

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 631
3045131

BETWEEN	A LABOUR INSPECTOR Applicant
AND	SATYAM LIMITED First Respondent
AND	SUNILKUMAR DALPATBHAI MISTRY Second Respondent

Member of Authority: Helen Doyle

Representatives: Miriam Long and Claire English, Counsel for the
Applicant
Umar Kuddus, Counsel for first and second
Respondents

Investigation Meeting: 30 May 2019

Submissions [and further
Information] Received: 13 June 2019 and 13 August 2019 from applicant
17 July 2019 from respondent

Date of Determination: 4 November 2019

DETERMINATION OF THE AUTHORITY

- A Satyam Limited is ordered to pay to the Labour Inspector for payment to the Crown a penalty for record keeping and public holiday entitlement**

breaches in the sum of \$18,000 within 28 days of the date of this determination.

B Sunilkumar Dalpatbhai Mistry is ordered to pay to the Labour Inspector for payment to the Crown a penalty as a person involved in the breaches in the sum of \$9,000 within 60 days of the date of this determination.

C Costs are reserved and failing agreement a timetable set for an exchange of submissions.

Employment Relationship Problem

[1] An Authority investigation meeting was scheduled for 30 May 2019 to determine whether there were breaches by Satyam Limited (Satyam) of employment standards and whether Sunilkumar Dalpatbhai Mistry is a person involved in the breaches of employment standards under s142W of the Employment Relations Act 2000 (ERA). The Labour Inspector asked that penalties be awarded.

[2] At the commencement of the investigation meeting Counsel asked for an opportunity to discuss matters. At the conclusion of a lengthy discussion the Authority was advised that Satyam accepted that it had breached employment standards as set out below:

(a) Failing to keep compliant wage and time records under s 130 of the Employment Relations Act 2000 (ERA) for five employees:

- (i) Diptikumari Solanki;
- (ii) Kalpesh Patel;
- (iii) Radhika Patel;
- (iv) Shraddha Miyani; and
- (v) Ilaben Jatakiya.

(b) Failing to keep compliant holiday and leave records under s 81 of the Holidays Act 2003 (HA) for four employees:

- (i) Diptikumari Solanki;
- (ii) Kalpesh Patel;
- (iii) Radhika Patel; and

- (iv) Shraddha Miyani.
- (c) Failing to provide public holiday entitlements under ss. 46, 49, 50, 56, and 60 of the HA for three employees:
 - (i) Diptikumari Solanki;
 - (ii) Kalpesh Patel; and
 - (iii) Radhika Patel.

[3] It was also accepted that Mr Mistry is a person involved in the breaches as the sole director of Satyam.

Background of the breaches

[4] Because of the way matters unfolded the Authority has not tested the evidence and made findings. Ms Long and Mr Kuddus both set out a summary of the facts. Whilst there is no significant difference between the two, at times a subjective element is discernible.

[5] To avoid that, in setting out the background I have referred in the main to the facts that appear in both sets of submissions and are supported by documentation.

[6] Satyam is a registered company which was incorporated in 2016 and has a convenience store business in Dunedin which began trading in April 2017. Satyam employed two employees at any given time including a store manager and ceased its business operations in August 2018. All of the employees were in New Zealand on working visas.

[7] Mr Mistry is the sole director and shareholder of the first respondent. He lives in Auckland.

[8] In December 2017 the Labour Inspector investigated Satyam. This was part of a proactive investigation of Dunedin employers and did not arise as a result of a complaint.

[9] In March 2018 at the completion of the investigation the Labour Inspector found a number of breaches. On 12 March 2018 the Labour Inspector issued an infringement notice in the sum of \$4,000 for not keeping compliant holiday and leave records under s 81(2) of the HA.

[10] Satyam asked that the fee be discounted and it was reduced to \$3,000 on the basis that over the relevant time the employees were employed, in relation to one employee there was no public holidays and arguably therefore no breach would have occurred.

