

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 678
3063735

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	A1 COMMUNICATION LIMITED First Respondent
AND	HAROLD HIRDESHWAR DEO Second Respondent

Member of Authority: Rachel Larmer

Representatives: Joseph Perrott, counsel for the Applicant
No appearance by First Respondent
No appearance by Second Respondent

Investigation Meeting: On the papers

Submissions and further Information Received: 28 August 2019 from the Applicant

Date of Determination: 27 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] These proceedings are brought by a Labour Inspector, who is designated under s 223 of the Employment Relations Act 2000 (the Act).

[2] A1 operates a business supplying subcontractor service to the Chorus Ultra-Fast Broadband project.

[3] Mr Deo is the sole director and shareholder of A1 Communications Limited. He was the person who decided what actions A1 would and would not take, and he was the person who engaged (or failed to engage, as the case may be) with the Labour Inspector.

[4] Being the hands on director of A1, and the person who was running the business, Mr Deo is a person who was directly involved in A1's alleged breaches of employment standards.

Penalties claimed by Labour Inspector

[5] The Labour Inspector seeks that penalties be imposed on A1 for:

- (a) Failure to produce employment records forthwith, in breach of s 229(2) of the Act;
- (b) Failure to keep wage and time records that complied with s 130 of the Act; and
- (c) Failure to keep holiday and leave records that complied with s 81 of the HA03.

[6] The Labour Inspector also seeks that penalties be imposed on Mr Deo personally, as a person involved in A1's breaches of the following minimum employment standards:

- (a) Failure to keep wage and time records that complied with s 130 of the Act; and
- (b) Failure to keep holiday and leave records that complied with s 81 of the HA03.

[7] Because A1's alleged failure to provide the Labour Inspector with employment documentation in breach of s 229(2) of the Act is not a breach of minimum employment standards, a penalty could not be sought against Mr Deo personally for that alleged breach.

Labour Inspector's requests

[8] On 27 June 2018, as part of a proactive operation targeting Chorus subcontractors, Labour Inspectors visited the offices of A1 Communication Limited. There appeared to be no one at the address at that time, so the Labour Inspectors left a request for A1 Communications Limited (A1) to provide them with an employee list.

[9] There was no response to that request.

[10] On 17 July 2018 the Labour Inspectors couriered a "*Notice to Produce Records*" (the Notice) to A1, at its registered address.

[11] The Notice requested A1 to provide all past and present employees' employment records for individuals employed between 17 July 2016 and 17 July 2018. A1 was given until 31 July 2018 to produce these employment records.

[12] On 7 August 2018 Mr Harold Hirdeshwar Deo provided the Labour Inspector with two electronic files that appeared to have been employment agreements for two employees.

[13] The Labour Inspector was unable to open these files.

[14] On 9 August 2018 the Labour Inspector emailed Mr Deo advising that the files that he had provided were not readable and asking him to provide pdf copies of the employment records that had been identified in the Labour Inspector's Notice.

[15] A1 did not respond to that request.

[16] On 23 August 2018 the Labour Inspector emailed Mr Deo again, asking that he provide the employment records in a readable format. A1 was given until 27 August 2018 to provide the requested records.

[17] A 1 did not respond to that request.

[18] On 14 September 2018 the Labour Inspector emailed Mr Deo again, asking for readable employment records, as per previous requests, be provided by 17 September 2018. The Labour Inspector cautioned Mr Deo that failure to comply with this request would be viewed as obstruction of the Labour Inspector's investigation.

[19] On 17 September 2018 Mr Deo emailed the Labour Inspector saying he was in Australia visiting his sick mother and will be returning to New Zealand on 21 September 2018.

[20] Mr Deo also informed the Labour Inspector that the relevant employment documentation would be provided by the weekend.

[21] That did not occur.

[22] The Labour Inspector did not receive any records from Mr Deo or from A1.

[23] On 29 November 2018 the Labour Inspector again emailed Mr Deo and offered to travel to A1's office so he (the Labour Inspector) could review readable versions of the employment

records himself, and take copies of them. Mr Deo was given until 30 November 2018 to respond.

[24] On 5 December 2018 Mr Deo emailed the Labour Inspector claiming that the Labour Inspector's email to him (Mr Deo) dated 29 November 2018 had gone into Mr Deo's junk mailbox.

[25] Mr Deo acknowledged that the documents he had sent earlier were not readable and advised that he would organise all of the documents to be printed out by 10 December 2018 at the latest, and he would deliver them in person to the Labour Inspector on 11 December 2018.

[26] That did not occur.

[27] No employment records were delivered to the Labour Inspector.

