

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 379
3051112

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

AND DANSAN INVESTMENTS
LIMITED TRADING AS SAAJ
INDIAN CUISINE
First Respondent

AND MARY GEORGE VARGHESE
Second Respondent

AND SHEIK ABDUL KADER
Third Respondent

Member of Authority: Nicola Craig

Representatives: Sarah Blick, counsel for the applicant
Sheik Abdul Kader in person and for the first
and second respondents

Investigation Meeting: 11 December 2019

Submissions [and further At the investigation meeting from both parties
information] Received: 13 December 2019, 4 March and 19 June 2020
from the applicant

Date of Determination: 21 September 2020

DETERMINATION OF THE AUTHORITY

- A. Dansan Investments Limited (Dansan) breached the Minimum Wage Act 1983, the Holidays Act 2003 and the Wages Protection Act 1983.**
- B. Dansan is to pay the following sums to the Labour Inspector within 28 days of the date of this determination, to be forwarded to Suman Devi:**
 - (i) \$19,610.50 gross for minimum wage arrears;**
 - (ii) \$6,950.25 gross for annual holiday pay;**
 - (iii) \$860.48 gross for public holiday pay;**
 - (iv) \$1,452.00 gross for alternative holiday pay;**
 - (v) \$3,000 net for a premium paid for employment; and**
 - (vi) Interest on the above sums as set out in the determination.**
- C. Both Mary George Varghese and Sheik Abdul Kader are persons involved in some of the breaches by Dansan.**
- D. Within 42 days of the date of this determination if Dansan has not paid, Ms Varghese is to pay to the Labour Inspector the sums under paragraph B (i) to (iv) above and interest on those amounts as set out in the determination.**
- E. The following penalties are to be paid to the Labour Inspector within 28 days of the date of this determination, with 30% to be forwarded to Ms Devi and the remainder paid to the Crown account:**
 - (i) \$11,000.00 by Dansan;**
 - (ii) \$4,500.00 by Ms Varghese; and**
 - (iii) \$600.00 by Mr Kader.**
- F. Costs are reserved and a timetable set if the parties are unable to reach agreement.**

What is the Employment Relationship Problem?

[1] A Labour Inspector of the Ministry of Business Innovation and Employment (MBIE), Weiran Liu, brings a claim against Dansan Investments Limited (Dansan or the company) trading as Saaj Indian Cuisine, Mary George Varghese and Sheik Abdul Kader. Ms Varghese and Mr Kader are business partners being the two directors and shareholders of Dansan, as well as personal partners.

[2] Dansan operated two small Saaj Indian Cuisine restaurants in Auckland. Suman Devi worked for Dansan, mainly at its Henderson store in a front of house role. Ms Varghese was the other person usually working at that restaurant.

[3] The claim covers breaches of the Minimum Wage Act 1983 (MW Act), the Holidays Act 2003 (H Act) and the Wages Protection Act 1983 (WP Act). The Labour Inspector

claims that Ms Varghese and Mr Kader are persons involved in some or all of the breaches by Dansan, under to s 142W of the Employment Relations Act 2000 (the ER Act). Orders are sought that Ms Varghese should pay the arrears to the extent Dansan does not pay.

[4] The statement in reply filed by the respondents does not respond directly to each paragraph in the statement of problem but indicates that the respondents dispute some or all of the claims against them.

[5] In the lead up to an investigation meeting the Authority was informed that Ms Varghese and Mr Kader had moved overseas. Mr Kader indicated that he would attend the investigation meeting on behalf of the respondents. At the meeting Mr Kader accepted that there may be some holiday pay owing to Ms Devi but disputed other claims.

[6] The investigation meeting was held on 11 December 2019. I heard evidence from Ms Devi, the Labour Inspector Ms Liu, Ms Devi's flatmate and Mr Kader.

[7] After the investigation meeting counsel for the Labour Inspector Sarah Blick informed the Authority that Ms Liu wished to clarify aspects of the calculations relied on in the claim. Ms Liu filed an affidavit confirming those clarifications. The Authority also asked the parties to provide further submissions in light of the Employment Court's *Southern Taxis* and *Fernando* decisions.¹ Submissions were received on behalf of the Labour Inspector but not the respondents.

[8] This determination does not record everything received but states findings, expresses conclusions and specifies orders made as a result.²

What was Dansan's earlier involvement with the Labour Inspectorate?

[9] Dansan came to the attention of the Labour Inspectorate in 2015 following a complaint by a former employee about a failure to pay minimum entitlements. In November 2015 the Inspectorate commenced an investigation, which identified breaches of the ER Act and the H Act. An improvement notice was issued on 28 October 2016. The Inspectorate decided that the notice was not fully complied with. Dansan had not maintained compliant wage and time records, or holiday and leave records. Arrears had not been paid.

¹ *Southern Taxis Ltd v A Labour Inspector* [2020] NZEmpC 63, now under appeal. *Labour Inspector v Fernando* [2020] NZEmpC 66.

² Section 174E of the ER Act.

[10] The Inspectorate and Dansan entered into an enforceable undertaking on 5 April 2017. The undertaking was complied with.

[11] On 11 January 2018 Dansan was again brought to the attention of the Inspectorate by a complaint from Ms Devi. She started working for Dansan after the Inspectorate had interviewed employees in late 2015.

What did the Labour Inspector's investigation regarding Ms Devi entail?

[12] Ms Devi told the Labour Inspector that she had not received wage payments for her actual working hours, along with not getting paid for public holiday, alternative holiday or annual holiday entitlements. Ms Devi also reported that she had been asked by the directors to pay \$6,000 for assistance in supporting her work visa, although she had actually only paid \$3,000 cash to Ms Varghese.

[13] The Labour Inspector interviewed Ms Varghese and Mr Kader, as well as requesting records and employment agreements from them. Ms Devi's flatmate was interviewed about her knowledge of the days and times which Ms Devi worked for Dansan. The Inspector's work was peer reviewed by another inspector and Ms Devi asked further questions.

[14] On 13 December 2018 the Labour Inspector provided Ms Varghese and Mr Kader with findings of her investigation.

Does Dansan owe Ms Devi minimum wages?

[15] The Labour Inspector claims that Ms Devi was not paid at the minimum wage for all the hours she worked, based on work of considerably more hours than were specified in the employment agreement. The agreement provided that Ms Devi was to work Monday to Sunday with a minimum of 35 hours per week.

[16] The respondents assert that Ms Devi only worked 35 hours per week which she was paid for. They say no arrears are therefore owed.

[17] Ms Varghese would usually inform Ms Devi by text about the hours she was required to work. There was no system for recording Ms Devi's actual hours of work. Her bank account records show her often being paid the same amount for several weeks in a row, although sometimes a higher or lower figure would be paid. Ms Devi says she usually worked

six days a week, which fits with Mr Kader's evidence that he did not require his staff to work seven days a week.

[18] When interviewed by the Labour Inspector, Ms Devi said that she started her work as a part-time employee around 7 January 2016. She initially worked about 20 to 30 hours per week but from late September 2016 that started increasing to between 45 and 50 hours. This was when she received a new work visa which tied her to working for Dansan. Prior to that Ms Devi had been on an open work visa, permitting her to work for any employer.

[19] The Labour Inspector received from Dansan wages and time records for Ms Devi. There are no working hours recorded per day or per week from April 2017 to February 2018. The method of calculation of wages is also not recorded.

[20] Ms Devi provided text messages between herself, Ms Varghese and Mr Kader, which show her being required to work variable days and hours. She was unable to obtain text messages for the whole of her time with Dansan.

[21] Ms Devi provided her Auckland Transport (AT) Hop card records from 2015 to 2018. They show the card being used on regular times and dates to tag on buses near Ms Devi's home and off near the Henderson restaurant. Many of the times and dates shown on the card records are consistent with the agreed dates and times of work shown in texts between Ms Devi and Ms Varghese.

[22] Ms Devi's flatmate reports Ms Devi normally leaving home for work around 10:00 or 10:30 am and working six days a week. The flatmate picked up Ms Devi from the restaurant at 9:00 or 9:30 pm most nights.

[23] Based on the texts, Hop card records and flatmate's statement, the Labour Inspector concluded that for a period Ms Devi worked between 40 and 65.5 hours per week but based on PAYE records, was only paid for between 28 and 33 hours per week.

[24] When the actual hours worked were divided by the minimum wage, the Inspector concluded that the minimum wage was not paid. She calculated the amount of wages owing on the basis of the minimum wage as \$19,610.50 gross.

[25] Mr Kader does not accept the Inspector's calculation of work hours. He questioned the use of Hop card records when Ms Devi could have been going anywhere. Ms Varghese,

who worked directly with Ms Devi, did not attend the investigation meeting nor give evidence in any other way.

[26] Clearly the Hop card records at most show someone with Ms Devi's card getting the bus from near her home to near the Henderson restaurant on particular dates and times. The person could have gone somewhere other than the restaurant. However, I found Ms Devi a credible witness. The Hop card records show regular and frequent patterns of the same bus trip. Ms Devi's flatmate was also a credible witness and her evidence supported the Labour Inspector's assessment of Ms Devi's hours.

[27] Also the Labour Inspector has not claimed for time before or after the restaurant's hours of operation. Where there were no Hop card records the Labour Inspector used the minimum 5.5 daily work hours from Ms Devi's employment agreement.

[28] Having examined the documentary evidence and heard the witnesses, I am find that Dansan owes minimum wage payments to Ms Devi and that the Labour Inspector has accurately calculated what is owing. I order Dansan to pay to the Labour Inspector the sum of \$19,610.50 gross within 28 days of the date of this determination, to be forwarded to Ms Devi.

Does Dansan owe Ms Devi holiday pay?

[29] Ms Devi took a holiday in February 2017 but I conclude that she was not paid for that time. There is no indication of her taking any other holidays. Ms Varghese accepted during her interview with the Labour Inspector that she did not pay Ms Devi holiday pay on termination. Mr Kader accepted at the investigation meeting that Ms Devi might be owed holiday pay.

[30] I conclude that Dansan did not make any holiday payments to Ms Devi during her employment and accept the calculations from the Labour Inspector as to the amount owing. I order Dansan to pay to the Labour Inspector the sum of \$6,950.25 gross as annual holiday pay within 28 days of the date of this determination, to be forwarded to Ms Devi.

Does Dansan owe Ms Devi public holiday entitlements?

[31] Ms Devi claims to have worked at the restaurant on some public holidays but not receive payment of time and a half for those days nor alternative holidays. The Labour

Inspector analysed the Hop card records and copies of text messages and concluded work had occurred on 13 public holidays.

[32] The flatmate says Ms Devi was required to work on public holidays and that she dropped her at the restaurant around 10:00 or 10:30 am and picked her up around 9:00 or 9:30 pm on those days as there were no suitable buses on public holidays. Mr Kader and Ms Varghese confirmed to the Labour Inspector that Ms Devi worked on some public holidays in the Christmas and New Year periods.

[33] The directors told the Labour Inspector that Dansan employees got paid their normal wage payments when they worked on public holidays but were given one and a half additional days off which were paid out when employment ended. However, there is no record in the wages nor holiday records of Ms Devi receiving any alternative holiday entitlements or such payments on termination.

[34] I find that Ms Devi was not paid by Dansan the half-time loading on public holidays she worked nor did she receive alternative days off during her employment or pay for them on termination. I order Dansan to pay to the Labour Inspector the following sums within 28 days of the date of this determination, to be forwarded to Ms Devi:

- (a) \$860.48 gross as public holiday pay; and
- (b) \$1,452.00 gross as alternative holiday pay.

Was a premium sought and paid?

[35] The Labour Inspector alleges that in 2016 a premium was sought and paid to Ms Varghese on behalf of Dansan and that in 2018 Mr Kader sought a premium on behalf of the company although nothing was paid.

2016

[36] In September 2016 Ms Devi was applying for a new work visa. Ms Varghese asked her to pay \$6,000 for supporting the work visa application. Ms Devi said that she did not have the money at the moment. Ms Varghese replied that if she wanted to keep her work visa she needed to pay.

[37] Ms Devi then borrowed \$3,000 from her flatmate. The two went to an ATM machine, where the flatmate withdrew \$3,000 which she gave to Ms Devi. The money was repaid, with bank accounts recording deposits as “DEVI SUMAN borrow money”.

[38] Initially Ms Devi did not tell her flatmate what the money was for but a couple of weeks later said she needed it for her visa. She reported that Ms Varghese had told her not to tell anyone.

[39] Ms Varghese told Ms Devi to place the cash in the till at work when finishing work for the evening, which Ms Devi did. She checked the till the next day and the \$3,000 cash was gone.

2018

[40] On 3 January 2018 Mr Kader contacted Ms Devi, asking her to pay additional money. She replied by text message:

Hello Boss. Before I have money in my account. On 1 Jan I sent all money to my mummy because I borrowed money from my uncle now I have left in my account only \$700. I will pay you slowly I hope you understand my condition. Thanks.

[41] Mr Kader replied:

...you would have done this long time back almost one and half year now, you promised we helped you but you don't bother, this I should not reminded you but it was to be done from your side...

Mary reminded you before also but you dint bother.

[42] Ms Devi responded:

Boss. When I came to NZ I spent lots of money I have still pending loan I already given you \$3,000 that time I also borrowed money from my friends. I told madam also I can't afford more than that. Madam knows that time my mother was sick and still paying my mother expenses. Boss please try to understand...

Conclusion on premiums

[43] More than one reason for asking for money was advanced by Dansan. In February 2018 Ms Varghese advised the Labour Inspector that Mr Kader had asked Ms Devi by phone to pay a \$5,000 deposit before making an application for her work visa. She said that Mr Kader did this because Ms Devi processed cash in the restaurant and had no references from her previous employer. Ms Varghese said that Ms Devi had then paid her \$3,000 in cash, as

part of what was requested. She said that Mr Kader had then phoned Ms Devi asking for the remaining \$2,000 to be paid.

[44] Mr Kader advised the Labour Inspector that he knew his wife had asked Ms Devi to pay a \$5,000 deposit in case she left the job after receiving her work visa also because she had no references and was dealing with cash at the restaurant. He confirmed that Ms Devi had paid \$3,000 to his wife and he himself asked her to pay \$2,000.

[45] At the investigation meeting Mr Kader described the money as being a bond or deposit which was refundable after two years. When asked at the investigation meeting why Ms Devi had to stay two years, Mr Kader described bad experiences with staff not continuing work once they had got their work permits. He did not want that experience repeated and so took the deposit.

[46] Mr Kader acknowledged that Dansan did not pay any of the cost for employees to get their work visas. He agreed that in order to keep her job Ms Devi had to pay the money and accepted that the \$3,000 was paid by Ms Devi to Dansan.

[47] Ms Liu understood that in terms of the WP Act, this was seeking money for employment. The job would not be given if the “deposit” was not paid.

[48] During the investigation meeting Mr Kader attempted to distinguish the amount sought as a deposit, rather than a premium. He says that the market rate for a work permit, in the sense of employer’s support to enable the employee to get a work visa, is in the \$10,000 to \$20,000 range. He asked why he would ask for so little (as \$5,000 or \$6,000) if that was what he was seeking payment for.

[49] Mr Kader’s argument about a deposit was not assisted by the failure to pay Ms Devi back \$3,000 once she finished work around two years’ work for Dansan without incident.

[50] I conclude that Ms Varghese and Mr Kader both asked Ms Devi for money in relation to supporting her work visa application and continuing to employ her. She required a work visa in order to continue working. Those actions amounted to breaches of s 12A of the WP Act under which no employer or person engaged on behalf of the employer shall seek or receive any premium in respect of any person’s employment. Both directors sought a premium and Ms Varghese received one in 2016 on behalf of Dansan.

[51] Premiums paid may be recovered in the Authority, including by the Labour Inspector on behalf of the employee.³ I order Dansan to pay to the Labour Inspector the sum of \$3,000.00 being the premium received, within 28 days of the date of this determination, to be forwarded to Ms Devi.

Should the directors be liable for arrears?

[52] The Labour Inspector seeks an order under s 142Y of the ER Act that Ms Varghese pay arrears and money owing to Ms Devi to the extent Dansan is unable to do so. The arrears sought regarding Ms Varghese relate to the minimum wage, various holiday entitlements and the 2016 premium. At the investigation meeting Ms Blick informed the Authority that no arrears were sought against Mr Kader.

[53] Ms Varghese was directly involved in the breaches by aiding and abetting Dansan in terms of the failure to pay the minimum wage, annual and public holiday pay, provide alternative holiday entitlements along with the seeking and receipt of the 2016 premium payment. Ms Varghese was aware of Ms Devi's work hours and days as she told her what times to work. Ms Varghese was also involved in calculating wages as well as arranging the payments to Ms Devi. Ms Varghese asked for the payment of the premium to Dansan in 2016 and received the money. She was a person involved as defined in s 142W of the ER Act.

[54] Under s 142(2)(b) of the ER Act arrears may only be recovered against persons involved in breaches where the employee's employer is unable to pay the arrears.

[55] It has on occasions been the Authority's practice to make an order for payment by an employing company and then require an applicant to return to the Authority once the company does not pay, for an order under s 142Y of the Act against individual people involved in a breach. However, the *Fernando* decision specifies that the cause of action against people under s 142Y arises when the employment standards are breached, namely default in the payment of wages and holiday occurred.⁴ This is usually well before the claim is filed in the Authority.

[56] There has been a default in payment by Dansan to Ms Devi of wages and other money owed to her. I have allowed the company 28 days to make payment. In the event that it fails

³ Section 12A(2) of the WP Act.

⁴ *Labour Inspector v Fernando* [2020] NZEmpC 66 at [38] and [42].

to do so, Ms Varghese shall have 42 days from the date of this determination to pay \$28,873.23 gross to the Labour Inspector to be forwarded to Ms Devi.

[57] I see the premium situation as different. A repayment order is required and so the cause of action for the premium against Ms Varghese does not arise, in my opinion, until there has been a failure by Dansan to pay in accordance with this determination and so I make no order under s 142Y at this point regarding the premium.

What about interest and instalments?

[58] The Labour Inspector seeks interest. I order Dansan to pay interest as follows calculated using the Civil Debt interest calculator:

- (a) on \$3,000, being the premium, from 1 October 2016 (shortly after the premium was received) until payment; and
- (b) on \$28,873.23, being the wages and H Act arrears, from 8 February 2018 (when the last weekly pay was received) until payment.⁵

[59] As referred to in the Court's decision in *Fernando*, I exercise my discretion under cl 11 of Schedule 2 of the Act to award interest against Ms Varghese. Ms Varghese is ordered to pay interest on the \$28,873.23 sum, if it is not paid by Dansan, within 42 days of the date of this determination.

[60] Her liability regarding the premium has not yet arisen and so no order is made regarding the interest on that sum.

[61] Mr Kader should not be liable for any interest. The Labour Inspector has not attempted to argue that he was a person involved in the breaches other than regarding seeking the 2018 premium. As payment was not made in 2018, there is nothing to award interest on as regards Mr Kader.

[62] Mr Kader raised concerns about himself and Ms Varghese not having the money to pay amounts awarded. I gave him the opportunity at the end of the investigation meeting to

⁵ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

file any material about payment by instalments but nothing was received. Therefore I have not ordered any instalment arrangement.

What penalties are sought against Dansan?

[63] Penalties are claimed against the company for the statutory breaches and I consider Dansan should pay penalties. These actions were deliberate and came after Dansan's previous involvement with the Labour Inspectorate including the issuing of an improvement notice and an enforceable undertaking.

What penalties are sought against the directors?

[64] The penalty claims against Ms Varghese and Mr Kader are based on them being people involved in Dansan's breaches, in accordance with s 142W of the Act. Where the employer is a company as here, only officers of the company may be treated as persons involved in a breach.⁶ As directors of Dansan, Ms Varghese and Mr Kader are officers of Dansan and so that requirement is met.⁷

[65] As outlined above, I have found that Ms Varghese was a person involved in the wages and holiday entitlements breaches and 2016 premium. In terms of Mr Kader, he was knowingly concerned in the seeking of a premium from Ms Devi in 2018.

[66] As Ms Varghese and Mr Kader are people involved in Dansan's breaches, they are liable for penalties under s 142Y of the Act on application of the Labour Inspector.

[67] However, in order that penalties be imposed the position currently under the *Southern Taxis* and *Toulson v Potter* Court decisions is that proof of intentional purposeful actions is required.⁸

[68] Here the evidence establishes that Ms Varghese was directly responsible for calculating and arranging pay and maintaining Ms Devi's wages and holiday records. The Labour Inspector had earlier informed Ms Varghese of the requirement to pay holiday pay on

⁶ Section 142W(2) of the Act.

⁷ Section 142W(3)(a) of the Act.

⁸ *Southern Taxis Limited v A Labour Inspector* [2020] NZEmpC 63 at [187] and *Toulson v Potter* [2020] NZEmpC 98 at [15].

termination of employment along with the obligations regarding additional pay and alternative days for work on public holidays.

[69] The necessary element of intentional purposeful action in terms of the arrears issues and requesting and receiving the 2016 premium is established.

[70] Mr Kader acted in an intentional and purposeful manner when he sought payment from Ms Devi of the 2018 premium.

[71] In *A Labour Inspector and Sampan Restaurants Limited v Yu Ouyang* the Court found it a mistake to conclude that the actions of an employer and the person involved are necessarily the same.⁹ The employer has liability for a breach of the relevant employment standard itself whereas the actions of the person involved are collateral to the breach.

[72] On that basis, even though it may be difficult to differentiate in cases like this one where the director's actions can be perceived as being those of the company, I must consider Dansan's actions separately from Ms Varghese's and Mr Kader's actions.

[73] The Labour Inspector has recognised the differences in their roles. The penalties against Ms Varghese are sought under all the same provisions as the penalties sought against Dansan, except for the 2018 premium. By contrast, the only penalty sought against Mr Kader relates to the 2018 premium issue under the WP Act.

[74] I consider that both Ms Varghese and Mr Kader should be required to pay penalties. This is a situation involving deliberate actions which, particularly as regards Ms Varghese, occurred over an extended period.

What penalty should Dansan pay?

[75] I consider the statutory factors in s 133A of the ER Act, along with the guidance provided by the Court in *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.¹⁰ A table setting out the steps is appended to this determination.

⁹ *A Labour Inspector and Sampan Restaurants Limited v Yu Ouyang* [2018] NZEmpC 69 at [17].

¹⁰ *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

Statutory consideration 1 – the Object of the Act

[76] The objects of the Act include acknowledging and addressing the inherent inequality of power in employment relationships, as well as promoting the effective enforcement of employment standards.¹¹

[77] The actions here all involve undermining employment standards. This was a situation involved a particular inequality of power, with Ms Devi being a migrant whose ability to work and thus remain in New Zealand was dependent was an employer-sponsored temporary work visa entitling her to work only for Dansan.

Statutory consideration 2 – the Nature and Extent of the Breach

[78] The breaches all relate to one employee and are of:

- (i) s 6 of the MW Act, failing to pay the minimum wage for every hour worked;
- (ii) ss 21 and 24 to 27 of the H Act, failing to pay annual holidays;
- (iii) s 50 of the H Act, failing to provide public holiday entitlements;
- (iv) ss 56 and 60 of the H Act, failing to provide alternative holiday entitlements; and
- (v) s 12A of the WP Act, seeking and receiving payment of a premium.

[79] The breaches of the MW Act being failure to pay the minimum wage each time payment was due, should be globalised into one breach. Similarly the breaches of provisions of the H Act should be globalised into one breach as they all relate to the failure to pay annual holiday pay.

[80] I accept Ms Blick's submission that the two premium instances should be treated as separate as they are remote in time from each other being two years apart and each involve a different director.

¹¹ Employment Relations Act, s 3(a)(ii) and (ab).

[81] Therefore the breaches become one breach under the MW Act, three under the H Act and two under the WP Act. The maximum penalty available for the breaches is \$120,000, being \$20,000 per breach.

Statutory consideration 3 –intentional, inadvertent or negligent

[82] I find that the breaches were intentional. There were repeated failures to pay the minimum wage. As regards holiday pay, Dansan accepted it was owing but decided not to pay until the Authority process was complete. The request for a premium was repeated. I also take into account that Dansan had previous involvement with the Labour Inspectorate.

Statutory consideration 4 – nature and extent of any loss or damage

[83] I now look at the severity of the breaches. The unpaid arrears total \$23,873.23 and a \$3,000 premium was paid. Ms Devi lost the use of these sums to which she was entitled. Much of it was due during the course of her employment, which finished over two years ago. In the scheme of Ms Devi's modest pay, these are large amounts of money. Dansan benefited financially by retaining the money for an extended period.

Statutory consideration 5 – steps to mitigate effects of the breach

[84] There is no evidence of Dansan attempting to mitigate the effects of the breaches. On the contrary, once it became aware after receiving the Labour Inspector's correspondence that holiday pay was owing, it chose not to pay straightaway, preferring to leave Ms Devi without her entitlements until the Authority concluded the matter.

Statutory consideration 6 – circumstances of the breach and any vulnerability

[85] As noted above, Ms Devi is a migrant and dependent on her employment, making there a considerable power imbalance between her and Dansan.

Statutory consideration 7 – previous conduct

[86] Dansan and its owners had prior involvement with the Labour Inspectorate resulting in enforcement action being taken in the form of an improvement notice and an enforceable undertaking. Some of the breaches there were the same as those in the present case.

Additional consideration 8 – deterrence

[87] There is a need to bring home to Dansan and its owners, as well as other employers in the hospitality industry, that operating a business which provides less than minimum entitlements to employees and requiring them to pay to secure work, will not be tolerated by the Authority.

Additional consideration 9 – culpability

[88] I consider the severity of the breaches, along with aggravating and mitigating factors under this head to establish a provisional starting point for the penalty. Aggravating factors here include Ms Devi's loss of use of money she was entitled to, Dansan's benefit in retaining that money and Ms Devi's vulnerability.

[89] A starting point of 50% of the total maximum penalty is appropriate for each of the minimum entitlement breaches and the 2016 instance of seeking and receiving a penalty. The 2018 seeking of a penalty without receipt warrants 25% of the penalty for that breach.

[90] As regards ameliorating factors, Dansan and its directors promptly provided documents requested by the Labour Inspector as part of her investigation. Ms Varghese and Mr Kader participated in interviews. My overall impression is that they were relatively frank in those interviews, admitting for example that money had been requested from Ms Devi and in one instance received. Mr Kader returned to New Zealand to participate in the investigation meeting. I make a 50% deduction for these factors.

Additional consideration 10 – consistency

[91] Many of the Authority's penalty decisions involve breaches in relation to a group of employees and so are not directly comparable to this case. However, penalties are often globalised where the same breaches have occurred regarding several employees. I have considered comparable cases and make a 20% reduction.

Additional consideration 11 – ability to pay

[92] Mr Kader spoke of the closure of the Dansan operation not resulting in much income for himself, Ms Varghese and their children. The Labour Inspector considered that a modest

discount for inability to pay could be applied. I conclude that a deduction of 25% should be made.

Additional consideration 12 – proportionality of outcome

[93] This is considered below when comparing penalties for all three respondents.

What penalties should Ms Varghese and Mr Kader pay?

Ms Varghese

[94] The first statutory consideration referred to above as regards Dansan also applies to Ms Varghese.

[95] As regards the nature and extent of the breaches, Ms Varghese was involved in five breaches as globalised above; all breaches bar one of the premium breaches. At the maximum penalty for an individual of \$10,000 per breach, this totals \$50,000.

[96] Statutory considerations two to seven as discussed above also apply to Ms Varghese. As a half owner of the business she must be taken to have benefited considerably from money not paid to Ms Devi and the premium received from her.

[97] Regarding additional consideration 8, I regard there as being a need to deter Ms Varghese from any such future conduct. Given her direct involvement in and instigation of the breaches I assess her as also being culpable to a level of 50%, the same as Dansan.

[98] Ms Varghese is entitled to deductions totalling 70% for her co-operation with the Labour Inspector and of consistency. I also deduct 25% regarding her financial position.

Mr Kader

[99] The first statutory consideration applicable to Dansan also applies to Mr Kader. He is accused of only being involved in one breach; the premium sought in 2018. He thus faces a maximum penalty of \$10,000. Similar factors regarding the remaining statutory considerations apply to Mr Kader although he was only directly involved with one breach.

[100] Mr Kader also needs to be deterred. He was only involved in one breach but the seeking of payment for a job is a serious matter. Consistency with other Authority determinations suggest that a smaller reduction should be made as regards the premium

penalty. I conclude that a 60% reduction should be made for ameliorating factors. I also make a reduction of 25% for the financial circumstances.

What is the proportionality of penalties?

[101] I now look at proportionality between Dansan and the two directors and as regards the amounts outstanding. As the operator of the restaurant where Ms Devi mainly worked, Ms Varghese has a very high level of involvement in the company's actions. However, Parliament has set the penalties for individuals at half the rate for companies and those pursued under s 142 of the Act as people involved, will always be individuals.

[102] Standing back and looking at all the factors and considering whether the provisional penalties are right in all the circumstances, I conclude that find that a reduction is needed for Dansan and Ms Varghese but not for Mr Kader.