[11] On 10 April 2018 the Labour Inspector issued the first improvement notice. Satyam did not object to the notice which set out breaches of s 65 of the ERA, incorrect calculation and non-payment for public holidays worked and unworked, and no provision of paid alternative days, and non-compliant holiday and leave, wages and time record breaches.

[12] Satyam did not object to the improvement notice and attempted to comply but the information provided was not adequate for the Labour Inspector's purposes. Communication took place between the Labour Inspector and the respondents' accountant until 7 August 2018 about the requirements of the first improvement notice. On 13 June 2018 the respondents' accountant advised that payments had been made to three employees as follows - Diptikumari Solanki \$251.12 and 117.19; Radhika Patel \$298.38 and Kalpesh Patel \$780.60.

[13] On 7 August 2018 the Labour Inspector withdrew the first improvement notice and issued a second improvement notice. This second improvement notice addressed the same matters as the first improvement notice but detailed annual holiday issues and requested compliance by 11 September 2018. Satyam did not object to the second improvement notice and its accountant provided some information but the Labour Inspector did not consider the improvement notice was complied with.

[14] On 13 November 2018 the Labour Inspector filed a statement of problem in the Authority and Satyam and Mr Mistry lodged a statement in reply. The statement in reply in the main focussed on the desirability of mediation. The Labour Inspector did not wish to attend mediation.

[15] Satyam then engaged a tax accountant to analyse its business operations with respect to record keeping and recalculated annual leave and public holiday arrears. A report was provided to the Labour Inspector and Ms Long before a video meeting between the Labour Inspector, counsel for both parties and Satyam's accountant in March 2019.

[16] The Labour Inspector then carried out her own calculations which showed some discrepancies with Satyam's calculations. The Labour Inspector calculated total arrears of \$6,283.27 that were owing to employees as follows:

- (a) Diptikumari Solanki, \$3,888.65 being arrears for worked and unworked public holidays, alternative holiday arrears owed at termination, annual holiday arrears owing at termination;
- (b) Kalpesh Patel nil
- (c) Radhika Patel, \$2,104.22 being arrears for worked and unworked public holidays, alternative holiday arrears, annual holiday arrears; and
- (d) Shraddha Miyani, \$290.00 for worked and unworked public holidays and annual holiday arrears.

[17] On 24 May 2019 the Labour Inspectorate were advised that all arrears had been paid in full.

[18] It later transpired that there was a net amount of \$567.61 owing to an employee and before the investigation meeting on 30 May it was confirmed that all arrears had been paid in full.

[19] The employees were paid their gross rather than net entitlements. Mr Kuddus records that Mr Mistry has undertaken to pay the tax component to Inland Revenue Department when it falls due himself.

Penalty Analysis

Purpose of Penalties

[20] Penalties are imposed for breaches of employment standards to punish, deter employment breaches, compensate those who are victims of such breaches and eliminate unfair competition.¹

[21] I will proceed to consider what is required for determining an appropriate penalty.

¹ *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 [61-63]

Determining an appropriate penalty

[22] In determining an appropriate penalty for a breach of employment standards the Authority must consider all relevant matters including the seven factors set out in s 133A of the ERA, the purpose of the HA² and the four step process known as the *Preet* analysis.³

[23] As Ms Long submits the Employment Court has confirmed culpability and involvement where there is an employer and a person involved should be considered separately.⁴

[24] The Employment Court has emphasised that the process in each case involves the exercise of a discretion and that will mean a varied range in the quantum of penalties imposed.⁵

The object of the ERA and HA

[25] One of the objects of the ERA is to acknowledge and address the inherent inequality of power in employment relationships. I accept that the employees employed by Satyam were vulnerable because they were on work visas and in receipt of minimum or low wages. Confirming receipt of minimum entitlements for wages, holidays, public holidays and other leave was particularly important. Employers who keep proper records comply with good faith obligations because their employees can have trust and confidence that they are receiving minimum entitlements.

[26] The records Satyam kept for holidays and leave and wage and time were poor and inadequate. This impacted on the ability to have confidence about adherence with employment standards. The purpose of the HA is to promote balance between work and other aspects of employees' lives and accurate records are very important for that reason.

