

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 730  
3042571

BETWEEN	INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	GAUTAM RAJAN KAPUR AKA KAPOOR First Respondent
AND	SUNRISE HORTICULTURE LIMITED Second Respondent
AND	GAUTAM RAJAN KAPUR AKA KAPOOR Third Respondent

Member of Authority: Rachel Larmer

Representatives: Marija Urlich, Counsel for Applicant  
Gautam Kapur in person as First and Third Respondents  
No appearance by Second Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 27 August 2019 from Applicant  
10 September 2019 from First and Third Respondent  
4 November 2019 from Applicant  
4 November 2019 from First and Third Respondent  
9 December 2019 from Applicant  
19 December 2019 from First and Third Respondent  
20 December 2019 from First and Third Respondent

Date of Determination: 20 December 2019

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

### *Substantive determination*

[1] On 1 August 2019 the Authority issued a substantive determination that concluded that Mr Guatam Ragan Kapur aka Kapoor (Mr Kapur), the First Respondent and Third Respondent in this matter, was the employer (in his own personal capacity) of four young female Singaporeans (collectively referred to as “*the workers*”), namely:

- (a) Ms Aw;
- (b) Ms Lim;
- (c) Ms Ang; and
- (d) Ms Ling.

[2] Mr Kapur employed these four workers to do pruning work on a kiwifruit orchard in Pukehina that was owned and operated by Joba Orchard Limited. The Labour Inspector successfully claimed wage arrears and penalties on behalf of the workers.

### *Mr Kapur’s submissions regarding identity of employer*

[3] Mr Kapur’s submissions focused on his belief that he was not the employer of the workers because he was acting as an employee of, and on behalf of, Sunrise Hort Limited. This is not the entity that has been named as the Second Respondent in this matter.

[4] Mr Kapur’s evidence that the workers had been employed by Sunrise Hort Limited was rejected for the reasons explained in paragraphs [17]-[25] of the Authority’s substantive determination.<sup>1</sup>

[5] Although Mr Kapur gave the workers blank employment agreement templates, and told them what to write on the templates he had provided, that occurred after the workers had already accepted his offer of employment and had actually started work for him, on the terms he had personally offered them.

[6] That timing means that when Mr Kapur handed over blank employment agreement templates for the workers to sign, they were already in an employment relationship with him.

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<sup>1</sup> [2019] NZERA 454.

Mr Kapur did not advise the workers that by signing the templates he had given them they would be changing employers.

*Penalties to be imposed*

[7] The Authority's substantive determination held Mr Kapur personally liable for breaches of the:

- (a) Employment Relations Act 2000 (the Act);
- (b) Minimum Wage Act 1983 (MWA), and
- (c) Holidays Act 2003 (HAO3).

[8] The Authority held that the nature of Mr Kapur's breaches required penalties be imposed on him under s 65(4) of the Act for failing to provide the workers with legally compliant employment agreements and under s 229(3) of the Act for not supplying, upon request, the Labour Inspector with the workers' wage and time records, holiday and leave records and employment agreements.

[9] All parties have been given an opportunity to provide information and submissions relating to the Authority's assessment of penalties in this matter.

*Authority's penalty jurisdiction*

[10] The Authority's penalty jurisdiction arises under the Act. The full Employment Court in *Boorsboom v Preet Pvt Limited* and *Warrington Discount Tobacco Limited* is the leading case that provides the Authority with guidance on how its penalty discretion is to be exercised.<sup>2</sup>

[11] The Employment Court has provided further analysis on the penalties jurisdiction in the cases of *A Labour Inspector v Prabh Limited* and *A Labour Inspector v Daleson Investment Limited*.<sup>3</sup>

[12] The purpose of imposing penalties in this case is to punish Mr Kapur for his breaches of the Act, to deter him, the companies he is associated with and other employers in New Zealand from breaching their employment related obligations.

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<sup>2</sup> [2016] NZEmpC 143.

<sup>3</sup> *LI v Prabh* [2019] NZEmpC 110 and *LI v Daleson* [2019] NZEmpC 12.

[13] Penalties also recognise the harm the workers suffered as a result of Mr Kapur's breaches as well as acting to reduce and hopefully eliminate unfair competition in the New Zealand labour market by those employers who do not comply with their legal obligations.<sup>4</sup>

[14] The Employment Court in *Preet* set out a four-step process that was to be applied when penalties are assessed.

