

[70] Messages on WhatsApp about the payment of Divyang and his start date are not straightforward. There is a WhatsApp message on 22 December 2014 from Mrs Taylor which seems to be asking Mr Patel when he wants her to start making payment to Divyang's account. There is a statement to the effect "you left on 23/11/14 so we should show him working from 24/11/14. There is confirmation that Mrs Taylor would pay \$1003 to Divyang. There is a further message on that same day asking Mr Patel to collect money from Divyang and deposit "in our business account." Divyang did say that he paid one payment of \$1003 to Mr Patel. Mr Patel said that after that date he simply repaid the money himself to the company that had been paid to Divyang.

[71] Mrs Taylor says that the request to collect money was focussed on the collection of expenses for food and other items taken from the dairy and not wages.

[72] The Labour Inspector appropriately took into account the hours Divyang worked as with Kaushal and reduced the hours it was concluded Mr Patel worked accordingly.

Prakruti

[73] The Labour Inspector concluded in her assessment of hour/days worked that Prakruti did not work in the dairy but was a "sham employee" who appeared on some company records and was included in correspondence with Immigration New Zealand. Mr Patel said that whilst Prakruti was paid a fortnightly wage she was required to refund that to Indy Supa.

[74] The respondents and Prakruti say that she did work at the dairy and was not required to refund her wages. Mr Chow submits that customers of the dairy who gave evidence, Sim, Frank

and Carlos say that they have seen a “short tiny smiley Indian girl” working at the dairy. Further that the company accountant Mr Reginald Hintz treated her as an employee for tax purposes.

[75] Prakruti’s husband is Mr Taylor’s friend. Prakruti said that she worked at the dairy from 2 June 2014 to 10 August 2014 for 10 hours per week and then from 11 August 2014 to 17 May 2015 for 20 hours per week.

[76] I shall consider below the various aspects of the evidence I heard about Prakruti.

Customers at the dairy

[77] Sim is a customer at the dairy. In her evidence she referred to a petite “smiley faced girl” and a “grumpy girl who was not interested in serving/working at the dairy”. She described Mr Patel as “there a lot” and that Mr and Mrs Taylor were there as well. When asked by Ms Tait whether there were months when Mr and Mrs Taylor were not in the dairy she responded “No”.

[78] It is not disputed that Mr and Mrs Taylor were out of the country in India for varying periods. As confirmed by travel records in the bundle of documents Mr Taylor for the material period was out of the country for 11 months from 7 October 2014 to 5 September 2015 and then for two months from 1 December 2015 to 30 January 2016. Mrs Taylor for the material period was away from 25 July 2013 to 17 August 2013, 6 January 2014 to 22 February 2014 and three months from 23 November to 14 February 2015.

[79] The response by Sim that there were not months when the Tailors were not in the dairy is not consistent with the agreed absences of Mr and Mrs Taylor which is reliable evidence. I find that does tend to suggest that her recollection may be less reliable as a result. Interestingly Sim was the only witness to refer to two female employees.

Frank

[80] Frank’s evidence was that he visited the dairy every day and usually first thing in the morning and mid-afternoon. He said that he saw a “young girl” and Mr Patel on some occasions. When asked about a timeframe he said that he thought he had seen that young woman 2013/2014.

He said in answer to questions from Ms Tait about changes to staff that he saw a young lady at times but could not recall any other staff apart from family, being Mr and Mrs Taylor and their son. He said that he very rarely saw Mr Patel. He made no mention, although there is no dispute that Divyang and Kaushal worked at the dairy, of other male employees.

Carlos

[81] Carlos was another regular customer who gave evidence but his evidence and recollection was less clear about a young woman working.

Jamie Lynn

[82] Ms Lynn lives directly opposite the shop. She has lived there since about 1991 although the dairy only operated from in or about 2010. Mr and Mrs Taylor rented the home next door to Ms Lynn and then they purchased the home and rented it out when they shifted elsewhere.

[83] The Labour Inspector interviewed Ms Lynn as part of their investigation. Ms Lynn is retired and said that she spends a lot of time at home during the day. She explained that her windows of her dining room and the lounge face the dairy and she can see the front door of the dairy. She said that she could see the car park that Mr Patel used when he worked there. The Labour inspector visited at her home and was able to confirm in her report the good visibility of the dairy from the windows.

[84] Ms Lynn said in her evidence that she recalled Mr Patel starting in 2013 and said that he worked every single day. She said that he worked the same hours as the female employee who worked before him. That is from 6am to 8pm Monday to Friday and 9am to 8pm Saturdays and Sundays. She recalled he worked fewer hours after he returned from India in 2016.

[85] The female employee Ms Lynn referred to is Savita. The Authority spoke to Savita during the investigation meeting by facetime connection from India. There is a significant dispute about how long Savita worked at the dairy. Savita says she was working there, and for a while at another dairy Mr and Mrs Taylor had some interest in, for about 8 months. Mr and Mrs Taylor say she was there for a week. I will refer to Savita in more detail shortly.

[86] Ms Lynn was very clear when questioned that there had never been a female working there since Savita although she did recall a “couple of guys” working there. She did not recognise Prakruti at the Authority investigation meeting. She adamantly denied when questioned by Mr Chow that she had a grudge against Mr and Mrs Tailor or held ill feelings toward them because primarily two matters. An issue over the hedge was in January 2017 before Mr Patel resigned and the yellow lines issue was several years prior.

[87] Ms Lynn said that she continued to visit the dairy regularly after Mr Patel resigned usually daily to get her milk and bread and lotto and only stopped in May 2017. Ms Lynn said that that was when Mr Tailor came to her home on a Saturday night and spoke to her about withdrawing her statement to the Labour Inspector because it was going to cost them a lot of money. She said that she felt threatened and scared and did not want to be in a position where she would need to talk to Mr and Mrs Tailor again and did not visit the dairy again. There is a note recording concerns raised by Ms Lynn at this time with the Labour Inspector.³ Mr Tailor agreed that he had gone to talk to Ms Lynn however said that she agreed to his visit. He did not accept that he was aggressive or threatening or asked her to withdraw her statement. He said that he wanted to know whether or not she was involved with Mr Patel’s actions.

