

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 597
3026454

BETWEEN	A LABOUR INSPECTOR Applicant
AND	INDIAN HEAVEN LIMITED First Respondent
AND	SAYED MASOUN NOORI Second Respondent
	NAJIMA NOORI Third Respondent
	FATIMA NOORI Fourth Respondent

Member of Authority: Andrew Dallas

Representatives: Claire English, counsel for the Applicant
Fatima Noori for the Respondents

Investigation Meeting: On the papers

Date of Determination: 17 October 2019

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Mike Heyward, lodged proceedings in the Authority against Indian Heaven Limited (Indian Heaven), Sayed Noori, Najima Noori and Fatima Noori alleging breaches of minimum employment standards in respect of seven employees.

[2] On 15 April 2019, the Authority issued a determination making various findings and found Indian Heaven liable for the imposition of penalties for contraventions of minimum employment standards. Sayed Noori, Najima Noori and Fatima Noori were found to be persons involved in those contraventions and, as a consequence, also liable for the imposition of penalties.¹ This determination now resolves the matter of penalties between the parties.

The Authority's investigation

[3] With the agreement of the parties, the Authority heard this matter "on the papers". Having regard to s 174E(b)(ii) of the Employment Relations Act 2000 (the Act), I do not refer in this determination to all the submissions advanced by the representatives, however, I have fully considered them.

Issues

[4] The issues for determination are:

- (i) Are Indian Heaven and Sayed Noori, Najima Noori and Fatima Noori liable for the imposition of penalties for the contravention of employment standards and if so, in what quantum; and
- (ii) If so, should Indian Heaven and Sayed Noori, Najima Noori and Fatima Noori contribute to the costs of the Labour Inspector's representation before the Authority?

The Labour Inspector's claim for penalties

[5] Having considered the determination, the Labour Inspector's evidence and the submissions of the parties, it is appropriate, in all the circumstances, for the Authority to impose penalties on Indian Heaven and Sayed Noori, Najima Noori and Fatima Noori.

¹ *A Labour Inspector v Indian Heaven Limited and Ors* [2019] NZERA 227

[6] In *Borsboom v Preet PVT Limited*² the Court articulated the analytical steps to be taken by the Authority for the assessment of penalties. The penalty analysis now consists of a number of relevant considerations drawn from the statutory framework and the common law after the Court's approach in *Preet* was supplemented by further decisions of the Court and the enactment of s 133A of the Act.³

[7] The Labour Inspector's submissions were consistent with this analysis. Fatima Noori on behalf of Indian Heaven and Sayed Noori, Najima Noori and herself provided information she said was relevant to the imposition of penalties but this was not focussed on the penalties analysis. Further, no information was provided about the ability of Indian Heaven and Sayed Noori, Najima Noori and Fatima Noori to pay penalties beyond vague generalities.

Relevant considerations

Objects of the Act

[8] Consistent with this step of the penalties analysis, the Labour Inspector identified various objects of the Act said by the Court to be relevant to the imposition of penalties.⁴

Nature of breaches

[9] The Labour Inspector correctly observed the Authority had found 36 breaches of minimum standards.⁵ The Labour Inspector said these breaches could be globalised into seven categories of breaches but it would be inappropriate to further globalise them beyond this. Having considered this submission, and given there was no contrary submission advanced by Indian Heaven and Sayed Noori, Najima Noori and Fatima Noori, I accept it.

² [2016] NZEmpC 143 at [67] and [68].

³ See, *Nicholson v Ford* [2018] NZEmpC 132, *A Labour Inspector v Pradh Limited* [2018] NZEmpC 110 and *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12.

⁴ *Daleson* above n 3 at para [27]

⁵ Above n 1 at [21]

[10] Based upon a penalty of \$20,000 for each breach, the maximum penalties available to the Labour Inspector against Indian Heaven are \$720,000. Based upon a penalty of \$10,000 for each breach the maximum penalties available against Sayed Noori, Najima Noori and Fatima Noori as persons involved in the breaches are \$360,000.

Aggravating and ameliorating factors going to penalty amounts

[11] Aggravating factors of the breaches include that the arrears have not been paid to affected employees, despite the orders of the Authority, and steps taken to set up a new restaurant business venture. The Labour Inspector also contended this was designed to defeat the effect of the Authority's arrears awards. However, despite these matters the Labour Inspector proposed an aggregate deduction of 61% from the maximum penalties payable by Indian Heaven to \$440,000 and an aggregate deduction of 61% from the maximum penalties payable by Sayed Noori, Najima Noori and Fatima Noori to \$220,000 (\$73,333 each). I accept this submission.

[12] After considering ameliorating factors going to quantum of penalties which were identified solely as Indian Heaven, Sayed Noori, Najima Noori or Fatima Noori having had no proceedings brought against them in the Authority previously (but had been subject to an improvement notice), the Labour Inspector said a further modest discount of 20% could be applied. So then, at this step of the analysis maximum penalties payable by Indian Heaven are \$352,000 and the maximum penalties payable by Sayed Noori, Najima Noori and Fatima Noori are \$176,000 (\$58,666 each). Given the merits of this submission, and in the absence of any submissions at this point to the contrary, I accept it.

Ability to pay

[13] The Labour Inspector said the onus was squarely on Indian Heaven, Sayed Noori, Najima Noori and Fatima Noori to place evidence before the Authority about their ability to pay penalties through the provision of up to date and accurate financial information. While I accept this submission, I also note that at the time of issuance of this determination this had not been done. However, the Labour Inspector said the continuing business activities of Sayed Noori, Najima Noori and Fatima Noori suggested there was some ability to pay penalties.

[14] Sayed Noori, Najima Noori and Fatima Noori provided some limited comment on their individual and collective financial position. However, this was unsupported by any evidence.

[15] Having considered the respective submissions of the parties as to this step, I have decided a sensible discount ought to be applied based on ability to meet any penalties imposed. This should be 50%. So then, at this step of the analysis, the total potential penalties after applying this discount, are:

- (i) Indian Heaven: \$176,000; and
- (ii) Sayed Noori: \$29,333; and
- (iii) Najima Noori: \$29,333; and
- (iv) Fatima Noori: \$29,333.

Proportionality of outcome

[16] As is common with submissions advanced by the Inspectorate, the Labour Inspector accepted the application of the proportionality test at this stage of the analysis would likely result in an overall reduction of penalties. However, the Labour Inspector said the Authority should impose meaningful penalties. Indian Heaven, Sayed Noori, Najima Noori and Fatima Noori said no penalties should be imposed on them and denied any wrongdoing warranting the imposition of penalties.

Result

[17] Taking the general thrust of the parties' submissions and the following factors into account:

- a. the inherent vulnerability of seven migrant employees,
- b. the failure to pay the ordered arrears,
- c. the lack of contrition,
- d. the obvious attempts to simply "carry on" in a similar vein with a new restaurant business,
- e. the need for both deterrence and consistency;

it is appropriate to impose significant, but proportionate, penalties on Indian Heaven, Sayed Noori, Najima Noori and Fatima Noori.

[18] So then, the following penalties must be paid to the Authority within 28 days of the date of this determination for subsequent transfer to a Crown Bank Account:

- (i) Indian Heaven: \$71,600; and
- (ii) Sayed Noori: \$15,733; and
- (iii) Najima Noori: \$15,733; and
- (iv) Fatima Noori: \$15,733.

Costs

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

[20] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.⁶

Andrew Dallas
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.