

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 603
3045832

BETWEEN	A LABOUR INSPECTOR Applicant
AND	SUNWIN TECHNOLOGIES LIMITED First Respondent
AND	RAMESH KUMAR KONEY Second Respondent
AND	PHANI KUMAR CHEVENDRA Third Respondent

Member of Authority: Vicki Campbell

Representatives: Sarah Blick for Applicant
Michael Witt for First Respondent
Beverly Edwards for Second and Third Respondents

Investigation Meeting: 14 October 2019

Determination: 22 October 2019

DETERMINATION OF THE AUTHORITY

- A. Mr Koney and Mr Chevendra are persons involved in breaches of minimum standards under section 142W of the Employment Relations Act 2000.**
- A. Sunwin Technologies Limited is ordered to pay to the Labour Inspector the sum of \$18,697.86 as arrears of wages under s 131 of the Act for the benefit of the specified employees. As persons involved in the failure to pay wages Mr Koney and Mr**

Chevendra are ordered to pay to the Labour Inspector the arrears to the extent that Sunwin is unable to pay.

B. The respondents are ordered to pay the following penalties into the Authority:

Sunwin Technologies Limited	\$19,698
Mr Koney	\$7,527
Mr Chevendra	\$7,527

C. The parties are directed to use their best endeavours to agree upon a payment schedule. Leave is reserved to return to the Authority in the event that agreement cannot be reached.

D. Costs are reserved.

Employment relationship problem

[1] Sunwin Technologies Limited (Sunwin) operated as a sub-contractor to Universal Communications Group New Zealand Limited (UCG) which in turn sub-contracts to Chorus Limited to provide services within the Ultra-Fast Broadband project.

[2] In November 2017 Sunwin came to the attention of the Labour Inspectorate following a media report claiming Sunwin had used unpaid volunteers to carry out fibre installation work. The Labour Inspector undertook an investigation which has given rise to these proceedings.

[3] The Labour Inspector claims Sunwin has breached the Employment Relations Act 2000 (the Act), the Minimum Wage Act 1983 (MWA) and the Holidays Act 2003 (Holidays Act). The Labour Inspector claims payment of arrears of wages and penalties against Sunwin.

[4] The Labour inspector also claims Mr Koney and Mr Chevendra, the directors and shareholders of Sunwin, were persons involved in the breaches and seeks the imposition of penalties against them personally.

The Labour Inspector's Investigation

[5] In December 2017 the Labour Inspector commenced an investigation and issued a notice to Sunwin requiring it to provide copies of full wages and time records, holiday and leave records, employment and volunteer agreements for all past and present employees and volunteers from 9 June 2016 to 4 December 2017.

[6] The Labour Inspector interviewed Mr Koney and Mr Chevendra on 28 May 2018 as part of its investigation. In a letter to the Labour Inspector on 20 June 2018 Mr Koney explained that when Sunwin had advertised for experienced staff there were many applicants who had completed Chorus' mandatory safety training but who lacked experience in the Telecom industry.

[7] In response to the lack of skills and experience Mr Koney and Mr Chevendra, through Sunwin, developed a volunteer/work experience program with a view to developing new Fibre Technicians. The intention was to provide interested people looking for work in the fibre installation industry with an opportunity to help expand their skills to make them employable. Sunwin intended and did offer volunteers paid employment after they had gained experience and if they were interested in pursuing a career in the industry. The program was in place from 27 September to 11 November 2017 inclusive.

[8] Sunwin says it was a widespread industry practice of engaging individuals as volunteers. Such arrangements were promoted by other contractors including UCG. At the time it established the program it notified UCG of the suggested arrangements and provided a template volunteer agreement. UCG did not express any concerns at that time.

