

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 50
3023415

BETWEEN	A LABOUR INSPECTOR Applicant
AND	LA WHEAT LIMITED First Respondent
AND	WANNAKAWATTAWADUGE JANAKA SUJEEWA FERNANDO Second Respondent
AND	ARUMADURA UDENI LAKMALI FERNADO Third respondent

Member of Authority: David Appleton

Representatives: Ella Tait, Counsel for Applicant
Rob Davidson, and Sarah-June Wong, Co-Counsel for
Respondent, on first day of the investigation meeting,
and then Peter Cahill, advocate for Respondent.

Investigation Meeting: 11 July 2018, 28 to 30 November 2018 at Christchurch

Submissions Received: 21 December 2018 from Applicant
21 January 2019 from Respondent

Date of Determination: 1 February 2019

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The Labour Inspector (Ms Ingrid Kim) is seeking an order for the payment of arrears of pay pursuant to the Minimum Wage Act 1983, together with annual holiday

pay, public holiday pay, alternative holiday pay and sick leave pay pursuant to the Holidays Act 2003 in respect of a former employee of the first respondent, Sandeep Patel, totalling \$60,071.17¹.

[2] Ms Kim also seeks an order for the payment of arrears of pay in the total sum of \$16,468.79 pursuant to the Minimum Wage Act, and holiday pay, public holiday pay, and alternative holiday pay pursuant to the Holidays Act in respect of a second individual who the Labour Inspector asserts was a former employee of the first respondent, Manish Makkar.

[3] Interest is also claimed on the arrears allegedly owed.

[4] To the extent that the First Respondent is unable to pay the amounts due to Mr Patel and Mr Makkar, the Labour Inspector seeks to recover the sums owed from the second and third respondents pursuant to s 142Y of the Employment Relations Act 2000 (the Act), s 77A of the Holidays Act and s 11A of the Minimum Wage Act.

[5] In addition, the Labour Inspector seeks the imposition of penalties against the first, second and third respondents in connection with alleged failures to pay minimum wages under the Minimum Wage Act, annual holiday pay, public holiday pay, alternative holiday pay and paid sick leave under the Holidays Act, to keep complete wages and time records in relation to the employees' employment in accordance with s 130 of the Act; and keep complete holiday and leave records in relation to the employees' employment in accordance with s 81(2) of the Holidays Act.

[6] The respondents admit that they incorrectly calculated Mr Patel's holiday pay as they paid it at 8% rolled in with his regular pay, but otherwise deny that he is owed any arrears of pay of any kind. The respondents assert that Mr Patel was a casual employee for over a year of his employment and, thereafter, worked 35 hours per week as a full-time bakery manager.

[7] The respondents denied throughout the Authority's investigation meeting that Mr Makkar had ever been employed by them, although this position apparently

¹ The figure originally claimed was \$57,338.11, but this was revised to \$58,030.98 after a different calculation methodology was adopted following a suggestion of the Authority, for reasons of greater transparency. It was then changed again when it emerged after receipt of submissions that the calculation did not include arrears said to be due under s 50 of the Holidays Act.

changed at the submission stage when Mr Cahill submitted that Mr Makkar had been employed since 6 November 2016.

[8] This matter had to be investigated in two parts due to the unexpected illness of one of the representatives around the time the investigation meeting was originally set down, which prevented the matter being heard on consecutive days.

Background

[9] For most of the material time the first respondent operated a bakery in Bush Inn Mall, Christchurch. During part of the material time it also operated a bakery/café in Leeston, together with a bakery in Methven. It also formerly operated a bakery in Ashburton, although that is not relevant to these proceedings.

[10] The second and third respondents are husband and wife. Mrs Fernando was a director of the first respondent at all relevant times in relation to the matter before the Authority. Mr Fernando was a director for the latter part of that time. Both second and third respondents were actively involved in the daily operations of the first respondent's bakery and café business throughout the material time. The third respondent had primary responsibility for the day to day administration associated with the running of the business, including setting the rosters and had access to, and was responsible for, payments of wages to the employees each week. The second respondent was primarily responsible for the baking to meet the supply needs of the business, as well as training staff in relation to baking.

[11] It is the Labour Inspector's contention that the second and third respondents shared responsibility for the control and direction of Mr Patel and Mr Makkar, including determining when they would work, approving leave requests, and communicating with them regarding daily orders, required tasks and daily sales.

[12] Mr Patel and Mr Makkar raised their complaints about the first respondent on 4 January 2017 with the Labour Contact Centre of the Ministry of Business Innovation and Employment. The Labour Inspector commenced her investigations and discovered that breaches of the Holidays Act had been identified by another Labour Inspector between January and December 2016, which were resolved by way of an Enforceable Undertaking. Ms Kim investigated the allegations raised by Mr Patel and Mr Makkar between January and March 2017. The Labour Inspector's

investigations included interviewing the second and third respondents, reviewing employment records for Mr Patel, including rosters, and copies of texts passing between Mr Patel and the second respondent.

[13] The Labour Inspector also interviewed Mr Patel and Mr Makkar as well as a number of other individuals, including the operator of a butchery located directly opposite the bakery in Leeston, and a flatmate of the two complainants. Both of these witnesses confirmed to the Labour Inspector that both Mr Patel and Mr Makkar had been working very long hours for the respondents.

[14] On 10 March 2017 the Labour Inspector notified the respondents of the outcome of the investigation and they were given an opportunity to respond. They eventually responded by denying that any money was owed to Mr Patel and Mr Makkar. There are substantial differences between the parties as to the hours worked by both individuals, although there is no dispute as to the wages that Mr Patel received, nor that Mr Makkar received no wages at all.

Mr Patel

[15] Mr Patel came to New Zealand in order to study for a diploma in business management and, under the terms of his visa, was allowed to work 20 hours a week during term time and unlimited hours during college vacation period. He would attend college during term time Monday to Friday from around 9.30am to 1:30pm.

[16] According to Mr Patel, he first started working for the first respondent on 9 June 2015, doing split shifts, mainly delivering bread. The respondents do not deny that Mr Patel started to work for the first respondent around this time but maintain that he did so on a casual basis and did not do deliveries, only cleaning.

[17] According to Mr Patel, after an initial period he settled into a pattern of work commencing at 5am in the morning and finishing at 8:30am and then recommencing at 3pm and finishing at 5pm during week days. During weekends, he would work both days from 8am to noon. According to Mr Patel, this pattern of work continued from 15 June 2015 until 5 February 2016. He says that, although there was another employee who did deliveries, Venence Correia, that individual only did deliveries to Methven.

[18] Around 15 July 2015 Mr Patel also started working nightshifts on a casual basis for the Countdown store at Christchurch airport. These hours varied from day to day and week to week but tended to average around four to six hours, Mondays to Fridays, tending to start at 9pm and ending at 3am. Therefore, there were some days when, according to Mr Patel's claimed hours of work, he would be free for only four hours in 24, when one takes into account college term times as well. When questioned about this, he said that this was true, and that he would sometimes sleep in his car, or at the college, and that he would essentially snatch meals when he could.

[19] More typically, however, Mr Patel would be free around eight hours a day, although these were divided into smaller chunks of consecutive hours of around four hours each. Mr Patel continued to work for the Countdown store until 29 February 2016.

[20] Mr Patel says that, on 5 March 2016, he continued to work for the first respondent from 5am to 8:30am and 3pm to 5pm shifts during the week but then significantly increased his hours during the weekend, typically from 4am until 8pm, Saturday and Sunday. According to Mr Patel, this pattern of very long hours during the weekends continued until 8 May 2016. He then ceased working during the week for the first respondent, working instead for a ducting company, but continued working for it from 4am to 8pm, Saturdays and Sundays, from 14 May through to 17 July 2016.