[27] There was an attempt to comply with the requirements of the improvement notice and an accountant was engaged initially and then another at a later stage. Unfortunately the process was drawn out, compliance was not achieved and the Labour Inspector considered its role was not taken seriously. That was not consistent with good faith obligations.

² Section 76A of the Holidays Act 2003

³ Above n1

⁴ *Labour Inspector v Sampan Restaurant Limited* [2018] NZEmpC 69

⁵ Above n 3 at [53]

The nature and extent of the breaches

Number of breaches

[28] Both Ms Long and Mr Kuddus agree the breaches number 12 in total.

Types of breaches

[29] There are three types of breaches.

[30] The first is the public holiday breaches. Ms Long accepts that the breaches are materially similar and can be treated as three breaches for three employees.

[31] The second is holiday and leave record breaches. There is one course of conduct for each affected employee resulting in four breaches.

[32] The third is wage and time record breaches. There is one course of conduct for each affected employee resulting in five breaches.

Maximum penalty in respect of each breach

[33] Section 135(2) of the ERA provides the maximum liability for a company is \$20,000 per breach. For an individual the maximum penalty is \$10,000 per breach. Ms Long submits that the liabilities under s 75(1)(b) of the HA be assessed in the same way.

[34] Mr Kuddus agreed in his submissions that there had been globalisation to a sufficient level. Taking into account the public holiday breaches being reduced to one breach for each employee I agree that further globalisation would not be appropriate.

[35] The maximum penalty payable by Satyam is \$240,000 being 12 breaches multiplied by \$20,000.

[36] The maximum penalty payable by Mr Mistry is for \$120,000 being 12 breaches multiplied by \$10,000.

Extent of the breaches

[37] The documents in the bundle support attempts by the first accountant engaged by Satyam and Mr Mistry to provide the Labour Inspector with information requested to show

compliant records. Over a period from December 2017 to January 2019 there was a sense of increasing frustration for the Labour Inspector because of the need to explain on numerous occasions what was required without success. Ms Long referred to the “half-hearted attempts” to comply which compounded the circumstances of the breaches and that matters were allowed to “limp along unsatisfactory.” The Labour Inspector did warn on several occasions that there may need to be application to the Authority whilst trying to achieve compliant records.

[38] The situation about the public holidays in particular remained unclear and contradictory. For example it was initially suggested that no public holidays were worked by employees but the information provided by the new accountant engaged after proceedings were lodged was to the effect that the employees did work on public holidays.

[39] I do accept that there were attempts by Satyam and Mr Mistry to comply but objectively assessed matters did take a long time to get to the point where there could be records of a sufficient quality to enable a proper assessment of what was owed.

[40] Ms Long properly raises a potential issue under this head about the infringement notice and the fee paid of \$3000 and penalty considerations. This is because s 235G of the ERA provides that a person is not liable to pay an infringement fee and penalty under for the same conduct.

[41] Ms Long submits that the infringement notice was issued for four breaches subsequently reduced to three of s 81(2) of the HA. Section 81(2) is the obligation to keep a holiday and leave record and the information required.

[42] There are four breaches of s 81(2) of the HA in this matter with three of them being for employees named in the infringement notice. Ms Long accepts that arguably the breaches could be viewed as relating to the same conduct as the infringement notice breaches. The Labour Inspector says that the breaches relied on for penalty arose after the infringement notice was issued and paid and are not part of the same conduct but are different breaches.

[43] Ms Long directs the Authority to document BZ 13 in the bundle which is an email request dated 10 April 2018 requesting samples of holiday and leave records from the first instructed accountant “since the investigation.” She then directs the Authority to an email

from the Labour Inspector dated 11 July 2018 at 10.20am in which she refers amongst other matters to the various spreadsheets that have been provided and writes they have not changed since the investigation and/or are not consistent.

