IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 281
3040431

	BETWEEN	PHILIP OLIVER Applicant
	AND	A1 RELOCATIONS LIMITED First Respondent
	AND	CHRIS HAMPTON Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person No attendance for First or Second Respondents
Investigation Meeting:	13 May 2019
Determination:	13 May 2019

DETERMINATION OF THE AUTHORITY

A. Chris Hampton is personally liable for statutory obligations arising out of the employment of Philip Oliver.

B. By no later than 11 June 2019 Mr Hampton must pay a penalty of $6,000 for breaches of the Employment Relations Act 2000, the Minimum Wages Act 1983, the Holidays Act 2003 and the Wages Protection Act 1983.

C. The penalty must be paid to the Authority and when recovered the Authority must pay $4,500 to the Crown Account and $1,500 to Mr Oliver.

D. Mr Hampton must also pay, by no later than 11 June 2019, the

following sums to Mr Oliver:

(i) $63.60 as holiday pay; and

(ii) $71.56 in reimbursement of the fee paid to lodge his application in the Authority.

Employment Relationship Problem

[1] In May 2018 Philip Oliver responded to an advertisement in a local community newspaper for drivers to do vehicle transfers in Auckland and intercity, working on a casual basis. Chris Hampton contacted Mr Oliver to get a copy of his driver's licence, IRD number and home address and later confirmed Mr Oliver would be offered work. Although Mr Hampton is a director of A1 Relocations Limited, a registered company, Mr Oliver said Mr Hampton did not refer to the company in arranging for him to do vehicle transfer work.

[2] Mr Oliver said he asked about the pay rate for the work but Mr Hampton did not give any figure in reply. Rather Mr Hampton described the work as "recreational employment". Mr Oliver decided to accept the work on the basis that his first pay slip would show his hourly rate.

[3] Mr Oliver's first day of work was on 30 May 2019, transferring cars between Auckland Airport and a city depot.

[4] His second assignment was to drive a campervan from Auckland to Christchurch, beginning on 7 June. The transfer was being carried out for a company that need only be referred to as WML in this determination.

[5] On that transfer journey Mr Oliver was expected to make an overnight stop in Picton or Blenheim and finish the transfer in Christchurch on 8 June in time to make an afternoon flight back to Auckland. He was told to pay for fuel for the vehicle himself and the cost would be reimbursed when he was paid his wages.

[6] When Mr Oliver received his wages he calculated that the amounts paid meant he was paid $12 an hour for his work on 30 May and $11 an hour for 14 hours of actual driving time on 7 and 8 June.

[7] Mr Oliver then carried out two further assignments transferring campervans for WML – one on 25 and 26 June and another on 2 and 3 July. In the early hours of

3 July Mr Oliver accidently damaged the campervan while turning into a vehicle marshalling lane at the Interislander ferry terminal in Wellington. The rear tail light assembly of the van collided with the edge of a portacabin.

[8] On arrival in Christchurch Mr Oliver reported the damage and a WML staff member contacted Mr Hampton by telephone to discuss insurance details. Mr Hampton then spoke to Mr Oliver on the same call. Mr Hampton said there was a $500 insurance excess that he would pay to WML and Mr Oliver would have to "work it off" to repay. Mr Oliver did not agree with that arrangement but decided to pay the excess directly to WML and to pursue the matter with Mr Hampton on his return to Auckland. Mr Oliver paid the amount of $500 by credit card incurring an additional $12.50 in fees.

[9] Following his return to Auckland Mr Oliver decided to accept no further assignments. After speaking with a Labour Inspector and researching his rights on a Ministry of Business website, www.employment.govt.nz, Mr Oliver wrote to Mr Hampton seeking arrears of wages, reimbursement of the insurance excess amount he had paid and holiday pay on his wages. His letter said Mr Hampton had failed to provide a written employment agreement, failed to pay him at the adult minimum wage of $16.50 an hour and could not demand Mr Oliver pay the insurance excess unless such a term was agreed in a written employment agreement.

[10] Mr Oliver calculated he was owed $258 for the shortfall in wages paid to him for work on 30 May in Auckland and his three transfer journeys to Christchurch in June and early July. Reimbursement of the $512.50 excess payment took his calculation of the total owed to him up to $770.50. He also sought holiday pay of eight per cent on the pay due to him for all hours he had worked.