[21] According to Mr Patel, from 19 July 2016 he then worked for the first respondent from 4am to at least 8pm every single day, consecutively, until 12 December 2016. He then fell ill between 13 and 17 December 2016 and then recommenced his very long hours until 24 December, when he finally left the employment of the first respondent. On some days, from 15 October when he was working at the new Leeston stop, he says that he would work from 4am until 10pm. According to his estimated work pattern, he alternated the 4am to 10 pm days with the 4am to 8pm days every three days or so. In addition, from 17 October, on the days when Mr Patel was not working from 4am until 10pm, he was working from 4am to 9pm instead of 8pm.

[22] Before he started at the new Leeston shop, Mr Patel says he was doing deliveries at different times of the day; shuttling between the Bush Inn bakery and the

Methven store at the beginning and end of each day; staffing the Methven store all day, serving customers, heating pies, tidying and cleaning. He says he staffed the Methven shop all on his own, but that this was possible because it was not a very busy shop. He would also have to do what he called management tasks, involving recording the deliveries, and the produce baked each day.

[23] The respondents' account of Mr Patel's hours is very different. Typically, according to them, Mr Patel would work two or two-and-a-half hours a day with a significant number of days off from 19 June 2015 until 9 March 2016. After this date, the respondents say he worked slightly more days per week but, from 19 May 2016, does not appear on their rosters until 31 July 2016.

[24] In October 2016 the respondents opened a new bakery and café in Leeston. This shop did not bake bread on the premises, but served breads, pastries, and pies, amongst other foods, as well as coffees, smoothies and frappés. Mr Patel worked in the Leeston Bakery from around 15 October 2016, but no more than four to five-and-a-half hours per day, according to the respondents. The respondents also say that he took every Sunday off.

[25] During cross examination of the second and third respondents, they were asked about why text messages had passed between Mr Patel and Mr Fernando on several occasions when he was shown on the roster as having a day off, or not rostered. These texts were all about work issues, including about deliveries, ingredients, and sales figures. Mr Fernando said that these were to cover emergencies, but it is clear from the sheer volume of the texts and the content of many that this cannot be the case. I counted 67 days when Mr Patel was rostered as not working, but when texts were exchanged between him and Mr Fernando about work issues.

[26] In addition, these texts were being sent and received at all hours of the day. On one day, Sunday 21 February 2016, for example, at 07.04 in the morning Mr Fernando texted Mr Patel asking "where are y". Mr Patel answered immediately, "at bakery". This was on a day off according to the roster. Another text (on 21 March 2016) was sent at 12 minutes past midnight by Mr Fernando to Mr Patel.

[27] Mr Patel also produced copies of delivery notes, production notes and wastage notes, together with purchase receipts that appear to show that he worked on days

when he had not been rostered to work. Out of 129 dates when Mr Patel either delivered goods, bought items for the first respondent's business, bought petrol or worked in other ways for La Wheat, 44 of those dates were days when Mr Patel was either not shown on the roster at all or was shown as having a day off. Whilst I accept that he may conceivably have bought some of the items, or the petrol, on a day off, he would not have been doing deliveries.

[28] Another discrepancy between the evidence of the respondents and contemporaneous documents is the evidence that Mr Patel was initially hired as a casual weekend cleaner. However, he was not rostered on during weekends at all between 18 June and 19 August 2015.

Mr Makkar

[29] According to Mr Makkar, he had been working for Bake 1st PVT Limited, a bakery store in Matamata which is owned by a former employee of the first respondent but, when he was told that this bakery was suffering financial problems, Mr Makkar decided to seek employment elsewhere. Mr Makkar was put in touch with the second respondent and an arrangement was made for Mr Makkar to fly to Christchurch to meet with the second respondent on 14 October 2016.

[30] Mr Makkar says that the second respondent picked him up at the airport and that they immediately went shopping for a range of ingredients and material required for the Leeston bakery which was going to be opening the following day. Mr Makkar said that he assisted the second respondent and Mr Patel, whom he met for the first time that day, preparing the Leeston shop for its first day of trading the following morning. Mr Makkar said that he was told he could go home at 10:30 that night and that he was going to be staying with Mr Patel in his flat.

[31] Mr Makkar's evidence is that, the following morning, Mr Patel and he went to the Bush Inn shopping centre, arriving there at about 4am. They loaded the work van with the trays of breads which the baker had prepared and then drove to the Leeston bakery. He and Mr Patel then worked to set up the shop and he worked there the whole of that day making coffees, frappés and smoothies. He said that he and Mr Patel finished work at around 10pm that evening. He says that he did not get a break because there was no-one else to make coffee that day. He says that he was told by the second respondent that he would have to work seven days a week.

[32] Mr Makkar's evidence was that the second respondent told him and Mr Patel that they needed to spend a long time cleaning and tidying the shop, but that there was no hot water supply so that it took a long time to clean the greasy and oily dishes. The lack of hot water was confirmed by the owner of the building in which Leeston bakery was situated.

[33] Mr Makkar was allowed to have four days off work, between 24 and 27 October 2016, in order to travel back to Matamata to collect his belongings, and he then returned to Christchurch with his parents, who were visiting from India, and started back at work on 28 October. He said that, as previously, he and Mr Patel started work each day at 4am and finished work at around 9:30pm. Mr Makkar says that he was allowed another day off work on the day his parents returned to India in November 2016.

[34] Mr Makkar said that he and Mr Patel were required to make 'missed calls' from the Leeston store to the second respondent's mobile phone each morning at 5:30am to prove that they had arrived. Mr Makkar described his typical day working in the Leeston store as follows:

- 4AM start with Sandeep, drive to La Wheat Bush Inn
- Load the work van with crates of breads
- Delivery to Healthy Harvest in Rolleston
- Small order deliveries to one or two other shops
- Reach La Wheat Leeston by 5.30AM
- Unload the van; put the breads on to the racks; turn on all the machines and small ovens; stock the display cabinet; get the coffee machine ready for use; take the pies out of the chiller; bake the pies and put them in the pie cabinet; place the sweets and savouries on to the wires and put them in the display area; pack the rolls; put the focaccia and other breads on the \$5 table
- 6AM La Wheat Leeston opens
- Serve customers; make coffees; make smoothies and frappés; process sales; help Sandeep with icing and packing
- 7.30-8.30AM, either Janaka [second respondent] or Lakmali [third respondent] would call Sandeep to instruct him to drive back to La Wheat Bush Inn and work there. Later when La Wheat Methven reopened, Sandeep was required to drive there and man the shop until he drove back to Leeston to tidy up and drive back to Bush Inn with me.
- 4-5PM, Sandeep would drive back to La Wheat Leeston to help me once Janaka and/or Lakmali has gone home. Sandeep would look after the customers and I would make the drinks or cook the takeaway meals.
- Sandeep and I together washed all the dishes that had been used on the day; mop the floor; wipe the table; sweep the floor; clean the chiller area; clean the bathroom every day; clean the cabinets;

clean the back area; wash all the clothes used that day; put all the drinks in the fridge.

- 9-10.30PM, Sandeep and I would close the shop and drive back to La Wheat Bush Inn to drop off all the empty crates; put the van key in the drawer in the shop; drive home in either Sandeep or my car.

[35] Mr Makkar confirmed in his evidence that around 15 days into the opening of the Leeston store the second and third respondents introduced takeaway nights and that Mr Makkar was in charge of the cooking with Mr Patel assisting in the preparation. He said that the shop would open at 6am, to serve truck drivers, and stay open well into the evening, with no set closing time.

