

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 133
3024131

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Applicant

AND HAWKES BAY SEAFOODS
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Clair English and Alistair Miller, counsel for the
 Applicant
 Jol Bates, counsel the Respondent

Investigation Meeting: 27 May 2019 at Napier

Submissions [and further Submissions from the Applicant on the day of the
Information] Received: investigation meeting. Further information from the
 Respondent on 4 June 2019

Date of Determination: 30 March 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In May 2017 a Labour Inspector commenced an audit of HBS' compliance with minimum employment standards where HBS had received an Improvement Notice 18 months earlier, in 2015, regarding its employment practices.

[2] The employment relationship problem before the Authority largely arises as a consequence of the Labour Inspector's inquiries during the 2017 audit.

[3] Broadly, the Labour Inspector alleges HBS breached obligations as an employer to keep compliant wage and time records and holiday and leave records regarding six Indonesian nationals employed by HBS (the “crewmen” or “crew members”), in the 18 months after the Improvement Notice was issued. As a consequence of the audit, the Labour Inspector also alleges crew members did not receive minimum entitlements regarding annual holidays, public holidays and alternative holidays.

[4] HBS denies the claims. It says that it has kept the required records in written form or in a manner that allows the information to be easily accessed and converted into written form. It says the information has been kept in the form of timesheets, payslips, a “top-up” schedule and employment agreements.

The Authority’s investigation

[5] The Labour Inspector that undertook the 2017 audit was no longer available to give evidence. However the Labour Inspector who issued the 2015 Improvement Notice, Mr Rick Brown, provided written evidence and was present at the Authority’s investigation.

[6] On behalf of HBS, Chartered Accountant, Mr Rob de Terte, also attended the Authority’s investigation and provided written evidence.

[7] Both witnesses helpfully answered questions from the Authority and during cross examination. None of the crewmen attended the investigation meeting.

[8] This determination has been issued outside the three month timeframe required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances exist to allow a written determination of findings at a later date. Having regard to s 174E of the Act, it has not been necessary to refer to all the evidence or other information placed before the Authority in this determination. However, all material provided has been considered.

The Labour Inspector’s investigation

[9] The 2017 audit commenced on 11 May when the Labour Inspector wrote to HBS seeking records. The letter was accompanied by 3 separate notices. Collectively, the notices required HBS to produce by 18 May 2017, in respect of crewmen who had worked on HBS fishing vessels *Mutiara* and *Pacific Explorer* between 1 November 2015 to 3 May 2017 (the period under review) inclusive, the following records:

- (a) “*complete holiday and leave records*” inclusive of “*public holidays worked*”, “*public holidays not worked*”, “*alternative holidays*”, “*annual leave records and any final pay records*”-
- (b) “*complete timesheets*”-
- (c) “*complete pay records including payslips and final payslips*” -

[10] Between the date of the initial demand and 30 November 2017, the Labour Inspector communicated with HBS representative, Chartered Accountant, Mr Rob de Terte, on no less than 11 occasions. Much of Labour Inspector’s correspondence expressed concerns that the records had not been provided or were inadequate. In each instance he sought additional information. I have not detailed every exchange between the parties however the following events are relevant:

[11] On 6 June 2017 Mr de Terte forwarded to the inspector 48 monthly separate handwritten timesheets said to cover the review period. He advised that timesheets for two crew members were not available for the month of November 2015. A week later he forwarded payslips corresponding to 5 of the 6 crewmen over the material time frame.¹ The payslips reflected weekly wage payments made to crew members based on a 42 hour working week.

[12] The Labour Inspector wrote soon after advising no holiday records or final pay information had been furnished. A further ‘Notice requiring production of holiday and leave records’ on issued on 3 July 2017.

[13] During the Authority’s investigation the parties disputed whether additional documents titled “*summaries of hours as per timesheets and hours paid for each individual*” had been attached to the 6 June 2017 email. That information has some importance because it reflects a disparity between hours worked by crew and hours recorded as paid. It is notable that the Labour Inspector, in his email response of 9 June 2017, advised he has only received incomplete timesheets. No mention is made of the “*summaries*” or the information contained therein. However, in the absence of evidence from the Inspector to the contrary I must find the summaries were sent on 6 June 2017.²

¹ Above, pg 74-394

² Agreed Bundle of Documents, pg 461-467

[14] Despite HSB' advise to the Labour Inspector in September 2017 that it had provided all the information it had, on 9 November 2017 HBS sent reworked summaries for each crew member, advising "*each crew member has two spreadsheets, the first summarising weekly pays and the second timesheets with holiday calculations*". The first spreadsheet recorded each crew members' hours of work as 42 per week and wages corresponding to those hours. The second spreadsheet set out actual hours worked by individual crew members per week and corresponding wages. These documents further reflected the disparity referred to previously. The second spreadsheet also listed the public holidays and the hours specific to individuals who had worked on those days.

[15] The Labour Inspector responded on the same date. His focus remained on the timesheets, and he queried why some dates, recorded as having been worked by an individual crew member, did not match days and dates available in the calendar year purported. He observed this "*typified most of the records you have provided*". He noted the records concerning public holidays worked by crewmen were unclear as to whether these were paid inclusive of a penal rate. He asked for payslips and bank transactions showing proof of payments.

[16] On 13 November 2017 the Labour Inspector sent Mr de Terte his investigation report; findings that HSB had failed to keep records in accordance with the Holidays Act 2003 (which I refer to as the HA03) and the Employment Relations Act 2000 (the Act). HBS provided two email responses on 24 November 2017. One sought to address concerns regarding the crew member referred to in previous correspondence. A further revision of payments was attached. The second advised three crewmen had recently received additional payments which had been due in the period under review.

Events prior to the Authority's investigation

[17] On 28 January 2018 the Labour Inspector lodged a statement of problem with the Authority. In its statement in reply, HBS recorded some further revised calculations regarding (hourly) wages, annual holiday and statutory entitlements for each of the crew members, noting "*clerical errors in the calculation of payments*" had since been identified.

[18] The parties attended mediation in August 2018. Around this time HBS furnished the Labour Inspector with a template individual employment agreement said to govern the

relationship with the crewmen. Materially, HBS says cl. 34 formed part of wage and time records, and cl 35 as part of the holiday and leave records. These are replicated below:

REMUNERATION

- 34** *The gross salary for this position is NZ dollars \$3,141.66 per month. This is for 42 hours work per week.
The gross salary shall be according to the New Zealand regulations for Seamen. Effectively the New Zealand prescribed minimum wages per hour plus \$2 per hour during the term of this contract.*
...
- 35** *The crewman will be entitled to one month (24 days) paid leave per year worked. This equates to 2 days (two days) paid leave per month worked. Paid leave is payment when not working aboard vessel. Crewman will sleep aboard vessel when vessel is in port or such other accommodation arranged by the crew member. If the vessel is in port and the crewman is not working then this will be interpreted as paid leave.*

[19] On 24 January 2019 an amended statement of problem was lodged. The parties subsequently provided the Authority an ‘Agreed Statement of Facts’. That document provides some clarity regarding the “disparity” issue, as follows: HBS paid crew a flat rate of \$724.92 (gross) per week whether the crewmen worked in excess of, or below, 42 hours per week. Payments to reconcile the difference between standard weekly payments for 42 hours of work and actual hours worked is said to have occurred approximately 4-5 weeks after the relevant pay period in which work occurred. Those payments were referred to as “top-ups”. There are no payslips that reflect top-up payments.

The crewmen

[20] Each of the crewmen worked for HBS at different junctures in each of the years 2013-2015. They were all employed at some point during the period under review by the Labour Inspector, albeit five of the six crew members had an extended absence (between 3.5 and 7 months depending on the individual) from HBS over this timeframe.³

What records must an employer keep?

[21] The Act and the HA03 both place a requirement on an employer to keep, respectively, a wage and time record, and holiday and leave record. Both pieces of legislation state the records “*must be kept in a written form or in a form, or in a manner that allows the information in the record to be easily accessed and converted in a written form*”.

³ Above, pg 455

[22] While the nature of information that must be kept in the separate records varies, the Act at s 130(1)(g), and at s 81(2)(c) of the HA03, each require an employer to keep records that show, in the case of every employee employed by the employer, “*the number of hours worked each day in a pay period and the pay for those hours*”.

[23] Section 130(1B) of the Act and s 81(3A) of the HA03 both provide almost identical limited modifications to the mandatory requirement to record daily hours in a pay period, as follows:

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 [the requirement to keep a recording showing the number of hours worked in a day in a pay period and the pay for those hours] if those usual hours and pay are stated in—

- (a) the wages and time record; or
- (b) the employment agreement; or

...

[24] At 130(1C) of the Act and s 81(3B) of the HA03 the legislation provides:

... 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.

[25] Despite the provisions concerning “usual hours”, s 130(1D) and s 81(3C) each state, that an 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.

[26] Section 4B(1) of the Act states “An employer must keep records in sufficient detail to demonstrate that the employer has complied with minimum entitlement standards.

[27] Relevant to this matter, s 81(2) of the HA03 further requires the holiday and leave record to show:

...

- (d) the employee’s current entitlement to annual holidays:
- (e) the date on which the employee last became entitled to annual holidays:

...

- (g) the dates on which any annual holiday ... has been taken:
- (h) the amount of payment for any annual holiday ... that has been taken:
- (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 a public holiday:
- (k) the date on which an employee became entitled to any alternative holiday:
- ...
- (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):

The claims

[28] The Labour Inspector alleges HBS has breached its statutory obligations concerning the crewmen, as follows;

TIME RECORDING

HBS failed to record the number of hours worked each day in a pay period and the pay for the hours, pursuant to the Act at s 130(1)(g), and s 81(2)(c) of the HA.

ANNUAL HOLIDAYS and HOLIDAY PAY

- (i) If annual holidays were not taken by crewmembers and employment ceased:
 - HBS failed to provide final holiday pay when employment came to an end (at s 27 HA03) or;
 - HBS failed to record the amount paid as holiday pay upon termination of employment, (at s 81(2)(p) HA03) or,
- (ii) Where it is found annual leave was taken by crewmembers:
 - HBS failed to record the dates on which annual leave has been taken (at s 81(2)(g) HA03), and

- HBS failed to record the amount paid for this leave (at s 81(2)(h) HA03);
- (iii) If employment of crewmen was continuous for 12 months (or longer):
- HBS failed to record entitlement to annual holidays (at s 81(2)(d) HA03); and
 - HBS failed to calculate holiday pay (in accordance with s 24(2) HA03).

PUBLIC HOLIDAYS and ALTERNATIVE HOLIDAYS

- (i) HBS failed to record the dates of any public holidays on which crew members worked (at s 81(2)(i) HA03);
- (ii) HBS failed to pay time and a half for work done on a public holiday (at s 50 HA) or failed to record the payment (at s 81(2)(i) HA03);
- (iii) HBS failed to pay for the public holiday in the pay period the public holiday occurred (at s 55 HA03);
- (iv) HBS failed to provide payment for an alternative holiday not taken before employment ended (at s 60 HA) or failure to record the amount paid on termination of employment (at s 81(2)(p) HA03).

LABOUR INSPECTOR REQUIREMENTS

HBS failed to provide all wage and time records, and all holiday and leave records, “forthwith” to the Labour Inspector (at s 229(2) of the Act);

[29] The inspector seeks payment of minimum entitlements due, and penalties for the above breaches.

Did HBS fail to record the number of hours worked each day by each crew member in a pay period and the pay for those hours?

[30] For HBS, the primary records regarding the number of hours worked by crew members were monthly timesheets. These were filed out either by crewman and/or the skipper of the vessel on which crewmen worked.

[31] Having reviewed the material and evidence provided by the parties, I must find HBS has not met the statutory requirement to record the number of hours worked each day by each crew member in a pay period and the pay for those hours, for the following reasons:

[32] Firstly and primarily, the timesheets setting out the number of hours worked each day in a pay period are deficient. Over the course of his investigation the Labour Inspector identified 22 incorrectly recorded monthly timesheets⁴ (out of the 48 provided on 6 June 2017⁵), where weekday and date combinations for the relevant month that crew members are recorded as working do not exist in the calendar month of the year purported. Further, some timesheets stated a month in which work is said to have occurred but did not record the year. In many instances the days of the month recorded as worked do not align with any of the calendar months in either of the years under review.

[33] The following example illustrates the issue: A timesheet setting out the hours of work for a crew member over December 2015 records he worked 20 days over the month beginning Monday 2 December 2015.⁶ The 2nd of December in 2015 occurred on a Wednesday. None of the day/dates the employee is said to have worked in December 2015 correspond to calendar dates available in December 2015. The inspector canvassed whether the timesheet had been mistakenly recorded and that the timesheet documented hours of work performed in December 2016, but there is no Monday 2 December in 2016 either. I note also HBS's "summaries" sheet records the crew member as working 183 hours over December 2015⁷ whereas the December 2015 timesheet records the crew member worked 198 hours in December 2015.⁸

[34] HBS provided no substantive explanation to the inspector in respect of the inconsistencies in the 22 monthly timesheet records compared to calendar dates.

[35] At the Authority's investigation meeting, Mr de Terte accepted that the timesheets were inadequate. Despite this concession HBS submits that cl 34 of the employment agreement provides a gross monthly salary in exchange of 42 hours of work per week. It submits the contractual provision effectively sets crew members' "usual hours" in a weekly

⁴ Agreed bundle, pages 14, 16, 17, 19, 20, 31, 32, 33, 35, 37, 38, 40, 43, 45, 52, 53, 54, 56, 58, 59, 60, 62.

⁵ Agreed bundle, at tab 5

⁶ Agreed Bundle, at p 19 t

⁷ Above at pg 466 and in the reworked summary documents sent by HBS to the inspector on 9 November 2017.

⁸ Above n6, at pg 19

pay period, and in this way, as is permitted under that Act at s 130(1B)(b) of the Act and by the HA03 at s 81(3A), the employment agreement is consistent with the obligations at s 130(1)(g) and s 81(2)(c).

[36] HBS's position on this issue is untenable. The employment agreement is silent as to the number of hours a crew member is required to work "*each day*", and I am unwilling to accept an agreement to a 42 hour working week reasonably implies a 6 hour working day over a 7 day week. I note there is an earlier contrasting statement by HBS to the Labour Inspector that "*8.4 hours are a standard day [for crewmembers]*".⁹

[37] It is plain from the timesheet records that the hours of work for crew members were highly variable; there are no discernible pattern of hours or days of work which could be objectively characterised as "usual hours" for the crewmen. It follows that cl 34 does not meet the criteria of "usual hours" as defined at s 130(1B) and s 81(3A) of the Act and HA (respectively).

[38] HBS is unable to characterise the pattern of work performed by the crewman as falling within circumstances that permit an employer to avoid strict compliance with the obligation to keep a record the number of hours worked each day in a pay period and the pay for the hours. In any event, HBS however was required to accurately document any additional hours worked beyond those expressed in the employment agreement to enable it to comply with its general obligation under s 4(B1) of the Act. The monthly timesheets do not satisfy that obligation.

[39] HBS has not complied with its obligations under the Act at s 130(g) to record the number of hours crewman worked each day in a pay period where the days recorded do not exist and the pay period is unclear. I am unwilling to consider the breach is minor or technical failing.

Claims regarding annual holidays

[40] The claims concerning annual leave centre around whether annual holidays were taken and paid for correctly during employment or on termination, and whether HBS properly recorded those matters including "entitlement" to annual holidays.

⁹ Above at 421

[41] Several claims have made in the alternative where the parties dispute whether; annual leave was taken by crewman over the course of employment, and the length of employment and therefore “entitlement to annual leave”.

Did HBS fail to pay annual holiday pay on termination of employment, or if leave was taken during employment, did it fail to record when annual leave was taken and the amount paid for the leave?

[42] The inspector alleges HBS failed to record the amount paid as holiday pay upon termination of employment of employment. In the alternative, if annual holidays were taken by crew members the inspector says HBS breached its obligation to record dates on which it occurred as required by the HA03 at s 81(1)(g) or the amount paid for the holiday(s).

[43] The first issue to be determined whether crew men took annual holiday leave during their employment.

[44] HBS says each crew member took their full entitlement to annual holidays over the course of employment. It submits no holiday pay was owed to the crewmen on termination of employment and it was not required to record that matter.

[45] The onus lies with HBS to establish accruing holiday days were taken by crewman. It refers to cl 35 of the employment agreement, and says the effect of the provision is that, as a matter of agreement, when crew members were onshore and not working they received paid leave. I note the timesheets record only one vessel returning to port over the entire period in review, and then, only on two occasions in March/April 2016 (5 or 6 days in total).¹⁰

[46] HBS goes on to say that paid leave days can be identified in the timesheets where no hours of work are recorded against a particular day. Mr de Terte’s written statement refers to the number of days not worked by each crew member over the material period. This evidence was produced to demonstrate that crew members received pay for a greater number of days than could feasibly be accrued as annual holiday days over the material timeframe. In this way HBS submits the obligation regarding the provision of annual holidays was met in substance. HBS further says all weekly payslips record the crew members as having received proportional salary inclusive of days not worked, being where crew were on paid leave.