[11] Between 3 September 2018 and 6 March 2019 Mr Oliver received 23 part-payments from Mr Hampton for his outstanding wages and reimbursement of the insurance excess he had paid. The amount paid each time ranged from $4.93 to $196.60, with 18 payments being for an amount less than $30. Each payment was made by post-dated cheque, causing further delay and effort in receiving the payment. The cheques were accompanied by notes written by another person on Mr Hampton's behalf. Those notes included sarcastic messages calling Mr Oliver "a good boy" and "ducky". One included an out-of-date Lotto ticket with the words "for being a good

boy" written on it. Another included an out-of-date Keno ticket bearing a handwritten note saying: "Goodwill. You will be rich." Other envelopes included pictures that appeared to be cut out from fashion brochures showing parts of women's bodies. One included a copy of an email containing a picture of a naked woman with text advertising sexual services.

[12] By the date of the Authority investigation meeting the 23 part-payments made over a six month period had met the amount for underpaid wages and reimbursement of the insurance excess that Mr Oliver had claimed but not his holiday pay.

The Authority's investigation

[13] Mr Oliver lodged a statement of problem in the Authority on 3 October 2018. In a statement in reply lodged on 17 October Mr Hampton responded that all wages owing to Mr Oliver were paid and he was "now paying off the $512.50 excess". He described the matter as "all sorted" and he was "off overseas". The matter was referred to mediation but Mr Hampton did not respond to attempts by Employment Mediation Services to make necessary arrangements, including for him to attend by telephone from wherever he might be at that time.

[14] On 28 February 2019 Mr Oliver lodged the amended statement of problem that is the subject of this determination. In addition to any outstanding wages and holiday pay, he sought orders imposing penalties for failure to pay him the minimum wage, failure to pay him holiday pay, failure to provide him with a written employment agreement, unauthorised deductions from his wages in relation to the insurance excess payment, failure to pay him wages in full when due and, specifically against Mr Hampton, for aiding and abetting breaches of his employment agreement.

[15] Mr Hampton has not engaged with the Authority process since lodging the statement in reply in October 2018. The last message from him, sent to a Mediation Services co-ordinator on 19 December 2018, read (as written):

> i am overseas for a year or to, you can ring me in febuary 2019 if you want if you cant get me leave a message, you can let phillip oliver know my good friend martha is paying off his excess for the camper he crashed on the ferry, so now everyone is happy. MARY XMAS EVERYONE SO TALLY HO FOR NOW GOODBYE.

[16] Authority Minutes setting out the steps taken to progress or resolve this matter have been issued on 7 January, 19 February, and 11 April 2019. The company and Mr Hampton were provided with an opportunity to respond to Mr Oliver's amended statement of problem and, once a Notice of Investigation Meeting was issued, an opportunity to arrange for Mr Hampton or any authorised representative of himself or the company to attend the investigation meeting, either in person, by telephone or by audio-visual means (such as FaceTime, WhatsApp or Skype).

[17] All Minutes and Notices have been sent to the company's registered office address, the street address given as both its address for service and the residential address of Mr Hampton, and the email address used by Mr Hampton in his communication with the Mediation Services. The street and postal addresses used were the same as those given in a company annual return filed with the Companies Office in March 2019. Couriers have returned the correspondence addressed to the registered office, in an East Auckland commercial area, as undeliverable. Items addressed to the residential address and the address for service were recorded as having been delivered.

[18] At the date of the Authority investigation meeting the company remained registered.

[19] The 11 April Minute advised that the Authority could proceed to make a determination and enforceable orders in the event of non-attendance of a party.[1]

[20] No one attended the investigation meeting on behalf of Mr Hampton or the company. Mr Hampton had not responded to the opportunities offered to attend by telephone or by audio-visual link. Sufficient measures were taken to notify both respondents of the investigation meeting and the opportunity to attend and participate. No good cause was shown for the failure to attend or be represented. The Authority was therefore able to act as fully as if one or both of the respondents had attended or been represented. There was no new or additional material provided by Mr Oliver that the respondents were not aware of or had not had the opportunity to comment on before it was taken into account for the purposes of this determination.

[1] Employment Relations Act 2000, s 173(2) and Schedule 2 clause 12.