[36] Mr Makkar says that he received no wages for any of the work he did and that the only money he ever received from the respondents was a one-way air ticket that the second respondent bought for him when he visited his parents in Matamata in October, and \$700 cash which the second and third respondents paid him through Mr Patel for his new work visa application.

[37] Mr Makkar said that he eventually could not handle the long working hours and stopped going to work at the Leeston store on 22 December 2016.

[38] Evidence was produced by the respondents showing payslips issued by the Matamata bakery showing that Mr Makkar was paid by it between the pay periods ending 23 October 2016 to the pay period ending 27 November 2016. This showed a total of 147.5 hours apparently worked on behalf of this third party company. In addition, the Authority saw copies of Mr Makkar's bank statements which showed that payments were put into Mr Makkar's account between 26 October 2016 and 7 December 2016. These payments totalled \$2,656.56. However, these did not appear as weekly or fortnightly wage payments because three payments were made on 26 October, another three on 21 November and the seventh on 7 December.

[39] Mr Makkar's explanation for this is that he was not properly paid by the bakery in Matamata, having to repay monies (ranging from \$200 upwards) to the owner out of his wages on a regular basis. He said that the owner (Priyanka) was a good friend of the second respondent, and when Mr Makkar told Priyanka that he was not being paid by the respondents, Priyanka agreed to pay Mr Makkar because he owed him money.

[40] There was a great deal of cross examination of Mr Makkar about when the respondents assisted him to apply for a work visa to work for them, and the extent of that assistance. There were some inconsistencies in Mr Makkar's evidence in this regard. However, I do not believe that these detract from the overall credibility of his evidence about his working for the respondents in Leeston. I will say a few words about Mr Makkar's immigration status however.

[41] It appears that there was some kind of arrangement in place between the owner of the Matamata bakery and the second and third respondents whereby Mr Makkar was effectively 'seconded' or lent to the first respondent, although remaining employed by the Matamata bakery. I infer that this was an attempt to avoid a breach of Mr Makkar's visa requirements, which stipulated that he could only work for the Matamata bakery. I surmise that the fact that the Matamata bakery continued to pay Mr Makkar was to facilitate this fiction. Whether or not Mr Makkar was aware of this arrangement I cannot be sure. Even if he was, it does not affect his right to be paid for his work.

[42] Mr Makkar did say in evidence that he was scared about his immigration status and that he had expected the respondents to apply for his visa change before he left Matamata, but that the second respondent had forcefully told him he must work.

[43] The Authority also saw a letter written by Mr Makkar which stated the following:

To
The Management
la wheat Bakery
My Self Manish Makkar, I am presently living in Matamata. I am interested in baking and baking skills. I am requesting you to please provide me 3 weeks training in your bakery. Which would help me in my future to grow. Please concern on my request and give me a chance to learn.
Thanking you.
Manish Makkar

[44] Mr Makkar says that he was asked by the second respondent to write this letter and that he did what he was told. He also says that he was asked to write a resignation letter without a date on it, but that he would not do that. Mr Makkar also said that he had no interest in learning to be a baker as he wanted to pursue a career in hospitality management. He also said that he was not training in Leeston because he

already knew everything that he had had to do, having done the same work in Matamata. I accept this evidence because there were no baking facilities in Leeston in any event, and he was clearly based there, and not Bush Inn, where the bakery was.

[45] The respondents have said that Mr Makkar was just ‘hanging out’ in the Leeston shop, helping Mr Patel from time to time. Mr Makkar denies this, saying that his parents had visited New Zealand until around late November 2016, and that it would have made no sense for him to have stayed in Leeston voluntarily when he could have been spending time with his parents. There is considerable force in this evidence.

[46] Furthermore, there are several texts passing between Mr Makkar and Mr Fernando talking about work issues, with Mr Fernando asking Mr Makkar to order ingredients, asking how many coffees were sold, where the food control book was, and so forth. Mr Fernando admits that Mr Makkar was at the Leeston store, but says that he was training.

[47] I note that Mr Fernando sponsored Mr Makkar for a work visa and completed an INZ form 1113. In this he stated that he had offered to Mr Makkar the position of store manager at the Leeston store, and described the type of work as “managing the bakery with staff and ordering the products and customer service”. It states that he was going to be paid \$2,800 a month and that the work was “ongoing/permanent”. He also stated, to the question why New Zealanders were not suitable, “No-one are ready to work the weekends and no-one are ready to start early. They do not have any background in bakery. Manish was the only suitable applicant”.

Evidence from other witnesses

[48] The respondents called David Bonniface, their former baker at Bush Inn, to give evidence. He worked at the Bush Inn bakery between 7 pm and 4.30 am five days a week. He remembered Mr Patel and Mr Makkar coming into the Bush Inn bakery at around 8 and 9pm, sometimes together, and sometimes alone. He says he never saw them arrive in the morning before he left. He also said that he would never leave the security gate open when he left. This contradicts evidence of Mr Patel that the gate was left open in the mornings by Mr Bonniface so he could enter it.

[49] On that point, I believe that Mr Patel is mistaken, and I expect that he knew the passcode to the gate. I conclude this because there are texts from Mr Patel to Mr Fernando after he had returned from his short term ducting job asking for the pass code. I infer that he had known the code previously, and that he had forgotten the code after being absent for a time.

[50] I do not think that the fact that Mr Bonniface did not see Mr Patel and Mr Makkar arrive at the Bush Inn shop at 4am means definitively that they did not do so. It is perfectly possible that he was focussed on finishing up at the back, while Mr Patel and Mr Makkar were sorting out crates and packing bread in the front.

[51] Evidence was given to the Authority by Mr Christopher Brown, who owns a butcher's shop directly opposite the first respondent's bakery in Leeston. His evidence is that he would normally be at his shop by 7am and finish around 6:30pm to 8:30pm. Mr Brown's evidence is that it was predominantly Mr Patel and Mr Makkar whom he saw working in the bakery shop opposite. He says that they were "the face of the shop", particularly Mr Makkar who was working there all the time. He said he saw Mr Patel and Mr Makkar working at the bakery "three or four times more than the owners of the bakery". He was "100% confident" it was Mr Makkar he would see as he had had several interactions with him and was his Facebook friend.

[52] Mr Brown said in his written evidence that he would see Mr Patel and Mr Makkar arrive at work together in the work van and go home together every night. However, in his oral evidence he said that he would arrive at his shop and see the light on in the bakery when he arrived. This is more consistent with the rest of his evidence. Mr Brown said that he recalls the bakery shop used to open from around 6am to 8pm. He says that he remembers when the bakery in Leeston had "takeaway nights", serving Indian curries, Sri Lankan food and Thai food in the evenings. He said that Mr Makkar and Mr Patel staffed the shop and that Mr Makkar did the cooking². He said that he and Mr Makkar used to have conversations about cooking and food. Mr Brown says that since the Leeston bakery first opened in October 2016 he had been into the shop 15 to 20 times.

[53] Mr Brown said:

² There was also evidence produced showing that Mr Makkar had made Facebook postings advertising the takeaway nights on behalf of the store.

I have no doubt that Sandeep and Manish worked for La Wheat. I saw them in their uniform with aprons on. I saw them at the counter serving customers, making foods, opening and closing the shop. Especially Manish, he was always in the shop and often he was there manning the shop on his own.

I found Mr Brown's evidence to be particularly convincing.

[54] Evidence was heard from Mr Pradeep Chauhan, who used to be the flatmate of both Mr Patel and Mr Makkar. He said that he had been flatmate and friends with Mr Patel for almost two years. Mr Chauhan's evidence was that, after completing his studies, Mr Patel would work up to more than 100 hours a week, starting at 4am and finishing as late as 11:30pm. His evidence was that he recalled Mr Makkar joining the flat and also going to work with Mr Patel. He said that Mr Patel and Mr Makkar would come home exhausted every night. He said, "I do not think I can explain in words how tired and exhausted they were and how they looked".

