

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 323
3020251

BETWEEN	A LABOUR INSPECTOR Applicant
AND	WAYS ELECTRONICS LIMITED First Respondent
AND	SHOBHIT SAINI Second Respondent

Member of Authority: M B Loftus

Representatives: Alistair Miller and Claire English, counsel for Applicant
Digby Livingston, Advocate for Respondents

Investigation Meeting: On the papers with input up to 27 November 2018

Determination: 31 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter stems from an application by a Labour Inspector which involved what I characterised as the normal range of claims normally seen there-in - underpayment of wages, sick leave and holiday pay; failure to maintain appropriate records and failure to provide written employment agreements. The Inspector sought rectification of the deficiencies along with penalties.

[2] After the claim was lodged some of the issues were addressed and rectified but a key issue remained. That was the question of whether or not the four individuals the Inspector represents were employees for their entire tenure or whether they were, as

Ways claims, volunteers for part of the time. It would only be once that was answered the extent of possible wrongdoing and with it exposure to outstanding wages and penalties could be determined and the parties agreed these issues be set aside for the time being.¹

[3] On 21 August 2018 I issued a determination in which I concluded the four were employees throughout which meant the question of outstanding wages and penalties remained.² Interest is also sought. An application for stay resulting from the fact the initial finding was challenged was raised but subsequently withdrawn with the parties deciding I should determine the remaining issues on the papers.

[4] The determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

Wages

[5] With respect to wages the following is sought for each of the four:

- a. Sukhdev Kumar - \$8,734.23
- b. Saurabh Sharma - \$ 477.90
- c. Gaurav Singh - \$5,468.04
- d. Rohit Pal Singh - \$1,823.99

[6] The above figures include both outstanding wages and holiday pay there-on. With one exception they are the same as the amounts sought in the statement of problem as attributable to the 'volunteer' phase of employment. The exception relates to Gaurev Singh with the claim having increased slightly as a result of evidence given during the investigation meeting. There is also a claim Mr Saini be held responsible for some of these amounts should Ways fail to pay.³

¹ Applicants submission dated 13 April 2018 at [103] and submission of 4 May 2018 at [9]; respondents submission of 24 April at [5.1]

² [2018] NZERA Wellington 76

³ Sections 142W and 142Y of the Employment Relations Act 2000

[7] The respondent is of the view the above sums are inflated as they are based on a belief Way's opening hours totalled 46.5 a week. It is submitted that overstates the situation and the figures are further inflated by failing to take account of meal breaks and the fact there remain hours over which the applicants volunteered for training.

[8] That response faces significant hurdles. The first is the detailed assertions now being made on behalf of the respondent lack an evidential base. The second is they continue to assert an element of voluntary participation on the part of the four and that approach was rejected in the earlier determination. Here I simply note that if the assertions have validity the matter has been challenged. That means it is being heard afresh which allows the relevant evidence to be proffered to the Court.

[9] In the interim I am in a position whereby the earlier determination has effectively declared the records that do exist to be invalid. In the absence of authoritative wages and time records s132 allows me to accept the Inspector's computations in the absence of credible evidence they are wrong. That evidence, such as it was, relied on a view those the Inspector represented were volunteers and that approach foundered.

[10] For these reasons I accept the Inspectors calculations and will order payment accordingly.

Interest

[11] There is then the claim for interest. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Ways has, by failing to make payments properly due, continued to have use of money rightfully belonging to those the Inspector represents. This is, I conclude, a circumstance in which interest should be payable.

[12] As the breaches occurred prior to 1 January 2018 the previous regime applies in respect to determining amount.⁴ That means interest is payable at 5.0% per annum in accordance with section 87(3) of the Judicature Act 1908 and clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011. The amounts I calculate as follows:

⁴ Sections 5 and 2 of the Interest on Money Claims Act 2016

- a. Sukhdev Kumar - \$738.22 plus a further \$1.20 for each day that passes from 1 June 2019 to the date of payment.
- b. Saurabh Sharma - \$40.39 plus a further \$0.07 for each day that passes from 1 June 2019 to the date of payment.
- c. Gaurav Singh - \$462.16 plus a further \$0.75 for each day that passes from 1 June 2019 to the date of payment.
- d. Rohit Pal Singh - \$154.16 plus a further \$0.25 for each day that passes from 1 June 2019 to the date of payment.

Penalties

[13] The next issue is whether or not Ways should have penalties levied against it and in the original statement of problem they were sought for:

- a. A failure to pay four employees the minimum adult wage as required by s 6 of the Minimum Wage Act 1893;
- b. A failure to keep complaint records which specified the number of hours worked each day in a pay period and the resulting pay as required by section 130(1)(g) of the Employment Relations Act 2000. This breach is claimed in respect to two employees;
- c. A failure to keep complaint holiday and leave records as required by s 81 of the Holidays Act 2003. This breach is claimed in respect to one employee;
- d. A failure to pay not less than an employees' relevant daily pay or average daily pay when that employee took a public holiday (s 49 of the Holidays Act). This claim applies to one employee;
- e. A failure to pay not less than time and a half when an employee worked on a public holiday (s 50 of the Holidays Act) and again applying to one employee;
- f. A failure to pay not less than an employees' relevant daily pay or average daily pay for an alternate holiday upon cessation (s 60 of the Holidays Act). Again one employee;

- g. A failure to provide and keep a written employment agreements for one employee as required by s 64(1) of the Employment Relations Act;
- h. A failure to pay an employee sick leave as required by s 71 of the Holidays Act; and
- i. A failure to pay monies owing for holidays in respect to an incomplete year of employment (s 23 of the Holidays Act).

[14] In the statement of problem penalties were only sought against Ways with the Inspector now quantifying what it considers should be ordered via legal submission and a detailed spreadsheet. The starting point was 13 infringements which might attract total penalties of \$260,000. From there the Inspector applied the criteria enunciated in *Preet* and as a result seeks penalties totalling \$50,000.⁵ In doing so the Inspector argues the aggravating factors warrant penalties between 50 and 70% of the total available; reduces that by 20% in recognition of ameliorating factors (namely attempts to rectify some of the issues) and a further 50% as recognition of Ways financial circumstances. Finally it is accepted proportionality will lead to a further reduction.

[15] Ways does not dispute the breaches but argues they should be globalised so as to give a starting point of \$80,000. In support it is submitted the breaches can be divided into three areas: the failure to treat volunteers as volunteers and to employ both Rohit Singh and Tarun Saini (a fifth individual covered by the initial claims) at minimum standards. It is argued the breaches in respect to Tarun Saini are minor but in any event both it and the issues concerning Rohit Singh were rectified. It is further argued a lack of knowledge explains most of the breaches as does the fact the second respondent was once himself the subject of similar failings and simply continued past practices.

[16] The factors to be considered when determining an appropriate level of penalty are prescribed in s 133A of the Employment Relations Act 2000, namely:

- a. the Act's objects; and

⁵ *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

- b. the nature and extent of the breach; and
- c. whether it was intentional, inadvertent, or negligent; and
- d. the nature and extent of any loss or damage suffered by the victim and/or gains made or losses avoided by the person in breach; and
- e. whether the person in breach has already paid an amount of compensation, reparation, or restitution, or taken other steps to avoid or mitigate any actual or potential adverse effects; and
- f. the circumstances in which the breach took place, including the vulnerability of the employee; and
- g. whether the person in breach has previously been found to have engaged in any similar conduct

[17] In respect to these points I record the following. The Act has been amended in recent times in an attempt to increase penalties for conduct such as this and there have been other changes which confirm conduct such as that which occurred here should be both discouraged and penalised. The extent of the breaches and maximum liability are accurately identified by the Inspector.

[18] I also note that while rectification has occurred in respect to a number of the breaches that does to address the fact they occurred and ignorance does not provide a defence when it comes to ensuring employees enjoy minimum standards. I can only conclude from the evidence and the line of defence the choices made by Ways were deliberate.

[19] The evidence suggests Ways gained from the efforts of the four in that their endeavours were charged. As already said some recompense, at least in respect to the original claims, has occurred. I accept the four had a level of vulnerability and some of this has been discussed in other determinations involving the same parties which raises the fact there are other issues though they emanate from the same set of originating circumstances.

[20] Having considered these factors and the submissions I come to the conclusion that with one alteration I accept the Inspector's approach. The alteration is I consider

a greater reduction should be applied to Ways efforts in addressing its failures and conclude 50% more appropriate.

[21] Retaining the rest of the Inspectors calculations and proportions I conclude the 13 breaches warrant penalties totalling \$31,300.

[22] The final point is the Inspector seeks an order that should Ways fail to pay the wages due the second respondent be held personally liable for a portion thereof pursuant to ss 142W and 142Y of the Act. The reason only a portion is sought is that the sections were enacted and therefore only apply from 1 April 2016. The portions sought under these provisions are \$2,569.32 plus interest for Sukhdev Kumar and \$5,468.04 plus interest for Gaurav Singh.

[23] That Mr Saini is a person involved is clear. He is the sole director of Ways and its personification. All of Ways actions are the result of decisions he made and implemented. He has therefore aided and procured the breaches by deciding Ways would act as it did in respect to the failures in complying with employment standards and then performing the actions that resulted in the breaches.

[24] It follows that should Ways fail to pay the outstanding arrears there will be orders making Mr Saini personally liable as sought by the Inspector.

Conclusion

[25] For the above reasons I make the following orders:

- a. The first respondent, Ways Electronics Limited, is to pay to the Inspector, for distribution to Sukhdev Kumar, Saurabh Sharma Gaurav Singh and Rohit Pal Singh, a total of 16,504.16 (sixteen thousand, five hundred and four dollars and sixteen cents) being outstanding wages and holiday pay; and
- b. Ways Electronics Limited, is to pay to the Inspector, for distribution to Sukhdev Kumar, Saurabh Sharma Gaurav Singh and Rohit Pal Singh, a further \$1,394.93 (one thousand, three hundred and ninety four dollars and ninety three cents) being interest on the above amount. This figure shall increase by a total of \$2.27 (two dollars and twenty seven cents) for each day additional day that passes till payment is made; and

- c. Ways Electronics Limited, is to pay to the Crown, via the Authority, penalties totalling \$31,300.00 (thirty one thousand, three hundred dollars).

[26] All the above payments are to be made no later than Friday 5 July 2019 and in the event Ways fails to pay outstanding wages and holidays liability will pass to the second respondent, Shobhit Saini, in accordance with paragraphs [22] to [24] above.

[27] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority