

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 493
3084452

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	RAJ KIWI LIMITED First Respondent
AND	RAJASEKAR CHELLAPPA Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Greg La Hood, counsel for the Applicant Rajasekar Chellappa, representing the Respondent's
Investigation Meeting:	1 and 2 September 2020
Submissions and/or further evidence	31 August and 9 October 2020 from Applicant 23 October 2020 from the second Respondent
Determination:	1 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, a Labour Inspector, seeks remedies and penalties against the First Respondent Raj Kiwi Limited (Raj Kiwi) for breaches of:

- a) the employment standards legislation (payment of minimum wages, various Holidays Act entitlements and unlawful deductions from wages) by Raj Kiwi in respect of its employees;

- b) the Employment Relations Act 2000 (the Act), for failures to provide legally compliant employment agreements and keep and maintain accurate wage and time records;
- c) the Holidays Act 2003 (the HA) by failing to keep and maintain accurate holiday and leave records;
- d) the Wages Protection Act 1983 (the WPA) by unlawfully deducting wages payable to an employee.

[2] The Applicant further seeks that Mr Chellappa as the sole director and shareholder of Raj Kiwi be made liable for any outstanding arrears owing to the relevant employees and seeks that penalties be awarded against him and a person involved in the business.

Issues

[3] The issues for determination are:

- a) Did Raj Kiwi fail to provide Mr Berthelot, Ms Roche and Ms Kaur with compliant employment agreements in accordance with s 65 of the Act and if so, should a penalty be awarded against Raj Kiwi and Mr Chellappa as a person involved in the breaches of Raj Kiwi pursuant to ss 65(4) and 142X of the Act?
- b) Did Raj Kiwi fail to keep wages and time records for Mr Singh, Ms Kaur, Ms Malcow, Mr Camacho-Luengo, Ms Kaur and Mr Stevenson that complied with s 130 of the Act and if so, should a penalty be awarded against Raj Kiwi and Mr Chellappa as a person involved in the breaches of Raj Kiwi pursuant to ss 65(4) and 142X of the Act?
- c) Did Raj Kiwi fail to keep holiday and leave records for Mr Singh, Ms Kaur, Ms Malcow, Mr Eliseche, Mr Camacho-Luengo, Ms Kaur, Mr Muthu and Mr Stevenson that complied with s 81 of the HA and if so, should a penalty be awarded against Raj Kiwi and Mr Chellappa as a person involved in the breaches of Raj Kiwi pursuant to s 75(1) of the HA?

- d) Did Raj Kiwi fail to pay Mr Singh, Ms Kaur, Mr Eliseche, Ms Roche, Ms Kaur, and Mr Berthelot not less than the prescribed minimum rate of pay for each hour worked in breach of s 6 of the MWA and if so:
- (i) should Raj Kiwi be made to pay the minimum wage arrears due to the affected employees pursuant to s 11(2) of the MWA 1983;
 - (ii) should Mr Chellappa as a person involved in the breaches of Raj Kiwi be ordered to pay any unpaid wages to the extent that Raj Kiwi is unable to pay the arrears in wages pursuant to s 11AA(1) of the MWA; and
 - (iii) should a penalty be awarded against Raj Kiwi and Mr Chellappa as a person involved in the breaches of Raj Kiwi pursuant to s 10 of the MWA?
- e) Did Raj Kiwi make deductions from the wages payable to Mr Eliseche without the written request or consent of Mr Eliseche in breach of s 5 of the WPA, and if so:
- (i) should Raj Kiwi be made to pay the deductions made pursuant to s 11(1)(a)(i) of the WPA;
 - (ii) should Mr Chellappa as a person involved in the breaches of Raj Kiwi be ordered to pay any deductions to the extent that Raj Kiwi is unable to pay the arrears in wages pursuant to s 11A of the MWA; and
 - (iii) should a penalty be awarded against Raj Kiwi and Mr Chellappa as a person involved in the breaches of Raj Kiwi pursuant to s 13(1) of the MWA.
- f) Did Raj Kiwi fail to comply with public holiday entitlements pursuant to ss 49,50, 56 and 60 of the HA, and if so:
- (i) should Raj Kiwi be made to pay the unpaid holiday pay pursuant to s 77(1) of the HA;

