

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 105
3047432

BETWEEN A LABOUR INSPECTOR
 Applicant

AND OLDE BERRY FARM NZ
 LIMITED
 First Respondent

AND ANDREW PETER MOLLOY
 Second Respondent

AND GIUBO JIANG
 Third Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Joseph Perrott, counsel for the Applicant
 David Nielsen, counsel for the first and second
 Respondents
 No appearance for the third Respondent

Investigation Meeting: On the papers

Submissions [and further 27 November 2019 from the Applicant and the
Information] Received: Respondents
 31 January 2020 from the Applicant and the Respondents

Date of Determination: 4 March 2020

CONSENT DETERMINATION OF THE AUTHORITY

- A. The first respondent, Olde Berry Farm Limited (Olde Berry) breached minimum code legislation and minimum employment standards in respect of 311 of its employees.**
- B. Olde Berry is ordered to pay to the Labour Inspector the sum of \$16,532.20 for the use of the specified employees, within 28 days of the date of this determination.**

- C. Olde Berry is ordered to pay to the Authority for transfer to the Crown bank account, a penalty of \$50,000 in 2 instalments of \$25,000. The first instalment of \$25,000 is to be paid within 28 days of the date of this determination. The second instalment of \$25,000 is to be paid on or before 30 May 2020.**
- D. As a person involved in the breaches of minimum code legislation and minimum employment standards, the second respondent, Mr Andrew Peter Molloy is ordered to pay to the Authority for transfer to the Crown bank account a penalty of \$10,000 within 28 days of the date of this determination.**
- E. Costs are to lie where they fall.**

Employment Relationship Problem

[1] The applicant, A Labour Inspector of the Ministry of Business Innovation & Employment (Christine Mclean) (Labour Inspector), has filed a range of claims against the first respondent, Olde Berry Farm NZ Limited (Olde Berry) and the second respondent, Mr Andrew Peter Molloy, that relate to various alleged breaches of minimum code legislation entitlements and minimum employment standards in respect of 311 employees of Olde Berry.

Settlement

[2] The parties attended mediation at which time they reached a settlement agreement in respect of the issues the Labour Inspector sought to have resolved.

[3] On 27 November 2019, counsel for the Labour Inspector, and counsel for Olde Berry and Mr Molloy filed a joint memorandum in the Authority.

[4] The joint memorandum confirmed terms of settlement reached and made a request that the Authority issue a consent determination and make orders in respect of breaches of minimum code legislation, arrears of wages and holiday pay, and quantum of penalties. Recommendations were made in respect of the breaches and quantum of penalties. The Authority was invited to make a final determination on the papers.

[5] The joint memorandum acknowledged that the Authority must be satisfied that orders for and quantum of penalties were warranted and that it is not bound by the agreement reached between the Labour Inspector, Olde Berry and Mr Molloy.

[6] The joint memorandum also confirmed that as the third respondent, Mr Jiubo Jiang did not attend mediation and was not legally represented, the agreement reached between the Labour Inspector, Olde Berry and Mr Molloy did not include him.

Relevant facts

[7] Large volumes of relevant documents were filed in the Authority relating to the Labour Inspector's extensive investigation which were helpful. On 31 January 2020, an agreed statement of facts was filed in the Authority.

[8] Olde Berry is a limited liability company which was incorporated on 10 April 2015. At all relevant times, Olde Berry operated a business growing, harvesting and selling berries on an orchard situated at 487 Tauwhare Road, Tamahere, Hamilton.

[9] The second respondent, Mr Molloy is the managing director of Olde Berry. The third respondent, Mr Giubo Jiang is a director of Olde Berry.

[10] Since April 2015, Olde Berry and another company, Matangi Berry Farm Limited (Matangi) have been involved in joint business enterprises, operating and sharing resources at the same orchard on Tauwhare Road. In addition to being a director of Olde Berry, Mr Jiang is also the sole director of Matangi.

Investigation into Olde Berry by the Labour Inspector

[11] In December 2017, in the course of investigating Matangi, the Labour Inspector became aware that employees of Matangi were also employed by Olde Berry. The Labour Inspector opened an employment standards investigation into Olde Berry.

[12] During her investigation into Olde Berry the Labour Inspector interviewed both Mr Jiang and Mr Molloy. The Labour Inspector required that they provide her with employment records, including wages and time, holiday and leave records and employment agreements. This information was provided to the Labour Inspector and analysed by her.

[13] The Labour Inspector also interviewed key employees of Olde Berry including the Office Manager, the Harvest Supervisor and the Orchard Operations Manager as well as a number of other employees.

[14] Employees complained variously of not being paid full wages for time worked, not being paid the minimum wage, not being paid holiday pay and not having an employment agreement.

Labour Inspector's conclusions

[15] The Labour Inspector's investigation determined that a significant number of the employees employed by Olde Berry at the relevant time were young, migrant workers aged between 18 and 30 years.

[16] The Labour Inspector concluded that Olde Berry:

- (a) never provided 290 of its employees with an individual employment agreement;
- (b) provided 21 of its employees with individual employment agreements which did not comply with s.65 of the Employment Relations Act 2000 (ERA);
- (c) failed to pay 5 of its employees the minimum wage in breach of the Minimum Wage Act 1983 (MWA);
- (d) underpaid holiday pay to 150 of its employees, in breach of the Holidays Act 2003 (HA).

[17] The Labour Inspector concluded that Mr Molloy as Managing Director of Olde Berry was responsible to ensure that individual employment agreements were provided to Olde Berry employees and that Olde Berry maintained wages and time and holiday and leave records for its employees.

[18] The Labour Inspector concluded that Mr Molloy:

- (a) Failed to provide employment agreements to 233 Olde Berry employees who were employed after 1 April 2016; and
- (b) Failed to ensure that Olde Berry maintained both wages and time and holiday and leave records for 247 employees employed after 1 April 2016.

Orders sought

[19] The parties seek the following orders by consent: Olde Berry breached:

- (a) Section 6 of the MWA for 5 employees to whom it did not pay the minimum wage;
- (b) Section 23 of the HA for 150 employees to whom Olde Berry did not pay their correct annual holiday pay entitlement;
- (c) Section 81 of the HA for 304 employees for whom Olde Berry failed to keep a compliant holiday and leave record;
- (d) Section 64 of the ERA for 290 employees for whom Olde Berry failed to retain a copy of an individual employment agreement;
- (e) Section 65 of the ERA for 21 employees for whom Olde Berry failed to retain compliant individual employment agreements;
- (f) Section 130 of the ERA for 304 employees for whom Olde Berry failed to keep a compliant wages and time record.

[20] Mr Molloy was a person involved in breaches of:

- (a) Section 81 of the HA for 247 employees for whom he failed to keep a compliant holiday and leave record;
- (b) Section 64 of the ERA for 233 employees for whom he failed to retain a copy of an individual employment agreement;
- (c) Section 130 of the ERA for 247 employees for whom he failed to keep a compliant wages and time record.

Orders are made accordingly.

Request for consent determination for arrears and penalties

[21] The parties have asked the Authority, if satisfied that it is appropriate to do so, that it issue a consent determination in respect of arrears and penalties. The Authority makes the following orders, by consent:

- (a) Olde Berry will pay arrears of minimum wages for 5 of its employees named below. The minimum wage arrears owed in respect of these employees totals \$1,012.96. The arrears owed in respect of each employee is as follows:
 - (i) Chen Wei (Wayne) is owed \$188.25
 - (ii) Huang Meng-Hui (Molly) is owed \$31.56

(iii)	Tang Ka Yan (Charlie) is owed	\$403.50
(iv)	Tsai Tung-Hsiang (aka Jung Xiang) is owed	\$194.50
(v)	Tsai Wei Chen (Wayne) is owed	<u>\$195.15</u>
	Total	\$1,012.96

- (b) Olde Berry will pay holiday pay arrears in respect of the 150 employees named in appendix A of the statement of problem (attached hereto) in the amounts specified in that appendix. The total annual leave arrears owed in respect of those employees is \$15,519.24.
- (c) Olde Berry will pay arrears owing to the specified employees in the amounts set out in para 21(a) and (b) totalling \$16,532.20 into the Labour Inspector's bank account for the use of those employees within 28 days of the date of this determination.

Penalties

[22] The legal framework for assessing and fixing a penalty, having regard to the statutory requirements in s 133A of the Act and the full Court's judgment in *Boorsboom v Preet Pvt Limited* were recently summarised by the Court in *Nicholson v Ford*¹ and *A Labour Inspector v Daleson Investment Limited*.²

[23] The Court in those cases confirmed the considerations as:

- (a) The object of the Act as stated in s 3 of the Act (statutory consideration 1);
- (b) The nature and extent of the breach (statutory consideration 2);
- (c) Whether the breach was intentional, inadvertent or negligent (statutory consideration 3);
- (d) The nature and extent of any loss or damage suffered by any person or gains made or losses avoid by the person because of the breach of involvement in the breach (statutory consideration 4);

¹ *Nicholson v Ford* [2018] NZEmpC 132 at [18].