[55] Mr Chauhan's evidence was that Mr Patel and Mr Makkar had no time to cook their own meals at home, simply because they were spending most of the time working for La Wheat. He said that he or another flatmate would cook extra food for them so they would have something to eat when they arrived home late in the evenings.

[56] Mr Patel later corrected some of Mr Chauhan's evidence, but this concerned when he first started to share a flat with him, rather than about his observations about Mr Patel's hours.

[57] The Authority also heard from Mr Rajit Singh, who worked at a store which the first respondent used to supply bread to. Mr Singh remembered Mr Patel delivering bread to the store four or five times a week for about a year, including at weekends. He explained the process that would be followed, including the checking of the products and the signing of the delivery notes. He said it would take about 15 minutes each time. I accept that this level of contact every week was sufficient for Mr Singh to have remembered Mr Patel very well.

[58] Evidence was also given by a former manager of a vegetable shop on behalf of the respondents. He confirmed that Mr Patel did make deliveries of bread on behalf of La Wheat to their shop, possibly after Mr Correia had left the employment of La

Wheat. Another employee of this vegetable shop confirmed that Mr Patel was “a common face” at the shop, making deliveries in the morning.

[59] Another individual who was called to give evidence on behalf of the respondents suggested under cross examination that he himself had been underpaid by the respondents for making deliveries to a shop in Edgware, which had led him to leave. I got the impression that this witness had not been planning on giving this evidence, and so it carried more weight in my mind.

[60] A former employee who worked in Bush Inn mainly on Sundays, Eleina Pemberton, whose evidence was quite credible, said that Mr Patel only worked there around 50% of the time on that day when she was there, and that he cleaned even less often. She said that he would take about three hours altogether to do the cleaning and the delivery to the shop in Edgware. She said that Mr Patel had told her that he would sometimes visit a friend when making the delivery, and that sometimes the bread was not ready to deliver and so he would go away and come back later.

[61] Another individual said in evidence that she saw Mr Makkar working in Bush Inn after the respondents had sold their business there. However, this witness’ evidence was not very cogent, and I believe she was confused as to when she had seen Mr Makkar.

The issues

[62] The Authority must determine the following issues:

- (i) Is Mr Patel owed arrears of wages pursuant to the Minimum Wage Act, and if so, in what amount?
- (ii) Is Mr Makkar owed arrears of wages pursuant to the Minimum Wage Act, and if so, in what amount?
- (iii) Is Mr Patel owed arrears in respect of the Holidays Act, and if so, in what amount?
- (iv) Is Mr Makkar owed arrears in respect of the Holidays Act, and if so, in what amount?

- (v) If arrears are owed to either Mr Patel or Mr Makkar, should the second and/or third respondents be ordered to make the payments?
- (vi) Should penalties be imposed upon the first, second and/or third respondent, and if so, in what proportions and in what amounts?

Is Mr Patel owed arrears of wages pursuant to the Minimum Wage Act, and if so, in what amount?

[63] Mr Cahill submits that Mr Patel's evidence was "totally unreliable". However, with respect, it is no less reliable than the evidence of most of the other witnesses I heard, and is more credible than that given by the second and third respondents, in my view. There is sufficient independent evidence which cumulatively suggests very strongly that Mr Patel worked significantly longer hours than the rosters suggest, and that he was therefore significantly underpaid by reference to those hours.

[64] However, I am not convinced on a balance of probabilities that all of the hours claimed by Mr Patel are likely to have actually been worked by him. This is for the following reasons:

- a. It is inherently unlikely that, between 14 July and 17 July 2015, Mr Patel would have had only 30 hours' rest out of a total of 96 hours.
- b. Similarly, it is unlikely that he would have had only 26 hours' rest in the 96 hours between 20 and 23 July 2015.
- c. Batches of similarly extreme hours have been claimed (taking into account claimed work for La Wheat, his college attendance and his work at Countdown) for the periods 27 to 30 July 2015 and for periods between August and December 2015.
- d. It is also inherently unlikely that Mr Patel would have worked continuously for at least 15 hours a day, with no break, between 19 July 2016 and 14 October 2016, increasing to between 16 and 17 hours a day from 15 October 2016 until he fell ill on 13 December. That is a total of 147 days with not a single day off.

- e. The evidence of Ms Pemberton suggested that, on Sundays while she was working at Bush Inn, Mr Patel did not work there every weekend and, when he did work there on a Sunday, he did not work three hours each time.
- f. Mr Patel did a lot of travelling, and he is likely to have stopped off from time to time for rests.

[65] I do not believe that Mr Patel deliberately misled the Authority. He presented as a credible witness who was anxious to give accurate evidence. I believe that he was a victim of the passage of time which resulted in memory lapses, involuntary confabulation and unwitting exaggeration. There are very few people who can recall what they did every day in detail, up to three years later.

[66] It is not possible to accurately calculate how many hours Mr Patel actually worked. However, I note that Ms Kim has said in her evidence that she deducted one day's pay from each week's earnings claimed because there were some weeks when Mr Patel had had a day off. She also deducted pay for a further 11 days which were separately disputed by the respondent.

[67] Ms Kim calculated that, based on the hours claimed by Mr Patel, the minimum wages earned for the entire period of employment from 10 June 2015 to 24 December 2016 was \$70,791.63, made up of \$22,685.50 at the relevant minimum wage pre 1 April 2016 of \$14.75 and \$48,106.13 at the relevant minimum wage post 1 April 2016 of \$15.25.

[68] Deducting from this figure the value of one day a week³ that the Labour Inspector has results in a total sum of \$61,662.38⁴. Deducting from that sum the gross earnings paid to Mr Patel during his employment (\$18,280.37) results in a total estimated underpayment of \$43,382.01. I believe that this sum is likely to be as accurate an approximation of the arrears owed to Mr Patel as can reasonably be achieved. To reduce it further would be an artificial exercise that would risk prejudicing Mr Patel. The lack of accurate wage and time records prevent a more accurate assessment of Mr Patel's hours.

³ Calculated by reference to the correct minimum wage rate prevailing at the material times.

⁴ The further 11 days in dispute that the Labour Inspector has conceded have already been factored into the calculation of \$70,791.63.

[69] In conclusion, on balance I accept the evidence of Ms Kim and Mr Patel in respect of the arrears of pay that the Labour Inspectorate says is due to him by way of underpayment of minimum wage.

Is Mr Makkar owed arrears of wages pursuant to the Minimum Wage Act, and if so, in what amount?

[70] I must say that the persistent denial of the second and third respondents that Mr Makkar was working for the first respondent defies all reasonable credibility. I agree with Ms Tait that there is a substantial volume of evidence which shows that Mr Makkar was working for the first respondent on a full time, permanent basis. Just by way of example, Mr Makkar did not need to be trained in how to make coffee, and did not need training in how to work in a baked goods shop. He also had a diploma in Business Management. In addition, Mr Makkar was not doing any baking himself, as there was only a small oven for heating products in the Leeston store. Mr Makkar was clearly doing productive work for the benefit of the respondents on a daily basis for extended periods of time. A written statement of a former staff member produced by the respondents even referred to Mr Makkar as a staff member.

[71] The respondents' persistent denials that Mr Makkar was an employee only apparently changed when Mr Cahill stated in his submissions that Mr Makkar did not become an employee until 6 November 2016. However, even if that was the case, and I do not accept it was, Mr Makkar was still not paid anything by the first respondent. I prefer the evidence that Mr Makkar was an employee of the first respondent from 15 October 2016.

[72] If there was an element of training in Mr Makkar's work, for Mr Makkar not to have been entitled to receive any remuneration would mean that he was a volunteer, pursuant to 6(1)(c) of the Act. There is no argument being pursued that he was an independent contractor.

[73] A volunteer is defined in s 6 of the Act as someone who does not expect to be rewarded for work to be performed as a volunteer and who receives no reward for work performed as a volunteer. It is quite clear that Mr Makkar did expect to be rewarded for his work. It would be absurd to think otherwise. Therefore, he cannot have been a volunteer. It is not necessary for him to have received reward as well, although there was evidence he was paid to fly back to Matamata by the respondents.

[74] Not being a volunteer, he was entitled to be paid at at least the prevailing minimum wages rate. The question is, for how many hours? In my view, the total lack of credibility evident in the stance of the second and third respondents regarding Mr Makkar's work means that their evidence cannot be relied upon at all.

[75] There is nothing inherently implausible about Mr Makkar's evidence. One witness who was working on the building in which the Leeston store was situated said in his written evidence that he did not see Mr Makkar actually working in the Leeston store, and that he was "frequently on his phone". However, in his oral evidence this witness said that Mr Makkar was there all day, and changed his evidence to say that Mr Makkar made coffee and served customers. He implied in his oral evidence that Mr Makkar may not have been working very hard, but that is not a test of whether someone is entitled to be paid the minimum wage for each hour worked.

[76] In summary, the evidence referred to above in support of the claims in respect of Mr Makkar is strongly convincing whereas the respondents' evidence is strikingly unconvincing. I see no reason to reduce the hours claimed on his behalf (15.5 hours a day from 14 October to 24 December 2016, except 15 October). This amounts to a total of 985 hours, and equates to \$15,013.63 by reference to the minimum wage order in force at the material time.

Is Mr Patel owed arrears in respect of the Holidays Act, and if so, in what amount?

[77] The Labour Inspector has claimed that Mr Patel is owed annual holiday pay, public holiday pay, pay in respect of alternative holidays, and sick pay. The respondent concedes that Mr Patel's holiday pay was incorrectly calculated as it was rolled into his pay contrary to s 28 of the Holidays Act.

[78] The Labour Inspector calculates that Mr Patel's ordinary weekly pay was greater than the average weekly earnings, taking into account the deduction of one day a week. Mr Patel is owed \$6,204.75 in respect of leave accrued during the first 12 months of his employment, which was not taken.

[79] Mr Patel is owed a further \$3,124.22 for the period between his anniversary and his last day of employment.

[80] The Labour Inspector calculates that Mr Patel worked on 12 public holidays which were otherwise working days for him. This means he is entitled to be paid for 12 alternative holidays. The Labour Inspector has applied the relevant daily pay for his last day of employment, which came to \$315. Multiplied by 12, this totals \$3,780. I accept the Labour Inspector's calculation.

[81] Mr Patel is also owed pay under s 50 of the Holidays Act for having worked on those 12 public holidays. Ms Kim calculates that Mr Patel worked a total of 85.5 hours between 26 October 2015 and 11 November 2016, and is therefore owed \$2,040.19. I accept this calculation. I note that this sum is less than the \$3,780 calculated for the unpaid alternative days off because the latter have had to be calculated by reference to the last day of employment.

[82] The Labour Inspector asserts that Mr Patel is owed pay for five days' sick leave which he took between 13 and 17 December 2016, and that his entitlement to be paid for these days is triggered because his employment was continuous, despite carrying out different roles. I accept that claim, as there was no break in the continuity of Mr Patel's employment, even when he worked for the ducting company, as he continued to work for the first respondent during weekends.

[83] Ms Kim has worked out the relevant daily pay for each day that sick leave was taken. She calculates that Mr Patel is owed \$1,540 in respect of unpaid sick pay. I accept this calculation.

[84] The total gross earnings owed to Mr Patel are \$60,071.17.

Is Mr Makkar owed arrears in respect of the Holidays Act, and if so, in what amount?

[85] The Labour Inspector has calculated that Mr Makkar worked on one public holiday, and so is owed a further half day's pay in respect of that, together with pay for an alternative day. Those total a gross sum of \$354.57.

[86] Mr Makkar is also entitled to a payment of final holiday pay under s 23 of the Holidays Act. The Labour Inspector's calculation is incorrect, in that it does not include the half day's pay for working on a public holiday. The correct calculation is \$1,238.91. The total owed to Mr Makkar pursuant to the Holidays Act is \$1,593.48.

Interest

[87] The Labour Inspector also seeks the imposition of interest on the arrears owed to Mr Patel and Mr Makkar. Schedule 2 of the Act currently provides that interest is to be calculated in accordance with the Interest on Money Claims Act 2016. However, that Act does not apply to actions commenced prior to 1 January 2018. As the Labour Inspector's action commenced in the Authority on 14 December 2017, the previous version of clause 11 of Schedule 2 of the Act must therefore apply. That provided as follows:

11 Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.

(3) Subclause (1) does not authorise the giving of interest upon interest.

The rate prescribed at the material time was 5% per annum.

[88] Both Mr Patel and Mr Makkar have been deprived of the wages they were legally entitled to, in breach of minimum employment standards. I am satisfied that it is just to award interest on the sums due to them. The interest should run from the respective last days of the two employees' employment, until date of payment. Interest on Mr Patel's total arrears accrues at \$8.23 a day, whereas interest on Mr Makkar's total arrears runs at \$2.29 a day.

If arrears are owed to either Mr Patel or Mr Makkar, should the second and/or third respondents be ordered to make the payments?

[89] The Labour Inspectorate asserts that the second and third respondents were persons involved in a breach, as defined in s 142W of the Act. This section, which first came into force on 1 April 2016⁵, provides as follows:

⁵ But partially amended on 31 March 2017

142W Involvement in breaches

(1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—

(a) has aided, abetted, counselled, or procured the breach; or

(b) has induced, whether by threats or promises or otherwise, the breach; or

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or

(d) has conspired with others to effect the breach.

(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:

(a) a person occupying the position of a director of a company if the entity is a company:

(b) a partner if the entity is a partnership:

(c) a general partner if the entity is a limited partnership:

(d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:

(e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

(4) This section does not apply to proceedings for offences.

[90] Section 142Y provides a mechanism for persons involved in a breach to be liable for a default in payment of wages or other money owed to an employee. It provides as follows:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

(1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—

(a) there has been a default in the payment of wages or other money payable to the employee; and

(b) the default is due to a breach of employment standards; and

(c) the person is a person involved in the breach within the meaning of section 142W.

(2) However, arrears in wages or other money may be recovered under subsection (1) only,—

(a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and

(b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[91] Mrs Fernando was a director of the first respondent between 15 May 2014 and 16 May 2017. Mr Fernando has been a director since 11 July 2016. The breaches of the Minimum Wage Act and the Holidays Act addressed by this determination

occurred between June 2015 and December 2016, and are breaches of employment standards as defined in the Act.

[92] I am satisfied beyond any reasonable doubt that both the second and third respondents were directly or indirectly, knowingly concerned in, or party to, the breaches. They jointly ran the enterprise and jointly made all of the principal decisions in relation to which staff members did what, and what they were paid. Therefore, subject to what I say below, the second and third respondents are persons involved in the breaches as defined, while they held the office of director.

[93] However, ss 142X and 142Y do not apply to conduct that occurred prior to the commencement of the amending Act, The Employment Relations Amendment Act 2016. Therefore, any arrears pre-dating 1 April 2016, and any penalties imposed in relation to conduct pre-dating 1 April 2016 are not caught by these sections, and only the first respondent would be liable.

[94] With respect to the arrears, it is not possible to ascertain at this stage whether the first respondent is 'unable' to pay the arrears ordered, as insufficient evidence was put before the Authority in that respect, which is no criticism given that the respondents did not know what the Authority's findings as to liability for arrears would be. It is possible, for example, that the first respondent could get a loan to pay the sums owed if it does not have direct access to the funds necessary.

[95] I give leave for the Labour Inspector to make an application under s 142W of the Act if the first respondent does not make the arrears payments ordered to be made within the time ordered in full.

[96] I shall address the liability of the second and third respondents for payment of penalties imposed below.

Should penalties be imposed upon the first, second and/or third respondent, and if so, in what proportions and in what amounts?

[97] First, I am entirely satisfied that penalties must be imposed in respect of the breaches which have been found to have occurred in respect of the employment of Mr Patel and Mr Makkar as they were serious and persistent. How they should be apportioned shall be considered below.

[98] I also agree that it is appropriate to follow the four steps set out in the judgment of the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*⁶.

[99] The Labour Inspector is seeking penalties both against the employer and Mr and Mrs Fernando separately, pursuant to s 142X of the Act. Section 142X provides that a person involved in a breach is liable to a penalty. It provides that:

142X Person involved in breach liable to penalty

(1) A person involved in a breach is liable to a penalty under this Act if—

(a) the person is involved in the breach within the meaning of section 142W; and

(b) this Act provides a penalty for the breach.

(2) An application for a penalty against a person involved in a breach may be made only by a Labour Inspector.

[100] The Employment Court issued guidance as to how to apportion liability for penalties in the judgment of His Honour Judge Perkins in *A Labour Inspector v Sampan Restaurant Limited and Yu Ouyang*.⁷ This judgment was issued following referral by the Authority to the Employment Court of two questions of law in relation to the methodology to be adopted when the Labour Inspector seeks the imposition of penalties for a breach of employment standards against both an employer and a person involved in the same breach.

[101] The two questions were formulated as follows:

(a) When the Labour Inspector seeks the imposition of a penalty against an employer for a breach of employment standards (as defined in s 5 of the Act) and also seeks the imposition of a penalty against a person involved in the same breach, should the Authority assess the respective liabilities of the employer and the person involved in the breach:

(i) Separately, by reference to their own separate liability and without reference to the liability of the other; or

(ii) By reference to the breach, then apportioning the resultant penalty between the employer and the person involved in the breach; or

(iii) In some other way?

(b) Whichever approach is to be taken, what factors should the Authority apply when carrying out the exercise?

⁶ [2016] NZEmpC 143.

⁷ [2018] NZEmpC 69.

[102] At paragraph [48] of Judge Perkins' judgment, His Honour states as follows:

Nevertheless, the answer to the first question does not necessarily require a narrow choice between two options. Indeed, the question itself asks whether there may be a third approach. The answer to the first part of the first question is that the Authority, in assessing the respective liabilities of the employer and the person involved, must commence the exercise by reference to their own separate level of culpability. However, regarding whether there should be no reference at all to the liability of the other, the authorities and materials considered earlier in this judgment show that the position is not black and white and is considerably nuanced. The New Zealand Law Commission's view points to this. Chisholm J in *Moir Farms*, while stating that individual culpability must be considered, nevertheless reduced the penalty imposed on the company because it was disproportionately high having regard to fairness and justice. Authority Members, when dealing at the same time with applications for the imposition of penalties against employers and persons involved, will obviously be aware of the respective positions of and consequences on both. This cannot be approached in a formulaic way, but by exercising the discretion having regard to proportionality, fairness and justice. This would also be in keeping with the fourth step outlined in *Preet*. Hopefully, these comments will also assist the Authority with the second question posed, which I now turn to.

[103] This statement by the Court makes it clear that, whilst the starting point for the Authority is to commence the exercise of assessing liability for penalties by reference to the first, second and third respondents' respective separate levels of culpability, the Authority is not prohibited from also cross-referring to the liability of the others. In a case such as this, where the second and thirds respondents are the 'controlling minds' of the first respondent, it would be artificial not to do so.

[104] In his answer to the second question, Judge Perkins directed the Authority to *Preet*, and the statutory schemes set out in the Holidays Act, especially at s 3, and s76A, and in the Act, at s3 (especially s3(ab)), and 133A.

[105] Section 76A of the Holidays Act sets out the matters which the Authority must have regard to in determining the amount of a penalty, being:

- a. The purpose stated in s 3 of the Holidays Act and, to the extent relevant, the object stated in s 3 of the Act; and
- b. The matters referred to in s 133A(b) to (g) of the Act.

[106] Section 3 of the Holidays Act provides:

3 Purpose

The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—

- (a) annual holidays to provide the opportunity for rest and recreation:
- (b) public holidays for the observance of days of national, religious, or cultural significance:
- (c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:
- (d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement.

[107] Sub-sections 133A(b) to (g) of the Act provide as follows:

- (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.

The first respondent - step one

[108] Step one involves identifying the number of breaches relevant to the fixing of the penalties and whether or not breaches should be “globalised”. The Labour Inspectorate submits that the following breaches have been committed by the respondents:

- a. Two breaches of s 6 of the Minimum Wage Act;
- b. Six breaches of ss 23, 24, 25, 50 and 60 of the Holidays Act⁸;
- c. A breach of s 71 of the Holidays Act;
- d. Two breaches of s 81 of the Holidays Act; and

⁸ This appears to be an error – see my commentary at paragraph [111]

e. Two breaches of s 130 of the Act.

[109] This amounts to a total of 13 breaches. The total penalty that may be imposed upon the first respondent is \$20,000 per breach, and so the total maximum penalty according to the applicant is \$260,000.

[110] I respectfully do not agree with Ms Tait that *Preet* renders it impermissible to globalise penalties for breaches across employees, as I think that stretches the reading of the judgement too far. However, I do believe that there will be only rare occasions when it would be appropriate and that it is not appropriate in this case, as Mr Patel and Mr Makkar were each impacted in their own way by the breaches in question.

[111] The Labour Inspectorate suggests that it is appropriate to globalise the penalties relating to the failure to pay holiday and leave entitlements from six breaches⁹ to five, by recognising that ss 23 – 25 and s 60 concerned a failure to pay on termination for each employee. However, I do not agree that there were six breaches in the first place. I believe that there were two breaches in respect of Mr Makkar (ss 23 and 60) and three in respect of Mr Patel (24, 50 and 60). Given that the Labour Inspectorate is willing to globalise these holiday and leave payment failures within each employee, that leaves two penalties in this category, one for each employee.

[112] I agree with Ms Tait that it is not appropriate to globalise in any way the two breaches of the Minimum Wage Act, the two breaches of s 81 of the Holidays Act, the two breaches of s 130 of the Act and the breach of s 71 of the Holidays Act. I agree that a failure to pay sick pay is a separate breach from the failure to pay the holiday payments on termination, and that it is not appropriate to mix the two categories of record keeping breaches as they derive from different enactments and address different mischiefs.

[113] Accordingly, after globalisation, there remain nine breaches, making a maximum penalty at step one of \$180,000 in respect of the first respondent.

The first respondent – step two

[114] At step two, the severity of the breach should be assessed in each case. Ms Tait submits that the failures to pay minimum wage should attract 80% of the

⁹ Setting aside the breach of s 71

maximum. In fact I am minded to make the figure higher, setting it at 90% in respect of Mr Patel and 100% for Mr Makkar. I am of the firm view that both individuals were deliberately exploited for the benefit of the first respondent, and it is hard to see how much worse a breach of the Minimum Wage Act can be than deliberately not to pay an employee any wages at all.

[115] Whilst it was not argued on behalf of the respondents, I will address briefly the possible argument that Mr Makkar was paid for at least some of his work by having received payments from Bake 1st PVT Limited. However, those payments do not satisfy s 6 of the Minimum Wage Act 1983 which says that every worker "... shall be entitled to receive from his employer¹⁰ payment for his work at not less than the minimum rate. Whilst Mr Makkar received some payments from the Matamata bakery, he did not receive it from his employer.

[116] Therefore, in respect of the two breaches of the Minimum Wage Act, the maximum of \$40,000 is reduced to \$38,000.

[117] In respect of mitigating factors, whilst the respondent has co-operated with the Labour Inspector to an extent, it has continually denied that Mr Makkar was an employee, even in the face of overwhelming evidence to the contrary, and has seriously underplayed the extent of Mr Patel's work. I reduce the sum of \$38,000 by 10%, to produce a sum of \$34,200.

[118] I agree with Ms Tait that the failures to calculate and pay public holiday pay should attract a starting point of 60%, at least for Mr Patel. This is only because Mr Patel was at least paid partially for the public holidays he worked. I see no reason not to start at 100% in the case of Mr Makkar, given that he received no holiday pay at all. That produces a total of \$32,000.

[119] In terms of mitigating circumstances, I again reduce the sums by 10%. That produces a total of \$28,800.

[120] The Labour Inspector assesses the correct percentage of the penalty for failing to pay Mr Patel sick pay at 50%. However, I believe that this is too low, and believe that it is necessary to recognise the potentially serious effect on an employee in not being paid his sick leave entitlement, which could discourage an employee from

¹⁰ Emphasis added.

taking such leave in the future, endangering their health. I assess the appropriate level at 70%, which produces a figure of \$14,000. I reduce it by 10% to recognise the mitigating factors, which gives a final total of \$12,600.

[121] In respect of the two wage and time record keeping failures, I agree that 70% is the correct starting point in respect of all breaches in this category. I am mindful that the first respondent tried to rely on inaccurate records in respect of Mr Patel and kept no records at all in respect of Mr Makkar. That produces a starting sum of \$28,000. Reducing this by 10% produces \$25,200.

[122] I also agree that 50% is the appropriate starting point for the two breaches of the requirement to keep holiday and leave records. The lesser starting point recognises the lower sums involved. That produces a starting point of \$20,000 which, reduced by 10% makes a total of \$18,000.

[123] The total reached at the end of step two is \$118,800.

First respondent – step 3.

[124] The Authority is now to consider the means and ability of the person in breach to pay the penalty reached under step 2. The first respondent produced an annual report for the year ended 31 March 2018. On the face of the report, the company barely broke even in the period in question. However, as Ms Tait points out, some of the expenditure shown was depreciation, which does not represent a cash outgoing. In addition, a substantial proportion of the liabilities related to Mr Fernando's shareholder account. An updated balance sheet, as at 30 November 2018, shows net assets of \$20,247.

[125] Ms Tait points out that no up to date bank statements have been produced, and no information has been given about the proceeds of the disposal of the Bush Inn bakery. She submits that caution should be exercised in relying on the information provided and submits that, if any reduction is made, it should be modest, in the region of 30%.

[126] Mr Cahill does not address the applicant's submissions on the company's financial position. No additional information was submitted despite Ms Tait's observation that no up to date bank statements were produced.

[127] Whilst the Labour Inspectorate implies that a false picture of the first respondent's financial position is being presented, I cannot accept such an assertion without more concrete evidence. On the face of the financial statements, there are insufficient assets available to enable the first respondent to pay a penalty of over \$100,000. I believe that it is appropriate to reduce the penalty to \$50,000 at step three.

First respondent – step four

[128] This final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached after the first three steps is proportionate to the seriousness of the breaches, and harm occasioned by them. This step is to ensure that the imposition of a penalty and the amount of it is just in all the circumstances.

[129] First, the overall seriousness of the breaches was high in my view, taking into account the fact that one employee was not paid at all and the other was paid around a quarter of what he should have been paid by reference to his hours worked. With respect to the harm occasioned, I must beware of confusing the stress and strain caused by the excessive hours worked (which is not the subject of the Authority's investigation) with the breaches of employment standards which are. However, it is easy to infer that the failure to pay what was properly due to the two employees will have caused them stress and financial hardship.

[130] In addition, the failure to pay the two employees properly gave the first respondent an unfair advantage compared with other businesses which complied with the law. It is important to be mindful of the need to send a message of deterrence to employers to show that such conduct is not acceptable and will be punished. This was conduct that merits punishment.

[131] On the other hand, it would not be appropriate to penalise the first respondent so heavily that it goes out of business. Not only would that be a disproportionate effect, but it would adversely impact other employees, and may prevent Mr Patel and Mr Makkar from receiving the arrears owed to them.

[132] That latter consequence is mitigated somewhat by the effect of s 142W of the Act, although the second and third respondents would be personally liable to pay only such arrears that date from 1 April 2016.

[133] Standing back, and being mindful that I must also consider the liabilities of the second and third respondents, I shall reduce the total penalty due to be paid by the first respondent to \$20,000.

The second and third respondents – step one

[134] As I have found above, I am satisfied beyond any reasonable doubt that both the second and third respondents were directly or indirectly, knowingly concerned in, or party to, the breaches. The second and third respondents are equally as responsible as the first respondent for the breaches that the Labour Inspector has identified. I am also satisfied that they were involved in a ‘joint enterprise’ in operating the business of La Wheat, and so were both responsible for those breaches, although to differing degrees in some cases.

[135] Accordingly, the second and third respondents are each liable to have penalties imposed upon them in their personal capacity subject to the limiting provision of s 142W(2) in respect of Mr Fernando not becoming a director until 11 July 2016, and the fact that s 142X did not come into force until 1 April 2016.

[136] Ms Tait has calculated that the arrears owed to Mr Patel from 1 April 2016 are \$27,940 in terms of his minimum wage entitlements, \$348.19 in terms of his public holiday pay, and the same amounts for alternative holiday pay and annual holiday pay as referred to above, as they fell due upon termination.

[137] The assessment of the breaches is the same as above, as is the globalisation assessment, so that the starting point for the liability of each respondent is \$90,000¹¹.

Second and third respondents – step two

[138] My assessment of the seriousness of the breaches of the Minimum Wage Act by the second and third respondents is the same as for the first respondent, in that I regard the breaches as very serious, especially in regard to Mr Makkar. I fix the penalty in relation to Mr Patel at 75% for Mrs Fernando and 70% for Mr Fernando, as

¹¹ The maximum penalty that the Authority may impose upon an individual is \$10,000 per breach.

Mr Fernando was not a director of the first respondent until July 2016. I fix the penalty in relation to Mr Makkar at 100% for both Mr and Mrs Fernando, for the same reasons as I have articulated above. This produces penalties for the Minimum Wage Act breaches at \$17,500 for Mrs Fernando and \$17,000 for Mr Fernando.

[139] I reduce each penalty by 10% to reflect their co-operation with the Labour Inspector. This produces \$15,750 for Mrs Fernando and \$15,300 for Mr Fernando.

[140] I believe that, for the breaches of the obligation to pay holiday pay and public holiday pay to Mr Patel (which I globalise as one breach), a starting point of 60% of the total for each of the second and third respondents is appropriate. That produces penalties of \$6,000 each. Reducing them by 10% for mitigation produces penalties of \$5,400 each. For Mr Makkar, the failure was more serious, and I fix the level of severity at 70% for both the second and third respondents. That produces penalties of \$7,000 each, reduced to \$6,300 each after a 10% reduction for mitigating factors.