[88] I have carefully weighed the evidence that I heard from customers at the dairy. I have considered the period of time that has elapsed since 2013/2014 and the time of the Authority investigation meeting. There is real potential for the fading of memory over that time and therefore issues of reliability of the evidence as a result. In this matter dates and years are important.

[89] Ms Lynn of all the customers I heard from spent a greater time observing the comings and goings at the dairy. Her evidence was more consistent with what was agreed to have occurred with Divyang and Kaushal working and that is an important test of reliability.

[90] I found Ms Lynn to be a straightforward witness who took an active interest in and observed the comings and goings of the neighbourhood and the dairy. She was unshaken under cross examination. Ms Lynn described herself as something of a neighbourhood detective and said she sometimes went to the dairy simply to chat to Mr Patel about everything going on. On the balance of probabilities I don’t accept that her evidence was fabricated because of some sort of

³ Tab 37 of bundle three - record of discussion between Ms Lynn and Ms Zonneveld dated 23 May 2017

vendetta against the Tailors. Had that been the case then I find it would be very unlikely she would have continued to go to the dairy every day until Mr Taylor visited her at home in May 2017.

[91] I have placed weight on her evidence and I find had Prakruti worked at the dairy over the period between mid-2014 and May 2015 then Ms Lynn would have, in all likelihood, noticed her arriving, departing and/or working.

[92] In reaching the decision about whether Prakruti worked at the shop or was simply on the payroll I have relied on other evidence and not simply that of the customers.

[93] I have placed particular weight for example on the evidence of Divyang that he did not see any other employees aside from Mr Patel when he worked there including Prakruti. The Authority has had regard to the company rosters at tab 11. There are quite a few that show Prakruti's shift finishing at 4pm and Divyang's starting at 4pm. I accept Ms Tait's submission that it is simply not plausible that Prakruti, if she had worked there, left the dairy unattended before Divyang started. Mr Chow places reliance that Divyang received one typed roster with Prakruti's name on but that is not persuasive that she actually worked there.

Is there evidence to support re-payment by Prakruti of money paid for wages?

[94] Ms Tait places weight on the WhatsApp message in her submissions of 22 December 2014⁴ in which Mrs Taylor from her Indian WhatsApp number states to Mr Patel:

Could you please ask prakruti to give u money back which we give her every fortnight, if she doesn't have time to come to d shop.

Please go to her home n d collect d money please...

N d deposit in our business account please...

Thank you

[95] There are other messages that follow on 29 December checking that money has been paid. There is another message on 30 January 2015 from Mrs Taylor to Mr Patel saying that she has paid wages to Prakruti and Divyang and asking them to "give u money back and put that into our business account."

⁴ Bundle one tab 5 page 21.

[96] Mrs Taylor under cross-examination said that the messages were about reimbursement of the expenses by Prakruti for purchase of food and other items at the dairy. Mr Chow submits that neither Divyang nor Prakruti said that they paid money back.

[97] I accept Mr Chow's submission that none of the messages refer to repayment of wages. I also accept Ms Tait's submission that the messages do not refer to expenses or money for food or other items. There are further matters as submitted by Ms Tait that support that the messages about paying money back are about more than reimbursement of expenses. There is the suggestion on 22 December 2014 that if Prakruti does not have time to come to the shop than Mr Patel should go to her home and collect the money. As Ms Tait submits, if she in fact worked at the dairy then that would seem unnecessary and would not make sense.

[98] There is also some persistency about the messages for repayment from Mrs Taylor to Mr Patel that would be less usual for expenses. The Indy Supa bank account was in credit and did not objectively justify such a level of concern about getting money back at that time in December.

[99] Mr Chow submits that the Authority should make allowances for Mrs Taylor and her style of written English. Even allowing for that they appear to relate to repayment of wages rather than expenses as in the message 22 December 2014 – "give u money back which we give her every fortnight." Prakruti was not given money each fortnight for expenses rather for wages.

[100] There is also a message from Mr Patel to Mrs Taylor in response to a question about getting money from Prakruti. "I will get her money in my friends account..."⁵ Mr Patel in his evidence said that Prakruti was very careful about hiding the repayments from officials during the period Mr Patel's application for residency was being considered. Mr Chow submitted that hiding the money made no sense but rather the Tailors simply left it to Mr Patel to recover the expense money in whatever way he thought best.

[101] I find that if Prakruti was to be an employee on the roster to assist Mr Patel in his residency application by supporting that he managed others and/or to disguise the fact that Mr Patel was working over 40 hours per week then hiding the repayment of wages does make some sense. There are no regular withdrawals of money from the statements of the account the Authority was provided with from Prakruti to show payments made that may account for either expenses or re-payment of

⁵ Tab 5 of bundle of documents – page 23

wages. I accept Ms Tait's submission that from the bank statement it is evident that there is a classic visa card and another account to which funds are transferred on occasion.

[102] Prakruti's last fortnightly payment was made on 18 May 2015. This was the date of the letter from Immigration New Zealand to Mr Patel advising him that his residency application had been declined. Ms Tait in her submissions placed some weight on the denial in Mr and Mrs Taylor's sworn statement of evidence that Mr Patel had ever told them about the outcome of his residency application. That is because there is a WhatsApp message from Mr Taylor to Mr Patel on 25 May 2015 expressing that he was sad to hear about the immigration response and asking the grounds on which they declined the application.⁶ Mr Chow does not accept that this is a credibility issue rather than the statements were a reflection of disappointment in not being told about the reason for declining the immigration application. I find that the sworn statements were about the outcome of the application not the reason for the outcome.

[103] There is one payment from Prakruti into Mr Patel's account of \$501 on 24 June 2015. In his evidence Mr Patel said that Prakruti was not so concerned at that stage about hiding the deposit as the residency application had been declined.

