

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED  
TO IN THIS DETERMINATION

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 7  
3030151

BETWEEN      LABOUR INSPECTOR  
Applicant

AND            MALCOLM BENNETT AND  
CLAIRE BENNETT  
Respondent

Member of Authority:      David Appleton

Representatives:          Ella Tait, for Applicant  
Gareth Abdinor and Grace Moore, Co-Counsel for  
respondents

Investigation Meeting:      25 October 2018 at Christchurch

Submissions and Information Received:      19 November and 3 December 2018 from Applicant  
6 and 26 November 2018 from Respondent

Determination:              9 January 2019

---

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

---

**Prohibition from publication order**

[1] Mr and Mrs Bennett put before the Authority a statement of personal assets and liabilities, and the trading accounts, profit and loss account and a balance sheet for the business of the Coalgate Tavern. The contents of these statements, and the evidence given by

the Bennetts about their financial situation, are confidential and I prohibit from publication all details contained in these statements and their evidence.

### **Employment Relationship Problem**

[2] The Labour Inspector (Eva Belley) originally sought the payment of arrears of final holiday pay, plus interest, to two former employees of the respondents, an order for the reinstatement of annual holiday entitlements to all employees of the respondents and the imposition of penalties against the respondents for breaches of various sections of the Holidays Act 2003.

[3] In her statement of problem the Labour Inspector sought the payment of arrears of holiday pay in the sum of \$15,508.45 for Ms Zante Pont, and \$6,176.78 for Ms Marion Karst. At the time of the investigation meeting the respondents had already made payments to the Labour Inspectorate for Ms Pont and Ms Karst of additional sums in respect of sick pay, public holiday pay and alternative holiday pay. Since the Authority's investigation meeting the respondents have paid the arrears of holiday pay sought on behalf of Ms Pont and Ms Karst. There are therefore no outstanding arrears owed in respect of these individuals.

[4] Since the investigation meeting the respondents have also agreed to reinstate all accrued annual holidays for all of their existing employees. This is despite the fact that the Labour Inspectorate's claim for an order in this respect was deficient, casting doubt on the jurisdiction of the Authority to make the compliance order sought.

[5] The Labour Inspector did not originally seek payment of arrears of final holiday pay, sick pay and alternative holiday with respect of a third employee, Ms Alice Greenwood, because the latter had initially wanted her name to be kept confidential. However, Ms Greenwood subsequently changed her position after she had left the employment of the respondents. At the end of the investigation meeting, Ms Belley stated that she believed that arrears of pay should be awarded to Ms Greenwood too.

[6] Accordingly, it was suggested by Ms Tait that, given that the Labour Inspector had not sought arrears for Ms Greenwood in the statement of problem, any arrears found owing to her should be funded out of any penalties imposed upon the respondents. Mr Abdinor did not

object to this approach, and it was agreed that further submissions would be made on the issue after Ms Belley had calculated the arrears.

[7] Ms Belley has subsequently calculated the arrears owing to Ms Greenwood as comprising \$7,653.56 final holiday arrears, 12 days' sick pay in the sum of \$1,441.05 and alternative holiday arrears in the sum of \$534.30.

[8] I am treating the written submissions by Ms Tait as an application to amend the statement of problem to include a claim for total arrears of pay for Ms Greenwood in the sum of \$9,628.91. I grant leave to amend the statement of problem in that way. The respondents have not challenged Ms Belley's calculation, nor denied that Ms Greenwood is owed that sum. However, the respondents do resist the imposition of penalties.

### **Brief account of the facts**

[9] Mr and Mrs Bennett own and operate the Coalgate Tavern in Coalgate, in the Selwyn District of Canterbury. They have done so for over 30 years.

[10] Up until the Labour Inspector's intervention, Mr and Mrs Bennett had always treated their employees as casual employees. This belief was based on the ability of the staff to pick up and drop shifts, swapping with each other, as they wished. However, the respondents now accept that, in law, the majority of their employees were permanent part-time staff. Having read the evidence of three former members of staff named below, and having reviewed their days and hours of work, I agree that those three staff, at least, were not casual employees.

[11] Ms Belley received a complaint from Ms Greenwood on 16 January 2018 to the effect that the employees of the respondents were treated as casuals and so were not provided with annual holidays or sick leave, and that alternative holiday entitlements were paid out automatically without the employees having the ability to take a paid day off.

