IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 23
3027934

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	MODERN FLOOR & WALL LIMITED First Respondent
	AND	SRINIVAS PANUGANTI Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Shona Carr, counsel for the Applicant Srinivas Panuganti, director of First Respondent and in person as Second Respondent
Investigation Meeting:	On the papers
Determination:	18 January 2019

DETERMINATION OF THE AUTHORITY

A. For breaches of employment standards Modern Floor & Wall Limited (MFWL) must pay a penalty of $15,000 to the Labour Inspector for transfer to the Crown Account.

B. As a person involved in those breaches of employment standards MFWL's director Srinivas Panuganti must pay a penalty of $10,000 to the Labour Inspector for transfer to the Crown Account.

C. Both penalties must be paid by no later than 28 days from the date of this determination.

D. MFWL must also reimburse the Inspector the sum of $71.56 paid to lodge his application in the Authority.

Employment Relationship Problem

[1] By settlement agreement certified under s 149 of the Employment Relations Act 2000 (the ER Act) the parties agreed Modern Floor & Wall Limited (MFWL) and Srinivas Panuganti, MFWL's sole director and shareholder, had breached statutory employment standards. Prior to that agreement MFWL had already paid arrears of wages to two employees that inquiries made by Labour Inspector Callum McMillan had found were due and outstanding as a result of those breaches. The parties agreed to refer the matter of penalties for the breaches back to the Authority for determination. Their agreement recorded that the Inspector would recommend the Authority consider imposing penalties on MFWL and Mr Panuganti totalling between $20,000 and $25,000, with the Respondents recommending any penalties imposed should fall at the lowest end of that range.

The Authority's investigation

[2] In a case management conference the representatives agreed the Authority's assessment of penalties would be made on the papers already on file. Those papers included the Inspector's statement of problem, the statement in reply of MFWL and Mr Panuganti, the parties' settlement agreement, an agreed statement of facts and a summary of arrears paid that were attached to that agreement, and a submission made by Mr Panuganti by email on 30 October 2018.

[3] As permitted by s 174E of the ER Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The breaches liable to penalty

[4] The breaches MFWL and Mr Panuganti accepted had occurred related to two workers employed during 2016 and 2017. They included failure to provide written employment agreements to both workers, in breach of s 65 of the ER Act, and the following breaches of employments standards:[1]

[1] Employment Relations Act 2000, s 5 definition of "employment standards".

- two failures to maintain compliant wage and time records (s 130 of ER Act);
- two failures to pay minimum wages (s 6 of the Minimum Wage Act 1983);
- two failures to pay annual holiday pay (s 23 and s 27 of the Holidays Act 2003);
- one failure to pay public holiday pay (s 50 of the Holidays Act);
- one failure to pay alternative days (s 56 and 60 of the Holidays Act);
- two failures to maintain holiday and leave records (s 81 of the Holidays Act); and
- two breaches by receiving premiums for employment (s 12 A of the Wages Protection Act 1983).

Findings of breach and liability

[5] The following findings are made in reliance on the basis of the agreed summary of facts lodged by the parties, the contents of their respective statement of problem and statement in reply, and relevant documents attached to those statements:

(i) MFWL breached the statutory obligations as identified by the Inspector; and

(ii) As the director of MFWL, his actions in operating its business and employing its workers, Mr Panuganti was a person involved in the breach of employment standards as identified by the Inspector;[2] and

(iii) MFWL was liable to penalties for breaches of those statutory obligations; and

(iv) As a person involved in breaches of employment standards, Mr Panuganti was also liable to a penalty for those breaches.[3]

Assessment of penalties for the breaches

[6] The principles and steps recommended by the Employment Court in *Boorsboom v Preet PVT Limited* have been applied in assessing the level of penalty to be imposed on MFWL and Mr Panuganti.[4] The assessments under those steps include consideration of the following factors identified in the ER Act:

[2] Employment Relations Act 2000, s 142W.
[3] Employment Relations Act 2000, s 142X.
[4] [2016] NZEmpC 143.

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

(a) the object stated in section 3; and
(b) the nature and extent of the breach or involvement in the breach; and
(c) whether the breach was intentional, inadvertent, or negligent; and
(d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
(e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
(f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
(g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

Step 1: Total liability and globalisation

[7] MFWL and Mr Panuganti had each committed a total of 14 breaches of obligations under the ER Act, the Minimum Wages Act (the MWA), the Holidays Act (the HA) and the Wages Protection Act (the WPA). The maximum provisional liability for MFWL, at up to $20,000 for each breach, was therefore $280,000. The maximum provisional liability for Mr Panuganti, at up to $10,000 for each breach, was therefore $140,000.[5]

[8] Globalising the breaches across each of the four Acts impinged there were four breaches apiece by the Respondents.[6] On that basis the maximum provisional liability for MFWL was $80,000. For Mr Panuganti, the maximum provisional liability was $40,000.