[104] Prakruti when she gave evidence said that the money referred to in the WhatsApp messages was about expenses. She denied paying any wages back. Prakruti said in her evidence the first payment to be arranged into Mr Patel's friend's account in December 2014 related to money for a car that Mr Patel had purchased from her husband and then changed his mind about. She said that the bank transfer payment to Mr Patel's account on 24 June 2015 was a partial reimbursement of payment for the car. The amount paid to Mr Patel in June 2015 was the same amount of wages that she had received on 18 May 2015 less 20 cents. It also followed a message from Mrs Taylor on 23 June 2015 to Mr Patel asking him to ask Prakruti to "give u money." If it was simply expense money that Mrs Taylor said she asked for at the time wages were paid that does not explain why it was being requested such a time after employment ended.

[105] Prakruti could not explain in her evidence the six month period between the first partial refund in late December 2014 to be organised into Mr Patel's friend's bank account and the second refund in 23 June 2015. The amount paid for the car Prakruti said was \$1100. Mr Chow submits

⁶ Bundle of documents tab 5 pg 26 from Mr Taylor's Indian number.

that Prakruti became confused about the questions asked of her about paying money into Mr Patel's friend's account in late December 2014 and the later payment in June 2015. He said that the two matters were unrelated to each other.

[106] Even allowing for some nervousness and confusion I did not find Prakruti able to credibly explain why she would deposit \$501 into Mr Patel's bank account the day after Mrs Taylor asked him to ask her for money. Further why Mr Patel would have an arrangement to deposit her money into a friend's account. The evidence about the car repayment was not, I find, plausible. Mr Chow submits that there was only "one suspicious payment" over the period Prakruti was paid wages. That has to be viewed with the evidence that appears to support steps taken to hide such transactions. Equally if, as Prakruti says, she paid back expenses there is no evidence to show a correlation between payment of expenses and requests made by Mrs Taylor to Mr Patel to ask Prakruti for money.

[107] When I view the evidence about Prakruti as a whole I cannot reliably conclude it more likely than not that she actually worked at the dairy. It is more likely, I find, that she was simply paid and refunded that money with no requirement that she work. In short an employee on the record only.

The Taylor Family

[108] Mr Patel's evidence is that Mr and Mrs Taylor only worked very occasionally between late June 2013 and mid January 2016 in the dairy.

[109] I have preferred Ms Lynn's evidence to that of other customers as more likely. Ms Lynn said that she never saw Mr and Mrs Taylor working there until either Mr Patel had left or started finishing at 4pm when he returned from India.

[110] Divyang in his evidence said that Mrs Taylor did not work at the shop during his employment but she brought groceries in three to four times.

[111] Ms Tait also places reliance on the fact that although Mrs Taylor said she was working in the dairy on a regular basis over many years some messages indicated a lack of familiarity with dairy operations.⁷ I accept that the messages give that impression.

[112] I find there is a real issue about the credibility of Mr and Mrs Taylor particularly but not limited to my findings about Prakruti.

[113] I am not satisfied the evidence about the hours worked by Mr and Mrs Taylor or their son proves that the Labour Inspectors claims about the hours, days and time worked by Mr Patel are incorrect.

Savita and the length of her employment with Indy Supa

[114] Before I make final findings about hours, days and times worked by Mr Patel I want to set out what Savita said when she was first interviewed by the Labour Inspectorate in October 2013 and when she was interviewed again after Mr Patel's complaint to the Labour Inspectorate in 2017.

[115] The focus for the Labour Inspectorate in 2013 was on another investigation so the employment with Indy Supa was background only. Savita said to the Labour Inspector that she started working at the dairy in Marshlands Road in August 2012. She said that she had to work 6am to 8pm Monday to Friday and 9am to 8pm Saturday and Sunday for which she was paid \$500 cash. She also worked at another dairy for the Tailors.

[116] Savita made a further statement to the Labour Inspectors on 15 January 2018 shortly before she left to travel to India. It was confirmed at that time that she did not know Mr Patel. Savita told the Labour Inspector that she received her wages in cash until her visa was approved in February 2013. It was able to be independently confirmed that the visa for the dairy was granted on 19 February 2013. Ms Saharan said that she worked every day at the dairy for the hours she had spoken of in her first statement in 2013. She said that she did not have a day off and there was no other employee to cover her absence. Further that Mr and Mrs Taylor did not work in the dairy. She said that she had to open and close the shop and worked alone every day. She said that she worked on public holidays and was never paid extra for doing so.

⁷ Bundle 1 tab 5 page 14 – 18 January 2015 messages

[117] She said her resignation because Mr Tailor told her that she needed to work another two years at the same amount of pay before he would support her residency. She signed a resignation letter dated 10 February 2013 which was provided in the bundle of documents however Mr and Mrs Tailor say that she only worked one week but was paid an additional two weeks in lieu of notice. Their evidence was that she sold synthetic cannabis and when confronted about it she offered to resign. Ms Saharan did not accept that she sold synthetic cannabis.

[118] Mrs Lynn recognised Savita when she joined by facetime at the Authority investigation as someone who had worked at the dairy “for months.” Savita recognised Ms Lynn. I find it more likely that Savita worked for a period without a visa to work at the dairy and was paid in cash. This left no traceable record of her employment aside from a brief period when the Tailors maintain her employment was limited to when she was paid by direct credit.

[119] The similarities between the description by Mr Patel of his conditions of employment and the description of Ms Saharan of her conditions of employment at the dairy are significant. Neither knew each other and the only similarity between them is that they both worked at the dairy on Marshlands Road.

[120] I accept as submitted by Ms Tait that Savita’s description of her employment adds further credibility to Mr Patel’s evidence about his employment conditions.

Have Indy Supa and Mr and Mrs Tailor proved that the claims by the Labour Inspector for minimum wage arrears based on hours, days and time worked by Mr Patel are incorrect?

[121] I am not satisfied for all the reasons set out above that the claims by the Labour Inspector for minimum wages arrears are incorrect. There was no dispute that complete wage and time records were not available. Rather there were rosters and reconstructed records based on those rosters. I have concluded for a variety of reasons that these cannot be relied on. It is more likely, I find, that they were made up for Immigration purposes. They have then been used to support that Mr Patel only worked 40 hours each week. That I find is not the case.

[122] The Labour Inspectorate undertook a thorough investigation and careful assessment into Mr Patel’s complaint. There was a level of complexity about what days, times and hours Mr Patel worked. Rosters including those he prepared himself have been shown to be inaccurate and unsafe

to rely on when assessed against other evidence. The absence of a time and wage record obviously prejudiced Mr Patel in bringing an accurate claim. Prakruti was included on the roster but I have found on the balance of probabilities she never actually worked in the dairy. Where the Labour Inspector was satisfied that other employees did work some hours or that no food was recorded by Mr Patel in the food diary appropriate deductions were made from hours that he worked each week. Further additional information by the Labour Inspector from PAYMARK about the record of the time the EFTPOS system was first turned on in the morning was requested when there was an issue about the time Mr Patel commenced each day.

[123] Where there was insufficient proof of a matter such as Mr Patel paying from his own wage Kaushal and Divyang that was not taken into account.

[124] I do not find as submitted by Mr Chow that Mr Patel “schemed the whole scam up for his own financial gain and benefit at the expense of the respondent.” I found Mr Patel to be a credible straightforward witness who if anything was somewhat understated in his evidence.

[125] Mr Chow placed some weight on the fact that Mr Patel had several immigration advisers and would have raised concerns earlier had he been treated in the way he says that he was. That does not however weigh that Mr Patel was particularly vulnerable in his employment. In answer to a question from Ms Tait why he had stayed so long at the dairy he said he was in debt and had a concern about his visa being cancelled and would not be able to stay in New Zealand. He said to the effect that he would prefer to “hurt himself” rather than go back to India with a debt.

[126] The only aspect that I find that has been proved to be incorrect by the respondents’ about wages and hours worked is the working by Mr Patel of 11 hours on five Sundays until 26 June 2013. I find that the Labour Inspector in all likelihood understates the wages owing before 26 June 2013 given food is recorded by Mr Patel as consumed for almost the full month of April 2013. There is no dispute that he was not paid at all for the whole period from April to 26 June 2013. I do not make any adjustment to the amount of minimum wage arrears in the Labour Inspectors schedule.

[127] I accept as proved under s 132 of the ERA the claims made by the Labour Inspector in respect of the wages paid to Mr Patel and the hours, days and time he worked. I accept because of the number of hours Mr Patel worked that he was paid well below the minimum wage.

[128] I accept the claim for minimum wage arrears prior to 2016 in the sum of \$70,387.25 and from 1 April 2016 in the sum of \$11,178.25. The total amount owed for minimum wage arrears is \$81,565.50 gross.

Holidays and Leave records

[129] There was no holiday and leave record kept. Mr Chow's submission is that Mr Patel was asked to keep such a record but s 81 of the HA provides that it is the employer who must at all times keep a holiday and leave record. A form of record was constructed just before the Authority investigation meeting by the respondents but I am not satisfied, having reached conclusions about the company records at tab 11 assessed with other matters, that this record is reliable or safe to rely on. It was not a contemporaneous record.

[130] I find under s 83(3) of the HA that the failure to keep an accurate and contemporaneous record of holidays and leave prevented Mr Patel and the Labour Inspector from bringing an accurate claim.

Annual leave

[131] The evidence from Mr Patel was that the only leave he took was when he returned to India in January 2016 to get married. Payments made during that period were taken into account by the Labour Inspector in assessing annual leave arrears. Mr Patel did provide evidence to the Labour Inspector that \$2770 was withdrawn from his bank account whilst he was in India so he did not consider that period to be paid leave. The Labour Inspector was unable to use the bank camera to verify who made the withdrawals so that period was treated as paid annual leave. The respondents say that additional paid leave was taken. Mr Chow refers to a WhatsApp message from Mr Patel to Mrs Tailor on 16 February 2015 seeking permission to take one week off to help a friend in Nelson and says that at that time he extended his leave and was away for 7 weeks from 23 February 2015 to 12 April 2015.

[132] The food diary that I have found is reliable shows that Mr Patel purchased food at the dairy for nearly every day of that 7 week period which would in all likelihood support he was actually working at that time rather than on leave in Nelson.

[133] Mr Chow refers to another message from Mr Patel to Ms Tailor on 8 January 2017⁸ where Mr Patel refers to working 8 days in a row in order to cover his day off and hours from the previous two weeks as he did not have any more annual leave entitlement. I have read those messages and I cannot find any reference to Mr Patel mentioning about his annual leave entitlement. Mr Chow says that Mr Patel has referred to leave in the records in tab 11 in his own handwriting however I have not found those records assessed with other evidence safe and reliable.

[134] I do not find there is evidence to satisfy me that Mr Patel took additional annual leave to the period the spent in India. I accept the assessment made by the Labour Inspector about annual leave.

Public Holidays

[135] I also accept the assessment by the Labour Inspector for public holidays worked. Mr Patel has not claimed that he worked every public holiday and the fact of work on public holidays is supported by the food diary. Ms Lynn was able to confirm that he worked on Christmas Day and New Year's Day. She recalled telling Mr Patel that he should open early on New Year's Day because it was a big day at the races and he was missing out on customers.

[136] The Labour Inspector has calculated that the following arrears owing for annual leave, alternative days and public holidays using the contractual rate which has resulted in a slight adjustment to the schedule handed in at the investigation meeting by the Labour Inspector.

Prior to April 2016:

- (a) Public Holiday arrears @ \$19 per hour of \$1624.50
- (b) Unworked public holiday arrears of \$1995
- (c) Annual leave arrears of \$8456.80

From April 2016

- (a) Public Holiday Arrears of \$570
- (b) Unworked public holiday arrears of \$418

⁸ Tab 5 bundle of documents page 35-36 Mrs Tailor's NZ number.

(c) Annual Leave arrears of \$4431.80

(d) Alternative holiday arrears of \$3,952

[137] The total amount owing for annual leave, public holidays worked and unworked and alternative day arrears is \$21,448.10 gross.

Interest on arrears

[138] The total amount owing for arrears for minimum wages and annual leave and public holidays/alternative days is \$103,013.60. There is a claim in the statement of problem for interest which is repeated in Ms Tait's final submissions.

[139] Mr Chow does not agree that interest should be awarded.

[140] I find that it is appropriate where an employee has been deprived of the use of money and the employer has had the benefit of that money to make an award for interest. In the exercise of my discretion I find that it is appropriate that interest be payable from the date that the original statement of problem was lodged with the Authority on 27 October 2017. That balances Mr Patel being deprived of money he was entitled to with the reasonably limited time between his complaint and the lodging of the statement of problem and the subsequent but appropriate amendment of that claim.

[141] As the proceeding was lodged before the date of commencement of the Interest on Money Claims Act 2016 which is 1 January 2018 the interest to be awarded is to be at the rate prescribed under s 87 (3) of the Judicature Act 1908. That rate is 5%.

[142] \$103,013.60 multiplied by 5% is \$5150.68 per annum. A daily rate is obtained by dividing \$5150.68 by 365 to arrive at \$14.11. The period between 27 October 2017 and the date of this determination which is 12 November 2018 is 380 days. 380 multiplied by \$14.11 is \$5361.80. Interest will continue to accrue at a daily rate of \$14.11 until payment is made.

Breaches

Breaches of the MWA and the ERA

[143] There is a breach of s 6 of the MWA because of the failure to pay Mr Patel at no less than the minimum rate for all the hours he worked.

[144] There is a breach of the obligation in s 130 of the ERA because there was a failure to keep a wage and time record for each employee.

Breaches of the HA

[145] There have been the following breaches of the obligations under the HA to correctly pay public holiday entitlements

- (a) Section 50 by failing to pay at least time and a half for working on a public holiday.
- (b) Section 49 of the HA being a failure to pay for public holidays that were otherwise working days.

[146] There have been breaches of the following sections of the HA about the correct payment of holiday and leave entitlements to Mr Patel:

- (a) Section 27 being the failure to pay annual holiday pay on termination.
- (b) Section 40 being a failure to pay for public holidays that fall after an employee's termination to which the employee would be entitled to if they had taken annual leave immediately after their termination date.
- (c) Section 60 being a failure to pay alternative holiday pay on termination.

[147] There have been breaches of the following section of the HA about keeping holiday and leave records:

- (a) Section 81 of the HA being a failure to keep holiday and leave records.

Penalties

Are Mr and Mrs Taylor persons involved in the breaches?

[148] Penalties are claimed against Mr and Mrs Taylor under s 142W of the ERA which is concerned with involvement in breaches. This section was inserted on 1 April 2016 and therefore does not apply in any assessment of penalty to conduct that occurred before that date. One of the requirements for a person involved in a breach under s 142W is that the breach is one of employment standards. I am satisfied that the breaches found in this matter are those of employment standards as defined in s 5 of the ERA.

[149] In this case the person in breach under s 142W is a company Indy Supa. Under s 142W(2) a person holding a position in relation to that company may be treated as a person involved in a breach only if the person is an officer of the person in breach. Section 142W (3) sets out the persons who are to be treated as officer of a company in breach.

[150] Mrs Taylor is a person under s 142W (3)(a) to be treated as an officer of Indy Supa in breach because she occupied the position of a director.

[151] The situation of Mr Taylor requires more consideration. In his submission Mr Chow left this matter to the Authority to decide. Ms Tait submits Mr Taylor, whilst not a director, was nonetheless able to exercise significant influence over the management and administration of Indy Supa under s 142W(3)(e) of the ERA.

[152] The evidence supported that Mr Taylor was involved in the management of Mr Patel. I accept that he gave instructions to Mr Patel about the frequency of banking and details of new staff hired. He also gave instructions to Mr Patel regarding creating new employment agreements for Immigration. He raised performance issues with Mr Patel. Mr Patel communicated with Mr Taylor about the offer of employment on 11 March 2013 and he sent his resignation letter to Mr Taylor. I have also placed some weight on Mrs Taylor's WhatsApp message of 7 August 2015 which I have referred to earlier in para [34] where Mrs Taylor said she had to check with Mr Taylor about working on a Sunday.

[153] On that basis I conclude that Mr Taylor was a person who exercised significant influence over the management and administration of Indy Supa under s142W(3)(e) of the ERA.

[154] I find that both Mr and Mrs Taylor were knowingly concerned in or party to the breaches. This included from 1 April 2016 the payment of Mr Patel for less than the hours he was working so

that he did not receive the minimum wage, the fact that he was working on a public holiday and not being properly remunerated for doing so and the failure to pay Mr Patel his correct entitlements on termination. It also included the failure to keep accurate wage and time records and any holiday and leave records. I find they are both persons involved in the breaches.

[155] A recent Employment Court judgment in *Labour Inspector v Sampan Restaurant Limited & Ors*⁹ considered how the Authority should assess the respective penalty liability of an employer company and a person involved.

[156] In *Sampan* it was held that the imposition of a penalty should be considered separately against the company and the person involved reflecting differentiation in their actions giving rise to liability.¹⁰ Therefore the liability for Indy Supa and Mr and Mrs Taylor as persons involved is to be separately considered and should be approached by exercising discretion with respect to fairness, justice and proportionality.

[157] The penalty sought by the Labour Inspector against Indy Supa was \$77,000 without a reduction for financial circumstances and for Mr and Mrs Taylor \$14,500 each.

Penalty against Indy Supa

[158] The Labour Inspector seeks a penalty against Indy Supa for the five types of breaches set out above. I have attached two tables that show the penalty calculations against Indy Supa and Mr and Mrs Taylor to this determination.

