

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 497  
**3044291**

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	MANUREWA CAR SPARES (NZ) LIMITED (In Liquidation) First Respondent
	MUHAMMAD SHAFIQ Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Shona Carr, Counsel for the Applicant No appearance by First and Second Respondent
Investigation Meeting:	20 August 2019
Submissions:	20 August 2019 from the Applicant None from the First and Second Respondents
Determination:	26 August 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, a Labour Inspector, seeks remedies and penalties against the First Respondent Manurewa Car Spares (NZ) Limited (MCL) and the Second Respondent, Mr Muhammad Shafiq, for breaches of the Holidays Act 2003 (HA) and the Minimum Wages Act 1983 (MWA).

[2] The Labour Inspector is seeking recovery of minimum wage entitlements in respect of wages owed to Mr Hardev Singh and annual pay entitlements in respect of Mr Gurdeep Singh Chang, Mr Cody White, Mr Hardev Singh, and Mr Evander Timu.

[3] The Labour Inspector claims penalties in respect of the following breaches:

- (i) Sections 6 and 10 MWA for failure to pay minimum wages to Mr Hardev Singh; and
- (ii) Section 75 of the HA for failing to failure to pay holiday entitlements to four employees.

### **Issues**

[4] The issues for determination are:

- Did MCL fail to comply with s 6 of the MWA?
- Did MCL fail to comply with sections 21, 23, 24, 25, 26 and 27 of the HA?
- Should Mr Shafiq be made liable for the default in the arrears payments?
- Should penalties be imposed on Mr Shafiq as a person involved with the breaches?

### **Background**

[5] The First Respondent MCL was a limited liability company operating a vehicle wrecking and dismantling business. It is currently in liquidation.

[6] Mr Muhammad Shafiq was the sole Director and a Shareholder of MCL.

[7] Mr Shafiq was the representative of MCL involved in the conduct of the case against both MCL and himself as Second Respondent.

#### *Failure to adhere to the scheduled timetables and Non-Attendance by Mr Shariq*

[8] Mr Shafiq failed to attend mediation as directed and persistently refused (i) to attend case management conferences to progress that matter or for case process issues,(ii) to file witness statements or (iii) to respond to any communications from the Authority.

[9] Mr Shafiq failed to attend the Investigation Meeting, and information received by the Labour Inspector is that Mr Shafiq and his family have departed New Zealand for Pakistan and have no return tickets to New Zealand.

[10] An Authority Officer attempted to contact Mr Shafiq by telephone prior to the commencement of the Investigation Meeting however the contact telephone number was inactive.

[11] Given the difficulties encountered in progressing this case, I was satisfied that no good cause had been shown for Mr Shafiq's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

*The Labour Inspector's involvement*

[12] The Labour Inspector was assigned a complaint file involving MCL to investigate in November 2017 following a complaint received from a former employee, Mr Gurdeep Singh Chang concerning his former employment with MCL. Mr Chang had told the Labour Inspectorate that although he had experienced problems himself whilst working at MCL, he was primarily making a complaint on behalf of his former colleague Mr Hardev Singh.

[13] As part of her investigation, the Labour Inspector conducted a sustainable compliance check as MCL had a previous interaction with a Labour Inspector in 2016. As a result of that interaction, MCL was issued with an Improvement Notice with which it had complied.

[14] The Improvement Notice had been issued in June 2016 identifying failings under s 23 of the HA as MCL had not calculated and paid an employee 8% of their gross earnings as holiday pay when their employment ended.

[15] Mr Shafiq had been involved in the Labour Inspector's investigation at that time.

[16] In November 2017 when the Labour Inspector commenced an investigation into the complaint received, she spoke to Mr Gurdeep Singh, to Mr Hardev Singh, and Mr Cody White. She had obtained any employment records they held, which included employment agreements, communications with MCL, bank statements and payslips.

