IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 146
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3030936

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	CLEANTIME SOLUTIONS LIMITED First Respondent
	AND	BINESH SHUKUL Second Respondent
	AND	RANJANA REDDY Third Respondent
	AND	AUGELINE DEO Fourth Respondent
Member of Authority:	Andrew Dallas	
Representatives:	Jodi Ongley, counsel for the Applicant Amy Keir, counsel for the First, Second and Third Respondents No appearance for the Fourth Respondent	
Investigation Meeting:	10 December 2018 at Christchurch	
Date of Determination:	11 March 2018	

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Eva Belley lodged proceedings in the Authority against Cleantime Solutions Limited, Binesh Shukul, Ranjana Reddy and Augeline Deo alleging breaches of minimum employment standards in respect of various workers.

[2] At the request of the Labour Inspector, Cleantime Solutions Limited, Binesh Shukul and Ranjana Reddy, a consent determination was issued by the Authority resolving the factual dispute between them.[1] The resolution of these matters has enabled the Authority to consider the potential imposition of penalties against Cleantime, Mr Shukul and Ms Reddy without the need for a time consuming and costly factual inquiry.

[3] The Fourth Respondent, Ms Deo has played no part in the Authority's proceedings to date. Consequently, this determination does not resolve any matters between the Labour Inspector and Ms Deo. To avoid doubt, those matters are reserved.

The Authority's investigation

[4] The Authority convened a brief investigation meeting to hear from the parties bound by the consent determination to consider the issue of penalties. An affidavit was provided by chartered accountant Lynda Stevenson on behalf of Cleantime Solutions Limited, Mr Shukul and Ms Reddy.

[5] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I do not refer in this determination to all the evidence received beyond the consent determination including that provided by Ms Stevenson. Further, although I have not referred to all the submissions advanced by the representatives in this determination, I record, for completeness, I have read and fully considered them.

Issues

[6] The issues for determination are:

(i) Whether penalties should be imposed on Cleantime for breaches of the Holidays Act 2003 and the Act;

(ii) Whether penalties should be imposed on Mr Shukul for breaches of the Holidays Act 2003 and the Act;

(ii) Whether penalties should be imposed on Ms Reddy (in respect of "Busy Bees") for breaches of the Holidays Act and the Act; and

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[1] *A Labour Inspector v Cleantime Solutions Limited* [2018] NZERA Christchurch 163

(iii) Should either party contribute to the costs of representation of the other party?

The Labour Inspector's claim for penalties

[7] Having considered the consent determination, the Labour Inspector's evidence and the submissions of the parties on penalties, I find it is appropriate in the all the circumstances to impose penalties on Cleantime, Mr Shukul and Ms Reddy for breaches of employment standards.

[8] The Authority has jurisdiction to hear and determine an application by a Labour Inspector for recovery of penalties under the Act and Holidays Act.[2] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.[3]

[9] The decision of the Court in *Borsboom v Preet PVT Limited*[4] identified a four step process to be taken in the assessment of penalties. More recently the Court in *Nicholson v Ford*[5] set out guidance about the inter-relationship between *Preet,* s 133A of the Act and the other relevant factors to be taken into account when considering the imposition of penalties.

Nature and number of breaches

Cleantime and Binesh Shukul

[10] For the purposes of the *Preet* framework analysis, the following breaches have been agreed by consent of the parties in respect of Cleantime. It has been further agreed by consent that Mr Shukul is a person involved in the breaches as an officer of the company.[6] The breaches are:

(i) 42 breaches of s 81 of the Holidays Act (failure to keep holiday and leave records);

(ii) 23 breaches of s 49 of the Holidays Act (failure to pay public holiday entitlements);

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[2] Employment Relations Act 2000, s 161(m)(iii) and s 161(m)(iv)
[3] *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].
[4] [2016] NZEmpC 143 at [67] and [68].
[5] [2018] NZEmpC 132
[6] Employment Relations Act, s 142W

(iii) 13 breaches of s 50 of the Holidays Act (failure to pay "time and a half");
(iv) 23 breaches of s 60 of the Holidays Act (failure to pay alternative holidays);
(v) 23 breaches of s 71 of the Holidays Act (failure to pay sick pay); and
(vi) 23 breaches of s 28 of the Holidays Act (incorrect holiday pay);

[11] Based upon a penalty of $20,000 for each breach of the above Acts, the maximum penalties available to the Labour Inspector against Cleantime are $2,950,000. Based upon a penalty of $10,000 for each breach as a person involved in the breach, the maximum penalties available against Mr Shukul are $1,470,000.

Ranjana Reddy/Busy Bees

[12] Similarly, the following breaches by Ms Reddy (in respect of "Busy Bees") have also been agreed by consent:

(i) 6 breaches of s 49 of the Holidays Act (failure to pay public holiday entitlements);
(ii) 11 breaches of s 81 of the Holidays Act (failure to keep holiday and leave records);
(iii) 11 breaches of s 27 of the Holidays Act (failure to pay final holiday pay); and
(iv) 11 breaches of s 130 of the Act (failure to keep wage and time records)

[13] Based upon a penalty of $10,000 for each breach, the maximum penalties available to the Labour Inspector against Ms Reddy are $390,000.

[14] The Labour Inspector said this was not a case where "globalisation" of penalties was appropriate because they related to four distinct categories of breaches. A distinction was drawn between the record keeping requirements of the Act and Holidays Act and, it was submitted, sick leave and annual leave were stand-alone entitlements.

[15] Cleantime, Mr Shukul and Ms Reddy also said globalisation was inappropriate but this submission was based on a belief that the "close association" between the breaches in each category meant only one penalty should be imposed in each category of breach.

[16] I agree there should be no globalisation of penalties. However, I do not accept the position advanced by Cleantime, Mr Shukul and Ms Reddy that only one penalty should be imposed for each category of breach. Indeed, such an approach can be characterised as the logical endgame for "globalisation" whereby systematic non-compliance is reduced to a single course of conduct based solely on factual similarity and purely, or largely, for the non-compliant party's benefit.

Seriousness of the breaches

[17] Consistent with *Preet*, the Labour Inspector identified various "aggravating" and "mitigating" factors which were relevant to the assessment of penalties. The Labour Inspector said the aggravating factors were ostensibly the same because Cleantime and Busy Bees were family businesses run by Mr Shukul and Ms Reddy. The Labour Inspector said the businesses shared poor labour practices and some staff; although Busy Bees operated for a shorter duration.

Aggravating factors

[18] The Labour Inspector identified the aggravating factors as follows:

(i) the incorrect classification of employees as "casuals" meant they did not receive the correct minimum entitlements;

(ii) there was an element of "intention" in the actions taken due to the length of time Cleantime had been operating which included its ability to seek advice on employment practices;

(iii) employees of both entities were vulnerable to exploitation;

(iv) breaches of minimum entitlements enabled Cleantime and Busy Bees to increase earnings and profits at the expense of employees;

(v) the number of Cleantime's employees involved (42).

[19] Cleantime, Mr Shukul and Ms Reddy did not specifically address the issue of aggravation but as we will see below, they did identify several ameliorating factors they said should be taken into account when assessing final penalties at this step.

[20] Consistent with *Preet*, and after applying various discounts to each category of breach, the Labour Inspector submitted that the maximum penalties payable at the conclusion of the first limb of this step was $1,775,000 for Cleantime. For Ms Reddy, the maximum was submitted to be $201,000. I accept these submissions. Applying the same approach, the maximum penalties payable by Mr Shukul at this stage total $887,500.

Ameliorating factors

[21] The Labour Inspector identified the following ameliorating factors:

(i) Mr Shukul has agreed to pay the arrears for Busy Bees for the periods it was operated by Ms Deo and Ms Reddy;
(ii) Neither Cleantime, Mr Shukul or Ms Reddy have previously been the subject of minimum standards proceedings;
(iii) Cleantime, Mr Shukul and Ms Reddy cooperated with the Labour Inspector's investigation, accepted their respective defaults and agreed to the breaches.

[22] The Labour Inspector also identified the, effectively, neutral factor of the stated willingness by Cleantime to pay all outstanding arrears.

[23] Cleantime, Mr Shukul and Ms Reddy identified further ameliorating factors as:

(i) some of the records required to be kept were lost in a flood and therefore not as a result of general default;
(ii) Cleantime's incorrect classification of employees as casual employees still meant those employees received 8% holiday pay and led to predominately "technical" breaches of other minimum standards;
(iii) Cleantime, Mr Shukul and Ms Reddy's cooperation with the Labour Inspector including participation in a mediation which helped reduce and clarify the Labour Inspector's claims; and

(iv) Cleantime, Mr Shukul and Ms Reddy have significantly improved their systems included use of a computerised payroll system.