[159] The Employment Court in *Borsboom (Labour Inspector) v Preet Pvt Limited & Ors*¹¹ provides a four step process when assessing penalties. That was also said in *Sampan* to be of assistance for assessing penalties for persons involved. The first step is to consider the number and nature of the breaches. The second is to assess the severity of the breaches including any aggravating and mitigating factors. The third step is to consider the means and ability to pay and make any adjustment accordingly. The final step involves consideration whether the provisional penalty after the first three steps is proportionate to the seriousness and the breach and the harm caused. Other similar cases where penalties have been imposed can be considered at this point.

⁹ *Labour Inspector v Sampan* [2018] NZEmpC 69

¹⁰ Above n 8 at [21]

¹¹ *Borsboom v Preet Pvt Limited* [2016] NZEmpC 143 – paras [137] to [159].

Step One

[160] The nature of the breaches is set out above and involves 5 types of breaches under the MWA, the ERA and the HA.

[161] The breach under the MWA of a failure to pay minimum wage only involves one employee Mr Patel. Although each failure to pay minimum wage could be considered a separate breach it is appropriate to regard the breaches as one single course of conduct.

[162] There are two breaches of a record keeping nature. The first breach under the ERA is the failure to keep wage and time records. The Labour Inspector wanted records for all current and former employees. The matter was pleaded quite generally and it is appropriate I agree with Ms Tait that this be limited to a breach in relation to Mr Patel's wage and time record only.

[163] The second breach for record keeping is that of a failure to keep a holiday and leave record under the HA. Although no record for any staff was kept the Labour Inspector seeks, and I consider this appropriate, one penalty in relation to Mr Patel for his holiday and leave record.

[164] There are also the five breaches of the holiday and leave payment obligations which involve multiple breaches but should be treated as one.

[165] The maximum penalty for a company is \$20,000 per breach. There is a total maximum therefore of \$160,000 being \$20,000 x 8 breaches.

Globalisation

[166] I accept the Labour Inspector's submission that the failure to pay holiday and leave entitlements could be globalised from five breaches down to two. This involves combining the holiday entitlement to be paid during the employment under ss. 49 and 59 of the HA into one and the obligations to make payments on termination ss. 27, 40 and 60 into another.

[167] I accept that the public holiday entitlements payable during employment are distinct from obligations to pay those sums on termination and I accept that further globalisation is not appropriate for those matters.

[168] Global penalties are not appropriate with respect to the two categories of record keeping breaches because the failures arise under different pieces of legislation. The failure to pay minimum wage should be treated as a standalone breach.

[169] This gives a total of five breaches for the purpose of calculating penalties which is a maximum of \$100,000 in penalties for an employer company.

Step 2

[170] The Authority is required to consider at this step the severity of the breaches and make adjustment for aggravating and mitigating factors accordingly.

[171] An aggravating factor in this matter is the deliberate nature of the breaches. I accept the failure to pay minimum wages is a particularly serious breach and was exploitative. The amount of minimum wage arrears is considerable at \$81,565.50 gross. Mr Patel was a vulnerable migrant employee who had a work visa and no family support in New Zealand. There is evidence to support that long hours worked impacted on his mental and physical health. He was concerned about his financial situation and the ability to perform everyday tasks such as showering because of the long periods of time he was working. Little support was evident when he raised concerns with his employer.

[172] It is clear that Mr Patel had no familiarity with his rights as an employee enabling breaches to continue unchecked for a considerable period until he realised that he was being exploited. I do not consider, as Ms Tait submits, I should the treatment of Savita as similar conduct. I find it is only appropriate to consider her situation to reach conclusions on the balance of probabilities for the arrears claims.

[173] There is also a serious element to the failure to keep accurate wage and time records. The records relied on were incorrect and an untrue picture of what was occurring with work hours and who was working. This hampered and delayed the Labour Inspector in her investigation and required further and different avenues of investigation to be carried out with Ms Lynn, Savita, WhatsApp and text messages and the food diary. The incorrect records were used to disguise the reality of Mr Patel's working hours which were exploitative and subsequently the records were used against him in the defence of the claim for arrears on the basis he had compiled them. Those were

records he was, I accept, instructed to keep and he was in no position to refuse to do so given his vulnerability and lack of support. Whatever the reasons were for the incorrect records I accept they masked the reality of the hours Mr Patel was working.

[174] Indy Supa has been in business since 2010 and should have known about the public holiday payment obligations. Instead Mr Patel worked on many public holidays for no additional payment. Further I accept that the obligation to pay holiday and leave entitlements on termination was known about but no steps were taken to meet that obligation. I accept Ms Tait's submission that initially the respondents said they were waiting for Mr Patel to contact them and request such a payment. The respondents then constructed a leave and holiday summary provided shortly before the Authority investigation that stated Mr Patel owed them \$6,615 for excess leave and cash sales. Mr Patel was left without his entitlements in circumstances where he had made it clear from his resignation letter that he was in "so much depression" that he had thought of ending his life from working long hours without any breaks. The likelihood of him returning to request his proper entitlements was remote. Mr Patel stated in his resignation letter "I don't want to see you again in my life so please don't call me or try to approach me in anyway otherwise I will call the Police."¹²

[175] I accept that the failure to keep holiday and leave records was less serious in terms of the amount of arrears than the wage and time records.

[176] I do not find that there are any mitigating factors. Whilst there was partial co-operation with the Labour Inspector investigation it can only be seen around the edges and there was continued denial of the hours worked and minimum wage arrears claims which were the most serious aspect. There was a failure to answer the questions beside the WhatsApp messages which showed the records could not be relied on.

[177] I reduce the provisional penalty of \$100,000 to \$77,000 as set out in table attached by assessing the aggravating factors as a proportion of the maximum penalty for each breach.