[15] The approach to be adopted is as follows:

- (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 breaches
  - (ii) Identify the number of breaches
  - (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 issues
- (g) Statutory consideration 7 – Previous conduct
- (h) Additional consideration 8 – Deterrence
- (i) Additional consideration 9 – Culpability
- (j) Additional consideration 10 – Consistency
- (k) Additional consideration 11 – Ability to pay

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<sup>4</sup> See above n3.

- (i) Consider the means and ability of the person in breach to pay any penalty that may be imposed
- (l) Additional consideration 12 – Proportionality of outcome
  - (i) Consider the proportionality of the penalty in relation to the harm caused.

### **Statutory Consideration 1 – The object of the Act**

[16] Section 3 of the Act states that the objects of the Act are to:

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

[17] The Court has found that these objects are particularly relevant in penalty matters involving migrant workers in which the Court has recognised that there is a distinct “*power imbalance*”.<sup>5</sup>

[18] In this case Mr Kapur has failed to keep compliant employment agreements and has failed to supply wage and time records and holiday and leave records for the workers to the Labour Inspector upon request.

[19] These failures to keep compliant employment agreements and/or to co-operate with the Labour Inspector’s investigation by promptly supplying the requested records undermines employment standards, has made it difficult for the Labour Inspector to bring accurate wage arrears claims and gives Mr Kapur as an employer an unfair competitive advantage in the labour marketplace.

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<sup>5</sup> *LI v Prahb*, above n3.

## **Statutory Consideration 2 – The Nature and Extent of the Breach**

### *Identifying the nature of the breaches*

[20] Penalties should be imposed on Mr Kapur for two types of breaches, under the Act namely failures by him to provide:

- (a) The workers with legally compliant written employment agreements, s 65(4) of the Act; and
- (b) The Labour Inspector with all requested employment related documentation “forthwith”, s 229(3) of the Act.

[21] These failures mean that Mr Kapur was unable to demonstrate compliance as an employer with minimum entitlements he owed the workers under the Act.

### *Identifying the number of breaches*

[22] There is one claim in relation to the failure to produce employment records to the Labour Inspector forthwith and there are four claims in relation to the breaches involving failures to provide legally compliant employment agreements to the four workers.

[23] Accordingly, there are a total of five breaches for which penalties may be imposed.

### *Identify maximum penalty*

[24] Maximum penalty for each of these breaches under the Act is \$10,000 per breach because Mr Kapur is an individual. The total maximum penalty that could potentially be imposed on Mr Kapur is \$50,000 (being 5 x breaches x \$10,000 per breach).

### *Identify maximum penalties available for each identified breach*

[25] The maximum penalty available for failing to produce employment records to the Labour Inspector is \$10,000.

[26] The maximum available penalty against Mr Kapur for failing to provide the workers with compliant employment agreements is \$40,000 (being four breaches (one breach per each of the 4 workers) x \$10,000 per breach).

*Is globalisation appropriate?*

[27] Globalisation of penalties in this case is not appropriate as penalties imposed for the failure to provide legally compliant employment agreements should be approached on a per employee basis.

**Statutory Consideration 3 – Whether the breach was intentional, inadvertent or negligent**

[28] Given Mr Kapur's previous involvement with Ministry of Business Innovation and Employment he cannot reasonably claim he was ignorant or unaware of his obligations to provide legally compliant employment agreements to workers he had employed, or to supply the Labour Inspector with employment records on request.

[29] Ignorance of the law is also not a valid defence of wrongdoing.

[30] The breaches in this case were not the result of inadvertence or oversight.

[31] While the failure to provide the workers with written employment agreements before they had been offered and accepted employment, and had actually started work, could be viewed as negligent, the failure to provide employment records to the Labour Inspector upon request was intentional.

*Assessment of the severity of the breaches*

[32] Mr Kapur has breached long-standing, well-known and clear legal obligations that are placed on employers to provide every employee with a legally compliant employment agreement that meets the requirements of s 65 of the Act.

[33] Employers are also well aware that they must keep employment records for every employee and must produce those on request. This includes producing employment records on the request of a Labour Inspector, which is what occurred in this case.

[34] The impact of Mr Kapur's breaches was serious because it hindered the Labour Inspector's task of identifying compliance with minimum standards by making it far more difficult for the Labour Inspector to determine whether minimum employment standards had been complied with.