- (ii) should Mr Chellappa as a person involved in the breaches of Raj Kiwi be ordered to pay any unpaid holiday pay entitlement to the extent that Raj Kiwi is unable to pay the arrears in holiday pay pursuant to s 77A (1) of the HA; and
 - (iii) should a penalty be awarded against Raj Kiwi and Mr Chellappa as a person involved in the breaches of Raj Kiwi pursuant to s 75(1) of the HA?
- g) Did Raj Kiwi fail to calculate and pay annual holidays correctly at termination for Mr Eliseche, Mr Berthelot, Ms Roche, Ms Kaur, Mr Singh, Ms Kaur in breach of s 23 of the HA and if so:
- (i) should Raj Kiwi be made to pay the unpaid holiday pay pursuant to s 77(1) of the HA;
 - (ii) should Mr Chellappa as a person involved in the breaches of Raj Kiwi be ordered to pay any unpaid holiday pay entitlement to the extent that Raj Kiwi is unable to pay the arrears in holiday pay pursuant to s 77A (1) of the HA; and
 - (iii) should a penalty be awarded against Raj Kiwi and Mr Chellappa as a person involved in the breaches of Raj Kiwi pursuant to s 75(1) of the HA?

The Authority's investigation

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[5] Raj Kiwi is a limited liability company that operates as a kiwifruit contractor, providing employees to kiwifruit orchards in the Bay of Plenty region. Mr Chellappa was the sole director and shareholder of Raj Kiwi from the date of incorporation on 26 October 2016 until 8 August 2019.

[6] The Labour Inspector's investigation was initiated as a result of complaints from six former employees of Raj Kiwi which were lodged with the MBIE service centre. The complaints were made by Mr Mandeep Singh on 11 February 2019, Mr Matias Eliseche on 16 May 2019, Mr Sergio Camacho-Luengo on 23 July 2019 and Mr Marin Berthelot, Ms Gaelle Roche and Mr Simon Solar on 1 August 2019.

[7] The complaints related to unlawful deductions and non-payment of minimum wage, public holiday entitlements and holiday pay. The Labour Inspector said this triggered the Labour Inspectorate's strategic focus of investigating possible migrant exploitation because all six former employees were migrant workers on temporary visas.

The Labour Inspector's investigation

[8] The Labour Inspector commenced an investigation into the complaints. She provided Raj Kiwi with notices requiring supply of a copy of Wages, Time and Holiday Records of a sample of employees on 6 June, 25 July, 26 July and 20 August 2019.

[9] The investigation included the following:

- (a) reviewing the employment agreements, wages and time and holiday and leave records provided by Raj Kiwi;
- (b) reviewing evidence provided by the complainants in respect to their employment relationship, hours worked and wages paid or outstanding;
- (c) interviewing Mr Chellappa, the complainants and other employees that were randomly selected as part of the investigation; and
- (d) communicating with Zespri and the managers of some of the orchards identified as being worked on by Raj Kiwi.

[10] On 8 August 2019 Mr Chellappa advised the Labour Inspector that Raj Kiwi had been sold and the records were no longer in his possession. The Labour Inspector said she made a number of unsuccessful attempts to contact the new sole director and shareholder of Raj Kiwi, Mr Balbir Singh and said it is unclear if Raj Kiwi is still operating.

[11] The Labour Inspector said she did not receive any records for the employees sampled following the Notice to Produce dated 20 August 2019.

Investigation Conclusions

[12] Following her analysis of all the information the Labour Inspector concluded that the wages and time records and holiday and leave records provided for Raj Kiwi were not compliant. There was also a failure to provide the wages and time records and holiday and leave records for Mr Solar, Mr Berthelot and Ms Roche.

Investigation Report

[13] The Labour Inspector provided an investigation report for comment to Raj Kiwi and Mr B Singh by email on 11 October 2019. On 21 October 2019 Mr Chellappa responded maintaining that he had: "followed all process to meet my obligations in regards to all except two staff Gale and MARIN to whom I am morally committed to pay pending wages as soon I can afford to."

[14] The Labour Inspector said the investigation report was not altered as a result of Mr Chellappa's comments. The report was re-sent to Raj Kiwi, Mr Chellappa and Mr B Singh by email on 21 October 2019.