[28] On 12 December 2018 the Labour Inspector emailed Mr Deo seeking his explanation as to why the employment records had not been delivered.

[29] The Labour Inspector also asked Mr Deo to provide the required employment records by the week ending 16 December 2018. The Labour Inspector advised Mr Deo that the Labour Inspector's investigation would progress as of 17 December 2018, regardless of whether the records were provided or not.

[30] Mr Deo did not respond to the Labour Inspector's email.

[31] On 20 March 2019 the Labour Inspector emailed Mr Deo a draft report which outlined A1's and Mr Deo's non-compliance with the Labour Inspector's investigation.

[32] The Labour Inspector advised Mr Deo that he would be applying to the Authority seeking penalties for non-compliance. Mr Deo and A1 were asked to respond to the Labour Inspector by 27 March 2019.

[33] That same day (27 March) Mr Deo emailed the Labour Inspector seeking a further extension of time within which to respond, until 8 April 2019.

[34] Mr Deo claimed he was in India at the time and due to return to New Zealand on 5 April 2019, at which point he said he would personally deliver the employment records to the Labour Inspector's office.

[35] Mr Deo then made a phone call to the Labour Inspector again asking for an extension. The Labour Inspector told Mr Deo to email him any comments he had on the Labour Inspector's investigation report but did not agree to provide a further extension.

[36] Subsequent to their telephone discussion, the Labour Inspector emailed Mr Deo asking for proof of travel and for him to show a return itinerary of 5 April 2019 from India.

[37] On 20 March 2019 Mr Deo emailed the Labour Inspector with comments to the investigation report in which Mr Deo claimed he was unable to provide the requested information because of the passing of a family relative, an ill mother and a busy work schedule.

[38] On 21 March 2019 Mr Deo emailed the Labour Inspector providing proof of a flight returning to New Zealand from India.

[39] On 10 April 2019 an individual by the name of Mr Sajid Ali (Mr Ali) who appears to hold a position as assistant accounts manager/taxation, emailed the Labour Inspector from a gmail address providing employment records on behalf of A1 and Mr Deo.

[40] It is unclear what organisation Mr Ali is working for and there is no clear indication that Mr Ali has authority to represent Mr Deo, apart from the fact that Mr Deo was copied in on the email that Mr Ali sent to the Labour Inspector.

[41] That same day (10 April) the Labour Inspector responded to Mr Ali requesting a PAYE summary and wage and time records that show wages paid to each employee for each pay period and the calculation of those wages. Mr Ali and Mr Deo were given until 12 April 2019 to provide the Labour Inspector with these additional records.

[42] On 16 April 2019 Mr Ali provided the requested PAYE summary on behalf of Mr Deo and A1. However, no wage and time records were provided.

[43] That same day (16 April) the Labour Inspector emailed Mr Ali and Mr Deo seeking confirmation from both of them that there were no further employment records to be provided and a deadline of 17 April 2019 was set for their response.

[44] On 30 April 2019, after receiving no response from either Mr Ali or Mr Deo, the Labour Inspector again emailed Mr Ali and Mr Deo seeking additional information concerning who held responsibility at A1 for record keeping and business operations.

[45] That same day (30 April) Mr Ali responded to the Labour Inspector indicating that all record keeping and business operation responsibilities of A1 were held with Mr Deo.

[46] The Labour Inspector analysed the records that were made available to him by Mr Ali, on behalf of Mr Deo, and found various breaches of record keeping relating to minimum employment standards.

[47] The Labour Inspector was unable to assess any potential arrears because the records provided by A1 were insufficient to allow the Labour Inspector to conduct a calculative analysis.

Deficiencies in the employment records that were provided to the Labour Inspector

[48] In the records that Mr Ali had provided on behalf of Mr Deo, the Labour Inspector noted that the wage and time records were not compliant in terms of the requirements of s 130 of the Act because they did not have:

- (a) Mandatory information about the employees' postal address;
- (b) The employees' pay for the hours recorded in each pay period; and
- (c) The hours the employees had worked; and
- (d) The wages paid to the employees for each pay period; and
- (e) The method of calculation of the employees' wages.

[49] The Labour Inspector also identified that A1's holiday and leave records did not comply with s 81 of the Holidays Act 2003 (HA03) because they did not include the following mandatory information:

- (a) The number of hours and pay for hours recorded in each pay period;
- (b) The amount of payment for any annual holiday, sick leave, bereavement leave or domestic violence leave that has been taken;
- (c) The dates of, and payments for, any public holidays on which an employee worked;
- (d) The date on which the employee became entitled to any alternative holiday;

- (e) The details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but which the employee had an entitlement to holiday pay;
- (f) The details of any payment to which the employee is entitled under s 61(3), which relates to payment in exchange for an alternative holiday;
- (g) The amount paid to the employee's holiday pay upon the termination of the employee's employment.

Documents the respondents provided to the Authority

[50] When A1 and Mr Deo filed their Statement in Reply on 22 July 2019 they included, for the first time, further records including some of the payslips of employees who had been identified in the Labour Inspector's Statement of Problem.

[51] Analysis by the Labour Inspector of the payslips, that had been provided for the first time with A1's Statement in Reply, identified that the wage and time records had now been complied with in respect of two employees, Parveen Sharma and Abdul Mohen Hameed, in accordance with the requirements in s 130 of the Act.

[52] However, the Labour Inspector considered that the new employment records provided for the other three employees who were named in the Statement of Problem were still not compliant with the wage and time information required by s 130 of the Act.

[53] The Labour Inspector identified discrepancies between the payslips provided with the Statement of Reply and the holiday and leave records and time records that Mr Deo had provided to the Labour Inspector on 10 April 2019.

[54] The Labour Inspector identified that for the employee Mr Sharma, his time sheets record a holiday in Fiji from 16 December 2018 to 17 January 2019, but the holiday record does not record any leave taken for that period and the payslips for the period ending 20 January 2019 do not record annual leave, and record instead payments to Mr Sharma for ordinary hours of work.

[55] The Labour Inspector also identified on the holiday and leave record that Mr Hameed had taken two lots of leave from 6 March 2016 to 17 April 2016 and from 8 January 2018 to 28 January 2018.

[56] However, the commencement of Mr Hameed's employment was stated to have occurred on 7 March 2016, which is a day after the first leave was taken. Also in the payslips provided there was no evidence to suggest that any holiday pay was paid to Mr Hameed for the periods where annual holiday were supposedly taken.

[57] During periods of annual leave supposedly taken by Mr Hameed, the payslips only showed ordinary hours work and public holidays taken of one day on all of the payslips that had been provided for him.

[58] These discrepancies led the Labour Inspector to conclude that the payslips that A1 had attached to its Statement in Reply were not a true reflection of A1's record keeping and were not compliant with s 81 of the HA03.

Issues

[59] The following issues are to be determined:

- (a) Did A1 breach s 229(2) of the Act by failing to comply with the Labour Inspector's request for employment documents?
- (b) Did A1 keep wage and time records that complied with s 130 of the Act?
- (c) Did A1 keep holiday and leave records that complied with s 81 of the HA03?
- (d) If breaches of the Act and/or HA03 have occurred, what if any penalties should be imposed on A1 for those breaches?
- (e) Was Mr Deo a person involved in any breaches of employment standards by A1 that may have occurred?
- (f) If so, what if any penalties should be imposed on Mr Deo personally?
- (g) What if any costs should be awarded?

Did A1 breach s 229(2) of the Act by failing to comply with the Labour Inspector's request for employment documents?

[60] Section 229 of the Act sets out the powers of Labour Inspectors.

[61] This includes the power under s 229(1)(c) of the Act for the Labour Inspector to require production of, and to inspect, and take copies from:

- (a) Wage and time records or holiday and leave records;
- (b) Documentation relating to employees' remuneration; and
- (c) Any other document that is reasonably believed to be able to assist determining whether employment related aspects of the legislation identified in s 223(1) of the Act has been complied with.

[62] Section 229(1)(d) of the Act gives the Labour Inspector:

The power to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both of any employee of that employer.

[63] Section 229(2) of the Act states:

Where any Labour Inspector makes any requirement of any request of an employer under subsection (1)(c) or subsection (1)(d), that employer must **forthwith** comply with that requirement. (*my emphasis*)

[64] Section 229(3) of the Act provides that a penalty may be imposed on an employer that, without reasonable cause, fails to comply the Labour Inspector's requests/requirements made under s 229(1)(c) or (d) of the Act regarding employment records.

[65] A1's failure to comply with the Notice that was issued to it during the first Labour Inspectors' visit on 26 June 2018 breached s 229(1)(c) and (d) of the Act.

[66] It is clear from the evidence that the Labour Inspector requested employment records that they were statutorily empowered to request. A1 failed, without reasonable cause, to provide the requested employment records in a timely manner.

[67] It is also clear from the multiple requests that the Labour Inspector made, and the multiple engagements with Mr Deo, who was acting as the mind of and on behalf of A1, that the respondents were well aware of:

- (a) The Labour Inspector's Notice to produce employment records;
- (b) The Labour Inspector's repeated requests that related to A1's employment documentation;
- (c) Failure to provide the requested employment records would be a breach of A1's obligations under the Act and HA03; and

- (d) Failure to provide the requested employment records to the Labour Inspector could attract penalties.

[68] The requirement in s 229(2) of the Act to provide the Labour Inspector with documents “*forthwith*”, required that information to be provided to the Labour Inspector immediately, at once, and without delay.

[69] The Act therefore expects that an employer will provide the Labour Inspector with the requested documentation within a reasonable time. That did not occur here.

[70] The Labour Inspector’s Notice to produce records was dated 17 July 2018.

[71] Although the respondent purported to provide some documents on 7 August 2018 that was ineffective because the supposedly attached documents were unreadable. The Labour Inspector immediately, and properly, drew that obvious problem to A1’s attention, with a request that this problem be remedied immediately.

[72] The Labour Inspector also repeatedly extended the time frame for A1 to provide the requested employment records. However despite multiple extensions of time, and repeated statements by Mr Deo that the documents would be provided, that did not occur.

[73] The employment records that were originally requested on 17 July 2018 were not provided to the Labour Inspector until 10 April 2019. That was after the Labour Inspector’s draft investigation report had been provided to A1 on 20 March 2019.

[74] Although the respondents did not give evidence to the Authority about the affidavit evidence the Labour Inspector had provided in support of the claims he was pursuing against them, the respondents in their Statement in Reply sought to explain away the delay in complying with the Labour Inspector’s Notice on formatting problems and family and work obligations.

[75] Their explanation about that is not accepted by the Authority.

[76] The respondents have not provided an explanation about why the reformatting of the employment documents was delayed by seven months or why it was unable to provide documents in a readable form, as required by the Act. Nor why the Labour Inspector’s offer to attend A1’s premises to view, and copy, the required employment records was not responded to.

[77] In their Statement in Reply the respondents included payslips that they claimed established that their employment records were complete and compliant. However there was no explanation as to why they had delayed ten months before providing these records, or why they had been provided to the Authority but not the Labour Inspector.

[78] It is not consistent with the purposes and requirements of s 229 of the Act, for employment records that are relevant to an ongoing Labour Inspector investigation to be provided over such an extended period of time. The timeframes involved here obviously did not meet the “*forthwith*” requirement in s 229(2) of the Act.

[79] A1 has breached s 229(3) of the Act, by failing without reasonable cause to provide the Labour Inspector with employment records contrary to the obligations imposed on it by the Notice it was issued on 17 July 2018.

Did A1 keep wage and time records that complied with s 130 of the Act?

[80] Section 130 of the Act requires every employer to keep accurate wage and time records for every employee. Section 130 of the Act sets out the specific information that each employee’s wage and time records must include.

[81] A1 has failed to keep proper wage and time records for three employees (Harmandeep Singh, Jivitesh Singh and Krishneel Bali) in breach of its obligations under s 130 of the Act.

[82] The Labour Inspector has acknowledged that as a result of further information provided, at a very late stage, by the respondents that A1 has met its s 130 obligations regarding its employees Mr Sharma and Mr Hameed.

[83] Breaches of A1’s obligations under s 130 of the Act have occurred because the wage and time records for Mr Sandhu, Mr Singh and Mr Bali failed to include:

- (a) A postal address for any of them;
- (b) A record of the number of hours worked each day in a pay period and the pay for those hours;
- (c) The wages paid to each employee each pay period and the method of calculation.

Did A1 keep holiday and leave records that complied with s 81 of the HA03?

[84] A1 has failed to keep accurate holiday and leave records in breach of s 81 of the HA03 for five employees (Mr Harmandeep Singh, Jivitesh Singh, Krishneel Bali, Parveen Sharma and Abdul Mohen Hameed).

[85] Breaches of s 81 of the HA03 have occurred for these five named employees because A1 failed to record:

- (a) The days the employees actually worked, being information that was relevant to the calculations of entitlements and payments made under the HA03;
- (b) The amount of payment for any annual leave, sick leave, bereavement leave or domestic leave that had been taken;
- (c) The days of, and payment for, any public holiday on which the employees worked;
- (d) The date on which the employees became entitled to any alternative holiday;
- (e) The details of the dates of, and payments for, any public holiday or alternative holiday on which the employees did not work, but for which they had an entitlement to holiday pay;
- (f) The details of any payment the employees were entitled to, relating to payments in exchange for an alternative holiday; and
- (g) The amount paid to the employees as holiday pay on termination.

[86] In addition to record keeping deficiencies, A1 also kept inaccurate holiday and leave records for two employees (Mr Harmandeep and Mr Sharma).

[87] A1's leave records record that Mr Harmandeep took annual leave over the period 8 January 2018 – 28 January 2018.

[88] However Mr Harmandeep's payslips for the period ending 21 January 2018 and 4 February 2018 do not record that annual leave was taken in January 2018. Instead the payslips record that one paid public holiday was used, and the balance of time paid to Mr Harmandeep was described as pay for ordinary hours work.

[89] Mr Parveen Sharma's timesheet records a five-week trip to Fiji. However, his holiday and leave records do not record any leave being taken by him over that same period.

[90] Mr Sharma's payslips for that same period ending 9 December 2018, 20 January 2019 and 3 January 2019 do not record any annual leave being taken by him but instead record that he was paid for ordinary hours he had worked.

[91] A1's failure to keep accurate holiday and leave records for all of its employees breaches its obligations s 81 of the HA03.

What if any penalties should be imposed on A1?

Should penalties be imposed on A1?

[92] The imposition of penalties is necessary and appropriate to punish A1 for its breaches, to deter it and others from breaching of minimum employment standards, to signal the Authority's disapproval, and to eliminate unfair competition that is obtained by those who do not meet their statutory obligations.

Law relating to penalties

[93] The decision of the full Employment Court in *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited* set out a four-step process to be used by the Authority when assessing penalties.¹

[94] Section 133A of the Act sets out the factors the Authority must consider when assessing penalties.

[95] Based on case law and the requirements imposed by the Act, the following matters are to be considered by the Authority when setting penalties:

- (a) Statutory consideration 1 – The object of the Act
- (b) Statutory consideration 2 – The nature and extent of the breach
 - (i) Identify the nature of the breaches
 - (ii) Identify the number of the breaches

¹ [2016] NZEmpC 143 at [151].

- (iii) Identify the maximum penalty available in respect of each identified breach
- (iv) Consider whether global penalties are appropriate
- (c) Statutory consideration 3 – Whether the breach was intentional, inadvertent or negligent
 - (i) Assess the severity of the breach
- (d) Statutory consideration 4 – The nature and extent of any loss or damage
- (e) Statutory consideration 5 – Steps to mitigate effects of the breach
- (f) Statutory consideration 6 – Circumstances of the breach, and any vulnerability
- (g) Statutory consideration 7 - Previous conduct
- (h) Additional consideration 8 – Deterrence
- (i) Additional consideration 9 – Culpability
- (j) Additional consideration 10 – Consistency with other cases
- (k) Additional consideration 11 – Ability of person in breach to pay a penalty
- (l) Additional consideration 12 – Proportionality of outcome in relation to harm caused by the breach.

Authority's assessment of penalties to be imposed on AI

Statutory consideration 1 – object of the Act

[96] Section 3 of the Act states that the objects of the Act are (among other things) to:

- (a) Promote good faith in all aspects of the employment environment and employment relationship;
- (b) Promote the effective enforcement of employment standards, in particular by Labour Inspectors; and
- (c) Acknowledge and address the inherent inequality of power in employment relationships.

[97] The failure by an employer to keep compliant employment records puts its employees at a disadvantage in circumstances where there is already a distinct power imbalance.

[98] A1 failed to both keep wage and time records in breach of s 130 of the Act and holiday and leave records in breach of s 81 of HA03.

[99] A1's lack of record keeping, and delays in providing employment records, made it very challenging for the Labour Inspector to determine the scope of the breaches and in turn undermined the Labour Inspector's ability to pursue accurate wage arrears claims for affected employees.

[100] A1's failure to keep accurate and compliant wage and time records and holiday and leave records undermines employment standards and gives A1 an unfair advantage in the marketplace.

Statutory Consideration 2 – the nature and extent of the breach

Identify the nature of the breaches that occurred

[101] A1 has engaged in three types of breaches, under the Act and the HA03.

[102] Mr Deo has engaged in two types of breaches, under the Act and the HA03.

Identify the number of A1's breaches

[103] There is only one claim that A1 has failed to produce records forthwith, in breach of s 229(3) of the Act.

[104] There are three breaches that attract penalties under s130(4) of the Act. This arises from A1's failure to keep compliant wage and time records for Harmandeep Singh, Jivitesh Singh and Krishneel Bali, in breach of s 130 of the Act.

[105] There are five penalty claims under s 75 of the HA03 for A1's failure to keep compliant holiday and leave records for the five employees named in the Statement of Problem.

Identify the number of Mr Deo's breaches

[106] Because he was effectively the mind of A1, Mr Deo was the person who failed to ensure A1 met its legal obligations regarding the keeping of accurate employment records, and the production of such records to the Labour Inspector upon request.

[107] Mr Deo was a person involved in A1's three breaches, involving failures to keep compliant wage and time records for the three employees named in the Statement of Problem.

[108] Mr Deo was a person involved in A1's five breaches, involving failures to keep holiday and leave records for the five employees named in the Statement of Problem, in breach of s 75 of the HA03.

Identify the maximum penalty available for the breaches

[109] Under s 135(2)(a) of the Act the maximum potential penalty that could be imposed on an individual, such as Mr Deo, is \$10,000 per breach.

[110] Under s 135(2)(b) of the Act provides that the maximum potential penalty that can be imposed on a company or corporation, such as A1 is \$20,000 per breach.

[111] Under s 75(1)(a) of the HA03, the maximum potential penalty that could be imposed on Mr Deo, as a person involved in a failure to comply with the HA03, is \$10,000 per breach.

[112] Under s 75(1)(b) of the HA03, the maximum potential penalty that could be imposed on A1 is \$20,000 per breach.

Identify the maximum penalties available for each of A1's breaches

[113] The maximum potential penalty available for A1's failure to produce employment records for one employee is \$20,000, (1 breach x \$20,000).

[114] The maximum total potential penalty that could be imposed on A1 for its failures to keep compliant wage and time records is \$60,000 (3 breaches (one breach for each of the three named employees) x \$20,000 per breach).

[115] The maximum potential penalty that could be imposed on A1 for its failures to keep compliant holiday and leave records is \$100,000 (5 breaches (one breach for each of the five named employees) x \$20,000 per breach).

[116] The potential total maximum penalty for all of A1's breaches is \$180,000 (\$20,000 + \$60,000 + \$100,000).

Identify the maximum penalties available for each of Mr Deo's breaches

[117] The maximum potential penalties available against Mr Deo for being a person involved in A1's failures to keep compliant wage and time records is \$30,000 (one breach per each of the three named employees, x \$10,000 per breach).

[118] The maximum potential penalties available against Mr Deo, as a person involved in A1's failures to keep compliant holiday and leave records, is \$50,000 (one breach of each of the five named employees, x \$10,000 per breach).

[119] The total potential maximum penalties that could be imposed on Mr Deo is \$80,000.

Is globalisation appropriate?

[120] Globalised penalties are not appropriate.

[121] The breaches involve different employment legislation, different employment standards and they affected different employees. Penalties should be not globalised across different legislation.

[122] Penalties associated with failures to keep wage and time records, and holiday and leave records, should also be approached on a per employee basis.

Statutory consideration 3 – whether the breach was intentional, inadvertent or negligent

[123] A1 as an employer should have known that it was legally required to keep compliant wage and time, and holiday and leave records, for all of its employees and that these had to be produced upon request.

[124] Employers are expected to familiarise themselves, and comply, with their employment related obligations under minimum code legislation. A1's failure to keep employment records, and Mr Deo's involvement in A1's breaches regarding its records keeping, was negligent at best.

[125] A1's failure to produce employment records to the Labour Inspector forthwith, and Mr Deo's involvement in those repeated and ongoing breaches, appears to have been intentional.

[126] Despite the Labour Inspector giving A1 ample opportunities to provide the required employment records, A1 and Mr Deo engaged in subterfuge regarding the production of these records.

[127] They gave the Labour Inspector unreadable documents and were mostly unresponsive to the many attempts the Labour Inspector made to address that. When Mr Deo did respond on behalf of A1 he made empty promises that records would be provided, when they were not, in attempts to delay the Labour Inspector's investigation.

[128] The fact that A1 and Mr Deo provided entirely new employment documentation to the Authority, that had not previously been provided to the Labour Inspector, suggests a level of delay and deception that is highly culpable.

[129] There was no explanation provided as to why some new employment records were attached to the Statement in Reply, ten months after the original request for employment records had been made by Labour Inspectors.

Assessment of the severity of the breaches

[130] The respondents have breached long-standing, well known and clear obligations to maintain compliant wage and time, and holiday and leave records.

[131] The respondents' breaches impacted on the Labour Inspector by hindering his investigation, draining resources away from other activities, and undermining his ability to ascertain whether any of A1's current or former employees were owed outstanding wages and/or other minimum entitlements.

[132] These breaches have not only made the Labour Inspector's discharge of his duties far more difficult, in terms of identifying any potential non-compliance with other minimum standards legislation, but it has also caused significant delay in the Labour Inspector being able to finalise his investigation, and in the Authority being able to determine the various claims that the Labour Inspector has pursued.

[133] The starting point for assessing penalties for A1's failures to keep wage and time records, and holiday and leave records, and Mr Deo's involvement in these breaches, should be 50% of the maximum penalty.

[134] The starting point for assessing penalties for the failures by A1 to produce employment records to the Labour Inspector forthwith should also be 60% of the maximum penalty for each of the respondents.

Statutory consideration 4 – the nature and extent of any loss of damage

[135] A1's failure to produce employment records, and its failure to keep compliant wage and time, and holiday and leave, records had a negative impact on the Labour Inspector's ability to investigate the extent to which A1 was compliant with minimum employment standards.

Statutory consideration 5 – steps to mitigate effects of the breach

[136] There is no evidence that A1 has taken steps to update its employment documentation, record keeping or payroll systems. Mr Deo did not provide any assurances or undertaking regarding his or A1's future conduct in terms of complying with minimum code standards.

Statutory consideration 6 – circumstances of the breach and any vulnerability

[137] A1 was incorporated on 6 August 2009. It has therefore been operating for a significant period of time. A1 and Mr Deo should have known better. Ignorance of the law is no defence.²

Statutory Consideration 7 – previous conduct

[138] Neither A1 nor Mr Deo have previously had penalties imposed on them for breaches of employment standards.

Additional consideration 8 - deterrence

[139] Deterrence is a significant factor when imposing penalties for breaches of employment standards.

[140] There is a need to bring home to A1 the standards it must meet as an employer, if it is to continue employing employees.

[141] All employers must understand that compliance with minimum code legislation is mandatory. Compliance does not just have to occur if/when it is financially convenient for the employer to do so or when an employer is put under pressure by the Labour Inspector.³

[142] There is a need for individual deterrence of A1, and of Mr Deo personally, as well as more generalised deterrence of other employers who may be tempted to engage in breaches of employment standards either through ignorance of their obligations or in order to obtain a competitive advantage in the market place.

Additional consideration 9 – A1's culpability

[143] Factors that increase A1's culpability include:

² *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [29].

³ *A Labour Inspector v Daleson Investments Limited* [2018] NZEmpC 79.

- (a) The fact that five employees were affected by the s 81 HA03 breaches and three employees were affected by the s 130 breaches of the Act;
- (b) There was extensive delay in providing the Labour Inspector with the requested employment records;
- (c) Employment records were ‘drip fed’ in an unsatisfactory manner to the Labour Inspector;
- (d) The Labour Inspector was purposely misled to believe that he would be provided with documents, when that did not occur;
- (e) There appears to have been a general lack of regard associated with A1’s record keeping obligations.

Additional consideration 10 – consistency with similar cases

[144] The Labour Inspector submits that this matter is comparable to that of *Labour Inspector v New Lucky Star Restaurant Limited* in which the Authority assessed, prior to the respondent’s financial circumstances being taken into account, that 50% of the maximum penalty for failing to keep holiday and leave records was appropriate.⁴

[145] *New Lucky Star* is similar in that it also involved some partial compliance with record keeping, although the records that were kept were inadequate to meet the obligations under the HA03.

[146] The Authority’s recent decision in *Labour Inspector v Sunwin Technologies Ltd* involved similar breaches, by a company in the same industry as A1.⁵ Total penalties of \$19,698 were imposed on Sunwin and \$7,527 penalties were imposed on each of its two directors, who were held to be “*persons involved in the breaches of employment standards*”.

[147] *Sunwin* involved a greater range of breaches than this matter. Sunwin’s breaches involved failures to provide employment agreements, failures to pay its employees the minimum wage for hours they had worked, and failure to keep wage and time and holiday and leave records.

⁴ [2019] NZERA Auckland 386.

⁵ [2019] NZERA 603.

[148] Although Sunwin had engaged in multiple breaches that were more serious than the breaches in this matter, the mitigating factors were also far stronger than in the case.

[149] Whilst a number of other cases have involved the imposition of penalties for breaches of s 229 and/or s 130 of the Act and of s 81 HA03, these are of limited value in terms of benchmarking penalties in this case, because the fact scenarios differ so much. Some cases involved multiple and more serious breaches, while others involve a one off breach.

[150] This case involves attempts to disguise non-compliance, inaccurate record keeping and breaches extending over a long period of time that undermined the Labour Inspector's ability to investigate potential breaches of employment standards in a timely manner.

[151] The range of other breaches in other cases and level of penalties imposed have been considered when assessing penalties in this case.

Additional consideration 11 – A1's ability to pay penalties

[152] The onus rests on A1 and Mr Deo to provide evidence to the Authority regarding any alleged inability to pay a potential penalty that is awarded. That has not occurred.

[153] There is no financial information available, so ability to pay must be treated as a neutral factor.

Additional consideration 12 – proportionality of outcome

[154] It is important that penalties are not so low as to create perverse incentives for employers, by inadvertently encouraging non-compliance with employment obligations, on the basis that it is more cost effective to face a penalty than to comply.

[155] However there also needs to be some readjustment to the proposed penalties for the breaches that have occurred in this matter, to reflect the proportionality of outcome of the total penalties overall.

[156] Accordingly, a discount of 60% is appropriate.

Summary of penalties imposed on A1

[157] The attached Appendix 1 provides an analysis of the penalties that have been imposed on A1, in terms of summarising penalties imposed in terms of *Preet's* four step penalty assessment process.⁶

[158] A1 is ordered to pay total penalties for all of its breaches of the Act and HA03 of \$19,200, which is to be paid by A1 into the Crown Bank Account.

Is Mr Deo a person who was involved in A1's breaches of employment standards?

[159] Section 5 of the Act defines "*employment standards*" as (among other things) the requirements in s 130 of the Act to keep wage and time records and under s 81 of the HA03 to keep holiday and leave records.

[160] A1's breaches of s 130 of the Act and s 81 of the HA03 therefore involved breaches of employment standards. Mr Deo was "*a person involved in a breach*" in terms of the activities specified in s 142W of the Act.

[161] In accordance with the requirement in s 142W(2) of the Act, Mr Deo was A1's sole director. He was also the person who caused A1 to breach minimum employment standards.

What if any penalties should be imposed on Mr Deo personally?

[162] Under s 142X of the Act a person such as Mr Deo "*involved in a breach*" is liable to a penalty under the Act if s 142W applies, which it does in this case.

[163] The same reasoning that required penalties to be imposed on A1 also applies to the imposition of penalties on Mr Deo. The same factors that were assessed as applying to A1 also apply equally to Mr Deo because he was the mind of A1 and the person who had full control over it.

[164] The attached Appendix 2 provides an analysis of the penalties that have been imposed on Mr Deo, in terms of summarising penalties imposed in terms of *Preet's* four step penalty assessment process.⁷

⁶ Above n1.

⁷ Ibid.

[165] Mr Deo, as a person involved in breaches of employment standards, is ordered to pay total penalties of \$8,000 for causing A1 to breach employment standards, relating to its breaches of s 130 of the Act and s 81 of the HA03.

[166] Mr Deo is ordered to pay the entire penalty of \$8,000 into the Crown Bank Account.

Costs

[167] The Labour Inspector as the successful party is entitled to a contribution to its actual costs and disbursements.

[168] The parties are encouraged to agree on costs. If that is not possible then the Labour Inspector has fourteen days from the date of this determination within which to file a costs application, including proof of actual costs incurred.

[169] The respondents then have 14 days within which to file any costs submissions. If that occurs then the Labour Inspector has 7 days within which to file any costs submissions in reply.

Rachel Larmer
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 – s 130 ERA	3 x \$20,000	\$60,000
Failure to keep holiday and leave records – s 61 HA03	5 x \$20,000	\$100,000
Failure to produce employment records – s 229(1) of the Act	1 x \$20,000	\$20,000
	Subtotal	\$180,000
Step 2 – Aggravating factors as a proportion of maximum in Step 1		
Failure to keep wage and time records	50%	\$30,000
Failure to keep holiday and leave records	50%	\$50,000
Failure to produce employment records to Labour Inspector	60%	\$16,000
	Subtotal	\$96,000
Step 2 – Ameliorating factors (reducing aggravating factors)		
Less 50% of above	Subtotal	\$48,000
Step 3 – First Respondent’s financial circumstances – no reduction		
Step 4 – Proportionality		
Reduce by 60%		\$19,200

APPENDIX TWO - PENALTY ANALYSIS FOR THE SECOND RESPONDENT

Step 1 – Nature and number of breaches – potential maximum penalties		
Person involved in breach of s 130 of the Act - failure to keep wage and time records	3 x \$10,000	\$30,000
Person involved in breaches of s 81 HA03 - failure to keep holiday and leave records	5 x \$10,000	\$50,000
	Subtotal	\$80,000
Step 2 – Aggravating factors as a proportion of maximum in Step 1		
Person involved in breaches involving failure to keep wage and time records	50%	\$15,000
Person involved in breaches involving failure to keep holiday and leave records	50%	\$25,000
	Subtotal	\$40,000
Step 2 – Ameliorating factors (reducing aggravating factors)		
Less 50% of above	Subtotal	\$20,000
Step 3 – Second Respondent’s financial circumstances – no reduction		
Step 4 – Proportionality		
Reduce by rounding down by 60%	Total	\$8,000