[17] Mr Singh, Mr White and Mr Evander Timu provided evidence to the Authority in support of the evidence of the Labour Inspector, including evidence which substantiated the written evidence of Mr Chang who was unable to attend the Investigation Meeting in person.

[18] All the employees had been provided with written employment agreements signed by Mr Shafiq.

*Mr Hardev Singh*

[19] Mr Singh had been employed at MCL as a Warehouse Dispatch Supervisor from February 2017 until 29 March 2018. He was working in accordance with a work visa which required him to work at MCL.

[20] His agreed contractual hours of work were from 8.00 a.m. until 5.00 p.m. but he said he was habitually required to work until 7.00 or 8.00 p.m. in the evenings. He was not paid for the additional hours worked.

[21] In addition, the payslips he was provided with by MCL did not accord with payments made into his bank account and some payments were missed. Mr Singh attempted to discuss these issues with Mr Shafiq but they were not resolved and he was warned by Mr Shafiq that if he continued to raise the issues his visa would be cancelled.

[22] The failure to pay his wages correctly resulted in his struggling to pay his bills as they fell due.

[23] Mr Singh has not since been paid the outstanding amount due.

*Mr Cody White*

[24] Mr White was employed at MCL as a Sales Person and Dismantler from February 2017 to 27 January 2018. He reported to Mr Shafiq.

[25] Mr White said that the payslips he was provided did not accord with payments made into his bank account and although he was paid for the hours he worked, payments were frequently not made in the weeks they fell due. As a result household bills were dishonoured and this created financial stress for him and his young family.

[26] He had raised these issues with Mr Shafiq whom he said was the decision maker in MCL but they were not resolved. Mr White had decided to resign from his employment at MCL as a result but did not work his notice period due to the financial difficulties he was experiencing due to the payment issues with MCL.

[27] MCL has not paid his holiday pay entitlement upon the termination of his employment.

[28] He has not since been paid the outstanding amount due.

*Mr Evander Timu*

[29] Mr Timu was employed at MCL as a Dismantler from 1 November 2017 to January 2018.

[30] His agreed hours of work were from 8.00 a.m. until 5.00 p.m. but he was habitually required to work until 7.00 p.m. or 8.00 p.m. in the evenings. He was not paid for the additional hours worked.

[31] He did not receive any holiday pay entitlement upon termination of his employment.

[32] He has not since been paid the outstanding amount due.

*Mr Gurdeep Chang*

[33] Mr Chang was employed at MCL as an Automotive Dismantler from February 1 November 2017 to January 2018.

[34] He did not take any annual leave during his employment. When he resigned, although he provided his contractual notice and was prepared to work his notice period, Mr Shafiq had instructed him to write a letter stating that he wanted to end his employment immediately. As a result he did not work out his notice period despite his intention to do so.

[35] He did not receive any holiday pay entitlement upon termination of his employment.

[36] He has not since been paid the outstanding amount due.

**Did MCL fail to comply with s 6 of the MWA?**

[37] Section 6 of the MWA 5(2)(a)(iv) requires that workers shall be entitled to payment for the work they do at not less than the minimum rate .

[38] Mr Shafiq admitted to the Labour Inspector that Mr Singh was not paid for all the hours he worked during his employment at MCL and to breaching s 6 of the MWA.

**Did MCL fail to comply with s21, 23, 24, 25, 26 and 27 HA?**

[39] Sections 21, 23, 24, 25, 26 and 27 of the HA require that employers calculate holiday entitlement for employees and make payment of any outstanding entitlement with an employee's final pay.

[40] Mr Chang, Mr White, Mr Timu and Mr Singh were all owed holiday pay entitlement at the date of termination but they were not paid it.

[41] MCL acknowledged that holiday entitlement was due to the employees but withheld payment.

**Should Mr Shafiq be made liable for the default in the arrears payments?**

[42] MCL is in liquidation and therefore is unable to pay the arrears due to the employees. Mr Shafiq was the sole director of MCL and I am satisfied from the evidence that he was: “in a position to exercise significant influence over the management” of MSC.<sup>1</sup> Further, that he did in fact exercise such control.