[103] The following penalties are ordered to be paid to the Labour Inspector within 28 days of the date of this determination:

- (a) \$11,000 by Dansan;
- (b) \$4,500 by Ms Varghese; and
- (c) \$600 by Mr Kader.

[104] The Labour Inspector considers it appropriate for some or all of the penalties to go to the employee under s 136 of the Act but did not wish to comment on the appropriate percentage. I conclude that Ms Devi should receive a portion of the penalties. The Labour Inspector shall forward 30% of the penalties received to Ms Devi with the remaining sums received to be put into the Crown account.

Costs

[105] The Labour Inspector has been successful in this case and seeks costs. Costs are reserved. The parties are encouraged to reach an agreement to resolve costs. If they are unable to do so the Labour Inspector shall have 28 days from the date of this determination to file a memorandum seeking costs. The respondents will then have 14 days from receipt to file a memorandum in response.

[106] The Authority operates a notional daily tariff as regards costs which usually provides a starting point, with adjustments being considered upwards or downwards. The tariff for a one day investigation meeting is \$4,500.

Nicola Craig
Member of the Employment Relations Authority

Appendix - Penalties

First respondent: Dansan Investments Limited		
Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to pay minimum wage	1 x \$20,000	\$20,000
Failure to pay annual holiday pay	1 x \$20,000	\$20,000
Failure to pay public holiday pay	1 x \$20,000	\$20,000
Failure to pay alternative holiday pay	1 x \$20,000	\$20,000
Seeking and receiving premiums	2 x \$20,000	\$40,000
	Subtotal	\$120,000
Step 2(a) — Aggravating Factors as a proportion of maxima in Step 1		
Failure to pay minimum wage	50% x \$20,000	\$10,000
Failure to pay annual holiday	50% x \$20,000	\$10,000
Failure to pay for public holiday pay	50% of \$20,000	\$10,000
Failure to pay alternative holiday pay	50% of \$20,000	\$10,000
Seeking and receiving a premium (2016)	50% of \$20,000	\$10,000
Seeking a premium (2018)	25% of \$10,000	\$5,000
	Subtotal	\$55,000
Step 2(b) — Ameliorating factors (reducing aggravating factors subtotal of \$55,000)		

First respondent: Dansan Investments Limited		
Less 70% of above subtotal	Subtotal	\$16,500
Step 3 — Respondent's Financial Circumstances		
Less 25% of above subtotal	Subtotal	\$12,375
Step 4 — Proportionality		
Adjusted downwards	TOTAL	\$11,000

Second respondent – Mary Varghese		
Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to pay minimum wage	1 x \$10,000	\$10,000
Failure to pay annual holiday pay	1 x \$10,000	\$10,000
Failure to pay for public holiday pay	1 x \$10,000	\$10,000
Failure to pay alternative holiday pay	1 x \$10,000	\$10,000
Seeking and receiving a premium	1 x \$10,000	\$10,000
	Subtotal	\$50,000
Step 2(a) — Aggravating factors as proportion of maxima in Step 1		
Failure to pay minimum wage	50% x \$10,000	\$5,000
Failure to pay annual holiday pay	50% x \$10,000	\$5,000
Failure to pay for public holiday pay	50% x \$10,000	\$5,000

Second respondent – Mary Varghese		
Failure to pay alternative holiday pay	50% x \$10,000	\$5,000
Seeking and receiving premiums	50% x \$10,000	\$5,000
	Subtotal	\$25,000
Step 2(b) — Ameliorating factors (reducing aggravating factors subtotal of \$25,000)		
Less 70% of above subtotal	Subtotal	\$7,500
Step 3 — Respondent’s Financial Circumstances		
Less 25% of above subtotal	Subtotal	\$5,625
Step 4 — Proportionality		
Adjusted downwards	TOTAL	\$4,500
Third respondent – Sheik Abdul Kader		
Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Seeking a premium	1 x 10,000	\$10,000
	Subtotal	\$10,000
Step 2 — Aggravating Factors as a proportion of maxima in Step 1		
Seeking a premium	20% x \$10,000	\$2,000

Third respondent – Sheik Abdul Kader

Step 2 — Ameliorating factors (reducing aggravating factors)

Less 60% of above subtotal

Subtotal

\$800

Step 3 — Respondent’s Financial Circumstances

Less 25% of above subtotal

Subtotal

\$600

Step 4 — Proportionality

No adjustment

TOTAL

\$600