¹⁰ Agreed Bundle, pg 24.

[47] The Labour Inspector observes that cl 35 of template employment agreement makes no mention that wages paid whilst vessels are in port and crew members are not working, will be treated as annual holidays under the HA03. He further says there is nothing in the timesheets over the review period that records any particular day(s) as an annual holidays for crew members, nor do the payslips assign wages for payment of annual holidays.

[48] Setting aside the question as to the accuracy of the timesheets, there is no meaningful way to determine, amongst days recorded as not worked by crew, which of these are rest days or annual holiday days. Mr de Terte accepted under questioning that he was unable to locate any particular days recorded in the timesheets on which annual holidays occurred as compared to days in which crewmen were not actively required to work but were paid. That difficulty highlights the importance to keeping of accurate minimum entitlement records so that an employer, an employee and/or a Labour inspector or the Authority can properly assess whether minimum entitlements have crystallized or been expended. I agree with the submission on behalf of the inspector that the absence of recorded hours worked on a day by an employee does not constitute a “record” of annual leave taken for the purposes of s 81(1)(g) HA03.

[49] There is some further evidence that suggests HBS itself did not view paid leave days as annual holidays. Towards the end of the Labour’s Inspector’s inquiry, HBS furnished several documents that recorded a calculated sum owed to crewman as annual holiday pay.¹¹ The sum was equal to 8% of individual gross earnings for each crew member over the material time frame. Those calculations were irrelevant and unnecessary if HSB considers annual holidays had been taken and paid for during employment.

[50] I am unwilling to conclude annual holidays were taken by the crew members where there is no records of when annual holidays occurred, or records of payment for annual holidays.

[51] Pursuant to s 27 HA03, the crewman were entitled to be paid for annual holidays in accordance with s 23 or 24 the HA03, each of which sets out a formula to calculate payment of holiday pay (depending on the duration of each individual’s employment) when their employment terminated.

¹¹ Above, pg 409, 411, 413.

[52] There is a peripheral dispute in respect of whether crewman were employed by HBS for more than 12 months despite a hiatus from work for 5 of the 6 crewman over the material period. That issue brings in question whether employment terminated (for 5 of the crewman) when they departed to Indonesia, and a new period of employment began when they returned to New Zealand, or whether employment was continuous where no new employment agreements were supplied and terms and conditions remained the same.

[53] Mr de Terte's explanation that the duration of employment for crewman depended on the length of individual work visas is persuasive, where there can have been no guarantee new work visas would be issued.

[54] I accept crew members returned to, and resided in, Indonesia when visa's expired. I am satisfied employment terminated for each crew member when he left New Zealand at some time in the second half of 2016. Employment for the sixth employee ended on the last day of the period under review.

[55] There is no dispute that final holiday was not paid, under s 27(2) HA03, in the pay period that relates to the employee's final period of employment. It follows that there are no records reflecting payment of annual leave on termination of employment.

Did HBS fail to record ongoing entitlements to annual leave and calculate payment of annual leave pursuant to s 24 HA03 where employment exceeds 12 months?

[56] Section 16(1) of the HA03 provides "*At the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays.* An employer's obligation, at s 81(d) HA03, to keep a record showing "*the employee's current entitlement to annual holidays*" correspondingly arises.

[57] Calculation of payment for annual holidays where an employee has an "entitlement" to paid annual holidays is set out at s 24 HA03 and provides a different methodology to that prescribed at s 23 HA03 which concerns payment of annual holidays where employment ceased within 12 months.

[58] Two the six crewmen, Mr Suwoto and Mr Fahruri, worked for HBS for more than a year before the review period commenced on 1 November 2015 and continued to do so into the period under review. Both individuals were entitled to annual leave at the beginning of

the review period. Another crewman, Mr Faud, became entitled to annual holidays during the review period.¹²

[59] HBS was unable to account to the Labour Inspector the quantum of “entitlement to annual holidays” for these three crew members. That failure breaches s 81(2)(d) of the HA03.

[60] Having found payment of holiday pay was not made to crew members when employment ended, it follows that calculation of payment of holiday pay for employees employed for more than a year was not undertaken in accordance with s 24 of the HA03. This breach is also established.

Claims concerning the recording of, and payment for, public holidays and alternative holidays

Records

[61] HBS relies on the monthly timesheets to say it kept a record of the dates of, and payment for any public holidays in a written form or in a manner that allows the information in the record to be easily accessed and converted into a written form.

[62] I am not persuaded that the timesheets provided a satisfactory written “record” of the dates in which crew members worked a public holiday where I find many timesheets unreliable. An example is as follows; two separate timesheets record different employees working Friday 6 February 2017 (Waitangi day).¹³ Waitangi day did not occur on a Friday in 2017. Neither employee was paid for the day in circumstances where both were said not be to New Zealand.

[63] Where timesheets do accurately record work performed by various crew members on a public holiday, HBS accepts the payslips do not identify a wages component corresponding to any particular public holiday. I am not satisfied HBS held a record of the dates of, and payments for, any public holiday on which the employee worked. That failure is a breach of 81(2)(i) HA03.

Payment of public holidays and alternative holidays

¹² Agreed Bundle, pg 455

¹³ Agreed Bundle, page 52 and 53

[64] HBS now accepts it did not pay each of the crewman time and a half for public holidays worked. This failure breached s 50 HA03. It follows, that full payment for a worked public holiday did not occur in the period for which payment as due. Nor did HSB pay crewmen for an alternative holiday (having worked a public holiday) before the date on which employment ended. This failure is a breach of s 60 HA03.

Has HBS breached obligations at s 299(3) to provide wage and time records and holiday and leave records “forthwith”?

[65] The Labour Inspector claims HBS failed to provide all wage and time records, and all holiday and leave records, “forthwith”.

[66] HBS’s denies the claim. It says it provided its wage and time records as requested. It accepts there was occasional delays in the provision of its records but says these were permitted where concessions regarding timing for the provision of documentation were given by the Labour Inspector.

[67] Section 229(1)(c) of the Act sets out the powers of Labour Inspectors. Amongst other things, a Labour Inspector may require production of, and to inspect, and take copies of:

- i wage and time records or holiday and leave records;
- ii any documents which record remuneration of any employee;
- iii any other document that the Labour Inspector reasonably believes may assist in determining whether the requirements of the Acts referred to in section 223(1) have been complied with:

[68] Section 229(2) of the Act gives the Labour Inspector: as follows:

Where any Labour Inspector makes any requirement of any request of an employer under subsection (1)© or subsection (1)(d), that employer must **forthwith** comply with the requirement. (*my emphasis*)

[69] Section 229(3) allows a penalty to be imposed on an employer that, without reasonable cause, fails to comply with a Labour Inspector’s requests under s 229(1)(c).

[70] Forthwith is defined in the Oxford Dictionary (online edition) as meaning “*immediately, at once, without delay or interval*”.

[71] I have some doubts that the “concessions” HSB reports as having been given by the Labour Inspector can be fairly characterised as an agreement to waive HBS’s statutory

obligation to provide the requested records forthwith, but it is not necessary to determine matter.

[72] As already noted HBS has referred to the contents of the template employment agreement as forming its wage and time records and holiday and leave records. The document was not provided to the Labour Inspector during the course of his inquiries.

[73] Mr de Terte says the focus was placed on providing the specific records recorded in the Notices and he did not turn his mind to the employment agreements as a relevant record.

[74] The explanation does not absolve HBS from its omission to have supplied the employment agreement if it formed an integral part of HBS' wage and time records and holiday and leave records as is now claimed.

[75] I note also that payslips concerning one of the crewmembers was not furnished until after the Labour Inspector lodged the statement of problem with the Authority.

[76] On balance I find HBS failed to provide wage and time records, and holiday and leave records to the Labour Inspector "forthwith". These failings are each a breach of s 229(1)(c).

Summary of findings regarding arrears

[77] In its statement in reply, HBS provided, for each crew member; a summary of hours worked/paid; a calculation of annual holiday pay based on 8% of gross earnings, as well as the quantum of outstanding sums on for statutory holidays and alternative holidays. These sums (a total of \$25,002.34) must be paid as follows:

Mr Misyono - \$5,937.03

Mr Suwoto \$8,844.10

Mr Sunastro \$7,416.56

Mr Carsardi \$2,804.65

Should penalties be awarded?

[78] HBS has breached statutory obligations under the Act and the HA03. For reasons on which I will further expand later in this determination, I find those failures warrant the imposition of penalties.