The issues

[21] The issues for determination were:

(i) Who was the employer of Mr Oliver and who could he pursue over any failure to meet obligations owed to him as an employee? Was it the company or Mr Hampton personally?

(ii) Is Mr Oliver owed any holiday pay, not yet paid?

(iii) Should any penalties be imposed for breaches of employment standards by the employer and/or by instigating, aiding and abetting breaches of Mr Oliver's employment agreement?

(iv) Who should get any penalties paid?

(v) Should either party contribute to the costs and expenses of the other party?

[22] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Who was Mr Oliver's employer and who could he pursue over his rights?

[23] Mr Oliver, aged 67, is retired from full-time employment. His working life included years as an employee in various levels of responsibility in the brewing and meat industries and as an employer when he was the lessee of a hotel for some years.

[24] The advertisement he responded to in May 2018 sought "oncall drivers" to relocate vehicles nationwide. It gave Mr Hampton's first name and phone number. It made no reference to A1 Relocations Limited.

[25] Mr Oliver's evidence, given under oath at the investigation meeting, was that Mr Hampton did not tell him about the registered company. Mr Hampton gave him an email address that used the words "A1 Relocations" and Mr Oliver said he heard the business referred to by those same words when he reported for his first assignment at Auckland airport. This name was also referred to WML booking forms for the assignments to relocate campervans from Auckland to Christchurch. He provided a copy of one of those forms. It had two references to "A1 Relocations" without use of the word Limited.

[26] From his experience of having been a hotel lessee and proprietor earlier in his working life, Mr Oliver was familiar with the purpose of a limited liability company and its protective role for someone running a business. If the word "Limited" had been used at the outset, it was likely Mr Oliver would have noticed and remembered.

[27] Mr Oliver said the cheques for the part-payments he was sent after his employment ended included Mr Hampton's name as well as A1 Relocations.

[28] When Mr Oliver initially lodged his statement of problem he referred only to Mr Hampton as the respondent employer. He amended that statement at the suggestion of an Authority Officer who asked whether the respondent was correctly named. The officer had checked the Companies Officer register and identified A1 Relocations Limited as a company owned by Mr Hampton. Mr Oliver amended the statement, lodged on 3 October 2018, only as a result of that suggestion.

[29] In light of Mr Oliver's evidence, and what few documents might shine light on the true identity of the employer, it was more likely than not that the employment relationship was formed directly with Mr Hampton, with the words "A1 Relocations" appearing to be used as a trading name. Even if the registered company, A1 Relocations Limited, were intended to be the actual employer, Mr Hampton had not disclosed its existence to Mr Oliver. Having not disclosed the company's identity and existence at the outset, including by not providing Mr Oliver with a written employment agreement that might have referred to the company, Mr Hampton could be pursued personally as the agent of the company under the doctrine of the undisclosed principal.[2] Whether Mr Hampton was the direct employer or the liable agent of an undisclosed principal, Mr Oliver was entitled to pursue him in these proceedings and seek orders holding Mr Hampton personally liable for meeting statutory obligations and the consequences of failing to do so.

Is Mr Oliver owed any holiday pay or other payments?

[30] Mr Oliver was not paid holiday pay on his earnings. Allowing for the adjustment necessary to bring the pay rate for all hours worked up to the minimum wage of $16.50 an hour applicable at that time, Mr Oliver's gross earnings should

[2] *Cuttance (t/a Olympus Fitness Centres) v Purkiss* [1994] 2 ERNZ 321 at 332-333 and 338 and *Fuimaono v Houia* [2017] NZEmpC 63 at [41]-[46] and [59]-[60].

have totalled $795. He was entitled to a payment of eight per cent on that gross amount as holiday pay when his employment ended.[3]

[31] By no later than 11 June 2019 Mr Hampton must pay Mr Oliver $63.60 as holiday pay.

Is Mr Hampton liable for any penalties and, if so, of what amount?

[32] Mr Hampton is liable to a penalty for each of the following breaches of employment standards:

(i) Failure to provide Mr Oliver with a written employment agreement;[4] and

(ii) Failure to pay Mr Oliver the minimum wage for each hour worked;[5] and

(iii) Failure to pay Mr Oliver holiday pay at the end of the employment;[6] and

(iv) Failure to pay wages when due in full;[7] and

[33] For technical reasons Mr Hampton was not liable to a penalty for breach of the Wages Protection Act in respect of the insurance excess paid by Mr Oliver. Mr Oliver had paid the excess himself rather than follow Mr Hampton's suggestion that he would pay it and have Mr Oliver "work it off". As a result that amount was not deducted from wages due to Mr Oliver, so no illegal deduction was in fact made.