[9] In support of its position that it did not believe it was acting outside the law in engaging volunteers to train them to become fibre technicians Sunwin produced a notice provided by UCG the subject of which is stated as "Compliance to NZ Laws". The notice sets out the obligation all contracting partners to UCG have to adhere to New Zealand employment laws. It goes on to suggest that a possible solution to the difficulties associated with engaging experienced workers is to utilise volunteering as a strategy to bring in staff with a view of developing them into fibre technicians. The

notice contained a warning that once the volunteers had begun to perform the work of regular employees they were required to be treated as an employee.

[10] Following his investigation and in his report the Labour Inspector concluded the volunteers should have been engaged as employees and as a result Sunwin was not compliant with minimum standards and identified arrears of wages owing to employees.

[11] After receiving the Labour Inspector's report Sunwin acknowledged it had mistakenly engaged workers as volunteers from 27 September to 11 November 2017 when they should have been engaged as employees.

[12] Sunwin acknowledges that as a result of its mistake in engaging five employees as volunteers it failed to provide written employment agreements, to pay minimum wages and holiday pay and to retain wages and time, and holiday and leave records.

[13] For their part, Mr Koney and Mr Chevendra accepted at the investigation meeting that they were persons involved in the breaches under s 142W of the Act and are liable to penalties.

Issues

[14] As a consequence of the admissions by the three respondents this determination has focused on making orders relating to the arrears of wages and penalties.

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

Arrears of wages

[16] The Labour Inspector claims payment of arrears of wages for outstanding holiday pay plus unpaid wages at the minimum wage rate.

[17] Sunwin acknowledges the arrears are owing. A claim relating to the payment for one employee was withdrawn at the investigation meeting as those arrears have been paid in full.

[18] Sunwin accepts the following amounts are payable as arrears of wages (being minimum wages and holiday pay) for the following specified employees:

Mr Manpreet Singh	\$2,398.41
Mr Amrit Pal Singh	\$3,291.44
Mr Santosh Kumar Akuthota	\$4,662.47
Mr Thilak Paruchuri	\$5,425.82
Mr Vamish Kakkevenl	\$2,919.72
Total	\$18,697.86

[19] Subject to my determination on payment by instalments, Sunwin Technologies Limited is ordered to pay to the Labour Inspector the sum of \$18,697.86 as arrears of wages under s 131 of the Act for the benefit of the specified employees above. As persons involved in the failure to pay wages Mr Koney and Mr Chevendra are ordered to pay to the Labour Inspector the arrears to the extent that Sunwin is unable to pay.

Interest

[20] The Labour Inspector seeks an award of interest on the arrears of wages. I have concluded that it is appropriate to award interest from 11 November 2017 to 8 November 2018. This is the date Sunwin made genuine and reasonable attempts to pay the arrears of wages in full after receipt of the Labour Inspector's draft report.

[21] The Labour Inspector took no steps to facilitate the promised payments despite a number of requests from Sunwin. At the investigation meeting the Labour Inspector could not explain why he had not responded to Sunwin's requests for information to enable payment to occur and apologised for his oversight.

[22] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.¹

Penalties

[23] The Employment Court in *Borsboom v Preet PVT Limited* identified a framework for the assessment of penalties.² This analysis has been supplemented by the enactment of s 133A of the Act and further decisions of the Court which I have followed in reaching my conclusions on the quantum of penalties to be imposed.³

The breaches

[24] The following 36 breaches by Sunwin have been acknowledged:

- a) Five breaches of s 65 of the Act (failure to provide employment agreements);
- b) Five breaches of s 130 of the Act (failure to keep wages and time records);
- c) Five breaches of s 81 of the Holidays Act (failure to keep holiday and leave records);
- d) Five breaches of ss 23, 25 and 27 of the Holidays Act (failure to pay holiday pay) equating to 15 breaches in total;
- e) Six breaches of the MWA (failure to pay the minimum wage for each hour worked).

[25] Mr Koney and Mr Chevendra acknowledge that they were persons involved in 31 breaches set out in paragraphs [24](b)-(e) above. The Labour Inspector noted that Mr Koney and Mr Chevendra could not be held liable for the breaches of s 65 of the Act as s 65 is not included in the definition of employment standards in the Act.⁴

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator

² *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

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

⁴ Employment Relations Act 2000, s 142W.

Objects of the Act

[26] The Act's declared objectives include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.⁵ Those objects support the need to impose a penalty on each of the three respondents for their actions in failing to meet minimum standards.

Nature and extent of the breaches

[27] In reaching my conclusions on appropriate penalties I have taken into account the following factors:

- a) The volunteer scheme was in place for a limited time of approximately six weeks;
- b) The total amount of unpaid wages amounted to \$18,697.86.
- c) Each of the three respondents have accepted mistakes were made when it engaged up to six employees initially as volunteers and who were not paid (one worker was subsequently engaged as an employee and held that status at the time of the Labour Inspector's investigation).
- d) By way of explanation the three respondents say they relied on the notice received from UCG which appears to support the volunteer scheme. The notice from UCG made it clear that volunteering was only to be utilised for observers or new trainees and that if that was not the case the volunteer could be seen to be providing economic benefits and therefore likely to be classed as an employee. Further, the UCG notice is dated after the date Sunwin engaged its first volunteers and was recording information provided by Mr Koney and Mr Chevendra.

[28] Sunwin breached basic employment standards by not paying six employees at least the minimum wage for all hours worked during their engagement as volunteers, failing to provide employment agreements, failing to pay holiday pay and failing to

⁵ Employment Relations Act 2000, s 3.

keep and maintain records. Each breach attracts a maximum penalty of \$20,000 amounting to potential total penalties of \$720,000.

[29] In the case of Mr Koney and Mr Chevendra as persons involved in the breaches the number of breaches for which they are liable is 31. Each person involved in a breach of employment standards is liable to a maximum penalty of \$10,000 for each breach amounting to maximum penalties against each of Mr Koney and Mr Chevendra of \$310,000 each.

[30] I agree with the submissions by the Labour Inspector that globalisation of the breaches under the Holidays Act for failure to pay holiday pay is appropriate as well as the globalisation of the breaches of keeping and maintaining wages and time and holiday and leave records. This has the effect of reducing the total breaches for Sunwin to 21 and for Mr Koney and Mr Chevendra to 16 in total.

[31] At this stage of the analysis the total provisional penalties are \$420,000 for Sunwin and \$160,000 each for Mr Koney and Mr Chevendra.

Whether the breaches were intentional, inadvertent or negligent

[32] The three respondents do not dispute the breaches have occurred. All three respondents have submitted that the breaches occurred as a result of ignorance and were inadvertent.

[33] Sunwin did not seek legal advice about its plans to implement the volunteer program. It did contact the Employers and Manufacturers Association but its enquiry was about the form and content of a volunteer agreement and did not seek advice on the important question about whether the program it was proposing to implement was lawful.

[34] I have accepted the evidence of Mr Koney and Mr Chevendra that there was a lack of skills in the fibre industry and there was a genuine motivation to correct that position to enable skilled employees to be engaged on a paid basis. I have also accepted their evidence that the use of volunteers had become part of industry practice.

[35] Employers are expected to adhere to their obligations under the law and ignorance is no excuse. Once Sunwin embarked on the volunteer program it was

inevitable it would be in breach of employment standards if the volunteers were considered to be employees.

[36] Sunwin relied on discussions it held with UCG about the need to train staff and how that might be achieved. Sunwin sent UCG a copy of its proposed volunteer agreement and did not receive any notification that it might be unlawful.

[37] Sunwin also met with the local Ministry of Social Development office where they discussed the proposal and the training needs of the industry. Mr Chevendra and Mr Koney believe they received a positive response to their initiative.

[38] I have accepted the evidence of the respondents that the breaches were inadvertent and there was no purposeful intention to deny payment of wages or holiday pay.

[39] This factor warrants a reduction in provisional penalties of twenty percent making the total provisional penalties for Sunwin \$336,000 and for Mr Koney and Mr Chevendra \$128,000 each.

The nature of losses, damages or gains resulting for either party

[40] The failure to pay minimum wages during the six week period of the volunteer program deprived the employees of income they were entitled to have for various periods of between two to four weeks.

[41] I have accepted Sunwin's evidence that as volunteers the employees were engaged as an additional labour resource. Where normally a job would have two technicians working side by side, during the volunteer program there were three people working on a job. If there was any cost to the company for this additional resource those costs were not recoverable from UCG. It is not apparent from the evidence before the Authority that Sunwin benefitted financially from engaging the volunteers. If it had not engaged the volunteers it is unlikely to have had to pay the wages because the resources were additional to the needs of the business.

[42] It is arguable that the volunteers themselves gained from the program. All of those initially engaged as volunteers went on to secure full time paid employment after the volunteering period.

[43] This factor warrants a reduction in provisional penalties of twenty percent making the total provisional penalties for Sunwin \$268,800 and for Mr Koney and Mr Chevendra \$102,400 each.

Steps to mitigate the effects of the breach

[44] There is no dispute that Sunwin co-operated fully with the Labour Inspector's investigation. It has accepted responsibility for the breaches and is remorseful going so far as to apologise to each of the employees concerned. Until the Labour Inspector became involved Sunwin believed it was acting lawfully.

[45] On receipt of the Labour Inspectors draft report Sunwin undertook to cease and desist from the conduct of engaging volunteer workers, advised the Labour Inspector it had ceased trading and no longer operated in the Telecommunications/Fibre industry and by 23 November 2017 would no longer employ or otherwise engage any person for work.

[46] As stated earlier, Sunwin undertook to immediately rectify its error and pay the identified wage arrears and leave entitlements. However, despite a number of requests to the Labour Inspector no steps were taken to facilitate the promised payments to be made.

[47] At the time Sunwin offered to make reparations it had the financial resources to do so. That situation has now changed as the business has been sold, it has no assets and no funds to pay.

[48] This factor warrants a reduction in provisional penalties of thirty percent making the total provisional penalties for Sunwin \$187,600 and for Mr Koney and Mr Chevendra \$71,680 each.

Circumstances of the breach and vulnerability

[49] As noted earlier the breaches took place over a limited period of six weeks. While the breaches affected immigrant workers all those engaged as volunteers had open work visas. Their visas were not tied to Sunwin, however, Mr Koney and Mr Chevendra had offered to support future applications for visas if that were necessary.

[50] On the balance of probability I accept it is more likely than not that Sunwin did not set out to undermine worker's rights or entitlements. Mr Koney and Mr Chevendra genuinely believed that what they were doing was a lawful way to provide a stepping stone for those interested in pursuing a career in the telecommunications industry.

[51] The Labour Inspector told me at the investigation meeting that the Labour Inspectorate undertook a number of investigations within the industry and acknowledged that of those being prosecuted for breaches of minimum standards the breaches by Sunwin are at the lower end of the scale.

[52] This factor warrants a further reduction in the provisional penalty of twenty percent making the total provisional penalties for Sunwin \$150,080 and for Mr Koney and Mr Chevendra \$57,344 each.

Previous conduct

[53] Sunwin operated a new business and, as such there was no instance of similar previous conduct. The Authority has previously considered a reduction of fifty percent as appropriate in recognition that the company was a "first offender".⁶ I have followed that decision which means the total provisional penalties at this point for Sunwin are \$75,040 and for Mr Koney and Mr Chevendra are \$28,672 each.

Deterrence

[54] Sunwin is no longer operating as a business. Both Mr Koney and Mr Chevendra gave evidence that they no longer employ any employees and do not intend to in the future.

⁶ *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

[55] The breaches in this case involve minimum standards. As such it is important that a penalty is set at a level where it sends a message to the wider community of employers as a deterrence from engaging people to work without pay under the guise of a training program or work experience especially where those engaged are contributing to the benefit of the company. As in this case, such actions inevitably lead to breaches of minimum standards. Given the seriousness of the breaches no further reduction to the provisional penalties is warranted under this heading.

Degree of culpability

[56] This factor involves a consideration of the severity of the breaches and the degree of culpability of the persons in breach. In this case the degree of culpability of the three respondents is not high. The Labour Inspector told me that when compared to others in the industry the culpability of the respondents was at the lower end of the scale.

[57] This factor warrants a reduction in provisional penalties of twenty five percent making the total provisional penalties for Sunwin \$56,280 and for Mr Koney and Mr Chevendra \$21,504 each.

Consistency of penalty awards in similar cases

[58] Consistency with other similar cases is desirable. I have considered other cases which are to a significant degree distinguishable on their facts. For example a number of cases include attempts to disguise non-compliance, evidence of very long hours worked, provision of inaccurate information to the Labour Inspector, breaches occurring over extended periods of time and breaches affecting very vulnerable employees.

[59] I have weighed and considered those cases where relevant with the facts of this matter and the quantum of the penalties imposed. This factor warrants a reduction in provisional penalties of thirty percent making the total provisional penalties for Sunwin \$39,396 and for Mr Koney and Mr Chevendra (rounded up) \$15,035 each.

Ability to pay

[60] This factor is but one of the many factors to be taken into account and ought not to be given disproportionate weight.⁷ It was common ground that Sunwin, while still registered on the companies register, has not traded in more than twelve months and only continues to be registered to allow these proceedings to be concluded. Sunwin holds no funds or convertible assets.

[61] Both Mr Koney and Mr Chevendra have provided comprehensive evidence of their financial situations which for all intents and purposes shows that their financial situation is precarious at best.

[62] I accept all three respondents will struggle to pay any penalties imposed. However, that is an issue for subsequent enforcement and I have addressed this in the orders that follow regarding payment by instalment.

Proportionality of outcome

[63] This factor requires an assessment of whether the provisional penalty arrived at is just in all the circumstances and is proportionate to the seriousness of the breaches and the harm occasioned by them.

[64] Standing back I have concluded a further reduction of fifty percent is warranted. While the breaches were serious they were not sustained over a long period of time and was limited to six weeks. The harm caused to the employees was limited to less than \$20,000 and the provisional penalties are significantly disproportionate to the seriousness and the harm occasioned when all the circumstances of this case are considered.

[65] After the final reduction the total penalties (rounded up to the nearest dollar) for Sunwin is \$19,698 and for Mr Koney and Mr Chevendra are \$7,527 each.

[66] Subject to my determination on payment by instalment, the respondents are ordered to pay the following penalties into the Authority:

Sunwin Technologies Limited	\$19,698
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⁷ *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [46].

Mr Koney	\$7,527
Mr Chevendra	\$7,527

[67] On receipt of the penalties in the Authority they will be transferred to the Crown Account.

Payment by instalments

[68] At the investigation meeting all parties addressed me on an application by the three respondents under s 131(1A) of the Act for orders that the amounts payable be paid by instalments.

[69] The Authority may order payment of wages or other money to an employee by instalments, but only if the financial position of the employer requires it. The possibility of orders being made under s 131(1A) of the Act may be appropriate in circumstances where the interests of justice justify such a step.⁸

[70] I am satisfied payment by instalments of the wages and penalties is appropriate in this case. Neither the Labour Inspector nor the three respondents have provided a suggested payment schedule. Rather than impose a payment schedule the parties are directed to use their best endeavours to agree upon a payment schedule.

[71] Failing agreement, leave is reserved for the Labour Inspector to return to the Authority to request a timeframe for the penalties to be paid.

Costs

[72] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Labour Inspector shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The respondents shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[73] 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

⁸ *Fuimaono v Houia (No 2)* [2017] NZEmpC 83 at [17].

adjustment upwards or downwards. I note that the investigation meeting for this matter took half a day.

Vicki Campbell
Member of the Employment Relations Authority