Step 3

[178] The dairy continues to operate. The 2017 annual accounts indicate an annual income in excess of \$1m for the 2016/17 years, but that the dairy operated at a loss. That appears to be

¹² Bundle of documents – resignation message to Mr Tailor tab 56

because there is a small difference between the cost of sales and income from sales. The Labour Inspector suggests that the Authority should adopt a cautious approach with respect to the annual accounts. Ms Tait submits that the financial statements have not been audited and were prepared for taxation purposes only and there is an express statement that they should not be relied on for any other purpose. Further they are a Compilation expressed to be “limited primarily to collection, classification and summarisation of financial information supplied by the client.” Mr Chow submits that as a private company it is not mandatory for the financial statements to be audited and that it is standard practice for an accountant to prepare statements on compilation of the information provided by the officers of the company.

[179] I agree that a cautious approach should be adopted in circumstances where there are issues about the credibility. Accounts showing significant trading losses attributable to the relatively small difference between costs of sales and incomes from sales in *Preet* were one of several factors that led the Court to conclude the financial information supplied was in an unsatisfactory and incomplete state.¹³

[180] Ms Tait submits there should be no reduction because of the financial position. I find that there should be to recognise the financial position of Indy Supa but of a comparatively modest nature. I find that there should be a reduction of 20 percent for Indy Supa’s financial position.

Step 4

[181] Penalties should serve as a deterrent both generally and specifically and send a strong message that exploitation of vulnerable migrant workers has serious consequences for those who engage in it.

[182] In this particular case there was a level of deliberateness to the exploitation and attempts were made to mask the true picture of Mr Patel’s employment. The respondents considered records that I have found were inaccurate, untrue or constructed at a later date a sufficient answer to any claim about long hours worked and payments not made.

¹³ Above n 10 at [184 and 185]

[183] Ms Tait referred the Authority to another Authority determination¹⁴ in which there were unpaid wages and holiday pay in excess of \$100,000 and penalties were sought for failing to pay minimum wage, holiday entitlements and charging a premium. The offending was found to be severe and exploitative and the employer company was ordered to pay \$120,000 and the person involved \$24,000 in penalties.

[184] I accept that a penalty of \$61,600 is not disproportionate, taking into account the seriousness of the conduct, similar cases and the significant effects on Mr Patel which, from my observation, went unrecognised.

Penalty – Mr and Mrs Tailor

Step 1

[185] The nature and number of breaches is the same for Mr and Mrs Tailor as persons involved, 8 breaches in total. The involvement of Mr and Mrs Tailor in the various breaches is very closely intertwined. I do not therefore distinguish between their respective actions for the imposition of penalties. They operated the dairy jointly and were actively involved in and aware of the issues about Mr Patel's employment.

[186] Mrs Tailor was responsible for processing the payroll and Mr Tailor was aware of Mr Patel's employment conditions and remuneration. The extent of the breaches in which Mr and Mrs Tailor were involved differ from the company's because they can only be liable for breaches occurring on or after 1 April 2016, and it is useful to refer again to the monetary values from 1 April 2016. The underpayments from that date are as follows:

- (a) Minimum wage - \$11,178.25
- (b) Public holiday arrears - \$570
- (c) Unworked public holiday arrears -\$418
- (d) Alternative holiday arrears -\$3,952 (full amount payable on termination).

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¹⁴ *Labour Inspector & Ors v Pegasus Energy Limited & Ors* [2018] NZERA Wellington 26

(e) Annual holiday arrears - \$12,888.60 (full amount accrued payable on termination).

[187] As Mr and Mrs Tailor are individuals the maximum penalty is \$10,000 per breach, per individual, which is \$80,000 (\$10,000 x 8 breaches x 2). I agree with the Labour Inspector that it seems appropriate to adopt the same globalisation as in relation to Indy Supa, which is globalising the 5 HA arrears claims into two breaches, to give a total of five breaches and a maximum penalty of \$50,000 for each of the two persons involved.

Step 2

[188] The breaches in relation to the failure to pay the minimum wage were severe but viewed within the timeframe from 1 April 2016 the severity is not to the same degree as with the company employer Indy Supa. Mr Patel went without remuneration for nearly one-third of his working hours from 1 April 2016 until his resignation in late February 2017. The other aggravating factor is the effect on Mr Patel's health and his vulnerability with no family support.

[189] Ms Tait suggests that I take the prior conduct of Mr and Mrs Tailor into account before 1 April 2016 in assessing the seriousness of the underpayment. She submits this is in line with a history of non-compliance in a civil context or prior convictions in a criminal context. With respect I do not find that is the correct approach. Section 142W does not have retrospective application but taking conduct as suggested before 1 April 2016 into account I find would have that effect.

[190] The breaches with respect to the failure to keep accurate wage and time records is of concern but I agree that the failure is less than the employer company. The failure did not hamper the Labour Inspector to the same degree because from April 2016 Mr Patel made a contemporaneous record of his hours in the food diary and that was used in the absence of accurate and truthful records.

[191] The failure to keep holiday and leave records created difficulties but to a lesser extent compared to the employer company breaches.

[192] The failure to pay holiday and leave pay on termination of the relationship is more serious and impacted directly on Mr Patel's financial situation in circumstances where he felt forced to leave his employment related to long hours and no breaks.

[193] Calculating and paying public holidays breached obligation but the sums involved are less than with the employer company.

[194] I do not find mitigating factors that would justify a reduction. Mr and Mrs Taylor have been involved in the business for seven years and should be familiar with the law relating to employment standards.

[195] I reduce the provisional penalty of \$50,000 to \$28,000 each for Mr and Mrs Taylor as set out in the table attached to this determination, by assessing the aggravating factors as a proportion of the maximum penalty for each breach.

Step 3

[196] There was some financial information provided. Mr Hintz referred to three bank accounts in Mr and Mrs Tailors' personal names and one vehicle. There are two properties in Mrs Taylor's name. There is a family home and a rental property. Mr Chow says that the Kavita Family Trust owns both of the properties and Mrs Taylor is the sole trustee. From the title searches there is an undischarged mortgage on both properties. The information provided about the properties and the trust is lacking.

[197] Mr Taylor holds 99% of the shares in Indy Supa and Mrs Taylor 1% of the shares. Mrs Taylor also owns 100 percent of shares in Manila Holdings Limited, which is identified as a dairy operation. Mr Chow submits that there is no operating business and therefore she does not receive any income from it.

[198] I accept Ms Tait's submission that caution should be exercised in relying on the information as to Mr and Mrs Tailors' financial position and I am not satisfied that a reduction should be made at this point from the provisional penalty..

Step 4

[199] Appropriately the Labour Inspector recognises that the proportionality test should lead to some reduction in penalties fairly payable.

[200] Mr and Mrs Taylor have acted jointly in their roles in relation to the breaches and therefore the financial impact would be felt more than if they were two unrelated people. They reside together and their finances are in all likelihood intermingled. The evidence appeared to support that they have some family responsibilities. The Labour Inspector in recognition of this acknowledges that a reduction of 50 percent may be justifiable and I accept that would be appropriate.

[201] In assessing proportionality I have also considered the penalty awarded against Indy Supa of \$61,000. I find when assessed with that a penalty of \$12,000 each for Mr and Mrs Tailor is proportionate to the breaches which were serious and caused harm.

Should a portion of the penalty be paid to Mr Patel

[202] The Labour Inspector submits that Mr Patel should be paid a portion of the penalties. Mr Chow submits that Mr Patel was the source of the breaches because he was employed to operate the dairy and keep compliant records. Those are employer obligations. For reasons already set out in this determination I have found that Mr Patel was exploited as a vulnerable migrant. Mr Chow submits Mr Patel was provided with a happy and safe workplace. I do not find he was. The hours he worked took a toll on his health.

[203] Mr Patel should be paid a portion of the penalties in the sum of \$20,000 as he suffered significantly as a result of the breaches and he will not be fully compensated for that by repayment of the arrears.

Costs

[204] I reserve the issue of costs. Ms Tait is to lodge and serve submissions by 23 November 2018 and Mr Chow is to lodge and serve submissions in reply by 14 December 2018.

Orders made:

[205] Within 28 days of the date of this determination Indy Supa Store Limited is to either pay, or enter into a payment plan which is acceptable to the Labour Inspector, the sum of \$103,013.60 being minimum wage, annual leave, public holiday and alternative day arrears owing to its former employee Y Patel.

[206] Interest is ordered to be paid on the amount of \$103,013.60 gross from the date the original statement of problem was lodged with the Authority on 27 October 2017.

[207] Leave is reserved for the Labour Inspector to return to the Authority at the expiration of the 28 day period for further orders about arrears including under s142Y of the Employment Relations Act 2000.

[208] Within 60 days of the date of this determination Indy Supa Store Limited is to pay a penalty of \$61,600 to the Labour Inspector.

[209] Kavita and Mayurkumar Tailor are persons involved in the breaches of Indy Supa Store Limited.

[210] Within 60 days of the date of this determination Kavita Tailor is to pay a penalty of \$12,000 to the Labour Inspector.

[211] Within 60 days of the date of this determination Mayurkumar Tailor is to pay a penalty of \$12,000 to the Labour Inspector.

[212] From the penalties paid the Labour Inspector is to transfer \$20,000 to Mr Y Patel and the balance into the Crown Account.

[213] Costs are reserved and a timetable set for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority

Appendix 1

PENALTY TABLE FOR INDY SUPA STORE LIMITED

Step 1— Nature and Number of breaches — potential maximum penalties (after globalisation)		
Failures to pay minimum wage		\$20,000
Failure to keep wage and time records		\$20,000
Failure to calculate and pay public holiday pay (two breaches globalised to one)		\$20,000
Failure to calculate and pay holiday and leave pay on termination (three breaches globalised to one)		\$20,000
Failure to keep holiday/leave records		\$20,000
	Subtotal	\$100,000
Step 2 —Aggravating Factors as a proportion of maxima in Step 1		
Failures to pay minimum wage	60%	\$17,500
Failure to keep wage and time records	85%	\$17,500
Failure to calculate and pay public holiday pay	70%	\$14,000
Failure to calculate and pay holiday and leave pay on termination	80%	\$16,000
Failure to keep holiday/leave records	60%	\$12,000
	Subtotal	\$77,000
Step 2 —Ameliorating factors (reducing aggravating factors subtotal)		
No reduction	Subtotal	\$77,000
Step 3 — Defendant's Financial Circumstances		
20% reduction	Subtotal	\$61,600
Step 4 — Proportionality		
No reduction	TOTAL	\$61,600

Appendix 2

PENALTY TABLE FOR KAVITA AND MAYURKUMAR TAILOR

Step 1 — Nature and Number of breaches — potential maximum penalties (after globalisation)		
Failures to pay minimum wage		\$10,000
Failure to keep wage and time records		\$10,000
Failure to calculate and pay public holiday pay (two breaches globalised to one)		\$10,000
Failure to calculate and pay holiday and leave pay on termination (three breaches globalised to one)		\$10,000
Failure to keep holiday/leave records		\$10,000
	Subtotal	\$50,000 (for each respondent)
Step 2 —Aggravating Factors as a proportion of maxima in Step 1		
Failures to pay minimum wage	60%	\$6,000
Failure to keep wage and time records	60%	\$6,000
Failure to calculate and pay public holiday pay	40%	\$4,000
Failure to calculate and pay holiday and leave pay on termination	80%	\$8,000
Failure to keep holiday/leave records	40%	\$4,000
	Subtotal	\$28,000 (for each respondent)
Step 2 —Ameliorating factors (reducing aggravating factors subtotal)		
No reduction	Subtotal	\$28,000 (for each respondent)
Step 3 — Defendant's Financial Circumstances		
No reduction	Subtotal	\$28,000 (for each respondent)
Step 4 — Proportionality		
50% reduction and consideration of proportionality	TOTAL	\$24,000 (being \$12,000 for each respondent)