[79] In determining the total quantum of a penalty award I have given consideration to; the objects of both the Act and HA03; the factors set out at s 133A of the Act, and guidance given by the Court.¹⁴

The nature and number of breaches

[80] I have identified 9 separate (and ongoing) omissions/failures by HSB that have resulted in 41 separate breaches of either the Act or the HA03 as follows. HBS:

1. failed to keep compliant wage and time records by failing to record the number of hours worked each day in a pay period and the pay for the hours for all 6 crewmen, pursuant to s 130(1)(g) of the Act;
- 2 - 4 did not to keep compliant holiday and leave records by;
 - failing to record the number of hours worked each day in a pay period and the pay for the hours for all 6 crewmen, pursuant to s 81(2) of the HA03; and
 - failing to record entitlement to annual holidays for 3 crewmen; and,
 - failing to record dates; on which all 6 crewman worked on public holidays and the payment of the public holiday in accordance with s 81(2)(i) HA03,
- 5 failed to calculate and pay annual holidays at the conclusion of employment for all 6 crewmen pursuant to s 27(2) HA03;
- 6 failed to pay time and a half for public holidays worked by all 6 employees pursuant to s 50 HA03;
- 7 failed to pay alternative holidays at the conclusion of employment for all 6 employees pursuant to s 60 HA03;
- 8 - 9 failed, to provide “forthwith” to the Labour Inspector, pursuant to s 229(3);
 - wage and time records, and
 - holiday and leave records.

[81] The number of breaches leads to a potential liability of \$820,000 in penalties, where both the Act and the HA03 allow for a maximum penalty of \$20,000 for a single breach to be imposed. However, the Court has observed it may be appropriate to consider whether

¹⁴ See *Borsboom v Preet PTV Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] nZEmpC 132; *A Labour Inspector v Daleson Investments Ltd* [2019]NZEmpC 12

multiple but materially identical breaches arising from a particular course of conduct should be treated as a global single breach (noting care should be taken to ensure a global approach does not result in an artificially low penalty, and that a global approach to breaches of different statutory provisions should not be applied).¹⁵

[82] For the purpose then of assessing the number of breaches for which penalties should be considered in this matter I find the following:

- (a) the failure to keep proper wage and time records under s 130 of the Act, and the failure to keep proper holiday and leave records under s 81 HA03 should each be viewed as a separate single breach: \$40,000 in total;
- (b) the failure to calculate and pay annual holidays at the conclusion of employment in breach of s 27 of the Act should be assessed as a single breach: \$20,000 in total;
- (c) the failure to pay time and a half for public holidays worked pursuant to s 50 HA03 should be assessed as a single breach; \$20,000 in total;
- (d) the failure to pay alternative holidays at the conclusion of employment pursuant to s 50 HA03 should be assessed as a single breach; \$20,000 in total;
- (e) the failure to provide complete wage and time records, and complete holiday and leave records requested by the Labour Inspector pursuant to 229(3) be each be viewed as a separate breach; total \$40,000 in total.

[83] The provisional total maximum liability is \$140,000 for the above breaches.

The severity of the breaches; whether the breaches were intentional, inadvertent or negligent.

[84] HBS has failed to pay minimum entitlements to employees, failed to keep mandatory records, and failed to provide these to the Labour Inspector in manner prescribed under the Act. Each of these are significant failings.

[85] The breaches regarding wage and time and holiday and leave records cannot, objectively, be regarded as anything other than intentional. The time frame over which the Labour Inspector sought records concerned the period immediately after an investigation into

¹⁵ Above at fn.14. *Borsboom v Preet and Nicholson v Ford*

HBS employment practices had been concluded and an Improvement Notice setting out HBS' obligations regarding record keeping had been issued. Amongst other things that Notice refers also to HBS' agreement to:

“...review its recording systems of time, wages, holiday and special leave entitlements and maintain those systems in to ensure total compliance with minimum employment standards.”

[86] Given HSB' heightened understanding of minimum standards and its commitment to the Labour Inspector, it is difficult to understand why subsequent compliance with minimum standards did not occur. HBS's explanation that a payroll employee erred in ensuring minimum entitlements were calculated and paid is not supported by corroborative evidence and I do not accept it.

[87] Further, in respect of the Labour Inspector's inquiries in 2017 I find HSB must have known that the documents sought by the Labour Inspector were deficient.

[88] I am unwilling to find HSB deliberately mislead the Labour Inspector. But it was largely silent towards the Labour Inspector's expressed queries and concerns about the documents, for example: HBS provided no response to the Labour's Inspector's requirement for holiday and time records until 6 months' after the initial request, by which point HSB had reconstructed its records. The introduction of the template employment agreement more than 15 months after the Labour Inspector requested information further highlights HBS' failure to comply with the Labour Inspector's requests. I find HBS' overall approach to the provision of records seriously hampered the Labour Inspector's ability to discharge his duties and properly assess HSB's compliance with minimum entitlements.

[89] Next, there is no evidence of complaints from crewmen about payment of minimum entitlements and the Labour Inspector's inquiry in 2017 was not triggered by concerns about this issue. I find it likely that the crew men were likely unaware of their entitlements in circumstances where the nature of the work meant they had little opportunity to learn of their rights and, where work visas depended on HSB's endorsement the imbalance of power would have acted as a disincentive to exercise those rights. The crewmen were without doubt vulnerable, and I view HBS's failure to ensure entitlements were paid as opportunistic at best and exploitative at worst.

[90] The circumstances in which HBS approached its obligations to pay minimum entitlements to employees, and keep and supply mandatory records is unacceptable by any reasonable standard and I am unwilling to reduce penalties regarding its actions in this regard.

The nature and extent of any loss or damage or gains made because of the breaches

[91] HBS's failure to pay annual, public and alternative holiday payments when they became due deprived the crewmen of income they were entitled to receive. I find also HSB's approach to the Labour Inspector's investigation resulted in a significant delay to the conclusion of his investigation.

Previous conduct

[92] There is no evidence of penalties awarded against HBS for breach of employment standards before this determination. But it is clear from the Improvement Notice issued in November 2015 that HSB had been previously found to be non-compliant with s 130 of the Act and s 81 of the HA 2003 prior to the events that have led to the claims currently before the Authority. That matter is a serious, and aggravating, feature which points away from a reduction to the quantum of penalties.

Steps taken to remedy the breaches or mitigate the effects of the breaches

[93] In the 3-4 months before the Authority's investigation meeting HSB conceded some monies, largely concerning payment of statutory holidays and alternative holidays were owed to crewmen. It says it has been unable to locate the crewmen in order to pay the outstanding sum.

[94] HBS' willingness to remedy its failures regarding payment of minimum entitlements, albeit at a late hour, warrants a modest reduction to the total penalty quantum.

Deterrents

[95] The imposition of penalties for breaches of employment standards provides both a specific and general means of deterrence.

[96] By the time the Authority's investigation meeting proceeded HSB had ceased to operate. The use of penalties as a method to deter HSB from future non-compliance with minimum standards is not a factor in the circumstances. However I remain of the view that

an order for penalties against HBS provides an appropriate general deterrence to other employers who may be non-compliant with employment minimum standards.

Ability to pay

[97] No evidence was produced regarding HSB's ability to pay and therefore I am unable to assess this factor when setting a final quantum as to penalties.

Proportionality and consistency of penalty awards in similar cases

[98] An assessment as to proportionality requires consideration as to whether the provisional penalty is proportionate to the seriousness of the breaches and the harm caused by them.

[99] I have found that the breaches are serious. HSB was aware of its employment standards obligations, it failed to ensure these were complied with. That failure hindered the progression of the Labour Inspector's investigation. The crewmen were vulnerable migrant workers. The harm caused as a result of the recording failures means crew members were deprived of financial entitlements and the sum of money owed to individual crewman would likely be significant to each of them.

[100] I find however that the imposition of \$140,000 would be significantly disproportionate where the sum of arrears owed is approximately \$25,000.

[101] Taking all the above factors into account I consider an appropriate penalty in the circumstance of this case is \$40,000. This sum is within the range of penalties ordered by the Court and the Authority.

Orders

[102] Hawkes Bay Seafood Ltd is ordered to pay:

- (a) arrears of \$25,002.34 to the Labour Inspectorate to be held in trust on behalf of the crew members who are owed monies. That sum is to be distributed to individual crew members in accordance with [77] above once those individuals are located.
- (b) pay total penalties of \$40,000 for the breaches of the Employment Relations Act 2000 and Holidays Act 2003. This sum must be paid by it into the Crown Bank account.

Costs

[103] Hawkes Bay Limited is further ordered to pay the Labour Inspectorate \$4,500 in costs; the sum equal to the current daily tariff for a full day investigation meeting by the Authority plus a filing fee of \$71.56.

Michele Ryan
Member of the Employment Relations Authority