[12] Ms Karst then contacted the Ministry of Business Innovation and Employment about the same matter. Ms Belley was then referred to Ms Pont, who had left the employment of the respondents due to not being allowed to accrue holiday pay.

[13] Ms Belley visited the respondents in February 2018 and gathered together pay records. She also spoke to two then current employees about their employment arrangements. The emerging theme from these two employees was that paid sick pay and bereavement leave were not given and that holiday pay was included in the wages.

[14] Ms Belley says that all employees received an 8% holiday pay component with their regular wages, in accordance with a clause in their employment agreements. However, the 8% was not shown as an identifiable component on their payslips or in the PAYE books that were kept by the Bennetts. The Bennetts did not dispute paying 8% with their employees' regular pay, stating that this was the practice in the hospitality industry and that those were the conditions that the employees had signed up to in their employment agreements.

[15] Ms Belley says that, out of the 17 employees she identified, there were 15 who were not casual employees and who should have received four weeks annual holiday entitlements, based on their work pattern and length of service. She found a further two employees who had not yet accrued 12 months of continuous employment, but whose work patterns showed that they were permanent, and not casual employees. Those two employees were also being incorrectly paid 8% holiday pay with their regular wages.

[16] Ms Belley also found that, when an employee worked on a public holiday that was an otherwise working day for them, although they received pay at a time-and-a-half rate, they also got paid out for the accrued alternative holiday in the next pay cycle without being able to take the day as a holiday.

[17] Ms Belley says that Ms Karst, Ms Pont and Ms Greenwood all stated that they had always understood that they were not entitled to be paid if they had a day off sick because of their casual status, so they would swap shifts with someone else to cover for them. Mr and Mrs Bennett, however, denied that they did not pay their employees if they were off sick and said that, if an employee put down on their timesheet that they wanted sick pay, they would get paid for it. If they did not, they would not get paid.

[18] Ms Belley says that one employee told her that, if she could not turn up to work because one of her children were ill, she would not be paid sick leave and that, when her

mother passed away, she did not take any time off due to the financial pressure as she knew she would not get paid bereavement leave.

[19] In Ms Pont's statement of evidence she said that, in ten years of employment, she was only paid one day of sick pay when she was sent home unwell from work. She gave an example of an occasion when she had a medical certificate which stated that she was unfit for work for two days, but that, when she showed it to Mr and Mrs Bennett, they told her that if she did not come to work she would not get paid as she was not entitled to sick leave. She therefore worked those days, despite being signed off as unfit to work. She said that, on another occasion, she provided a medical certificate that she was unfit to work and did not get paid for those days.

[20] Ms Belley said in her evidence that, having reviewed the respondents' PAYE books, she found that paid sick leave had been provided on only four occasions over 15 employees between October 2013 and January 2018. She is therefore of the opinion, given the evidence of the employees, and former employees she had spoken to, that the employers did not have a practice of providing sick day entitlements to their employees.

[21] Mr and Mrs Bennett's evidence is that they believed their staff were truly casual employees and that they had never intended to disadvantage any of them. They said that they believed that their employees were benefiting through being treated as casuals as they always got paid 8% holiday pay with their wages, and were able to work flexible shifts. The respondents say that they only found out that they had been incorrectly treating their employees as casuals when Ms Belley advised them as such. They then quickly afterwards engaged a payroll company to help them pay their employees correctly and to record holiday entitlements.

[22] The Bennetts deny that they ever told their staff that if they did not work they would not get paid, and say that Ms Pont only had one paid sick day because that was all they were aware of. They deny that they received a medical certificate from Ms Pont on the occasion she worked. Ms Pont did say in evidence that she believed she may not have given a copy to the Bennetts, but had it in her hand when she spoke to them about her illness.

[23] The Bennetts dispute that they refused to allow an employee to take bereavement leave or that they told the employees that they would not get paid if they did not work. They say that they relied on their employees to note their hours correctly on their timesheets, and advised them that they needed to write “S” on their timesheets if they had been sick.

[24] Mrs Bennett says that she and her husband met with Ms Belley and another Labour Inspector on 15 March 2018 and, when the other Labour Inspector asked Ms Belley if she was going to seek penalties, Ms Belley said “No, not at all”. She says that they did not expect to see penalties being sought because of that conversation. The oral evidence of Mr Bennett was somewhat different in that he said that Ms Belley had replied to the question by saying “I don’t think so, I’ll have to think about it”.

[25] Ms Belley’s evidence was that she would not have said that they would not seek penalties as the Labour Inspectorate’s processes would not have allowed her to say that. She says that she had indicated that she would have to think about whether to impose penalties. She also says that the other Labour Inspector had actually said that, if the matter went before the Authority, it is likely that the Authority would view the matter as less serious, and that a lower penalty would be imposed. Ms Belley, however, also said in evidence that she did not view the matter as ‘less serious’.

[26] The Bennetts say that they have been in the hospitality industry for almost 40 years and now wish to retire (they are both in their 70s). They say that they are in a modest financial position and that the investment that they have in the business was intended to be used so that they would be able to retire. They say that the penalties that have been sought would cause major hardship to their financial situation.

## **Issues**

[27] The Authority has to determine whether penalties be imposed upon the respondents for breaches of ss 16, 28, 63 and 81 of the Holidays Act and, if so, whether \$9,628.91 of that penalty should be paid to the Labour Inspectorate to be paid to Ms Greenwood.

[28] In addition, the Authority needs to determine whether interest should be awarded on the arrears of sick leave, alternative holiday and unworked holiday arrears originally claimed on behalf of Ms Pont and Ms Karst.

### **Should penalties be imposed upon the Bennetts?**

[29] The Labour Inspector seeks penalties under s 75 of the Holidays Act in relation to four sets of breaches, as follows:

- (a) A failure to provide to 12 employees an entitlement to four weeks of paid annual holidays contrary to s 16 of the Holidays Act;
- (b) For incorrectly paying to two employees with less than 12 months continuous employment 8% of their gross wages with their regular wages contrary to s 28 of the Holidays Act;
- (c) For failing to provide sick leave entitlements to 15 current and former employees contrary to s 63 of the Holidays Act; and
- (d) For failing to record sick leave entitlements in respect of 19 employees contrary to s 81 of the Holidays Act, although the Labour Inspectorate now only treats this as one breach.

[30] The respondents argue that no penalties should be imposed because of the alleged representation by the Labour Inspectors that no penalties would be sought. They have also paid all of the arrears claimed. On balance, I do not accept that any binding promise was given by either Ms Belley or her colleague that penalties would not be sought. I prefer the evidence of Ms Belley in this respect. Whilst I suspect that she and her colleague were attempting to comfort the respondents by downplaying the extent of any penalties that may be imposed, the circumstances of the respondents' breaches do not suggest that the Labour Inspectors, both of whom are experienced, would have (or even could have) waived the Labour Inspectorate's right to seek penalties.

[31] As I discuss below, the breaches of minimum employment legislation committed by the respondents occurred over a significant period of time and were only corrected when the Labour Inspectorate intervened. The respondents had opportunities to address some of the

breaches before that intervention, but either chose not to, or recklessly shut their eyes to their obligations to their employees. I am quite satisfied that the imposition of penalties is warranted.

[32] Sections 63, 75 and 81 of the Holidays Act provide as follows:

**63 Entitlement to sick leave and bereavement leave**

(1) An employee is entitled to sick leave and bereavement leave in accordance with this subpart—

- (a) after the employee has completed 6 months' current continuous employment with the employer; or
- (b) if, in the case of an employee to whom subsection (1)(a) does not apply, the employee has, over a period of 6 months, worked for the employer for—
  - (i) at least an average of 10 hours a week during that period; and
  - (ii) no less than 1 hour in every week during that period or no less than 40 hours in every month during that period.

(2) Sick leave and bereavement leave must be provided—

- (a) to an employee to whom subsection (1)(a) applies, for—
  - (i) the 12-month period of continuous employment beginning at the end of the 6-month period specified in that subsection; and
  - (ii) each subsequent 12 months of current continuous employment:
- (b) to an employee to whom subsection (1)(b) applies, for—
  - (i) the 12-month period of employment beginning at the end of the 6-month period specified in that subsection; and
  - (ii) each subsequent 12-month period of employment as long as the circumstances referred to in subparagraphs (i) and (ii) of that subsection continue to apply.

(3) However, an employer and employee may agree that—

- (a) the employee may take sick leave or bereavement leave in advance; and
- (b) in the case of sick leave taken in advance, the amount of leave taken is to be deducted from the employee's entitlement under this section.

## **75 Penalty for non-compliance**

(1) An employer who fails to comply with any of the provisions listed in subsection (2), and every person who is involved in the failure to comply, is liable,—

(a) if the employer is an individual, to a penalty not exceeding \$10,000:

(b) if the employer is a company or other body corporate, to a penalty not exceeding \$20,000.

(2) The provisions are—

(a) section 16 and sections 21 to 28 (which relate to an employee's entitlement to, and payment for, annual holidays):

(b) section 40(3) (which relates to an employee's entitlement to be paid for a public holiday that would have occurred during the employee's annual holidays):

(ba) sections 28A and 28B (which relate to a request by an employee for a portion of his or her annual holidays to be paid out and payment for that portion):

(c) section 46, sections 49 to 56, section 60, and section 61(3) (which relate to an employee's entitlement to, and payment for, public holidays and alternative holidays):

(d) section 63, section 65, and sections 69 to 72 (which relate to an employee's entitlement to, and payment for, sick leave and bereavement leave):

(e) section 81 (which relates to an employer's obligation to keep a holiday and leave record):

(f) section 82 (which relates to requests for access to a holiday and leave record).

(3) For the purposes of subsection (1), a person is **involved in a failure to comply** if the person would be treated as a person involved in a breach within the meaning of section 142W of the Employment Relations Act 2000.

## **81 Holiday and leave record**

(1) [Repealed]

(2) An employer must at all times keep a holiday and leave record showing, in the case of each employee employed by the employer, the following information:

(a) the name of the employee:

(b) the date on which the employee's employment commenced:

- (c) the number of hours worked each day in a pay period and the pay for those hours:
- (d) the employee's current entitlement to annual holidays:
- (e) the date on which the employee last became entitled to annual holidays:
- (f) the employee's current entitlement to sick leave:
- (g) the dates on which any annual holiday, sick leave, or bereavement leave has been taken:
- (h) the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken:
- (ha) the portion of any annual holidays that have been paid out in each entitlement year (if applicable):
- (hb) the date and amount of payment, in each entitlement year, for any annual holidays paid out under section 28B (if applicable):
  - (i) the dates of, and payments for, any public holiday on which the employee worked:
- (j) the number of hours that the employee worked on any public holiday:
- (ja) the day or part of any public holiday specified in section 44(1) agreed to be transferred under section 44A or 44B and the calendar day or period of 24 hours to which it has been transferred (if applicable):
- (k) the date on which the employee became entitled to any alternative holiday:
- (l) the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:
- (m) the cash value of any board or lodgings, as agreed or determined under section 10:
- (n) the details of any payment to which the employee is entitled under section 61(3) (which relates to payment in exchange for an alternative holiday):
- (o) the date of the termination of the employee's employment (if applicable):
- (p) the amount paid to the employee as holiday pay upon the termination of the employee's employment (if applicable):
- (q) any other particulars that may be prescribed.

(3) The holiday and leave record must be kept—

(a) in written form; or

(b) in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.

(3A) If an employee's number of hours worked each day in a pay period and the pay for those hours are agreed and the employee works those hours (the **usual hours**), it is sufficient compliance with subsection (2)(c) if those usual hours and pay are stated in—

(a) the employee's wages and time record kept under section 130 of the Employment Relations Act 2000; or

(b) the employee's employment agreement; or

(c) a roster or any other document or record used in the normal course of the employee's employment.

(3B) In subsection (3A), the **usual hours** of an employee who is remunerated by way of salary include any additional hours worked by the employee in accordance with the employee's employment agreement.

(3C) Despite subsection (3B), the employer must record any additional hours worked that need to be recorded to enable the employer to comply with the employer's general obligation under section 4B(1) of the Employment Relations Act 2000.

(4) Information entered in the holiday and leave record must be kept for not less than 6 years after the date on which the information is entered.

(5) The holiday and leave record may be kept so as to form part of the wages and time record required to be kept under section 130 of the Employment Relations Act 2000.

[33] 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.

[34] 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.

[35] 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.