² *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Boorsboom v Preet Pvt Limited* [2016] NZEmpC 143 at [18];

- (e) Whether the person or entity in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5);
- (f) The circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6);
- (g) Previous conduct (statutory consideration 7);
- (h) Deterrents (both particular and general) (*Preet* additional consideration 1);
- (i) Degree of culpability (*Preet* additional consideration 2);
- (j) Consistency of penalty awards in similar cases (*Preet* additional consideration 3);
- (k) Ability to pay (*Preet* additional consideration 4);
- (l) Proportionality of outcome to breach (*Preet* additional consideration 5).

Olde Berry

[24] The breaches set out in paragraph 19 of this determination have been accepted by Olde Berry. Each penalty that Olde Berry is liable for carries a maximum amount of \$20,000 on the basis that it is a company.

[25] Having considered the submissions made by the parties and applying *Preet*, I consider globalisation of penalties should occur as follows:

- (a) Penalties for breaches of ss 6 and 10 of the MWA should remain at 5 breaches reflecting 1 penalty for each breach;
- (b) Penalties for breaches of ss 23 and 75 of the HA should be globalised from 150 to 1 breach reflecting that Olde Berry made one systemic error in its approach to making holiday payments, which was factoring holiday pay at 8% into the piece rate despite the fact that holiday pay needs to be identifiable from the wage rate;
- (c) Penalties for breaching s 81 of the HA should be globalised from 304 to 1 breach to reflect that there was one overall failure to keep an adequate holiday and leave record;

- (d) Penalties for breaching s 64 of ERA to be globalised from 291 to 1 breach to reflect that there was one overall failure to retain individual employment agreements;
- (e) Penalties for breaching s 65(1) of the ERA to be globalised from 21 to 1 breach to reflect that this represents one overall failure to retain compliant individual employment agreements;
- (f) Penalties for breaching s 130 of the ERA should be globalised from 304 to 1 breach to reflect that this represents one overall failure to keep a compliant wages and time record;

[26] The maximum penalty available in respect of these breaches, following globalisation, totals \$200,000, reflecting ten breaches at \$20,000 per breach.

[27] The nature of the breaches are serious. They represent failures by Olde Berry in respect to its record-keeping and systems. Also, those employees whose rights were breached by Olde Berry, were primarily young migrants to New Zealand who would not have known their employment rights and this meant they were vulnerable.

[28] Mitigating factors which the Authority takes into account when assessing penalties includes:

- (i) That the amount of arrears identified by the Labour Inspector is small as an overall figure and particularly small per individual employee;
- (ii) The breaches are in the nature of negligent rather than intentional breaches.

[29] Taking into account the submissions by both parties and proportionality, I order payment by Olde Berry of a total penalty of \$50,000 in respect of these breaches.

[30] Payment is to be made by Olde Berry as follows:

- (a) Payment of the sum of \$25,000 must be made by Olde Berry within 28 days of the date of this determination. The remaining \$25,000 is to be paid by Olde Berry on or before 30 May 2020;

- (b) Payment of these sums is to be made to the Authority and then transferred by the Authority into the Crown bank account.

Penalties – Mr Molloy

[31] Mr Molloy is a person who was involved in breaches as set out in paragraph 20 of this determination. Each penalty that Mr Molloy is liable for carries a maximum amount of \$10,000 on the basis that he is an individual.

[32] Applying the factors set out in para [22] above, I consider that there should be globalisation of penalties as follows:

- (a) Penalties for breaching s 81 of the HA to be globalised from 247 to 1 breach to reflect that it is one overall failure to keep an adequate holiday and leave record;
- (b) Penalties for breaching s 64 of the ERA to be globalised from 233 to 1 breach to reflect that it is one overall failure to retain individual employment agreements;
- (c) Penalties for breaching s 130 of the Employment Relations Act should be globalised from 247 to 1 to reflect that it is one overall failure to keep a compliant wages and time record;

[33] Taking globalisation into consideration the maximum penalty available in respect of each of these breaches is \$30,000 reflecting 3 breaches at \$10,000 per breach.

[34] I consider the same aggravating and mitigating factors referred to in paragraphs [27] and [28] of this determination are applicable.

[35] As managing director, Mr Molloy had significant responsibility for the breaches that occurred. Taking account of proportionality, the Authority is of the view that a penalty of \$10,000 is appropriate in respect of all breaches and can be apportioned per set of breaches.

[36] I order Mr Molloy to pay the Labour Inspector the sum of \$10,000 within 21 days of the date of this determination as a penalty for breaches as set out in para [32] above.

Costs

[37] Costs are to lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority