IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 310
3034479

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	BABYLON COMMUNICATIONS LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Claire English and Alistair Miller, counsel for the Applicant Emma Butcher, counsel the Respondent
Investigation Meeting:	27 February 2019
Submissions received	On the day
Date of Determination:	27 May 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Nicola Rowe, lodged proceedings against Babylon Communications Limited, which trades as Clearvision Communications (Clearvision) alleging various breaches of minimum employment standards.

[2] The Labour Inspector initially sought recovery of minimum wage arrears on behalf of five employees. However, Clearvision has now paid these arrears. The Labour Inspector also sought penalties arising out of this and also for failure to keep proper wage and time records for nine employees. The Labour Inspector continues to press these claims. Clearvision opposes the imposition of penalties.

[3] In order to assist the resolution of the Labour Inspector's claims against Clearvision, the parties, in discussion with the Authority, undertook to agree on the relevant facts. The Labour Inspector and Clearvision agreed on the following facts[1]:

a. Clearvision installs fibre optic communications throughout New Zealand and employs approximately 140 employees, many of whom are on supported work visas.

b. In 2016, Labour Inspectors Varsha Mistry and Jo-Ann Duff conducted an audit of the respondent.

c. On 14 July 2017 the applicant sent Neel Kamal, the manager and contact person for Clearvision, a formal notice under s 229 of the Employment Relation Act 2000 (the Act) requiring a Clearvision to produce full records for a selection of 13 salaried employees.

d. On 31 July 2017 Mr Kamal sent partial records for these employees to the applicant.

e. On 2 August 2017 Mr Kamal sent the Labour Inspector further partial records consisting of approximately one week of timesheets for 10 employees and advised the applicant that some were missing.

f. On 9 August 2017 the Labour Inspector interviewed Mr Kamal and asked him questions about the company's current business processes regarding statutory minimum employment standards.

g. During the interview, the Labour Inspector asked Mr Kamal if Clearvision 's employees kept time records. Mr Kamal advised that he relied on the employees keeping records of work performed and hours worked but that he did not know that it was a requirement to keep time records for Clearvision's employees who were paid by way of salary.

h. These employees are paid a base salary. On top of that salary, the employer calculates a piece rate for each piece of work completed by the employee.

i. Clearvision believed this method met legal requirements.

j. The Labour Inspector's calculations show that on some weeks the employees did not receive the minimum wage.

[1] These have been amended for style.

k. Between 11 August 2017 and 24 October 2017 Mr Kamal sent the Labour Inspector further records they had for 10 employees.

l. Without keeping complete wage and time records Clearvision has not been able to show that it has paid its employees at least the rate of the minimum wage for all hours worked.

m. The Labour Inspector determined from the partial records provided by Mr Kamal that minimum wage breaches had occurred. On 14 November 2017 the Labour Inspector emailed her preliminary findings to the respondent for comment.

n. On 4 December 2017, Clearvision provided detailed responses to the applicant's preliminary findings.

o. Clearvision subsequently conducted its own investigation into the minimum wage breaches identified by the Labour Inspector by obtaining the GPS times recorded in the company's vehicles and comparing them to the employees' self-reported time records.

p. Clearvision provided a copy of the GPS reports for a number of employees and its analysis to the applicant. The Labour Inspector accepted Clearvision's evidence and conclusions.

q. The Labour Inspector subsequently calculated arrears of minimum wage owed to employees based on the GPS reports provided by the respondent. Using Clearvision's more favourable assumptions as to the actual hours of work, the Labour Inspector found breaches of minimum wage entitlements.

r. These proceedings were filed on 31 July 2018.

s. Clearvision accepts the applicant's findings that it failed to make payment at not less than the minimum rate of wages in breach of s 6 of the Minimum Wage Act 1983 to the following five employees and in the following amounts:

    (i) Sudeep Parajuli - $242.12;
    (ii) Rajpreet Singh - $66.20;
    (iii) Androop Peechara - $281.88;
    (iv) Gaurav Shekhar - $134.48; and
    (v) MD Kashif Umer - $32.81.

t. Clearvision further accepts that it did not keep full and accurate wage and time records in breach of s 130 of the Act in respect of the following employees:

(i) Nikhil Gone;
(ii) Sudeep Parajuli;
(iii) Androop Peechara;
(iv) Jaskaran Saini;
(v) Abhinandan Sharma;
(vi) Gaurav Shekhar;
(vii) Gaurav Singh;
(viii) Rajpreet Singh; and
(ix) Kashif Umer.

u. Clearvision has since made payment to the five employees listed at [s] above for the outstanding arrears of minimum wages identified by the applicant. In addition, Clearvision indicates it has updated its payroll processes.

The Authority's investigation

[4] During the investigation meeting, I heard evidence from Labour Inspectors Varsha Mistry and Nicola Rowe. For Clearvision, I heard evidence from Chief Executive, Sameer Ibrahim and Chief Financial and Operating Officer, Nilesh Kamal. Several other Clearvision employees gave evidence on behalf of the company. This collateral evidence, in summary, largely related to their views about how fair and reasonable they regarded Clearvision to be as an employer.

[5] Having regard to s 174E of the Act, I do not refer in this determination to all the information received during my investigation of the Labour Inspector's claims against Clearvision. To the extent I do not refer in to all the submissions advanced by the parties during the investigation meeting, I record, and I do so for the avoidance of all doubt, that I have fully considered these.

The Labour Inspector's claim for penalties

[6] As to the foundations of the Labour Inspector's claim, the Authority has jurisdiction to hear and determine an application for recovery of penalties under the Act and Minimum Wage Act.[2] As to the standard of proof for the imposition of a penalty on Clearvision, this is the civil standard of "on the balance of probabilities"; sometimes captured in the phrase: "more likely, than not".[3] The maximum penalty that can be imposed on Clearvision for each breach of minimum employment standards is $20,000.[4]

[7] Consistent with the decision of a full court of the Employment Court in *Boorsboom (Labour Inspector) v Preet PVT Limited*[5] (Preet), the Authority is required to undertake a "Preet" analysis when considering the imposition of penalties for breach of employment standards. This analysis has been supplemented in recent times by the enactment of s 133A of the Act and further decisions of the Court.[6]

[8] The synthesised analysis contains 12 relevant considerations drawn from the statutory framework and the common law. The Labour Inspector's submissions were consistent with this approach. While recognising the requirements of the penalties analysis, Clearvision provided a more global analysis consistent with its view that no penalties should be imposed on it. Therefore, to the extent all 12 considerations are not separately addressed in this determination, they have been addressed as appropriate or, at the very least, fully considered by the Authority before deciding to impose any penalties.

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[2] Employment Relations Act, s 161(m)(ii) and s 161(m)(iv)
[3] *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].
[4] Employment Relations Act, s 135(2)(b)
[5] [2016] NZEmpC 143
[6] See, *A Labour Inspector v Pradh Limited* [2018] NZEmpC 110 and *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12. See also, *Nicholson v Ford* [2018] NZEmpC 132.

Relevant considerations

Objects of the Act

[9] The objects of the Act include recognition of the inherent inequality in power in employment relationships between workers and employers; the promotion of good faith as underpinning the Act's regime and the effective enforcement of employment standards, particularly by the Labour Inspectorate.[7] The Court has found these objects are relevant when considering the imposition of penalties, particularly in cases involving migrant workers.[8]

[10] The Labour Inspector stated that the failure to keep proper wage and time records made it very difficult to ascertain whether Clearvision's predominately migrant workforce was being paid the minimum wage. The Labour Inspector also said Clearvision's failure to pay minimum wages undermined employment standards and gave it an unfair competitive advantage in the marketplace. Clearvision rejected both submissions.

Number and extent of the breaches

[11] The parties agreed on the nature and extent of possible penalties to be imposed on Clearvision. These are:

i. Five breaches of s 6 of the Minimum Wage Act (failure to pay the minimum wage) in respect of five employees: 5 x $20,000 = $100,000; and

ii. Nine breaches of s 130 of the Act (failure to keep wage and time records) in respect of nine employees: 9 x $20,000 = $180,000

Total: $280,000

[12] While Clearvision accepted their potentially liability for $280,000 in penalties, they described this as "clearly manifestly excessive and unjust when the totality of the evidence is considered".