[36] These factors set out in s.133A were incorporated in the guidance contained in the judgment of the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*<sup>1</sup>. The guidance set out by the Employment Court in the *Preet* judgment is now well known, involving four steps.

### **Step one**

[37] Step one involves identifying the number of breaches relevant to the fixing of the penalties and whether or not breaches should be “globalised”.

[38] In this case, it would also be necessary to consider whether Mr and Mrs Bennett are each liable to pay penalties of \$10,000 in respect of each breach, or whether, as trading

---

<sup>1</sup> [2016] NZEmpC 143.

partners, they should attract just one penalty per breach jointly. The Labour Inspectorate has decided that, in this case, it seeks one penalty per breach against both respondents jointly, and not individually. Ms Tait makes clear that this does not reflect a general practice of the Labour Inspectorate in terms of trading partners. However, I accept it as a reasonable approach to take in this case given that Mrs Bennett did not take any particularly active part in the granting, recording or payment of holiday and leave.

Ms Belley originally argued that there were 48 breaches, and that they should not be globalised. The Bennetts do not dispute the analysis of Ms Belley in respect of the number of affected employees. However, in her written submissions, Ms Tait said that they were treating the breach of s 81 as a single breach rather than as 19 breaches.

#### Breach of s 16 of the Holidays Act in respect of 12 staff

[39] I agree that the penalties should not be globalised in respect of these breaches, as each employee will have been personally affected by them in her own way. To globalise the penalties across the 12 employees would be to ignore the very real and personal effect on each. Therefore, the starting point for penalties in respect of this set of breaches is \$120,000.

#### Breach of s 28 of the Holidays Act

[40] These breaches relate to two employees with less than a year's service each, and who therefore were not entitled to holiday pay under s 16. However, as above, the effect on the two was likely to be different and so, again, I decline to globalise. The starting point for this set of breaches is therefore \$20,000.

#### Breach of s 63 Holidays Act

[41] There is a dispute between the parties as to whether paid sick leave was provided or not. I am clear that the employees thought that they were not entitled to it. I believe that the Bennetts were sincere in their evidence that sick leave was paid if it was recorded on a timesheet by the employee, but this rule was far too narrow, and does not reflect the requirements of the Holidays Act. Section 65 makes clear that an employee may take sick leave if she, her spouse or partner or a dependant is sick or injured. She is entitled to 5 days'

sick leave for each 12 month period of continuous employment starting at the end of the first six months, and for each subsequent 12 months of continuous employment.

[42] Therefore, the entitlement is not dependent upon the employee marking her sickness on a timesheet. I am satisfied that the Bennetts failed to pay sick leave when they knew that employees were sick. This was because of their rule, which was unlawful. They benefitted from the continued ignorance of their employees.

[43] Again, these breaches affected each employee in her own way, and it would not be appropriate to globalise across the employees. The starting point is therefore a penalty of \$150,000.

#### Breach of s 81 of the Holidays Act

[44] Section 81 makes clear that an employee's current entitlement to sick leave had to be recorded in a holiday and leave record. The Bennetts did not do that. This is likely to be responsible for the misunderstanding amongst the employees that they were not entitled to sick leave. The Labour Inspectorate now treats these failings as one breach. The starting point is therefore a penalty of \$10,000.

[45] This makes a total of 30 breaches that are liable to be penalised, attracting a starting point of \$300,000.

#### **Step two**

[46] At step two, the severity of the breach should then be assessed in each case. This establishes the provisional starting point for each penalty, potentially up to the maximum, and will include a separate adjustment for aggravating and mitigating factors respectively in relation to each breach. Each penalty may be expressed as a dollar amount or a percentage of the maximum.

#### Breach of s 16 of the Holidays Act

[47] When I consider the evidence of the witnesses, including Mr and Mrs Bennett, it is my finding that there was no intention to actively exploit or disadvantage the employees.

However, I do find that the Bennetts shut their eyes to their obligations as employers under the Holidays Act. Whilst they could perhaps be forgiven for having always treated their staff as casual employees in the absence of any reasonable indication to the contrary, once Ms Pont started to query her right to accrue holidays, and asked Mr Bennett to help her in view of her son starting school in the near future, the Bennetts should have made enquiries or taken advice. This is especially so given that Ms Pont had referred in a conversation with Mrs Bennett to information she had found on the internet about accruing holidays. I find Mrs Pont's evidence credible in that respect.

[48] Mr Bennett did make some suggestions to help Ms Pont, but not about her right to take paid holidays. I note also that Mr Bennett said in his oral evidence that he rolled up pay into wages because it helped the cash flow of the business. That is different from saying he did it because he was entitled to do so under s 28 of the Holidays Act.

[49] I would assess this breach as moderately serious, given that it was a practice that had been going on for a significant time. I would reduce the maximum penalties attributable to this breach by 50%. That makes a total penalty of \$60,000.

[50] In terms of ameliorating factors, Ms Belley said that the Bennetts had co-operated with her and had rectified the problems quickly by engaging a payroll provider to handle the pay and leave accrual from then on. I believe that this deserves recognition, and will reduce the penalty to \$30,000 at this stage.

#### Breach of s 28 of the Holidays Act

[51] A breach of s 28 overlaps with a breach of s 16, save that, in the case of these two employees, they did not have 12 months' service and so had not yet become eligible for rights under that section. However, paying the two employees under s 28 when they were not eligible meant that they were potentially deprived of accruing rights under s 16 once their 12 months' employment had been reached.

[52] My assessment of the seriousness of this breach is the same as my assessment of the breach of s 16 above; moderately serious. I reduce the penalty total attributable to this breach

by 50%, to \$10,000. I also reduce the penalty total further to acknowledge the Bennetts' co-operative response to the Labour Inspector, to \$5,000.

#### Breach of s 63 of the Holidays Act

[53] My finding is that there was a breach of the Holidays Act by the rule imposed by the Bennetts that sick pay was only payable if the timesheet was expressly marked with an "s". Not paying sick pay to staff is a serious matter, and hits at the very heart of the objective of the sick pay provisions in the Holidays Act. It risks employees working when they are unfit, or being deprived of income if they have no choice but to miss work.

[54] It was disingenuous of the Bennetts to claim that the employees were told that they could be paid sick pay if they would only have recorded their sick leave on their timesheets. It is inconceivable that people on low wages would have voluntarily foregone paid sick leave just to avoid writing an "s" on a timesheet.

[55] I regard this as a serious breach and will fix the starting point at 80% of the maximum. That makes \$120,000.

[56] Turning to ameliorating factors, the co-operative response of the Bennetts should be recognised again by a 50% reduction. That leaves a total of \$60,000.

#### Breach of s 81 of the Holidays Act

[57] A failure to record sick leave entitlements has probably led to the misunderstanding amongst the staff that they would not be paid for taking time off sick. If the Bennetts had recorded their employees' current entitlement to sick leave, the dates on which sick leave was taken and the amount of payment for sick leave taken, as required by s 81, it is highly likely in my view that the staff would have understood their rights far better.

[58] This failure is, therefore, moderately serious, and should attract a starting point of 50% of the maximum penalty; that makes a total of \$5,000. I reduce that by a further 50% by reference to the co-operative approach taken by the Bennetts after Ms Belley contacted them. That leaves a total of \$2,500.

[59] After step two has been applied, that leaves a total potential penalty of \$97,500.

### **Step three**

[60] The Authority is now to consider the means and ability of the person in breach to pay the penalty reached under step 2. There may be downward adjustment if evidence establishes real financial or other hardship. The consequences for the business and for continued employment of other employees may be a relevant consideration if these are established to the Authority's satisfaction.

[61] I will not share the details of the financial situation of the Bennetts here, but I note that they had the means to pay immediately the arrears of pay due to the three employees. However, it would likely cause hardship for them to also have to pay a penalty of \$97,500 in the near future. I note, though, that the tavern and the business associated with it are up for sale. The details are publically available on the internet and the sale price sought at the time of the finalisation of this determination was \$875,000 plus GST. Therefore, a substantial sum will be released to the Bennetts' trust once the tavern and its business are sold, even if the sale goes through at a lower price.

[62] I accept, though, that there is no foreseeable date when that sale may occur, and that it would be onerous on the Bennetts to force them to reduce the price to achieve a quick sale so as to have to pay a significant penalty.

[63] I agree with the applicant that a reduction of 50% is appropriate. That brings the total down to \$48,750.

### **Step four**

[64] This final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached after the first 3 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.

[65] There is no previous post-*Preet* Authority determination that I have been able to find which imposed penalties just for ss 16, 28, 63 and 81 of the Holidays Act. The closest matter

I could identify was *Labour Inspector v Japan Power Ltd*<sup>2</sup> in which a total of \$70,000 was imposed for 48 breaches of ss 16, 21 and 81 of the Holidays Act. However, the Authority found a greater degree of intentionality in *Japan Power* than I have in the current case, and the workers in the earlier matter were also arguably more vulnerable, in that they were migrant workers.

[66] Standing back, and assessing the degree of culpability and the need for deterrence, I conclude that a penalty in the total sum of \$30,000 is appropriate.

[67] Section 136 of the Act allows the Authority to order that the whole or any part of any penalty recovered must be paid to any person. During the investigation meeting Ms Tait suggested that Ms Greenwood, who was underpaid in terms of final holiday pay, but who was not expressly included in the statement of problem in terms of an application for the payment of arrears to her, should have part of any penalty imposed directed to her in the same sum as the arrears. The respondents do not object to this.

[68] I do not see any impediment to this proposal, which will save the Labour Inspector or Ms Greenwood having to lodge a separate application. Ms Greenwood is undoubtedly owed arrears and I agree that it is appropriate to adopt a pragmatic approach in this case.

### **Interest**

[69] The Labour Inspectorate seeks interest on the sick leave, alternative holiday and unworked public holiday arrears on behalf of Ms Pont and Ms Karst. Schedule 2 of the Act provides that, 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, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016, 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.

[70] Interest on arrears was sought in the statement of claim but counsel for the applicant made no substantive submissions except to say that interest was now not sought on the annual holiday arrears, only on the sick leave, alternative holiday and unworked public holiday

---

<sup>2</sup> [2018] NZERA Christchurch 44

arrears. It is not clear to me why this differentiation has been made and, in the absence of a clear explanation, I decline to award interest.

### **Orders**

[71] I order the respondents to pay a penalty in the sum of \$30,000, \$20,371.09 of which is to be paid to the Authority, which will then be paid by the Authority into a Crown bank account. The balance of \$9,628.91 is to be paid to the Labour Inspectorate, which will take such steps as it reasonably can to pay to Ms Greenwood. These sums are to be paid by no later than 4pm on Friday 25 January 2019.

### **Costs**

[72] Costs are reserved. The parties are to seek to agree how costs are to be dealt with. However, if they are unable to agree by 4pm on Friday 25 January 2019, the Labour Inspectorate may lodge and serve a memorandum of counsel setting out what contribution towards its costs it seeks, and the basis for that contribution, by no later than 4pm on Friday 8 February 2019. The respondents may reply by lodging and serving a memorandum in reply by no later than 4pm on Friday 22 February 2019. The Authority would then determine costs on the papers.

David Appleton  
Member of the Employment Relations Authority

### Appendix 1 – Summary of penalty analysis

<b>Step 1 - Nature and number of breaches – potential maximum penalties</b>		
Breach of s 16 of the Holidays Act		\$120,000
Breach of s 28 of the Holidays Act		\$20,000
Breach of s 63 of the Holidays Act		\$150,000
Breach of s 81 of the Holidays Act		\$10,000
	<b>Subtotal</b>	<b>\$300,000</b>
<b>Step 2(a) – Seriousness of breaches as a proportion of maxima in step 1</b>		
Breach of s 16 of the Holidays Act	50%	\$60,000
Breach of s 28 of the Holidays Act	50%	\$10,000
Breach of s 63 of the Holidays Act	80%	\$120,000
Breach of s 81 of the Holidays Act	50%	\$5,000
	<b>Subtotal</b>	<b>\$195,000</b>
<b>Step 2(b) - Reduction on account of mitigating factors</b>		
Breach of s 16 of the Holidays Act	50%	\$30,000
Breach of s 28 of the Holidays Act	50%	\$5,000
Breach of s 63 of the Holidays Act	50%	\$60,000
Breach of s 81 of the Holidays Act	50%	\$2,500
	<b>Subtotal</b>	<b>\$97,500</b>
<b>Step 3 – Respondents’ financial circumstances</b>		
Reduction of 50%	<b>Subtotal</b>	<b>\$48,750</b>
<b>Step 4 - Proportionality</b>		
	<b>TOTAL</b>	<b>\$30,000</b>