[24] Again after applying various discounts to each category of breach, the Labour Inspector submitted the maximum penalty payable at the conclusion of step 2 was $887,500 for Cleantime and $100,500 for Ms Reddy. I also accept these submissions. Applying the same approach, the maximum penalties payable by Mr Shukul are $443,750.

Financial circumstances of Cleantime, Mr Shukul and Ms Reddy

[25] The Labour Inspector acknowledged that Cleantime, Mr Shukul and Ms Reddy had provided financial information via an accountant relevant to the assessment at this step. The Labour Inspector said Cleantime was still operational, continues to employ a number of staff and, having analysed the financial information provided, its gross profit was growing – indeed, significantly in the 2017/2018 financial year. The Labour Inspector submitted there was no reason to suggest Cleantime could not meet a penalty payment but accepted a discount could be applied due to it being a "small business".

[26] The Labour Inspector also accepted the financial circumstances of Mr Shukul and Ms Reddy's family unit were modest.

[27] Cleantime, Mr Shukul and Ms Reddy submitted that despite the separate "legal personality" of Cleantime, the practical reality is that the company exists to provide income to their family unit. They relied on several factors identified in the affidavit prepared by Ms Stevenson which they said were relevant at this step including:

(i) Mr Shukul and Ms Reddy have three children;
(ii) Mr Shukul and Ms Reddy have no significant assets;
(iii) the family unit's drawings from Cleantime are modest and they live frugally; and
(iv) Cleantime has modest assets which are required for the performance of work and it is carrying considerable debt.

[28] Having considered the respective positions of the parties, I accept that a discount needs to be applied at this step to penalties against Cleantime, Mr Shukul and Ms Reddy. However, the discount will to be applied differentially. As to Cleantime, I accept it is a small business. However, I also accepted the submission of the Labour Inspector that there is nothing to suggest that it cannot meet a penalty. The discount that is to be applied here is 30%. As to Ms Reddy and Ms Shukul, I accept the evidence provided by Ms Stevenson as to their personal circumstances and the submissions advanced on their behalf about these. The discount that is to be applied here is 70%.

[29] So then, at the conclusion of step 3 the proposed penalties to be imposed are $621,250 for Cleantime, $133,125 for Mr Shukul and $30,150 for Ms Reddy.

Proportionality of outcome

[30] In *Preet* the Court said the penalties imposed should be proportionate to the level of wrongdoing. The Labour Inspector accepted there would be a reduction based on a proportionality exercise which included an assessment as to whether any penalty would be significantly out of proportion to the gravity of breaches and whether the magnitude of such a disproportionate outcome creates a significant risk of non-payment.

[31] The sums owing to employees of Cleantime amount to approximately $9,367 and to the employees of "Busy Bees" of $5,003.54. However, general non-compliance with statutory obligations, including provisions which aid and support the correct calculation for and payment of employees, should not be overwhelmed by a race to reduction because temporal observations of non-compliance by the Labour Inspectorate results in amounts owed to employees being not particularly large or significant. Further, I accept the Labour Inspector's submission that employers in breach should not be able to profit including by making large withdrawals from company funds for the benefit of directors and/or shareholders to the detriment of their employees.

[32] Cleantime and Mr Shukul and Ms Reddy said no penalties should be imposed because:

(i) the Labour Inspector's investigation has caused considerable distress to Mr Shukul and Ms Reddy;

(ii) Mr Shukul and Ms Reddy have agreed to pay the arrears owing to Ms Deo's employees;

(iii) a family rift has occurred between Mr Reddy and her sister-in-law, Ms Deo as a result of this matter;

(iv) there is no need to deter further breaches because the proceedings have been consequence enough;

(v) their admission of liability and steps to pay arrears; and

(vi) a further financial penalty will jeopardise the ability to pay arrears and potentially the future of the company.

Result

[33] Taking the submissions of the parties into account, and having regard to all the circumstances of the case, it is appropriate to impose significant, but proportionate, penalties on Cleantime, Mr Shukul and Ms Reddy.

[34] Cleantime is to pay penalties of $40,000. Mr Shukul is to pay penalties of $10,000. Ms Reddy is to pay penalties of $5,000. Penalties are to be paid into a crown bank account within 28 days of the date of this determination.

Next steps regarding Ms Deo

[35] As this determination does not resolve the claims against Ms Deo, the Labour Inspector is to advise the Authority if those claims are to be pressed. If so, the Authority will issue directions for the orderly progression of that in due course.

Costs

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

[37] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.[7]

Member of the Employment Relations Authority

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