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[7] Employment Relations Act, s 3.
[8] *Daleson* above n 6 at para [27]

[13] Consistent with the Preet analysis at this step, the Labour Inspector said the Authority should not undertake a "globalisation" approach to penalties because (a) it was inappropriate in the context of the particular breaches and (b) globalisation should not occur across two different statutes.

[14] Clearvision did not address the issue of globalisation directly at this stage of the analysis but it is clear from the general thrust of its submissions, a globalisation approach, which would have the resultant effect of reducing its liability, would be favoured by it.

[15] Having carefully considered the matter, I conclude this is not an appropriate case for globalisation of penalties at this step. The maximum penalties available to the Labour Inspector are those set out in paragraph [11] above.

Nature of the breaches

[16] The Labour Inspector said the breaches, were linked because Clearvision paid relatively low annual salaries without consideration as how to met its obligations to pay the minimum wage. She claimed that this was the result of a deliberate business decision to move employees from being paid an hourly rate to paying them on a piece rate basis. The Labour Inspector said a degree of ignorance about legal obligations was no excuse[9] and it was enough if Clearvision did not take reasonable steps to fulfil these.

[17] Clearvision rejected these submissions and said there was no intention to breach employment standards and professional advice was sought. It said the breaches were clearly unintentional and inadvertent. Clearvision also said the keeping of wage and time records for salaried employees could be seen as "outdated" and "not keeping pace with modern work practices".

[18] The Labour Inspector said the severity of the breaches should be assessed as follows:

(i) Failure to pay the minimum wages: 70% of total penalties because the failure resulted in a financial advantage to Clearvision;

[9] *Daleson* above n 6 at para [31]

(ii) Failure to keep proper wage and time records: 50% of total penalties because:

a. the requirement to keep such records is longstanding;

b. the failure hampered the Labour Inspector's investigation; and

c. the Labour Inspector relied on information provided by Clearvision and breaches were still found.

[19] Clearvision, describing the breaches as "technical", said they were not deliberate; there were no aggravating features and there was no continuing course of conduct. Clearvision said it was difficult to see how its employees were negatively impacted by the breaches and that it did not benefit from anti-competitive behaviour.

[20] I am not convinced by Clearvision's argument that its breaches were "technical". Consequences flowed from Clearvision's actions. First, it failed to comply with a fundamental statutory obligation to keep wage and time records for employees, regardless of whether this is an "outdated" practice. Second, the failure to keep such records hampered the ability of the Labour Inspector to carry out its statutory functions to monitor and enforce compliance with employment standards. Third, the breaches resulted in five employees being paid under the minimum wage.

[21] I accept the Labour Inspector's submission that a degree of ignorance about legal obligations is no excuse and it is enough if Clearvision did not take reasonable steps to fulfil these obligations.

[22] I also accept the Labour Inspector's submissions as to the severity of the breaches and the appropriate discounts to be applied. So then, at the this step in the analysis, the total potential penalties for Clearvision, after applying discounts, are:

i. Five breaches of s 6 of the Minimum Wage Act: $70,000; and,

ii. Nine breaches of s 130 of Act: $90,000.

Total: $160,000

Mitigating factors

[23] Clearvision said there were numerous mitigating factors in this case. First, the company had not been proceeded against previously for employment standards breaches. Second, it had cooperated with the Labour Inspector's investigation. Third, it had taken comfort from an earlier Labour Inspectorate investigation that did not identify the matters now subject to these proceedings. Fourth, it had taken steps to correct its systems. And fifth, it had paid the arrears of wages.

[24] The Labour Inspector said it is unclear whether there were any mitigating factors in this case. While Clearvision had paid the minimum wage arrears to the employees, this had only occurred after the commencement of Authority proceedings. The Labour Inspector said the Court has found such conduct not to be evidence of contrition but rather late performance of a duty.[10] Further, the Labour Inspector said that while Clearvision had now taken positive steps to maintain proper wage and time records, it was required to do this in the first place.

[25] Having considered the submissions of the parties, it is appropriate to apply a 30% discount to penalties. At this step of the analysis, the total potential penalties for Clearvision, after applying this discount, are:

i. Five breaches of s 6 of the Minimum Wage Act: $49,000; and,

ii. Nine breaches of s 130 of Act: $63,000.

Total: $112,000

Clearvision's ability to pay

[26] The Labour Inspector said the onus was on Clearvision to put evidence before the Authority concerning its ability to pay penalties. The Labour Inspector said no such evidence has been provided. The Labour Inspector said Clearvision claims that it is trading and employing 140 people, which suggested it continued to operate normally and had some capacity to meet a penalty award. However, the Labour Inspector said a discount of 20% could be applied at this step.

[10] *Daleson* above n 6 at paras [33] – [35]

[27] Clearvision said it was a well-run business, had been profitable and had the ability to pay penalties. However, it said the "truly devastating financial effect" would come not from penalties but from negative publicity, which could lead to the loss of work and the loss of jobs. Clearvision also submitted that the imposition of penalties would see it automatically added to Immigration New Zealand's (INZ) list of non-compliant employers, which would dramatically affect its ability to recruit migrant labour.

[28] The Labour Inspector said inclusion in a list held by INZ was not a relevant consideration for the Authority when imposing penalties and this has previously been found to be the case.[11]

[29] Having considered the respective submissions of the parties as to this step, I accept that submission. While I acknowledge the submissions of Clearvision about the possible or likely collateral effect of the imposition of penalties, it is ultimately a matter for the company as to how it found itself in such a position in the first place. In making this observation, and for the avoidance of doubt, I do not regard the automatic administrative inclusion of Clearvision on a list held by INZ as a relevant consideration in imposing penalties for non-compliance with employment standards.

[30] So then, at the this step of the analysis, the total potential penalties for Clearvision, after applying this discount, are:

i. Five breaches of s 6 of the Minimum Wage Act: $32,200; and,

ii. Nine breaches of s 130 of Act: $50,400.

Total: $82,600

Proportionality of outcome

[31] The Labour Inspector accepted that the application of the proportionality test at this stage of the analysis would result in an overall reduction of penalties. However, the Labour Inspector said the Authority should impose a meaningful and deterrent sanction on Clearvision.

[11] See, for example, *A Labour Inspector v Silviculture Solutions Limited* [2018] NZERA Auckland 402 and *A Labour Inspector v One World Resourcing Limited* [2018] NZERA Christchurch 48

[32] Clearvision said the underpayment of minimum wages was small ($790) and this had now been paid. Clearvision said there was no evidence of exploitation on its part and its employees were paid "handsomely" for their work within the context of the communications industry. Clearvision said to impose a penalty would result in consequences out of all proportion to its actions.

[33] Clearvision said it did not need to be made an example of and, if anything, should be held up as an "example of a conscientious and well-run organisation that trains, cares for and looks after its migrant workforce".

Result

[34] Taking the submissions of the parties into account, the inherent vulnerability of workers on supported work visas and the need and desire for both deterrence and consistency, it is appropriate to impose significant but proportionate penalties on Clearvision. A proportionality discount has been applied in relation to penalties for failure to keep wage and time records, no similar discount is applied in respect of failure to pay the minimum wage. However, while it is superficially attractive to calibrate penalties for such a breach to the level of mischief, which in this case was minimum wage arrears of $790, a party in default should not benefit from early detection, or even detection, because non-payment of the minimum wage strikes at the heart of the employment relationship and offends society's expectations that a worker receives at least the minimum in exchange for their labour.

[35] So then, within 28 days of the date of this determination, Clearvision must to pay the following penalties to the Authority for subsequent transfer to a Crown Bank Account:

i. Five breaches of s 6 of the Minimum Wage Act: $32,200; and,

ii. Nine breaches of s 130 of Act: $40,400.

Total: $72,600

Costs

[36] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 28 days from the date of this determination in which to file and serve a memorandum on costs. Clearvision have a further 14 days in which to file and serve a memorandum in reply.

[37] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.[12]

Andrew Dallas
Member of the Employment Relations Authority

[12] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.