[43] Pursuant to s 142Y of the Employment Relations Act 2000 (the Act) a Labour Inspector may recover from a person involved in the breach if that person is a person within the meaning of s 142W. Mr Shafiq is a person involved in the breaches and may be held liable pursuant to s 142Y(2)(b) of the Act: “to the extent that the employer’s employer is unable to pay the arrears in wages or other money”.

[44] I determine that Mr Shafiq is liable for the default in the arrears payments.

[45] **I order that Mr Sharif pay the following arrears:**

**\$6,445.99 gross to Mr Hardev Singh in respect of arrears owed pursuant to s 6 MWA**

**\$465.47 net to Mr Gurdeep Singh Chang in respect of arrears of final holiday pay entitlement**

**\$1,634.52 net to Mr Cody White in respect of arrears of final holiday pay entitlement**

**\$474.06 net to Mr Evander Timu in respect of arrears of final holiday pay entitlement**

**\$2,394.72 net to Mr Hardev Singh in respect of arrears of final holiday pay entitlement.**

**Interest is to be paid on the arrears owed at the rate of 5% until the arrears are paid in full.**

**Should penalties be imposed on Mr Shafiq as a person involved with the breaches?**

[46] Mr Shafiq was the person holding responsibility for the operation of MCL. As such he was responsible for all the breaches which occurred.

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<sup>1</sup> S 142W of the employment Relations Act 2000

[47] In *Nicholson v Ford* Chief Judge Inglis summarised a comprehensive list of relevant penalty consideration as being:<sup>2</sup>

- (a) The object stated in s.3; and
- (b) The nature and extent of the breach or involvement in breach;
- (c) Whether the breach was intentional, inadvertent or negligent;
- (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;
- (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, and has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- (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;
- (h) Deterrence, both particular and general;
- (i) Culpability;
- (j) Consistency of penalty awards in similar cases;
- (k) Ability to pay; and
- (l) Proportionality of outcome to breach.

[48] In *Preet* the Full Court of the Employment Court set out a four step process as helpful when addressing penalties:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

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<sup>2</sup> *Nickolson v Ford* [2018] NZEmpC at [18]

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[49] I consider that the four step approach set out in the Employment Court in *Borsboom (labour Inspector) v Preet PVT Limited* and *Warrington Discount Tobacco Limited* is appropriate in this case.<sup>3</sup>

[50] **Step 1: Identify the nature and number of the breaches and the maximum penalty available**

[51] There are 5 breaches comprising:

- 1 x breaches of s 6 and 10 of the MWA;
- 4 x breach of s 75 of the HA;

[52] The maximum penalty available against Mr Shafiq in respect of the breaches is \$10,000.00 per breach. Identifying the maximum penalties available in respect of each identified breach for MSL these are a maximum of \$50,000.00 calculated as:

- \$10,000 for 1 breach of s 6 and 10 of the MWAs 65;and
- \$40,000.00 for 4 breaches of s 75 of the HA;

[53] Counsel for the Labour Inspector submits that globalisation of the s 75 of the HA is appropriate.

[54] I consider that globalisation is appropriate in this case.

**Step 2: Assessment of the severity of the breaches**

(i) *Aggravating factors*

[55] The factors the Court must have regard to in determining the appropriate penalty under s.133A of the Act have been summarised in the Employment Court case of *Lumsden v*

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<sup>3</sup> *Borsboom (labour Inspector) v Preet PVT Limited* {

*Sky City Management Ltd*<sup>4</sup> as including whether the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.

[56] Mr Shafiq did not dispute that the breaches occurred.

[57] Despite the fact that MSC was not performing well and was experiencing financial constraints Mr Sharif acknowledged the shortfalls in wages payments to Mr Hardev Singh and stated that he would arrange to pay these, but failed to do so.

[58] Holiday pay entitlements upon termination of employment of the four employees, Mr Gurdeep Singh, Mr Cody White, Mr Evander Timu and Mr Hardev Singh was noted on payslips and noted on the pay roll entries but was not paid.

[59] Mr Shafiq claimed that the failure to pay Mr White and Mr Gurdeep Singh arose because they did not work their contractual notice periods, however the evidence establishes that they both offered and were prepared to work their notice periods, and it was at Mr Shafiq's direction that they did not do so.

[60] The evidence was that Mr Shafiq informed the Labour Inspector that he had posted cheques to the employees in relation to the owed holiday entitlement but there is no evidence that the cheques were posted or that they were received by the named recipients.

[61] During the Labour Inspector's process it was made aware of its obligations in relation to a number of the breaches for which the Labour Inspector is now seeking penalties.

[62] It is submitted by the Labour Inspector that a starting point of \$20,000.00 is appropriate in respect of the s 6 and 10 of the MWA and s 75 of the HA.

(ii) *Ameliorating Factors*

[63] I consider that no ameliorating factors are present that would justify lowering the starting point of \$20,000.00.

*The nature and extent of any loss or damage*

[64] No payments have since been made to remedy the loss suffered by the employees involved in the breaches.

*Circumstances of the breach*

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<sup>4</sup> *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

[65] As observed by the Full Court in *Borsboom v Preet PVT Limited (Preet)* it is a matter of common knowledge within the community generally, and the commercial and small business community in particular, that minimum wages, minimum holiday entitlements and other statutory minima are applicable to all employment.<sup>5</sup>

[66] The Labour Inspector submits that the circumstances of the breaches of the MWA and the HA highlights the vulnerability of employees, especially in the case of Mr Hardev Singh who felt unable to resign because his visa was dependent upon his continuing to be employed by MCL.

#### *Previous Conduct*

[67] The Labour inspector submits that MCL was subject to an Improvement Notice in 2016 when breaches of the HA were brought to its notice at that time.

[68] Mr Shafiq was the person involved in the Labour Inspector's investigation at that time. The steps MCL had taken at that time were sufficient to render it compliant but a breach of the HA has been a feature of both instigations.

#### *Deterrence*

[69] I consider that there is a need to enforce to employers the employment standards they are required to meet and that minimum entitlements are non-negotiable. Whilst there was compliance made following the Improvement Notice being served in 2016, compliance was not ongoing.

[70] As such I find that there is a need for particular deterrence for Mr Shafiq,

#### *Culpability*

[71] I find Mr Shafiq was aware of the need to meet minimum employment standards but failed to do so. As such I find a high degree of culpability.

#### *Consistency*

[72] The Labour Inspector submits that this case is comparable to the circumstances to those in *Labour Inspector v Mittal & Son Ltd*.<sup>6</sup>

### **Step 3: Financial Circumstances of the Respondent Employer**

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<sup>5</sup> *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

<sup>6</sup> *Labour Inspector v Mittal & Sons Ltd* [2019] NZERA 406

[73] There is no evidence from Mr Shafiq that informs his ability to pay any penalties awarded against him.

[74] He was the sole director and a shareholder of MCL which has been sold. There is no evidence as to whether or not Mr Shafiq has benefitted from the proceeds of that sale.

[75] I make no reduction in the penalties on the basis of Mr Shafiq's financial circumstances.

#### **Step 4: Proportionality or totality test**

[76] The parties acknowledge that in accordance with *Preet*, penalties imposed should be in proportion to the amounts of money unlawfully withheld from the employees as a result of 2CC's breaches and, in accordance with s.133A of the Act, the circumstances in which the breach took place.

[77] I consider that a proportional penalty reflecting the amount for monies unlawfully withheld to be represented by the sum of \$20,000.00.

**[78] In respect of the breaches, I order Mr Shafiq to pay a penalty of \$20,000.00 to the Crown.**

#### **Costs**

[79] Costs are reserved. In the event that costs are sought, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

[80] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson  
Member of the Employment Relations Authority**