[35] Mr Kapur's actions made it very difficult for the Labour Inspector to investigate this matter and it also significantly delayed the workers' ability to get their wage arrears claims resolved. It also left them very disillusioned about their working holiday in New Zealand.

#### **Statutory Consideration 4 – The nature and extent of any loss or damage**

[36] Mr Kapur was unco-operative with the Labour Inspector's investigation. The Labour Inspector was also put to formal proof of each claim it made against Mr Kapur.

[37] The Labour Inspector's investigation was resource intensive and required detailed analysis of documents and extensive interviewing of witnesses, given Mr Kapur's continued assertion that he was not the employer, and was not responsible for the wage arrears and lack of employment documentation for the four workers affected by the breaches.

[38] Mr Kapur's breaches created a lot of stress and distress for the workers, who were left in New Zealand without money for work that they had undertaken. It has been a long drawn out process for the workers and they have still not been paid for the work they did for Mr Kapur.

[39] Mr Kapur's breaches also overshadowed what was to have been a joyful working holiday in New Zealand for the workers because of the conflict that Mr Kapur's breaches created between the workers.

#### **Statutory Consideration 5 – Steps to mitigate the effects of the breach**

[40] Mr Kapur has not taken any steps to mitigate the effects of his breaches.

[41] The workers have still not been paid their wage arrears. There is no evidence about the steps that Mr Kapur has taken to ensure that he will be compliant in future with all employment law obligations when employing new employees.

[42] Nor was there any evidence of remorse or contrition from Mr Kapur. He has continued to deny any wrongdoing and has sought to minimise his liability. He has failed to demonstrate any recognition of, or insight into, the harm that these breaches caused the workers.

#### **Statutory Consideration 6 – Circumstances of the breach, and any vulnerability**

[43] Mr Kapur has been in business for a significant period of time. He has been associated with approximately sixteen different legal entities that appear to have operated in the orchard

industry. He is also someone who is known in the Bay of Plenty area as having experience in that industry and is someone who has run teams of workers to work within that industry.

[44] Mr Kapur should be well aware of the legal requirements associated with the engagement of employees.

[45] Mr Kapur took deliberate steps to conceal his involvement by using a vulnerable person (someone who was in New Zealand illegally so was unable to legally work in New Zealand) as a front for the Sunrise Hort Limited entity. This included Mr Kapur encouraging that person to use a false address to register Sunrise Hort Limited when incorporating that entity with the Companies Office.

[46] Mr Kapur then sought to evade responsibility for the breaches that occurred in this matter by claiming he was acting as an employee of Sunrise Hort Limited, so it was Sunrise Hort Limited that was the employer, not him personally.

[47] The Authority considers that Mr Kapur's supposed employment by Sunrise Hort Ltd was a sham device, instigated and effectively created by him, to help him avoid personal responsibility for breaches of minimum employment standards arising from his deliberate targeting of young transient migrant workers.

[48] It is an aggravating factor that the workers were migrant workers. English was their second language. They were young and vulnerable. This was their first working holiday away from Singapore and their first time in New Zealand.

[49] They could not be expected to be familiar with the New Zealand law and regulations, although they did tell the Authority that they knew that they should have something in writing from Mr Kapur regarding their employment. They had asked him for that, which is why (after they had already started work) Mr Kapur presented them with the blank employment agreement templates for them to complete.

[50] Mr Kapur used recruitment methods targeted at transient work visa holders. Obviously it is harder for migrant workers who have left the country to recover their wage arrears, which is what has happened here.

[51] It is only through the determination of these workers to seek redress for the poor way Mr Kapur treated them and due to the Labour Inspector's diligence that this matter has been able to get to this stage.

[52] All four of the workers made themselves available by telephone conference from Singapore to give evidence to the Authority about their employment by Mr Kapur. They all told the Authority that they believed that Mr Kapur was their employer.

[53] The Authority therefore concluded that the references in the written statements they provided at the beginning of their statement that said "[on] [date] I made a statement to [...], Labour Inspector about my employment with Sunrise Hort Limited and Guatam Kapur aka Kampoor" was a reference to the ambit of the Labour Inspector's investigation.

[54] It was not an acknowledgement that they had been employed by Sunrise Hort Limited. All of them were clear that they considered Mr Kapur was their employer and that the only references that he had made to Sunrise Hort were to the fact that that was his own business.

#### **Statutory Consideration 7 – Previous conduct**

[55] Mr Kapur has previously come to the attention of the Labour Inspector.<sup>6</sup>

#### **Additional Consideration 8 - Deterrence**

[56] There is a strong need for deterrence in this matter. Not only to deter to Mr Kapur and entities he is associated with but other deterrence of other operators in the kiwifruit industry and other employers more generally within New Zealand that may be included to ignore their employment law obligations to employees.

[57] There is a need to send a strong signal of disapproval to Mr Kapur and to remind employers of the need to ensure that they comply with all of their employment law obligations when employing workers, not merely when it is financially convenient for them to do so or after being put under pressure by the Labour Inspector to meet their legal obligations.

#### **Additional Consideration 9 – Culpability**

[58] There are a number of factors which increased Mr Kapur's culpability including:

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<sup>6</sup> *Labour Inspector v Freemind Enterprize Ltd and Ors* [2016] NZERA Auckland 165 and *Labour Inspector v BBS Horticulture Limited* [2017] NZERA Auckland 172.

- (a) The number of employees affected (four);
- (b) His unreasonable and unacceptable delay in providing the requested employment records;
- (c) His lack of regard for record keeping obligations;
- (d) His lack of regard for compliant employment agreement obligations;
- (e) His deliberate targeting of young transient migrant workers;
- (f) That the affected workers were young transient, migrant workers, who did not have English as their first language;
- (g) It was the first time that these workers had worked in New Zealand and they were only here for a limited period of time on a working holiday;
- (h) That Mr Kapur engaged with others to set up a business (Sunrise Hort Limited) that was not a legitimate business but was instead designed to, and used by them, as a front to avoid legal consequences arising from employment law breaches; and
- (i) His actions regarding Sunrise Hort Ltd were an improper attempt to shield himself from potential personal liability.

#### **Additional Consideration 10 - Consistency**

[59] The Labour Inspector asked the Authority to consider the following four cases when assessing consistency:

- (a) *Labour Inspector v Babylon Communications Ltd*;<sup>7</sup>
- (b) *Labour Inspector v Daleson*;<sup>8</sup>
- (c) *Labour Inspector v Symrose Ltd and Thind*;<sup>9</sup>
- (d) *Labour Inspector v La Wheat Ltd*<sup>10</sup>
- (e) *Labour Inspector v Modern Floor and Wall Ltd*.<sup>11</sup>

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<sup>7</sup> [2019] NZERA 310.

<sup>8</sup> [2019] NZEmpC 12.

<sup>9</sup> [2019] NZERA 94.

<sup>10</sup> [2019] NZERA 50.

<sup>11</sup> [2019] NZERA 23.

[60] In *Babylon Communications Ltd* the employer owed minimum wage arrears of \$790, among five employees.<sup>12</sup> The Labour Inspector sought penalties for minimum wage and wage and time records breaches involving nine employees. The Authority imposed total penalties of \$72,600, consisting of \$32,000 were awarded for five breaches of MWA and \$40,400 for nine breaches of s 130 of the Act.

[61] In *Daleson* the Employment Court imposed total penalties of \$40,000, described as generous to the employer, for 11 breaches of the Act, MWA and HA03 that involved arrears of \$12,542.52 involving six employees.<sup>13</sup>

[62] In *Symrose* the Authority imposed penalties on the employer of \$12,600 and \$2,400 on its sole director and shareholder.<sup>14</sup> This case involved seven breaches in total of the MWA and the Act (records and failure to provide employment agreements) and the HA03 (holiday pay, public holiday and sick leave entitlement) involving one employee who was owed arrears of \$26,167.47.

[63] In *La Wheat* the Authority imposed penalties of \$20,000 on the employer and \$10,000 each on the husband and wife who were involved in the breaches.<sup>15</sup> That case involved breaches of the Act and HA03 involving arrears of approximately \$77,000 in total that were owed to two employees.

[64] In *Modern Floor & Wall Ltd* the Authority imposed a penalty of \$15,000 on the employer and \$10,000 on its director (as person involved in the breaches) for 14 breaches in total of the MWA, HA03, the Act and the WPA, involving arrears of \$32,000 to two employees.<sup>16</sup>

### **Additional Consideration 11 – Ability to pay**

[65] Mr Kapur told the Authority during its substantive investigation meeting that there were no issues with his ability to pay penalties.

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<sup>12</sup> Above n7.

<sup>13</sup> *LI v Daleson*, above n3.

<sup>14</sup> Above n9.

<sup>15</sup> Above n10.

<sup>16</sup> Above n11.

[66] He was told that if that position changed then he should provide information to the Authority about that. The information that he filed on 10 September 2019 did not indicate that ability to pay was an issue.

[67] Mr Kapur's oral evidence to the Authority therefore stands, so ability to pay is a neutral factor.

### **Additional Consideration 12 – Proportionality of outcome**

[68] The Labour Inspector's submission that penalties should not be reduced in order to avoid creating perverse incentives for employers by inadvertently encouraging breaches of their employment obligations is accepted.

[69] The Labour Inspector seeks significant penalties that act as a meaningful deterrent to Mr Kapur and others. This is not a case where there are a large number of employees that meant that not globalising penalties across them as a group would result in disproportionately large penalties.

### **Outcome**

[70] The starting point for each breach of s 65 of the Act should be \$3,000 in this case. It gives an overall penalty for the failure to provide legally compliant employment agreements of \$12,000.

[71] This does not need to be adjusted to reflect aggravating or ameliorating factors under the step 2 of the *Preet* test. Mr Kapur's financial circumstances is a neutral factor under step 3 of the *Preet* test. Applying step 4 of the *Preet* test - considering the proportionality of the penalties to be imposed does not require any adjustment to be made to the provisional penalty amount.

[72] A penalty of \$6,000 is to be imposed on Mr Kapur for his failure to produce employment records to the Labour Inspector forthwith.

[73] The step 2 *Preet* factors (aggravating and ameliorating factors) do not require that to be adjusted nor does Mr Kapur's financial circumstances (*Preet* step 3) or considerations regarding proportionality (*Preet* step 4).

**Costs**

[74] The Labour Inspector as the wholly successful party is entitled to a contribution towards her legal costs.

[75] The Labour Inspector has sought:

- (a) Costs of \$11,000 based on the Authority's notional daily tariff for a two day investigation meeting (\$4,500 first day and \$3,500 for subsequent days); and
- (b) Reimbursement of actual disbursements of \$951.29.

[76] Mr Kapur did not file costs submissions.

[77] Although this matter was heard over two days, the first day started at 12pm and the second day finished by lunchtime. For the purposes of assessing costs this matter has been treated as involving one day of investigation time.

[78] The notional starting point for assessing costs is \$4,500, as that is the current notional daily tariff for the first day of an investigation meeting. The parties have not identified any factors that warrant adjustments being made to this notional daily tariff, and the Authority is not aware of any.

[79] Mr Kapur is ordered to pay the Labour Inspector \$4,500 towards her legal costs in connection with these proceedings.

[80] Mr Kapur is also ordered to reimburse the Labour Inspector disbursements totalling \$951.29, consisting of:

- (a) \$71.56 filing fee;
- (b) \$118.60 witness fees for Mr Dinesh Sharma;
- (c) \$761.13 for actual costs (supported by invoices) associated with obtaining overseas affidavits for the workers.

**Orders**

[81] Mr Kapur is ordered to pay to the Crown a penalty of \$6,000 for his failure to produce employment records to the Labour Inspector forthwith upon request.

[82] Mr Kapur is ordered to pay \$2,000 of that penalty to the Crown Bank Account and \$1,000 of that penalty to each of the four workers.

[83] Mr Kapur is ordered to pay a total penalty of \$12,000 for his failures to provide four employees with legally compliant employment agreements.

[84] Because of the harm that each of these workers has been subjected to as a result of these breaches, Mr Kapur is to pay \$2,000 of the penalties recovered by the Crown is to be paid to each of the workers personally under s 136(2) of the Act. The remaining \$4,000 of the total \$12,000 penalty imposed is to be paid to the Crown Bank Account.

[85] The total penalties imposed on Mr Kapur are \$18,000 of which \$6,000 is to be paid to the Crown with the balance of \$12,000 that has been imposed is to be shared equally between the four workers.

[86] Mr Kapur is ordered to pay the Labour Inspector \$4,500 costs plus \$951.29 disbursements.

[87] All of the above amounts (namely the penalties imposed and costs awarded) must be paid by Mr Kapur within 28 days of the date of this determination.

**Rachel Larmer**  
**Member of the Employment Relations Authority**