

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 568
3056232

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Applicant

AND NEW ZEALAND MOUNTAIN
 HUNTING LIMITED
 First Respondent

AND GARY HERBERT
 Second Respondent

Member of Authority: Helen Doyle

Representatives: Alistair Miller, counsel for the Applicant
 Craig O'Connor, counsel for the Respondent

Investigation Meeting: On the Papers

Agreed statement of facts
Received

30 May 2019

Submissions Received: 21 June and 19 July 2019 from the Applicant
 12 July 2019 from the Respondent

Date of Determination: 4 October 2019

DETERMINATION OF THE AUTHORITY

A New Zealand Mountain Hunting Limited is ordered to pay to the Labour Inspector for payment to the Crown a penalty for record keeping breaches in the sum of \$55,000 within 28 days.

B Gary Herbert is ordered to pay to the Labour Inspector for payment to the Crown a penalty as a person involved in record keeping breaches in the sum of \$27,500 within 28 days.

C Costs are reserved and failing agreement a timetable has been set.**Employment Relationship Problem**

[1] The Labour Inspector seeks an award of penalties against the first respondent who is an employer and the second respondent who is a person involved for record-keeping breaches under the Employment Relations Act 2000 (the ERA) and the Holidays Act 2003 (the HA).

[2] By agreement this matter is to be determined on the basis of an agreed statement of facts and submissions.

The Agreed Facts

[3] The first respondent is a limited liability company which operates a hunting lodge outside of Omarama and provides hunting trip packages combined with lodge stays.

[4] The employer employed 18 staff on fixed term employment agreements during the hunting season from February to July 2018 in Omarama, as well as one permanent full time employee who is based at the employer's farm in Waimate.

[5] The second respondent is the sole director and majority shareholder of the employer and has acted as the representative of the employer in all interactions with the Labour Inspectorate. The employees report to him and he is in charge of all aspects of the recruitment process, including the hiring and dismissal of employees. He is also in charge of directing the hunting guides' daily duties with clients and organising the clients' accommodation at the hunting lodge.

[6] On 20 March 2018, the Labour Inspectorate received a complaint from a former employee of the first respondent, who alleged that the employer required staff to work for twelve hours a day on average, but only paid a flat rate of \$150 per day of work.

[7] On 29 May 2018, the applicant advised the employer of the complaint and requested a list of employees, past and present, from the previous 12 months.

[8] On 24 July 2018, the applicant sent a formal notice to the employer requesting complete employment records for a sample of five employees, including employment agreements, wage and time records, and holiday and leave records.

[9] On 9 August 2018, the employer sent the applicant copies of partial wage and time records. The applicant then sent a further information request to the employer, seeking any further information that recorded the hours worked each day and holidays or leave taken by the employee.

[10] On 10 August 2018, the second respondent advised the applicant that he only had time sheets for one employee that recorded the hours worked each day. Subsequently, on 6 November 2018, the second respondent provided a copy of the timesheets for one further employee. No further information constituting wage and time records or holiday and leave records was provided.

[11] In addition, the copies of employment agreements for eight employees provided by the employer for the 2018 hunting season provided no indication of the usual hours of work for the employees, but simply stated that “[t]he employee’s usual hours of work will be as and when required”.

[12] On 8 February 2018 the second respondent was interviewed along with five employees. All five employees stated in their interviews that they did not record their start and finish times or the number of hours they worked each day. The second respondent also stated in his interview that no formal records or time sheets were maintained or kept for 2018.

[13] Having considered all the information collected during the course of the investigation, the applicant determined that the first respondent had breached minimum employment standards legislation in regard to its record-keeping obligations.

[14] The first respondent accepts that it has breached minimum employment standards as follows by failing to:

- (a) Keep full and accurate wage and time records in respect of 17 employees, in breach of section 130 of the ERA; and
- (b) Keep full and accurate holiday and leave records in respects of 19 employees, in breach of s 81 of the HA.

[15] The second respondent accepts that he was the person involved in these breaches pursuant to section 142W of the ERA and as a result he has also breached these minimum employment standards.

[16] The failure to keep complete wage and time records has resulted in an inability to show that minimum wage requirements had always been met by the employer and has also meant that the employer has been unable to demonstrate that it has complied with other minimum entitlement provisions. This has resulted in an inability for the applicant to substantiate the complaint of failure to pay the minimum wage to employees.