[34] Neither was Mr Hampton liable to a penalty for instigating, aiding and abetting breaches of Mr Oliver's terms of employment.[8] As this determination has found on the balance of probabilities that Mr Hampton was the actual employer, he is already personally liable to penalties for the primary breaches. To impose further penalties on him personally would be a form of double punishment. The same consideration would apply to the alternative analysis that Mr Hampton was personally liable as the agent of the undisclosed principal.

[35] For the four identified breaches for which liability to a penalty does apply, setting the amounts of those penalties is governed by s 133A of the Act:

> In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

[3] Holidays Act 2003, s 23.
[4] Employment Relations Act 2000, s 64(4).
[5] Minimum Wage Act 1983, s 6 and s 10.
[6] Holidays Act 2003, s 27 and 75(2)(a).
[7] Wages Protection Act 1983, s 4 and s 13.
[8] Employment Relations Act 2000, s 134(2).

(a) the object stated in section 3; and
(b) the nature and extent of the breach or involvement in the breach; and
(c) whether the breach was intentional, inadvertent, or negligent; and
(d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
(e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
(f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
(g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[36] Using a methodology it developed in *Borsboom v Preet PVT Limited* the Employment Court has summarised the appropriate steps in applying the s 133A framework in this way:[9]

> Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):
>
> 1. The object stated in s 3 of the Act (mandatory statutory consideration 1);
> 2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
> 3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
> 4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
> 5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
> 6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);
> 7. previous conduct (mandatory statutory consideration 7);
> 8. deterrence, both particular and general (Preet additional mandatory consideration 1);
> 9. culpability (Preet additional mandatory consideration 2);
> 10. consistency of penalty awards in similar cases (Preet additional mandatory consideration 3);
> 11. ability to pay (Preet additional mandatory consideration 4); and
> 12. proportionality of outcome to breach (Preet additional mandatory consideration 5).

[9] *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151]; *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

Object of the Act

[37] The Act aims to build productive employment relationships by a range of measures, including promoting of the effective enforcement of employment standards. Each of the breaches committed in Mr Hampton's employment of Mr Oliver was a breach of those employment standards. A penalty was required to uphold the Act's object of effectively enforcing those standards.

Nature and extent of the breaches

[38] Each breach was a breach of a separate statute. They occurred over a short period of time. Each one rendered Mr Hampton liable to a separate penalty. For an individual, the starting point was $10,000 for each breach, so Mr Hampton's total provisional liability was $40,000.[10]

Breaches intentional or inadvertent?

[39] The failure to provide and keep a written employment agreement cannot be excused as inadvertent given the long-standing and well-known statutory requirements to have such agreements for every type and instance of employment. Similarly the delay in payments, made worse by slow drip-feeding of amounts due, was plainly intended to taunt and insult Mr Oliver. No reduction of the total provisional penalties could be made due to that intentional behaviour.

Loss or damage suffered or gains made or losses avoided?

[40] Mr Oliver lost the use of money he was entitled to have in full. Mr Hampton gained the benefit of not paying what was due when it was due. No reduction in the provisional level of penalties was warranted on that account.

Any steps taken to mitigate adverse effects

[41] Mr Hampton did take steps to pay the outstanding amounts, of wages and reimbursing the insurance excess paid, but only because of Mr Oliver's persistence in pursuing his entitlements. The part-payments made were accompanied by what Mr Oliver fairly called demeaning and childish behaviour. This included placing cut-out pictures of women and one picture of a naked woman in the envelopes containing those cheques. Whatever credit might have been due for those steps, in repaying the

[10] Employment Relations Act 2000, s 135(2).

underpaid wages and reimbursing the insurance excess, was negated by that deliberately slow and offensive behaviour.

Circumstances of the breach, including any vulnerability of the employee?

[42] As a casual employee Mr Oliver's position was inherently vulnerable. In many instances such an employee would have been reluctant to pursue their rights due to the risk of not receiving further assignments. Mr Oliver had the fortitude and life experience not to be put off by Mr Hampton's misuse of his power in the employment relationship. Those circumstances did not warrant any reduction in the provisional level of penalties.

Previous conduct

[43] There was no information that Mr Hampton had been previously penalised or been involved in proceedings for similar conduct. For what appeared to be a first offence, a reduction of fifty per cent of the provisional penalty could be made, that is from $40,000 to $20,000.

Deterrence

[44] A penalty was appropriate to punish both the particular conduct of Mr Hampton in this particular case and to discourage other employers from engaging in similar conduct. The penalty marks not only the breach of workers' rights but also disapproval of anti-competitive conduct by Mr Hampton. Other employers take care to observe the statutory minimum entitlements, at some cost to their businesses. It would be unjust to them if Mr Hampton were not penalised for acting in a way that reduced his business costs and gave him an unfair competitive advantage.

Culpability

[45] Mr Hampton was entirely culpable for the breaches. Mr Hampton wrongly treated Mr Oliver as culpable for the insurance excess. Even if Mr Oliver were responsible for the campervan damage, there was no legitimate basis for expecting him to pay for the insurance excess. Even if a deduction for that reason was permissible, it would only be so under an express written term of an employment agreement and Mr Hampton was entirely responsible for the failure to make such as agreed arrangement.

Consistency

[46] Similar clusters of breaches occur in a range of circumstances and degrees of severity so assessing consistency with other cases is a matter of broad rather than precise evaluation.

[47] By way of example only, penalties of $15,000 were imposed on a company and a director for seven breaches involving one worker;[11] penalties of $50,000 were imposed for similar breaches involving four workers;[12] and similar breaches involving 15 workers led to orders for penalties totalling $40,000 in another case.[13]

[48] Allowing for the important but not severe or sustained nature of the breaches in Mr Oliver's case, involving one worker, a further reduction of 50 per cent of the provisional penalty could be made to allow for relative consistency with other cases. The adjustment reduces the provisional total from $20,000 to $10,000.

Ability to pay

[49] There was no information about the ability of Mr Hampton to pay any penalty ordered. As a result no adjustment could be made on that ground.

Proportionality

[50] A last cross-check considers whether the amount of $10,000 reached as the provisional level of penalty in this case was proportionate to the seriousness of the breaches and the harm occasioned by it. The provisional sum is 25 per cent of the maximum permitted for those breaches.

[51] Cross-checked against the outcome in other cases referred to and considering that the breaches relate to one worker over a relatively brief period, a further downward adjustment was appropriate to provide for a proportionate result that remained a sufficient amount to punish and deter such behaviour.

[52] Accordingly Mr Hampton must pay $6,000 as a penalty for the breaches of employment standards committed in the employment relationship with Mr Oliver. For comparative purposes that amount can be said to comprise $1,500 for each breach of four separate statutes.

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[11] *A Labour Inspector v Symrose Limited* [2019] NZERA 94.
[12] *A Labour Inspector v Direct Auto Importers* [2017] NZERA Auckland 195.
[13] *A Labour Inspector v D K Transport (2009) Limited* [2017] NZERA Auckland 97.

Who should the penalties be paid to?

[53] The Authority may order that the whole or some part of the penalty, once recovered, be paid to Mr Oliver.[14] In this case Mr Oliver was directly harmed by a failure to observe his minimum entitlements as an employee and had to go to the effort of bringing those breaches to the attention of the Authority. From the outset of lodging his application in the Authority he identified his motivation as being one of principle, to ensure present and future employees were protected by the relevant employment standards. However, having pursued the issue for those reasons rather than any particular personal gain, it was nevertheless appropriate that the breaches of employment standards he suffered be recognised by transfer to him of one quarter of the penalty to be recovered, that is the amount of $1,500.

[54] Accordingly Mr Hampton must pay the total of penalty of $6,000, into the Authority by no later than 11 June 2019. Once paid, $4,500 of the penalty is to be paid by the Authority into the Crown Account and $1,500 to Mr Oliver.

Costs and expenses

[55] Mr Oliver was also entitled to be reimbursed by Mr Hampton for the fee of $71.56 paid to lodge his application in the Authority. Mr Hampton must also pay that amount to Mr Oliver by no later than 11 June 2019.

Robin Arthur
Member of the Employment Relations Authority

[14] Employment Relations Act 2000, s 136(2).