[141] With respect to the failure to pay sick pay to Mr Patel, both the second and third respondents were directors when Mr Patel was off sick, and so share the responsibility not to pay equally. I would put the seriousness at 70%, as I did for the first respondent. This produces a figure of \$7,000 each, and reducing it by 10% for mitigating factors, this again produces penalties against the second and third respondents of \$6,300 each.

[142] With respect to the two failures to keep wage and time records, I agree that 60% is the appropriate starting point, at least for Mrs Fernando, who was primarily tasked with record keeping. Mr Fernando was less culpable I believe, and his level of liability should be 25%. This results in \$12,000 for Mrs Fernando and \$5,000 for Mr Fernando. Reducing these sums by 10% produces \$10,800 for Mrs Fernando and \$4,500 for Mr Fernando.

[143] In respect of the two failures to keep holiday and leave records, I agree that the starting point is 45%, at least for Mrs Fernando. I assess Mr Fernando's culpability at 25%. This results in \$9,000 for Mrs Fernando and \$5,000 for Mr Fernando. Reducing the sums by 10% produces \$8,100 for Mrs Fernando and \$4,500 for Mr Fernando.

[144] The totals reached at the end of step two are \$52,650 for Mrs Fernando and \$42,300 for Mr Fernando.

The second and third respondents – step three

[145] I will not set out in detail the information produced to the Authority about the financial position of the second and third respondents as it is confidential, but I would agree with Ms Tait that the information suggests they are in a comfortable financial position, at least able to each pay a moderate penalty. Ms Tait submits that not all relevant information has been provided and that I need to exercise caution before reducing the penalties. Nevertheless, there is no evidence that the Fernandos are wealthy, and I would not want to jump to that conclusion. I reduce the liability of Mrs Fernando to \$30,000 and that of Mr Fernando to \$20,000.

The second and third respondents – step four

[146] Applying the proportionality principle, I need to take into account the fact that the business of the second and third respondents, via the first respondent, has been ordered to pay a penalty of \$20,000, together with arrears and interest exceeding \$75,000. It would be naïve to believe that this will not impact upon the second and third respondents as well. Balancing the need to punish and deter against the need to be realistic as to what is likely to be paid, I reduce the penalties of Mr and Mrs Fernando to \$10,000 each.

Section 136 of the Act

[147] Should any of these penalties be paid to Mr Patel or Mr Makkar pursuant to s 136 of the Act? The Employment Court in *Tan v Yang*¹² stated that a penalty should not be used as an alternative route for compensation, although a full court stated in *Preet* that there is a compensatory element to penalties. It then discussed s 136 in paragraphs [149] to [150], saying that a penalty, or part of it may be directed to be paid to an individual who has suffered non-compensable loss. The example given is a failure to give an employment agreement.

[148] Although both Mr Patel and Mr Makkar were badly treated by the respondents, the Authority cannot compensate them for treatment which is not

¹² [2014] NZEmpC 65

directly linked to the breaches for which the penalties have been imposed. Most of those breaches have been remedied by the orders for arrears to be paid. The two sets of breaches for which no financial award has been ordered are the record keeping breaches.

[149] I am satisfied that the failures were partly responsible for 'loss' which both Mr Patel and Mr Makkar suffered, in that they each had to piece together and recreate his own work history with the first respondent in order for the applicant to pursue its case. This was a major task for Mr Patel in particular, albeit aided by Ms Kim.

[150] In recognition of this, it is appropriate that \$5,000 of the \$20,000 penalty which the first respondent must pay be paid to Mr Patel and that \$2,500 of the same penalty be paid to Mr Makkar.

Orders

[151] I order the first respondent to pay to the Labour Inspector by no later than 28 days after the date of this determination the following gross sums in respect of Mr Patel:

- a. \$43,382.01 in respect of arrears of pay due under the Minimum Wage Act; and
- b. \$16,689.16 in respect of arrears under the Holidays Act; and
- c. Interest accrued between 24 December 2016 and the date of this determination of \$6,337.10 (770 days x \$8.23 a day). Interest shall continue to accrue at a rate of 5% per annum for each day that the arrears remain outstanding in full or in part.

[152] I further order the first respondent to pay to the Labour Inspector by no later than 28 days after the date of this determination the following gross sums in respect of Mr Makkar:

- a. \$15,131.81 in respect of arrears of pay due under the Minimum Wage Act; and
- b. \$1,593.48 in respect of arrears under the Holidays Act; and

- c. Interest accrued between 22 December 2016 and the date of this determination of \$1,767.88 (772 days at \$2.29 a day). Interest shall continue to accrue at a rate of 5% per annum for each day that the arrears remain outstanding in full or in part.

[153] With respect to the \$20,000 penalty payable by the first respondent, I further order the first respondent to pay by no later than 28 days after the date of this determination:

- a. to the Authority the sum of \$12,500, which the Authority shall then pay into a Crown Bank Account; and
- b. to the Labour Inspectorate the sum of \$7,500, of which the Labour Inspectorate must then, within 14 days of receipt, pay to Mr Patel the sum of \$5,000 and to Mr Makkar the sum of \$2,500.

[154] I further order the second respondent to pay to the Authority by no later than 28 days after the date of this determination a penalty of \$10,000, which the Authority shall then pay into a Crown Bank Account.

[155] I further order the third respondent to pay to the Authority by no later than 28 days after the date of this determination a penalty of \$10,000, which the Authority shall then pay into a Crown Bank Account.

Costs

[156] I reserve costs. The parties should seek to agree how costs are to be dealt with between them. However, if they are unable to agree within fourteen days of the date of this determination, the Labour Inspectorate should serve and lodge a memorandum of counsel within a further fourteen days explaining what contribution it seeks, and the basis of that contribution, and any response from the respondents must be served and lodged within a further fourteen days thereafter. The Authority would then determine the matter on the papers.

David Appleton
Member of the Employment Relations Authority

Appendix

Labour Inspector v La Wheat Limited, Mr Fernando and Mrs Fernando – Summary of penalties

Step 1 – Nature and number of breaches – potential maximum penalties after globalisation				
		First Respondent	Mr Fernando	Mrs Fernando
Minimum Wage Act		\$40,000	\$20,000	\$20,000
Ss23, 24, 50, 60 Holidays Act		\$40,000	\$20,000	\$20,000
S 71 Holidays Act		\$20,000	\$10,000	\$10,000
S 81 Holidays Act		\$40,000	\$20,000	\$20,000
S 130 ERA		\$40,000	\$20,000	\$20,000
	Subtotal	\$180,000	\$90,000	\$90,000
Step 2(a) Seriousness of the breaches as a percentage of the maximum penalty available				
Minimum Wage Act		\$38,000	\$17,000	\$17,500
Ss23, 24, 50, 60 Holidays Act		\$32,000	\$13,000	\$13,000
S 71 Holidays Act		\$14,000	\$7,000	\$7,000
S 81 Holidays Act		\$20,000	\$5,000	\$9,000
S 130 ERA		\$28,000	\$5,000	\$12,000
Step 2(b) – Reduction for mitigating factors				
Minimum Wage Act		\$34,200	\$15,300	\$15,750
Ss23, 24, 50, 60 Holidays Act		\$28,800	\$11,700	\$11,700
S 71 Holidays Act		\$12,600	\$6,300	\$6,300
S 81 Holidays Act		\$18,000	\$4,500	\$8,100
S 130 ERA		\$25,200	\$4,500	\$10,800
	Subtotal	\$118,800	\$42,300	\$52,650
Step 3 – Financial circumstances				
		\$50,000	\$20,000	\$30,000
Step 4 – proportionality				
	TOTAL	\$20,000	\$10,000	\$10,000