The approach to the imposition of penalties

[17] The factors in s133A of the ERA the Authority must have regard to in determining the amount of a penalty have been considered together with the additional factors set out by the Employment Court in *Prett*.¹ More recent guidance from the Employment Court is found in *Prabh Limited*² and *Daleson Investment Limited*.³

The object of the Act

[18] The failure in this case by the respondents to keep wage and time and holiday and leave records did not advance the objects in s 3 of the ERA of good faith including enabling effective enforcement of employment standards. The lack of records made it challenging for the Labour Inspector to determine the extent of the breach of minimum entitlement provisions and compliance with employment standards. The inherent inequality of power in the relationship therefore was not addressed by these record keeping failings and the Labour Inspector has not been able to bring any possible claims for arrears as a result.

Nature and Extent of the Breaches

[19] There are two types of breaches. The first is a breach of s 130 of the ERA being a failure to keep time and wage records and the second is a breach of s 81 of the HA being a failure to keep holiday and leave records. 17 employees were affected by the failure to keep time and wage records and 19 employees by the failure to keep holiday and leave records. Whilst Mr O'Connor acknowledges the number of breaches in his submissions he notes that they only arise from one employee complaint and not 19 separate complaints. The important factor though is that the record keeping was not in accordance with the requirements of the

¹ *Borsboom (Labour Inspector) v Preet VTC Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, (2016) 10 NZELC 79-072

² *Labour Inspector v Prabh Limited* [2018] NZemPC 110.

³ *Labour Inspector v Daleson Investment Limited* [2019] NZemPC 12.

ERA and the HA. Less weight at this point of the assessment is placed on how that came to the attention of the Labour Inspector.

[20] The maximum penalty for the breaches of the ERA and HA by the first respondent is \$20,000 per breach under s 135(2)(b) of the ERA and s 75(1)(b) of the HA. The maximum penalty for the breaches of the ERA and the HA by the second respondent is \$10,000 per breach under s 135(2)(a) of the ERA and s 75(1)(a) of the HA.

[21] The maximum penalty for the failure to keep wage and time records is \$340,000 against the first respondent (\$20,000 x 17 employees) and \$170,000 against the second respondent (\$10,000 x 17 employees).

[22] The maximum penalties available for failure to keep holiday and leave records is \$380,000 against the first respondent (\$20,000 x 19 employees) and \$190,000 against the second respondent (\$10,000 x 19 employees).

[23] Mr Miller submits that global penalties are not appropriate for failure to keep records which should be approached on a per-employee basis. Further there should not be globalisation across two different pieces of legislation (the ERA and the HA). This approach is endorsed in judgments of the Employment Court.⁴ Mr O'Connor did not take issue with the assessment of the nature and number of breaches. I accept Mr Miller's submission on globalisation.

Were the breaches intentional, inadvertent or negligent?

[24] Mr O'Connor submits the respondents maintain the breaches were not intentional "in the sense of being a deliberate business practice" to avoid detection of a failure to comply with minimum statutory requirements. Mr O'Connor submits that the absence of records was due to naivety on the part of the respondents in operating a "flat rate" of remuneration which had the benefit of simplicity for the respondents and the employees. This was in circumstances it was submitted that accounted for the "swings and roundabouts" in the variation in employment duties between employees and the duration and frequency of hours.

[25] He further submits that the "flat rate" was designed to factor in other payments and/or benefits received by employees including accommodation in the lodge and meals also

⁴ Above n1 at [139] and n3 at [23]

enjoyed by the guests, WIFI access, power and the ability to use the respondents' private vehicles.

[26] Mr Miller submits that the respondents should be well aware of their minimum statutory obligations because the respondents have been in business for almost 25 years. He states that it is their responsibility to know and apply the relevant laws and even if concluded the breaches were unintentional that is no excuse.

[27] Mr O'Connor submits that over the time the respondents have been in business hundreds of employees viewed them as good and reasonable employers with no issues about deliberate flouting of minimum standards raised. He refers to some positive comments by an employee in a statement provided to the Labour Inspector by current employee P dated 8 February 2019:

Gary is a great person to work for, care for his staff and we are well looked after.

[28] I acknowledge as more likely than not that the respondents did not set out with the intention to deliberately defeat statutory minimum requirements. Rather there appeared a desire for simplicity in the application of a flat rate to employees who worked varying duties and hours with benefits of accommodation and food along the same lines shared by guests of the lodge. Mr O'Connor submits there was a degree of naivety about the minimum requirements for record keeping. In *Prett*⁵ there was reference to the sources of advice and assistance about employment obligations being freely available to businesses which together with common knowledge of these within the community generally meant it would be difficult to assert ignorance of the law. Failure to take some steps in that respect before setting up the "flat rate" system could be seen as negligent.

[29] I acknowledge the lack of earlier complaints from employees about their employment with the respondents. Lack of complaint could also be a result of employees being unaware the employer is not complying with the law and simply trusting that they are indeed compliant. I do note and weigh the positive statements particularly from one employee about the second respondent. .

[30] I accept Mr Miller's submission that there was a deliberate decision by the respondents to set up a payroll system without meeting its obligation about keeping records

⁵ Above n1 at [86] and [87]

about hours worked. The respondents did not make take steps to ascertain whether that system would satisfy record keeping requirements in the HA and ERA. It was not a situation where they checked and misunderstood the advice or were wrongly advised. As a result there are no records to assess compliance with minimum statutory entitlements. That is a particularly important aspect of an employer's responsibilities.

[31] In conclusion I find that the breaches were as a result of intentional actions by the respondents to set up a "flat rate" payroll system that did not comply with record keeping obligations. I do not consider it could be concluded that the breaches were inadvertent. That is an aggravating circumstance.

Nature and extent of any loss or damage suffered, gains made or lost by person in breach or involved in breach

[32] The lack of records has meant it is not possible to accurately assess if there are minimum wage breaches and the extent of any loss to the employees. Mr Miller submits that minimum wage breaches are likely to have occurred. I accept that the unknown factors about that increases the seriousness of the failure to keep records when viewed with the payment of a fixed daily rate and no consideration about payment of the minimum rate of wages each day.

[33] Concerns arise with the failure to keep holiday and leave records in any form. It is unclear whether public holidays have been accounted for. The respondents say they were and the applicant maintains that she simply does not know because of the complete absence of holiday and leave records but it is likely that public holidays were worked and there is no record to establish whether entitlements on those days were provided.

[34] Employees may well have suffered a loss in payment of their minimum wages and holiday pay. The breaches in respect of record keeping make it impossible for ascertain what that may have been.

[35] I take into account that more serious aggravating factors in some cases of deliberate under-reporting of significant and exploitative hours worked by employees and then denial that hours were worked, threats and pressure, delays in paying remuneration, unlawful deductions and a generally exploitative and unpleasant employment environment are not present in this case.

Mitigating effects of the breaches, circumstances of the breach and whether there has been engagement in similar conduct.

[36] The respondents say that they have implemented changes to ensure records are accurately recorded and maintained and there is compliance with the ERA and HA. Mr O'Connor submits that this has included obtaining advice from accountants, improved timesheets and payslips and appointing an Office Manager to install and operate a payroll system (MYOB Ace payroll) with the appointment taking place in October 2018 and the new payroll programme being operational in December 2018.

[37] The Labour Inspector is somewhat sceptical about these changes and said no evidence has been provided to date to support compliance. Further that it is unclear what evidence there is of contrition and remorse. A common sense view of the changes to date which include consultation with accountants and engagement of an office manager support a significant step in the right direction. I agree with Mr O'Connor that there is some objective information from an interview with employee P in February 2019 that there were changes to payslips and extra pay or time off for alternative days.

[38] In terms of contrition and remorse I weigh the prompt admission of wrong doing followed through to the statement in reply as a significant factor. There was co-operation with Labour Inspector to a high standard. Weighed with other matters that the Authority sees that is significant because it enables the Labour Inspectors to get about their business as the legislation intended in an efficient and effective manner without time wasting.

[39] Another matter that I weigh with contrition and remorse is that there has been considerable movement from the statement in reply lodged on behalf of the respondents that suggested the imposing of penalties was unnecessary and/or disproportionately severe and an improvement notice would be adequate. Now the respondents accept that penalties are inevitable and have put forward alternative analysis on what the quantum of those should be.

[40] The respondents could be expected to have known the requirement to keep records. It may be the case that breaches could have extended beyond the hunting season of 2018. I also weigh there was no submission to the effect that the employees were in as vulnerable a situation as with many other Labour Inspector matters that come before the Authority and Court. The first and second respondents have not been found to have engaged in similar conduct by the Authority or Court.

*Prett analysis**Deterrence and culpability*

[41] I weigh the importance of minimum standards and the need for these to be met without the Labour Inspector with limited resources to have to become involved and to point out non-compliance. There is a need to punish and deter those involved with the breaches of minimum employment standards. The quantum of penalties should reflect this.

Consistency

[42] I accept there is desirability for consistency with other similar cases. I have read the cases referred to by Mr Miller that are about, or have aspects of, record keeping breaches.⁶ Some of the cases are distinguishable on their facts where there were elements of deliberate attempts to disguise non-compliance, evidence of very long hours worked, provision of inaccurate information to the Labour Inspector and very vulnerable employees. I have considered and weighed where relevant with the facts of this matter and quantum of the award of penalties.

Ability to pay

[43] There are no issues with an ability to pay.

Proportionality

[44] The Labour Inspector accepts the application of the proportionality test will lead to some reduction in penalties “properly and fairly payable.” Here for example there are two different statutory breaches of the ERA and HA for failure to keep records multiplied by a large number of affected employees without globalisation. In those circumstances there is a real risk that the penalty would be out of proportion to the gravity of the breaches for that reason and this requires reduction accordingly by the Authority.

⁶ *A Labour Inspector & Ors v Pegasus Energy Limited & Anor* [2018] NZERA Wellington 26

A Labour Inspector v Xu t/a Golden Spring Takeaway [2019] NZERA Wellington 22

A Labour Inspector v Babylon Communication Limited [2019] NZERA 301

A Labour Inspector v Hai Ung in Partnership with Vuochhour Ung t/a South Dunedin Stay House & Anor [2018] NZERA Christchurch 173.

What penalties should be awarded?

[45] The maximum penalty for the first respondent for the breaches is \$720,000 and for the second respondent is \$360,000. Mr Miller submits severity/ aggravating features of the breaches should be assessed at 50% of the maximum penalty. Mr O'Connor submits that absence of aggravating features requires assessment at 25% or a reduction of 75% of the maximum penalties. Taking into account what has been set out earlier and the importance of record keeping to ensure minimum entitlements are complied with I provisionally allocate 50% of the maximum penalty at this stage. That brings the provisional total for penalties to \$360,000 for the first respondent and \$180,000 for the second respondent.

[46] I consider the mitigating circumstances in this case as set out earlier particularly weighed with the factors in similar cases including *Prett*⁷ warrant a 60% reduction.

[47] There is no reduction for financial reasons.

[48] Finally I consider whether the provisional amounts after the first three steps of \$144,000 for the first respondent and \$72,000 for the second respondent are proportionate to the seriousness of the breaches and the harm occasioned.

[49] Penalties are designed to punish and deter and I accept that they should be realistic so as not to encourage non-compliance with minimum standards.

[50] I agree with Mr O'Connor that a simple multiplication of the penalties over the large number of employees in this case results in a total penalty disproportionate to the overall seriousness of the matter when all matters are considered in the round including similar cases. I also weigh that penalties are claimed from both the first and second respondent.

[51] A reduction is required because the provisional penalties are significantly disproportionate to the seriousness of the breaches and the harm occasioned when all matters are considered. The awards made, I am satisfied will reflect the seriousness of the failure to keep records under the ERA and the HA and act as a deterrent to others.

[52] I order that the following penalties be paid to the Labour Inspector for payment to the Crown Account within 28 days of this determination:

⁷ Above n 1

- (a) \$55,000 by New Zealand Mountain Hunting Limited.
- (b) \$27,500 by Gary Herbert.

Costs

[53] I reserve the issue of costs. It may be that agreement can be reached on these. Failing agreement the Labour Inspector has until 18 October 2019 to lodge and serve submissions as to costs and Mr O'Connor has until 31 October 2019 to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority

APPENDIX ONE – PENALTY ANALYSIS FOR THE FIRST RESPONDENT

Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to keep wage and time records	17 x \$20,000	\$340,000
Failure to keep holiday and leave records	19 x \$20,000	\$380,000
	Subtotal	\$720,000
Step 2 – Aggravating Factors as a proportion of maxima in Step 1		
Failure to keep wage and time records	50%	\$170,000
Failure to keep holiday and leave records	50%	\$190,000
	Subtotal	\$360,000
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)		
Less 60% of above	Subtotal	\$144,000
Step 3 –First Respondent’s Financial Circumstances No reduction		
Step 4 – Proportionality		
Reduce by rounding down	Total	\$55,000

APPENDIX TWO – PENALTY ANALYSIS FOR THE SECOND RESPONDENT

Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to keep wage and time records	17 x \$10,000	\$170,000
Failure to keep holiday and leave records	19 x \$10,000	\$190,000
	Subtotal	\$360,000
Step 2 – Aggravating Factors as a proportion of maxima in Step 1		
Failure to keep wage and time records	50%	\$85,000
Failure to keep holiday and leave records	50%	\$95,000
	Subtotal	\$180,000
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)		
Less 60% of above	Subtotal	\$72,000
Step 3 – Second Respondent’s Financial Circumstances No reduction		
Step 4 - Proportionality		
Reduce by rounding down	Total	\$27,500