IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 406
3044072

	BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
	AND	MITTAL & SON LIMITED First Respondent
		SOHAN MITTAL Second Respondent
		HIREN PATEL Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Sarah Blick, Counsel for the Applicant Benazir Din, Counsel for the First and Second Respondent Third Respondent in person
Investigation Meeting:	8 April 2019
Submissions:	7 June 2019 from the Applicant 11 June 2019 from the First and Second Respondents None from the Third Respondent
Determination:	09 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, a Labour Inspector, seeks penalties against the First Respondent Mittal and Son Limited (MSL) trading as Mobil Porchester Road; the Second Respondent, Mr Sohan Mittal; and the Third Respondent, Mr Hiren Patel, for breaches of the Employment Relations Act 2000 (ERA), the Holidays Act 2003 (HA).and Minimum Wages Act 1983 (MWA).

[2] In particular the Labour Inspector claims penalties in respect of the following breaches:

(i) Section 65(2)(a)(iv) of the ERA in relation to two individual employment agreements, which failed to include any indication of the arrangements relating to the times employees were to work;

(ii) Section 130(1)(b) of the ERA for failing to record the age of an employee who was under 20 years of age at the time of his employment;

(iii) Section 81 (d), (g) and (h) of the HA for failing to record current entitlements to annual holidays, dates on which any sick leave has been taken and the amount of payment for any sick leave taken in relation to 10 employees;

(iv) Section 23(2) of the HA for failing to calculate and pay two employees annual holidays at 8% of their gross earnings upon termination; and

(v) Section 12A of the WPA in utilising a workplace policy which required employees to pay for the cost of fuel when customers could not pay for fuel or drove away without paying.

[3] The First and Second Respondents accept liability for the breaches of the ERA, HA and MWA for which penalties are sought.

[4] MSL has paid monies owed to employees related to (iv) and (v) above and the Labour Inspector no longer seeks an order for payment of that amount.

Issues

[5] The issues for determination are:

- Did MSL fail to comply with s 65(2)(a)(iv) of the ERA?
- Did MSL fail to comply with s 130(1)(b) of the ERA?
- Did MSL fail to comply with s 81(d),(g) and (h) of the HA?
- Did MSL fail to comply with s 23(2) of the HA?
- Did MSL fail to comply with s 12A of the WPA?
- Should any penalties be imposed on the Respondents, and if so, what quantum?

- Should a penalty be imposed on Mr Mittal as a person involved with the breaches

- Should a penalty be imposed on Mr Patel as a person involved with the breaches

Background

[6] The First Respondent is a limited liability company trading as a Mobil petrol station and retail business in Auckland. It operates on a 24 hour, 7 day a week basis. Mr Sohan Mittal is the sole director and a joint shareholder. Mr Hiren Patel is the Store Manager and reports to Mr Mittal.

[7] An Improvement Notice had been issued by a Labour Inspector to MSL in June 2016 in which failings had been identified in relation to indicating hours of work for casual employees under s65 of the ERA, record keeping under s 130 of the ERA and s 81 of the HA, and paying holiday entitlement. These had been complied with at that time.

[8] On 6 November 2017 the Ministry of Business, Innovation and Employment's (MBIE) Contact Centre received a complaint from an employee, Mr Ricky Robinson. Mr Robinson alleged that MSL was not paying migrant workers for minimum hours they worked, and that it was enforcing a 'wage deduction' for service station drive-offs on to its employees.

[9] A Labour Inspector commenced an investigation into the complaint and carried out a sustained compliance check as a result of an Improvement Notice having been issued previously to MSL.

[10] During the Labour Inspector's investigation she established that there were seven employees of MSL and, in addition to Mr Robinson, she had corresponded with another former employee, Mr Gianni Parish and his mother Ms Tania Parish in relation to an allegation of MSL charging employees for 'Unable To Pays' (UTP) and drive-offs.

[11] Mr Robinson and Mr Parish had both been issued with individual employment agreements which they had signed and which contained a clause in a 'General Policies' Schedule stating:

> The drive off will be paid by the staff on the duty whoever is responsible to authorise the pump or the employer can deduct from wages whichever is agreed between the employer and the employee.

[12] Mr Parish said that on a normal shift there were approximately three people working. Frequently this included Mr Hiren Patel, Manager, but in his absence there would be a Duty Manager.

[13] Mr Parish said that the employee who had been responsible for the till and/or who had authorised the release of petrol to the pump during a drive-off occurrence was asked to pay for the fuel taken by the customer, usually by Mr Patel.

[14] Mr Parish said he had been asked to cover such a default in payment on two occasions. He had paid the drive-off amount on those occasions by Eftpos.

[15] Mr Robinson said he had been required to make payment on occasion, on one such occasion in the amount of $130.14 however he had not in fact paid it.

[16] Both Mr Parish and Mr Robinson had since received repayment from MSL in respect of the amounts for which they had made payment.

Improvement Notice June 2016

[17] Mr Mittal said that after MSL received the Improvement Notice in June 2016 he had tried to ensure compliance. MSL had rectified all the issues which had been raised by the Labour Inspector and updated the employment agreements to the Labour Inspector's satisfaction and approval; and implemented the updated employment agreements.

[18] His understanding had been that MSL had resolved all the issues raised in the Improvement Notice and was compliant with existing law.

[19] When a Labour Inspector had approached him in response to the complaints received in November 2017 he had provided all requested information and answered any queries as fully as he was able to do.

[20] Mr Mittal stated that there had been no deliberate attempt by MSL to breach the law and he had believed that MSL had been compliant with its legal obligations following the Labour Inspector's investigation in June 2016.

Drive-off Policy

[21] Mr Sohan said that he had full control over MSL. He had been responsible for drafting the drive-off policy because employees were allowing family members or friends to obtain petrol without payment. He had expected Mr Patel as his Manager to enforce the policy.

[22] Prior to introducing the drive-off policy Mr Mittal said he had sought and verbally obtained legal advice and had been advised that provided the clause had been brought to the employees attention prior to them entering into the employment agreement and they were advised to seek independent advice, it should be satisfactory.

[23] Mr Patel said that the policy regarding drive-offs had been introduced by MSL and he had been instructed to explain it to the employees. He was also expected to adhere to the policy.

[24] Mr Mittal had advised Mr Parish to seek independent advice before signing the employment agreement offered to him in accordance with MSL policy. Mr Parish confirmed that he had received the employment agreement prior to commencement of employment and had taken it away and asked Ms Parish to review it. He had subsequently signed and returned it.

[25] Mr Mittal said he had been made aware of an incident involving Mr Robinson by Mr Patel which had occurred in October 2017. The incident had arisen as a result of Mr Robinson having authorised a fuel pump to deliver $130.14 instead of the lesser amount the customer had wanted. The customer had driven off without payment but returned with his father who had been aggressive towards Mr Robinson.

[26] Mr Patel had helped to defuse the situation and had advised Mr Robinson, who was upset and shaken by the incident, to report the incident to the police and this had been done. Mr Patel said he had not asked Mr Robinson to pay the amount involved in the drive-off.

Response by MSL to the Labour Inspector's investigation November 2017

[27] After the Labour Inspector raised issues of non-compliance with MSL in November 2017, Mr Mittal said he had obtained legal advice from lawyers Inder Lynch about the issues which had been raised, and on how to rectify them.

[28] He had requested Inder Lynch to work with the Labour Inspector to help resolve matters and in the interim did his best to resolve the issues and follow Inder Lynch's advice on how to comply with the legal requirements. He had also personally liaised with the Labour Inspector.

[29] In regard to Mr Parish's employment, Mr Mittal said it had arisen as a result of his having been approached by Ms Parish, who was an acquaintance and enquiring for a part-time vacancy for her son. He had offered Mr Parish a casual position but due to the informal nature of the engagement, the usual record-keeping systems had not been complied with fully including the recording of Mr Parish's date of birth.