Step 2: Aggravating factors

[9] The content of the Labour Inspector's report on his inquiries was not fully tested though an Authority investigation meeting but appeared well founded throughout. Some aspects, particularly concerning how what amounted to premiums were received from the two workers, identified aggravating factors that would have

[5] Employment Relations Act 2000, s 135(2).
[6] *Preet,* above n 4, at [139] and [141].

limited the reduction of those provisional liabilities. The statutory breaches also occurred right throughout the course of both workers' employment. Mr Panuganti's excuses about being new to business in New Zealand and his limited knowledge of the law were not compelling. Considering those factors a reduction of the provisional liability of only 50 per cent was warranted, that is to $40,000 for MFWL and $20,000 for Mr Panuganti.

Step 2: Ameliorating factors

[10] Two factors warranted a substantial reduction of a further 50 per cent on those provisional liabilities to $20,000 for MFWL and $10,000 for Mr Panuganti. Firstly, relatively early action by MFWL in paying a total of $31,166.92 arrears identified by the Inspector went some considerable way in mitigating the adverse effects of the breaches. Secondly, Mr Panuganti had co-operated with the Inspector's inquiries and requests for information.

Step 3: Financial circumstances of MFWL and Mr Panuganti

[11] Mr Panuganti submitted that his financial situation and that of his company was "not good" and he had already borrowed "too much" money from the bank. He said the business had lost money due to a market slump and liquidation of client businesses. However there were no company or personal financial records to support a reduction of penalty levels on those grounds. In the settlement agreement referring the penalties issue back to the Authority for determination the Respondents recommended a total penalty of $20,000 so funds to met at least that amount must have been available or in some way within their capacity to pay.

Step 4: Proportionality of outcome

[12] The final step considers whether the provisional penalty reached after the first three steps is proportionate to the seriousness of the breaches and the harm occasioned by them. It checks whether the imposition of a penalty and the amount is just in all the circumstances.

[13] The penalties imposed should be in proportion to the amounts of money unlawfully withheld from the two workers as a result of the Respondents' breaches.[7]

[7] *Preet,* above n 4, at [190].

Arrears paid totalled more than $31,166 so a penalty at the provisional level of $30,000 would not be disproportionate.

[14] The Respondents, in the settlement agreement, recommended penalties on them total no more than $20,000. While the subjective wishes of wrongdoers are not of great weight in exercise of the Authority's discretion, the amount referred to by the Respondents suggested something at that level was not disproportionate or could not be complied with.

[15] The provisional level of penalties reached of $20,000 for MFWL and $10,000 for Mr Panuganti reached in the previous steps was not inconsistent with the levels imposed in similar cases. Identifying the degree of similarity is difficult however as cases of this type vary widely in respect of the number of breaches, types of breaches, number of workers affected and levels of harm resulting. In *A Labour Inspector v Double Seven Services Limited & Qin Zhang*, for example, the Authority imposed a penalty of $85,000 on the company and $42,500 on Mr Zhang, the company's director, who was found to be a person involved in those breaches under s 142W of the Act.[8] In that case 199 workers were potentially affected by breaches in observance of their minimum entitlements but the amount of money they had not received was estimated to be about $65,000 so, proportionately, was much less than occurred in MFWL's case. As another example, in *A Labour Inspector v Sampan Restaurant Limited & Yu Ouyang* the Authority imposed a penalty of $20,000 on the company and $5000 on Mr Yu, the company's director, who was also found to be a person involved in breaches of the HA requirements applying to 13 workers.[9] However the *Sampan* case concerned only breaches of record keeping requirements under the HA, not the breaches of other employment standards found in MFWL's case.

[16] Having regard to the range of cases and the range of penalties imposed, a adjustment for proportionality was appropriate to set the penalty to be paid by MFWL as $15,000 and by Mr Panuganti at $10,000. This is consistent with the view of the Inspector that penalties up to a total of $25,000 were appropriate. I concluded no lower total amount was sufficient given the extensive failures revealed by the number

[8] [2018] NZERA Christchurch 195.
[9] [2018] NZERA Christchurch 149.

and nature of the breaches identified and accepted. It was an amount necessary to both punish the Respondents for their actions and to deter other employers engaging in similar behaviour.

[17] Mr Panuganti's close involvement in the entire course of the conduct of his business in such a non-compliant and anti-competitive manner made it appropriate that he personally bear a penalty of $10,000, that is 40 per cent of the total imposed for both Respondents.[10]

[18] As a final check of proportionality, I note that the amount MFWL must pay is just over five per cent of its maximum potential liability for the identified 14 breaches. The penalty Mr Panuganti must pay is just over seven per cent of his maximum liability for those breaches. On that measure, neither amount is unduly harsh.

Payment of the penalties

[19] MFWL and Mr Panuganti must now take the steps necessary for the prompt payment of these penalties that arise from the Inspector's investigation concluded in October 2017 and relating to events in 2016 and early 2017. Applying s 136 of the ER Act it was appropriate to make an order requiring the Respondents to pay the penalties imposed directly to the Inspector as the means of its collection by the Crown. Both amounts must be paid to the Inspector, for transfer to the Crown account, by no later than 28 days from the date of this determination.

Costs and expenses

[20] The Inspector sought reimbursement of $71.56 fee paid to lodge his application in the Authority. MFWL must reimburse him that amount.

Robin Arthur
Member of the Employment Relations Authority

[10] *A Labour Inspector v Sampan Restaurant Limited & Yu Ouyang* [2018] NZEmpC 69 at [46]-[48].