[44] I am satisfied from the documentation that the penalty is not in respect of the same conduct as that relied on for the infringement notice but ongoing non-compliance and subsequent breaches after the infringement notice and payment of the fee.

Were the breaches intentional, negligent or inadvertent?

[45] Both Ms Long and Mr Kuddus agree in their respective submission that ignorance of employment standards is difficult to accept and not a defence in any event to a penalty.⁶

[46] I record that Mr Mistry does have other business activities as he is director and shareholder of other companies. Mr Kuddus submits that all of the other businesses Mr Mistry is involved in have accountants who use payroll software.

[47] Mr Kuddus submits that the business operations carried out through Satyam were Mr Mistry's first solo business venture and that to keep costs low given the relatively low turnover of the business Mr Mistry took PAYE obligations into his own hands rather than engaging an accountant, Mr Mistry having had some accounting experience in India.

[48] Although the records were quite inadequate and much more care should have been taken I am not satisfied that the breaches were intentional. Rather I find the breaches arose as a result of negligence.

The nature and extent of any loss or damage

[49] The figure Ms Long provides for the total amount of entitlements calculated as owing is \$6,850.88 being arrears for worked and unworked public holidays, alternative holidays and the annual holiday arrears for three employees. It is unclear to me why that is a different amount from that set out in the factual background as total arrears owing of \$6,283.27. The amounts however are not so far apart and it suffices for present purposes that I set both out.

[50] I accept that the employees missed out on the entitlements at the time they were due and the poor record keeping and/or lack of records prevented an independent assessment of

⁶ Preet above n 1 at [87]

original records by the Labour Inspector. I do weigh there were some payments at an earlier stage by the respondents' on their calculations and this appears to have satisfied any amounts owing to one of the four employees at least to the extent that this was able to be ascertained from the records.

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

[51] There was payment of arrears identified to the employees. I take that into account as a mitigating factor.

[52] Mr Kuddus submitted that Mr Mistry had "great internal shame" at the thought that his inadvertent business practices led to some employees being deprived of their entitlements. Ms Long submitted the only impression was that Satyam and Mr Mistry felt singled out and victimised. The impression I had was that Mr Mistry felt somewhat powerless and anxious although those matters do not necessarily equate to remorse. I accept however there is some remorse, from Mr Kuddus's submissions, on the part of Mr Mistry and in turn Satyam in particular for the impact on employees.

[53] It was submitted on behalf of the Labour Inspector that the payment of gross amounts of arrears owing may in fact have a negative tax impact for the employees rather than a benefit. If there was to be a tax impact on the employees it would be on any analysis minimal. The total overpayment to all three employees was \$746.46. Mr Mistry will attend to the consequences of PAYE with the IRD. I do not see that as a particularly significant mitigating factor but I do weigh it to the extent that the employees have been belatedly paid their entitlements and a little bit extra akin perhaps to interest.

[54] I do weigh that there were attempts to comply and Satyam and Mr Mistry instructed accountants in order to do so. Some information was provided. Matters dragged on somewhat but it was not a situation where there was simply a failure to respond. Further I could not be satisfied that the failure to comply properly with the Labour Inspector's requests about compliant records was deliberate obfuscation. Rather I formed the view there was an inability to comprehend what was required. I accept that must have seemed rather inexplicable to the Labour Inspector as she repeated her requests on numerous occasions.

Steps should have been taken much sooner by Satyam and Mr Mistry to intervene and engage particularly once it became apparent there were continued concerns with non-compliance.

[55] Mr Kuddus submits that Satyam and Mr Mistry have already been punished for breaching employment standards. He makes this submission on the basis of payment of the infringement fee. I do not find that is a mitigating factor. It is clear non-compliance continued after that for holiday records. He also refers to the financial costs of engaging lawyers and accountants to assist. I accept that was a cost but it is not a mitigating factor.

[56] Mr Kuddus submits that Mr Mistry has taken active steps to eliminate the possibility of breaches in his other businesses by engaging accountants that use automated payroll systems which record accurately for wages and holidays. He submits that the deterrence element of penalties has achieved its purpose because of steps taken to ensure employment standards are not breached again. I think that is very positive for the future but not really a mitigating factor.

[57] Neither Satyam nor Mr Mistry has been previously before the Authority in matters of this nature.

[58] There was vulnerability for the employees in this matter who were immigrant workers on visas and the work was often part-time in nature meaning that every dollar was particularly important.

Deterrence and culpability

[59] I accept the need to emphasise employment standards to Satyam and Mr Mistry and the need for timeliness of responses to a Labour Inspector whose resources are limited.

Consistency

[60] There is need for consistency in the imposition of penalties. Weight has been placed on the Employment Court judgment of *A Labour Inspector v Daleson Investment Limited*⁷ by the Labour Inspector. In *Daleson* the arrears were \$12,500 and the penalty was \$40,000. Ms Long submits that the other determinations referred to with the exception of one were pre-*Daleson* and the lower penalties could be explained by a co-operative process. Ms Long in

⁷ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

her submissions does not accept there was co-operation in this matter in any kind of effective or authentic way before or after proceedings were lodged. On that basis a substantial penalty such as in *Daleson* is sought.

Ability to Pay

[61] Satyam's financial statements show a reasonably substantial loss for the year ending 31 March 2019. The business has ceased trading from August 2018.

[62] Mr Mistry's income to 31 March 2019 from his individual tax summary is modest.

Proportionality

[63] A penalty award needs to be proportionate to ensure that the penalties arrived at are fair and proper.

What penalties should be awarded?

[64] Mr Kuddus submits that ideally there should be no penalties awarded at all. I find that would be inconsistent with other cases where there have been breaches and payment of arrears owing. The circumstances of this matter support that there should be an award of penalties weighing the relevant factors as set out above.

[65] The maximum penalty payable by Satyam is \$240,000 and the maximum penalty payable by Mr Mistry is \$120,000.

[66] From that point I accept the submission of Ms Long that there should be a reduction of 50% of the maximum penalty for the record keeping breaches and 70% of the maximum penalty for the HA breaches.

[67] That brings the provisional total for penalties to \$132,000 for Satyam and \$66,000 for Mr Mistry.

[68] I find a greater reduction for ameliorating factors is called for than the 30% suggested by Ms Long although not to the extent of 80% suggested by Mr Kuddus. I find there should be a reduction of 45% at this stage for both Satyam and Mr Mistry. That brings the provisional total for Satyam down to \$72,600 and \$36,300 for Mr Mistry.

[69] I accept that very difficult financial circumstances of Satyam should not reduce the penalty to nil. They are however still a relevant factor. The company no longer trades. A loss is apparent. Whilst payments can be made by instalments the financial situation with Satyam is such that there is a risk that there will be an inability to make any payment at all. I find there should be a reduction at this stage for Satyam of 70% and Mr Mistry of 50% because of the modest nature of his income.

[70] The provisional amounts at the end of this third step are \$21,780 for Satyam and \$18,150 for Mr Mistry. I need to consider whether they are proportionate to the seriousness of the breaches and the harm occasioned.

[71] I accept that penalties should be realistic so that it is not seen to encourage non-compliance with minimum standards. Penalties are designed to punish and deter. They should also be fair and just and take into account the circumstances of each case before the Authority as each will have different aspects to be considered and weighed.

[72] Consistency is of some importance. In the Authority determination of *Labour Inspector v Babylon Communication Limited*⁸ the minimum wage arrears in that case were \$790 and the penalties were \$72,000 for both minimum wage breaches and wage and time record breaches. There was I accept a similarity in that the arrears owing were paid but there appeared to be more employees affected.

[73] Ms Long submits there was no co-operation in a real or authentic way to enable this matter to be seen in line with cases where penalties were \$20,000 or less.⁹ The arrears in those cases were 4 and 5 times higher than in this case. In another case *Labour Inspector v La Wheat Limited*¹⁰ the arrears were in excess of \$77,000. The matter was defended and there was a penalty awarded of \$20,000 against the company and \$10,000 against the director. I accept that *Daleson*¹¹ was decided after these earlier matters.

[74] I do note in this matter that there was some degree of co-operation in coming to an agreement about arrears payable, there was a request that was not accepted for mediation, and although last minute, an agreement to breaches at the investigation meeting. I accept the

⁸ *Labour Inspector v Babylon Communication Limited* [2019] NZERA 310.

⁹ *Labour Inspector v Modern Floor and Wall Limited* [2019] NZERA 23 and *Labour Inspector v Symrose Limited and Thind* [2019] NZERA 94

¹⁰ *Labour Inspector v La Wheat Limited* [2019] NZERA 50

¹¹ *Daleson* above n 6

degree of co-operation was not as evident as in the other two matters Ms Long referred to above.

[75] I find that there should be under the proportionality test some reduction. The awards made will still reflect the seriousness of the failings in this case with record keeping and the failure to engage in an active and timely manner with the Labour Inspectorate when there are non-compliant records. I take into account that there are penalties claimed from both Satyam and Mr Mistry.

Orders

[76] I order that the following penalty be paid to the Labour Inspector for payment to the Crown account within 28 days of the date of this determination.

- (a) \$18,000 by Satyam Limited

[77] I order that the following penalty be paid to the Labour Inspector for payment to the Crown account within 60 days of the date of this determination.

- (a) \$9,000 by Sunilkumar Dalpatbhai Mistry.

Costs

[78] I reserve the issue of costs. Ms English is now dealing with this matter in the absence of Ms Long. She is to have until 18 November 2019 to lodge and serve submission as to costs and Mr Kuddus is to have until 2 December 2019 to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority

APPENDIX ONE – SATYAM LIMITED (Employer)

Step 1 – Nature and Number of Breaches (12) – Potential Maximum Penalties		
Failure to keep wage and time records	5 x \$20,000	\$100,000
Failure to keep holiday and leave records	4 x \$20,000	\$80,000
Failure to pay for unworked public holidays (usually a working day), time and a half for worked public holidays, provision of and payment for an alternative holiday if an employee works	3 x \$20,000	\$60,000
	Subtotal	\$240,000
Step 2 – Aggravating Factors as a proportion of maxima in Step 1		
Failure to keep wage and time records	50% x \$100,000	\$50,000
Failure to keep holiday and leave records	50% x \$80,000	\$40,000
Failure to pay for unworked public holidays (usually a working day), time and a half for worked public holidays, provision of and payment for an alternative holiday if an employee works	70% of \$60,000	\$42,000
Step 2 – Ameliorating factors (reducing aggravating factors subtotal of \$132,000)		
Less 45% of above subtotal	Subtotal	\$72,600
Step 3 – Defendant’s Financial Circumstances		
Less 70% of above subtotal	Subtotal	\$21,780
Step 4 – Proportionality		
	TOTAL	\$18,000

APPENDIX TWO – SUNILKUMAR MISTRY (person involved)

Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to keep wage and time records	5 x \$10,000	\$50,000
Failure to keep holiday and leave records	4 x \$10,000	\$40,000
Failure to pay for unworked public holiday, time and a half for worked public holidays, provision of and payment for an alternative holiday if an employee works	3 x \$10,000	\$30,000
	Subtotal	\$120,000
Step 2 – Aggravating Factors as a proportion of maxima in Step 1		
Failure to keep wage and time records	50% x \$50,000	\$25,000
Failure to keep holiday and leave records	50% x \$40,000	\$20,000
Failure to pay for unworked public holidays (usually a working day), time and a half for worked public holidays, provision of and payment for an alternative holiday if an employee works	70% of \$30,000	\$21,000
Step 2 – Ameliorating factors (reducing aggravating factors) \$66,000		
Less 45% of above subtotal	Subtotal	\$36,300
Step 3 – Defendant’s Financial Circumstances		
Less 50% of above subtotal	Subtotal	\$18,150
Step 4 – Proportionality		
	TOTAL	\$9,000