[30] Mr Mittal said that he had not been aware that the drive-off policy could be regarded as an employment premium prior to the Labour Inspector raising the issue and as soon as the matter had been raised with him, all affected employees had been repaid.

[31] In regard to UTP customers, such matters were usually referred to a debt collection agency and the MSL employees were not required to pay for the cost of the fuel obtained by customers.

[32] Mr Mittal explained that MSL had always used the ACE payroll system. When the system had been set up initially he had been given 6 options from which to calculate holiday pay, and he had chosen the option of a percentage of gross as the calculation method.

[33] This method had shown the monetary sum owing for holiday leave instead of days of holiday leave owing. After the Labour Inspector advised him that Annual Leave Entitlement was the correct option, he had changed the calculation method.

[34] Mr Mittal said that he had kept records of all employees' holiday and sick pay on the ACE payroll system but it had been difficult retrieving information and he was given limited assistance by ACE.

[35] MSL had since changed to another payroll provider system, SmartPayroll, and had been provided with one on one training and assistance with record keeping. Each MSL employee was assigned their own login and password and could check their payslip and request leave.

[36] Mr Mittal had requested Inder Lynch to review the casual employment agreements which had been amended as a result of its advice, and the drive-off policy had been removed from the employment agreements.

[37] All fuel pumps had been changed to pre-pay to prevent drive-offs or UTPs. In addition correct employee records were being maintained which included identification and age regardless of the procedure used when employing an employee.

Did MSL fail to comply with s 65(2)(a)(iv) of the ERA?

[38] Section 65(2)(a)(iv) requires that a record be kept by the employer of the agreed hours of work of an individual employee.

[39] MSL has admitted breaching s 65(2)(a)(iv) of the ERA in respect of two individual employee agreements which failed to include any indication of the arrangements relating to the times employees were to work.

Did MSL fail to comply with s 130(1)(b) of the ERA?

[40] Section 130(1)(b) of the ERA requires a record to be kept of an employee's age if under 20 years of age.

[41] This breach occurred in respect of Mr Parish.

[42] MSL has admitted breaching s 130(1)(b) of the ERA in respect of Mr Parish.

Did MSL fail to comply with s 81(d),(g) and (h) of the HA?

[43] Section 81 (d) (g) and (h) of the HA require the employer to keep records of an employee's current entitlement to annual leave: (s 81(d)); a record of the dates when any annual holiday, sick leave or bereavement leave was taken: (s 81(g)); and the amount of payment for any annual holiday, sick leave or bereavement leave: (s 81(h)) that may have been taken.

[44] MSL admitted breaching s 81(d),(g) and (h) of the HA in respect of 10 employees.

[45] **Did MSL fail to comply with s 23(2) of the HA?**

[46] Section 23 of the HA requires an employer to calculate, and pay employees annual holiday at 8% of their gross earnings upon termination when employment has ended within 12 months.

[47] MSL admitted breaching s 23(2) of the HA which resulted in two employees being short-paid, Mr Robinson by $23.15 and another employee by $1.22 resulting in a total shortfall of $24.37.

[48] Payment has since been made by MSL to the employees affected by the breach.

Did MSL fail to comply with s 12A(1) of the WPA?

[49] Section 12A of the WPA states:

> **12A No premium to be charged for employment**
>
> (1) No employer or person engaged on behalf of the employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[50] MSL had accepted that employees had paid the amounts involved in the drive-offs, but that it had not been aware that the policy could be construed as an employment premium.

Submissions of the Labour Inspector

[51] Ms Blick, Counsel for the Labour Inspector submits that the evidence confirms that MSL breached the identified employment standards.

[52] In respect of the breach of s 12A of the WPA the Labour Inspector cites that the Employment Court has stated that 'premium' naturally captures paying to acquire a job , and held that it extends to situations where an employer recoups, or attempts to recoup, recruitment-related costs or other expenses that would normally be borne by the employer.[1]

[53] In that case the Employment Court concluded that 'trades testing' costs were an illegal premium in breach of s 12A of the WPA on the basis that the recruits who paid the trades testing costs did not derive any benefit in meeting the trade testing costs, other than obtaining a job.[2]

[54] The Labour Inspector further submits that contractual terms that provided for the forfeiture of a week's pay in reimbursement of the employer's training costs in the event that the employee left employment within two months of commencement were determined to be premiums in circumstances in which the training costs were in respect of normal on-the-job training. [3]

[55] In the MSL employment agreements below the clause in the 'General Policies' Schedule which referred to drive-offs there was a note which stated:

> If the staff doesn't follow with any of the above policies then it may cause employment termination without any further issue with Mittal & Son Ltd T/A Mobil Porchester Road

[56] The Labour Inspector submits that the evidence in this case show that MSL's general workplace policy which required employees to pay the cost of fuel when customers drove off without paying or could not pay was an illegal premium in breach of s 12A of the WPA.

[57] Whilst case law on premiums has focused on payments before or at the commencement of employment, it is submitted that a premium can be sought and/or paid at a later time in order to keep employment which is the case here.

[58] It is submitted that the evidence supports the drive-off policy having been enforced by MSL and the fact that the employees had signed employment agreements containing a term or condition which would amount to a premium, which does not make the clause or its enforcement legal.

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[1] *Labour Inspector, Ministry of Business, Innovation and Employment v Tech 5 Recruitment Ltd* [2016] NZEmpC 167 at [54]
[2] Above n 2 at [55]
[3] *Labour Inspector, Ministry of Business, Innovation and Employment v Matthews* ERA Auckland AA 125/06; *Labour Inspector, Ministry of Business, Innovation and Employment v* Mitchell ERA Auckland AA251/07

Submissions of the First and Second Respondent

[59] Ms Benazir, on behalf of the First and Second Respondents submits that one of the functions of a Labour Inspector pursuant to s223A of the ERA is: taking all reasonable steps to ensure that the relevant Acts are complied with".[4]

[60] It is submitted that Respondents' efforts to rectify the issues were overlooked by the Labour Inspector when the proceedings were brought, and she had failed to acknowledge all reasonable steps were taken to ensure that there was compliance with the relevant Acts. Examples of this included:

- The Labour Inspector's notes not being made privy to the Respondents and no confirmation being sought that her notes reflected what the Respondents understanding was of the questions asked;

- The Labour Inspector in her witness statement had not acknowledged the removal of the drive-off policy from MSL's employment agreement which Mr Mittal had noted in his email dated 12 July 2018. The Labour Inspector had acknowledged receiving the amended employment agreement prior to proceedings being issued.

- The Labour Inspector had confirmed when questioned in the Investigation Meeting that there are payroll systems which do not comply with the HA. It is submitted that the resolution suggested, namely that an employer should manually calculate the holiday pay and compare the results to the calculations of the software, was not reasonable when the employer was paying for a product that warranted compliance.

- The Labour Inspector had provided education to the Respondents about employment premiums and how the drive-offs could be viewed as a premium which indicates that she was aware that the Respondents lacked such knowledge and needed educating.

- The Labour Inspector failed to check the credibility of Mr Robinson and Mr Parish whose reasons for leaving MSL appeared to be connected with their personal circumstances not the drive-off policy specifically.

[61] It is submitted that the Labour Inspectorate has not had sufficient regard to the gravity of the breaches. Specifically it has not taken into account the applicable mitigating factors which include comprise, remorse and remedial action.

[4] S 223A(b) of the Employment Relations Act 2000

Should any penalties be imposed on the Respondents, and if so, what quantum?

[62] In *Nicholson v Ford* Chief Judge Inglis summarised a comprehensive list of relevant penalty consideration as being:[5]

(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.

[63] 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.

[5] *Nickolson v Ford* [2018] NZEmpC at [18]

Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

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.

[64] The Labour Inspector submits that the steps set out in the Employment Court in *Borsboom (labour Inspector) v Preet PVT Limited* and *Warringtom Discount Tobacco Limited are appropriate.*[6]Counsel are agreed that the four step approach as set out in *Preet* is appropriate in this case.

Step 1: Identify the nature and number of the breaches and the maximum penalty available

[65] There are 16 breaches comprising:

- 2 x breaches of s 65 of the ERA;
- 1 x breach of s 130 of the ERA;
- 10 x breaches of s 81 of the HA;
- 2 x breaches of s 23 of the HA;
- 1 x breach of s 12A of the WPA

[66] Whilst the Labour Inspectorate submits that it is open to the Authority to consider each individual instance of asking an employee to pay for a drive-off, it accepts that the general policy could also be considered one breach for penalty purposes.

[67] The maximum penalty available against MSL in respect of the breaches is $20,000.00 per breach. Identifying the maximum penalties available in respect of each identified breach for MSL these are a maximum of $320,000.00 calculated as:

- $40,000 for s 65 of the ERA;
- $20,000.00 for s 130 of the ERA;

[6] *Borsboom (labour Inspector) v Preet PVT Limited* {

- $200,000.00 for s 81 of the HA;
- $40,000.00 for s 23 of the HA; and
- $20,000 for s 12A of the WPA

[68] Penalties are also sought against Mr Mittal and Mr Patel personally in respect of the breaches with the exception of the breach of s 65 of the ERA.

[69] Counsel for the Labour Inspector submits that no globalisation is appropriate.

[70] I consider that globalisation is not appropriate in this case.

Step 2: Assessment of the severity of the breaches

(i) Aggravating factors

[71] 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 Sky City Management Ltd*[7] 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.

[72] MSL does not dispute that the breaches have occurred. Counsel for the Labour Inspector submits that intention is not necessarily about whether the party in breach was aware that it was breaching the law, but rather whether or not it acted intentionally in the sense of intending to do the act in question, or failed to take reasonable steps to fulfil its legal obligations.

[73] It is submitted that MSL had previously demonstrated to the Labour Inspectorate compliance with minimum employment standards through its engagement and compliance with the Improvement Notice. During that 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.

[74] The Labour Inspector notes that in relation to the s 12A breach, concerns about the drive off policy were raised by Ms Parish in December 2017 however Mr Mittal did not reconsider the policy or stop Mr Patel from enforcing it.

[75] It is submitted by the Labour inspector that a starting point of 50% is appropriate in respect of the s 12A breach of the WPA i.e. $10,000.00.

[7] *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

(ii) Ameliorating Factors

[76] MSL had understood that the steps it had taken in regard to the Improvement Notice issued in June 2016 meant that MSL was then compliant with the statutory requirements, and had placed reliance on the ACE pay roll system to be compliant with the requirements of the HA. I find that this reliance was reasonable in circumstances in which MSL as the employer was using software it had been led to understand was compliant and had relied on that assurance from a reputable software company.

[77] The Labour Inspector has acknowledged that the severity of the breaches apart from s 12A of the WPA is at the lower end of the spectrum. Therefore it is submitted that the starting point for a penalty could be in the range of 10 to 20 per cent of the maximum available.

[78] I consider that in the circumstances which encompass reasonable reliance on a payroll system which represented itself as compliant with the HA but subsequently transpired not to be compliant, a penalty starting point of 15% is appropriate for the breaches apart from that of s 12A of the WPA i.e. a starting point of $45,000.00.

[79] In regard to the s 12A breach I accept that MSL had continued to enforce the drive-off policy after Ms Parish objected to it. However I take into consideration the evidence of Mr Mittal was that MSL had sought and obtained legal advice about the acceptability of the drive-off policy prior to its introduction and had not appreciated that it could be regarded as an employment premium.

[80] MSL submitted that it had no appreciation that the drive-off policy could be regarded as an employment premium and as soon as the Labour Inspector had made it aware that that was the case, it had withdrawn the clause from its employment agreements.

[81] The Labour Inspector submits that a starting point of 50% is appropriate for the penalty.

[82] I consider that in all the circumstances a starting point of 40% is appropriate i.e. $8,000.00.

The nature and extent of any loss or damage

[83] Payments have since been made to remedy the loss suffered by some employees as a result of their losing the use of monies to which they were entitled.

Steps taken to mitigate the breach

[84] Monies owed to the employees have been paid to those employees.

[85] The Labour Inspector acknowledges that MSL and Mr Mittal have been technically compliant with the Labour Inspector's investigation, and MSL has implemented changes to achieve compliance.

Circumstances of the breach

[86] 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.[8]

[87] The Labour Inspector submits that the circumstances of the breach of s 12A of the WPA highlights the vulnerability of employees, and the power imbalance between employers and employees in that situation.

[88] I accept that even though employees were able to obtain independent advice on the employment agreement, there was a requirement to accept it in order to obtain the opportunity of employment offered which represents an imbalance of power and the vulnerability of employees.

Previous Conduct

[89] The Labour inspector submits that MSL was subject to an Improvement Notice in 2016 when the relevant breaches were brought to its notice at that time.

[90] Counsel for the First and Second Respondent submits that not all the breaches were brought to MSL's attention at that stage, and moreover there was an understanding on MSL's part that the steps it had taken at that time were sufficient to render it compliant.

Deterrence

[91] The Labour Inspector submits that there is a need to 'bring home' to MSL and to other employers the standards they are required to meet, and that they are not just to be met when it is financially convenient to the employer or when the employer has been brought under pressure by a Labour Inspector.[9]

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[8] *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

[9] *A Labour Inspector v Daleson Investments Limited* ERA Auckland 125

[92] Whilst there is a need to enforce to employers the employment standards they are required to meet and that minimum entitlements are non-negotiable, I note that in this case as soon as the Respondents were notified of the breaches, they immediately took steps to ensure compliance and sought to co-operate with the Labour Inspector. As such the need for particular deterrence for MSL as the employer in this case is low,

Culpability

[93] The Labour Inspector submits that there are factors which increase the employer's culpability including that the Respondent has demonstrated past compliance.

[94] I find that this is not a case in which there has been compliance for a short time after an Improvement Notice and then a reversion to the previous poor practices. MSL had behaved in what it understood to be compliance with the requirements as set out in the Improvement Notice prior to the subsequent investigation by a Labour Inspector. As such I find a low degree of culpability.

Consistency

[95] The Labour Inspector submits that the number, nature and extent of the breaches make it difficult to identify comparable cases for consistency purposes.

Step 3: Financial Circumstances of the Respondent Employer

[96] The Labour Inspector submits that ability to pay is different from enforcement, noting that the Court in *Daleson Investment stated:*

> Liability to pay a penalty is different from subsequent enforcement. This is particularly so in circumstances where Parliament has set out an extensive list of considerations and the financial circumstances of the defaulting party is not one of them. That is not to say that it is irrelevant – and s 133 makes it plain that the list is not exhaustive.23 It is clear, however, that it is not a factor that Parliament itself considers pivotal to the penalty-setting exercise. [10]

[97] The Court nonetheless in that case commented that the ability to pay is a factor to be taken into consideration, albeit not to be given disproportionate weight.

[98] MSL submits that if a penalty is imposed it is likely to struggle with payment. This is because its net surplus is low, and the source of Mr Mittal's income. Mr Mittal is the primary financial provider for his family.

[10] A Labour Inspector v Daleson Investments Limited [2019] NZEmpC 12 at [47]

[99] MSL submits that any financial penalty imposed should be made taking into consideration the fact that MSL has incurred significant legal, software, product installation and Employsure membership expenses to remedy its breaches and the domino effect the penalty will have on third parties.

[100] I accept that MSL has incurred significant financial costs in seeking to ensure ongoing compliance and I accordingly reduce the penalties other than the s12A breach by 2.5% i.e. to $42,700.00.

Step 4: Proportionality or totality test

[101] 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.

[102] There were two areas of non-compliance pursuant to which monies were paid to those employees affected by the non-compliance: in respect of the breach of s23(2) of the HA total amount of monies owed to the two employees was $24.37; and in respect of the breach of s 12A of the WPA $470.50 was the amount owed to the affected employees.

[103] In this case the proportion of monies withheld from the employees in respect of the breach of s 23(2) of the HA was very small. Whilst I accept that breach of s 81(d)(g) and (h) of the HA may have meant the employees incurred some loss, this has not been established.

[104] I consider that a proportional penalty reflecting the amount for monies unlawfully withheld to be represented by the sum of $10,000.00.

[105] **In respect of the breaches other than that of s 12A of the WPA I order MSL to pay a penalty of $10,000.00 to the Crown.**

[106] In regard to the breach of s 12A of the WPA I find that the drive-off policy represented an employment premium given that it formed part of the employment agreement to be accepted at the outset of employment and it was indicated that non-compliance with it might result in the employee's dismissal.

[107] Employment premiums are illegal and are indicative of the imbalance of power inherent in the employment relationship.

[108] Whilst I accept that MSL sought legal advice on the clause prior to inserting it in the MSL employment agreement, this does not mitigate the effect of the clause on the employees involved who made payments to MSL in accordance with the clause.

[109] **In respect of the breach of s 12A of the WPA I order MSL to pay a penalty of $10,000.00 to the Crown.**

Should a penalty be imposed on Mr Mittal as a person involved with the breaches?

[110] Mr Mittal was the person responsibility for the operation of MSL. As such he was responsible for all the breaches which occurred.

[111] I find that after the Improvement Notice had been issued Mr Mittal acted in accordance with his belief that MSL was compliant with the legislation, and take this into consideration.

[112] Mr Mittal drafted the drive-off policy clause which was inserted into MSL employment agreements.

[113] As stated above, I accept the Mr Mittal sought and obtained legal advice prior to inserting the clause into MSL employment agreements and that these were subsequently amended and the drive-off clause removed.

[114] However when Ms Parish raised concern about the drive-off clause in December 2017 Mr Mittal did not seek legal advice at that stage to check that his understanding of the legality of the clause was correct.

[115] I also take into consideration Mr Mittal's full cooperation with the Labour Inspector and his timely addressing of the breaches identified which has involved MSL in financial costs to ensure ongoing compliance.

[116] **I order Mr Mittal to pay a penalty of $3,000.00 to the Crown.**

Should a penalty be imposed on Mr Patel as a person involved with the breaches?

[117] Mr Patel was the Manager and responsible for enforcing the drive-off policy.

[118] Mr Mittal's evidence was that he had full control over MSL and expected Mr Patel as his employee to enforce the policies he had implemented.

[119] Mr Patel was not a director or shareholder of MSL and his evidence, as confirmed by that of Mr Mittal, was that he was not responsible for drafting the employment agreement or the clauses in it.

[120] Mr Patel's evidence was that he was an employee and also subject to the drive-off policy.

[121] I find no evidence that Mr Patel had any reason to question the requirement that he implement a drive-off policy or that it was illegal, and his failure to do so might have resulted in him being subject to disciplinary action because of Mr Mittal's expectation that he enforce the policy he (Mr Mittal) had introduced.

[122] I order that no penalty be imposed upon Mr Patel.

Summary

[123] MSL is ordered to pay a total sum of $20,000.00 to the Crown by way of penalties for breaches of the Holidays Act 2003 and the Wages Protection Act 1996.

[124] Mr Mittal is ordered to pay $3,000.00 to the Crown by way of penalties for breaches of the Holidays Act 2003 and the Wages Protection Act 1996.

Costs

[125] Costs are reserved. Given the extent to which both parties have been successful I am of a mind to let costs lie where they fall.

[126] However, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, they 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.

[127] 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