Failure to provide records

[15] It was found by the Labour Inspector that Raj Kiwi had entered into an employment relationship with Mr Solar, Mr Berthelot, and Ms Roche. Mr Solar appeared on the employee list provided to the Labour Inspector by email on 31 May 2019 by Mr Chellappa, and Mr Chellappa did not dispute that Mr Berthelot, Ms Roche and Mr Solar were employees during a telephone interview with the Labour Inspector on 5 September 2019, when the Labour Inspector said he referred to them as: "good workers".

[16] The Labour Inspector provided Raj Kiwi with a notice dated 20 August 2019 requiring supply of a copy of all employment agreements, wages, time, holiday and leave records and any other documentation which recorded the remuneration of Mr Berthelot, Ms Roche and Mr Solar. It was requested that the documents be provided no later than 5pm on 27 August 2019. The notice was also emailed to Mr Chellappa and Mr B Singh.

[17] The requested records were not received in the required timeframe and the Labour Inspector has not received the requested records to date. Raj Kiwi has not provided any cause for failing to comply with the requirement.

[18] The Labour Inspector noted the following:

- i. Mr Singh, Mr Eliseche, Mr Camacho-Luengo, Mr Berthelot and Ms Roche had all been offered employment with Raj Kiwi by Mr Chellappa;
- ii. Mr Eliseche reported that Mr Chellappa had offered him accommodation at Mr Chellappa's personal home and there was no discussion or agreement that rent would be charged;
- iii. Mr Singh, Mr Berthelot and Ms Roche had copies of their pre-employment application forms and signed employment agreements. Mr Chellappa had in each instance signed the agreements on behalf of Raj Kiwi;
- iv. Mr Eliseche said that he had not been provided a copy of his employment agreement despite multiple requests and Mr Camacho-Luengo said that he had not been offered an employment agreement;
- v. Mr Singh, Mr Berthelot and Ms Roche had kept a personal record of the hours they worked for Raj Kiwi, although Mr Singh had not recorded the hours for the period between September and October 2017 when he reportedly worked on contract rates in the kiwifruit orchards.

When these personal records were cross checked with the bank statements provided by the employees which covered their period of employment, the Labour Inspector noted that Raj Kiwi did not pay minimum wages into the employees accounts for all the hours the employees recorded as being worked, and the employees all reported not receiving any other form of payment for the hours which they had worked;

- vi. Mr Singh provided photographs of hand written records which he told the Labour Inspector Mr Chellappa had written to record the hours he (Mr Singh) had worked;

- vii. Mr Eliseche, Mr Camacho-Luengo, Mr Berthelot and Ms Roche told the Labour Inspector they had signed in and out on daily timesheets for Raj Kiwi. Mr Berthelot and Ms Roche said that on occasions Mr Chellappa would tell them not to worry about completing the timesheets;
- viii. Mr Camacho-Luengo said he could not recall the specific hours or days he had worked. He advised he had worked with Mr Berthelot and Ms Roche on occasion, but they had also worked on different days or at different orchards. This was corroborated by Mr Berthelot and Ms Roche;
- ix. The Labour Inspector said Mr Eliseche had clarified the days he worked for Raj Kiwi as being: week ending 24 March 2019 Monday, Tuesday, Thursday and Sunday; week ending 30 March 2019 Monday, Tuesday and Saturday; week ending 7 April 2019 either Monday and/ or Tuesday;
- x. Mr Eliseche and Mr Camacho-Luengo provided bank statements to the Labour Inspector in respect of their period of employment. Mr Eliseche's bank statement showed he was not paid wages by Raj Kiwi into his bank account. Mr Eliseche confirmed he only ever received \$100.00 in cash from Mr Chellappa during his first week of work and \$200.00 in cash from Mr Chellappa during his second week of work.

Mr Camacho-Luengo's bank statements showed he received wages from Raj Kiwi into his account. He reported not receiving any other form of payment for the hours he worked;

- xi. Mr Singh, Mr Eliseche, Mr Camacho-Luengo, Mr Berthelot and Ms Roche had kept What's App and / or text message conversations between themselves and Mr Chellappa. Some of these messages included Mr Chellappa directing them where and when to work, the employee complainants messaging Mr Chellappa their hours of work and discussing issues with their pay. Mr Chellappa was also recorded as having, on occasion, also made promises to rectify the issues raised;

- xii. Mr Eliseche, Mr Camacho-Luengo, Mr Berthelot and Ms Roche provided PAYE summary of earnings which showed that Raj Kiwi had not paid any PAYE in respect to their period of employment;
- xiii. Mr Singh provided PAYE summary of earnings which showed the first respondent had paid PAYE in respect to two payments during his period of employment;
- xiv. Mr Eliseche provided a photograph of a breakdown Raj Kiwi had written in respect of Mr Eliseche's wages due on termination which included deductions for rent, rides and cash advanced. Mr Eliseche advised the Labour Inspector that there had been no prior discussion or agreement that rent or car rides were an expense that would come out of his wages and he refused to accept the remaining \$54.11 of cash offered.

Stages in the investigation

[19] On 6 June 2019, 25 July, 26 July and 20 August 2019 the Labour Inspector emailed Mr Chellappa notices requiring Raj Kiwi to supply a copy of Wages, Time and Holiday records for the named employees.

[20] On 7 and 10 June 2019 Mr Chellappa emailed to the Labour Inspector records for some of the employees. After analysing the records emailed to her by Mr Chellappa, the Labour Inspector said she had emailed him on 17 June 2019 asking if Raj Kiwi had a record of the commencement and termination dates of employment, public holidays worked and unworked and any other wages and time record and holiday and leave record in accordance with s 130 of the Act and s 81 of the HA. She noted no records had been provided for Mr Singh and requested the information to be provided no later than 24 June 2019.

[21] On 26 June 2019 the Labour Inspector said she had emailed Mr Chellappa to follow up her earlier request because she had not received a response. Mr Chellappa replied saying he had been working in the field working for the previous three weeks and requested a two week extension which the Labour Inspector granted 5 July 2019.

[22] On 9 July 2019 the Labour Inspector telephoned Mr Chellappa because she had not received a response to her earlier request. Mr Chellappa advised he had been busy

and the Labour Inspector advised him to provide the information no later than 11 July 2019 confirming this by email.

[23] On 12 July 2019 Mr Chellappa emailed the Labour Inspector in response to her questions. He stated there was a record of commencement and termination dates but did not provide them. In terms of public holidays, he advised they: “*are off days*”. In regard to whether there were any other records, Mr Chellappa said: “*all records are in the office*”. In respect to Mr Singh, Mr Chellappa emailed a letter Mr Singh had signed on the company letterhead of Raj Kiwi, recording that “*Raj Kiwi Limited has followed compliance regulatory measure during my stay in company, all my fiscal matters are clear as of date 11/4/18.*”

[24] The Labour Inspector emailed Mr Singh on 17 July 2019 asking him to explain the document he had signed stating all fiscal matters were clear as of 11 April 2018. Mr Singh replied explaining he signed the document without reading it. He had met with Mr Chellappa because his wife had returned to India on holiday but had discovered on her arrival at the airport in India for her return flight to New Zealand that her visa sponsored by Raj Kiwi had been cancelled. Mr Singh said Mr Chellappa told him he needed his signature to start the process of clarifying things with the compliance officer.

Interview with Mr Chellappa

[25] On 19 July 2019 Labour Inspector accompanied by another Labour Inspector interviewed Mr Chellappa at the registered office of Raj Kiwi and recorded the meeting. They took photographs of records that could be located at the registered office for the sampled employees. The Labour Inspector after the discussion with Mr Chellappa and having examined the documents provided, emailed Mr Chellappa on 25 July 2019 with a second notice requiring wages, time and holiday and leave records.

[26] The Labour Inspector also made further enquiries with the former employees in relation to the evidence provided on behalf of Raj Kiwi.

[27] The Labour Inspector telephoned Mr Chellappa on 2 August 2019 to follow up the requested records which had not been received by 1 August 2019 as requested. An extension was granted upon request of Mr Chellappa.

[28] By 8 August 2019 the Labour Inspector had not been provided with the requested records and Mr Chellappa told her he intended giving the records to a lawyer, but did not disclose the name of the lawyer. As a result the Labour Inspector read Mr Chellappa a warning for obstruction.

[29] Mr Chellappa then advised he no longer had the records and had sold the business and would email the Labour Inspector with the details of the new owner.

New Owner

[30] The Labour Inspector ascertained from the Companies office website that the director of Raj Kiwi was now Mr Balbir Singh, and emailed him on 8 August 2019 advising him that Raj Kiwi was under investigation and provided the Notices to Supply which had not been complied with.

[31] On 15 August 2019 the Labour Inspector received further records for Mr Camacho-Luengo; and was advised by Mr Chellappa that in respect of Ms M Kaur, she never worked for Raj Kiwi.

Third Notice for Wages, Time and Holiday and Leave Records

[32] The Labour Inspector emailed Mr B Singh and Mr Chellappa on 20 August 2019 asking for further information and records.

[33] Requested records for Ms Roche, Mr Berthelot and Mr Solar were not received in the required timeframe nor had they been by the date of the Investigation Meeting.

[34] As Mr Chellappa had provided further information the Labour Inspector telephoned him on 5 September 2019 to clarify his role with Raj Kiwi. Mr Chellappa told her he was no longer involved with Raj Kiwi and the records were collected by Mr B Singh when the business sold. Mr Chellappa admitted to “running out of cash” and to having told Mr Berthelot and Ms Roche he would pay them once he got money.

[35] In regard to the employment agreements that were not signed Mr Chellappa told the Labour Inspector that he often gave the employee the signed copy and would keep a blank copy. On other occasions the employees would email that they agreed with the offer, but not sign the agreement. Where the payslips and bank statements

showed discrepancies, Mr Chellappa explained he had an office worker who may have entered the wrong data into flexitime but the bank payments were correct.

[36] The Labour Inspector made a further attempt to elicit a response from Mr B Singh.

[37] During the investigation the Labour Inspector investigated other avenues in an attempt to verify information and documents received. The steps included contacting the managers of a number of orchards, making a formal request to Immigration New Zealand; contacting Ms Sonia Duhan and her representative and obtaining the outcome of Ms Duhan's case against Raj Infotech Limited (a company of which Mr Chellappa was a director) in the Employment Relations Authority and receiving information from Ms Kaur and Ms R Kaur about their employment.

Investigation Conclusions

[38] Following her analysis of a significant volume of information the Labour Inspector found some discrepancies in the information gathered and received further clarification from the employees.

[39] On 11 October 2019 the Labour Inspector emailed an investigation report for comment to Raj Kiwi, Mr Chellappa, and Mr B Singh. This outlined the record keeping breaches and included schedules of arrears for Mr Singh, Mr Eliseche, Mr Berthelot, Ms Roche and Ms Kaur.

[40] Mr Chellappa responded on 21 October 2019 maintaining having: "followed all process to meet my obligations in regards to all except two staff Gale and Marin to whom I am morally committed to pay pending wages as soon I can afford to."

[41] The Labour Inspector did not alter the investigation report as a result of the comments received. She re-sent the report to Raj Kiwi, Mr Chellappa, and Mr B Singh by email on 21 October 2019.

[42] In November 2019 the Labour Inspector obtained formal witness statements from Mr Singh, Mr Eliseche, Mr Berthelot, Ms Roche and Ms Kaur. Mr Singh's witness statement was completed with the assistance of an interpreter.

The Labour Inspector's conclusion

[43] The Labour Inspector concluded that Raj Kiwi's had failed to keep and maintain compliant wages and time records and holiday and leave records as required and this had significantly hindered her ability to properly investigate and establish whether the employees had received their minimum statutory entitlements and, if not, what the quantum of arrears were owing to each employee.

[44] She said that her investigation was unnecessarily prolonged by the respondents failing to provide requested records altogether or failing to provide records by set or agreed deadlines. It was especially concerning that throughout the course of the investigation, the Labour Inspectorate continued to receive new complaints despite existing engagement with the respondents.

[45] The Labour Inspector said that the importance of wage and time records and their value in ensuring employees receive minimum employment entitlements was particularly highlighted to her during her investigation. She said that Raj Kiwi through Mr Chellappa had continually impeded the investigation meaning a likely deprivation to employees as a result of his conduct both before and during the investigation.

Did Raj Kiwi fail to provide Mr Berthelot, Ms Roche and Ms Kaur with compliant employments agreements in breach of s 65 of the Act?

[46] Ms Roche and Mr Berthelot provided evidence to the Authority and confirmed that they had been provided with a written employment agreement by Mr Chellappa, however these agreements do not contain a description of the work to be performed. I find they are in breach of s 65(2)(a)(ii) of the Act.

[47] During the Investigation Meeting Ms Kaur confirmed that she was provided with a written employment agreement dated 5 December 2017. However I find the agreement does not comply with s 65(2)(a)(iv) of the Act.

[48] Mr Chellappa's evidence was that he had provided the employment agreements, but did not deny the legislative breaches.

[49] I find that Raj Kiwi failed to provide Mr Berthelot, Ms Roche and Ms Kaur with compliant employments agreements in breach of s 65 of the Act.

Did Raj Kiwi fail to comply with a Notice to Produce wages, holiday and leave records?

[50] The Labour Inspector requested Raj Kiwi to produce wages, time and holiday and leave records in a Notice to Produce dated 20 August 2019. This was the third request to Raj Kiwi to provide the records.

[51] Raj Kiwi provided no wage, time and holiday and leave records for Mr Berthelot, Ms Roche and Mr Solar despite three requests to do so by the Labour Inspector.

[52] I find that Raj Kiwi failed to comply with the request from the Labour Inspector and this was in breach of s 130(1) of the Act.

[53] Raj Kiwi also failed to keep compliant wages and time record for Ms Kaur by failing to record the correct number of hours worked by her in September 2017 and February and March 2018. As a result the method of calculation of wages for her in that period was unclear.

[54] The same failures occurred in respect of Ms Malcow for November 2017 and there was no record of the piece rate for that period making the method of calculation unclear.

[55] Based on the records provided, I find that Raj Kiwi failed to provide wages and time records in breach of s 130(1)(g) and (h) of the Act, and this resulted in failures to pay employees correctly.

[56] Based on the records provided, I find that Raj Kiwi and Mr Chellappa also failed to keep a compliant Holiday and Leave record for Ms G Kaur, Mr Eliseche, Ms Malcow, Ms Kaur, Mr Stevenson, Ms R Kaur, Mr Camacho-Luengo and Mr Mutho in breach of s 81(2)(b), s 81(2)(p), s81(2)(g), s 81(2)(h), s 81(2)9k), and s 81(2)(l) of the HA.

Did Raj Kiwi fail to pay the minimum wage in breach of the MWA?

[57] The Labour Inspector has claimed arrears in respect of a failure by Raj Kiwi to pay the relevant minimum wage rate to Mr Berthelot, Ms Roche, Ms G Kaur, Mr M Singh and Ms R Kaur during the period they were employed by Raj Kiwi.

[58] Based on the records provided, I find that Raj Kiwi failed to pay the above named employees the relevant minimum wage in breach of the MWA.

Did Raj Kiwi fail to pay holiday pay in accordance with the HA?

[59] The Labour Inspector has claimed for arrears in respect of the failure to pay holiday pay upon termination of employment, for a failure to pay employees correctly for public holidays worked and alternative holidays, a failure to pay employees for holidays not worked which were otherwise working days. The affected employees were Mr Berthelot, Ms Roche, Ms G Kaur, Ms Kaur, Mr M Singh, Mr Eliseche, and Ms R Kaur.

[60] Based on the records provided, I find that Raj Kiwi failed to pay the above named employees the relevant minimum wage in breach of the MWA.

Did Raj Kiwi make unlawful deductions?

[61] Mr Eliseche said that Raj Kiwi deducted payments for rent and petrol from his final wages. He had not been informed that the deductions would be made and whilst the employment agreement he had with Raj Kiwi had a clause referencing deductions, it had been general in nature, and not referred to deductions for rent (being accommodation provided by Mr Chellappa) or petrol.

[62] The Labour Inspector submits that this clause was unenforceable for the purpose of the deductions made by Raj Kiwi due to its general nature and Mr Chellappa lacking authority to make the deductions.

[63] I find that Raj Kiwi made unlawful deductions from Mr Eliseche's final wages in breach of s5 of the WPA.

Submissions of the Labour Inspector

[64] Mr La Hood, counsel for the Labour Inspector, submits that the evidence provided by the witnesses questioned during the investigation Meeting was credible, reliable and supported the claims made by the Labour Inspector on their behalf.

[65] It is submitted that the evidence strongly supports Mr Chellappa as a person involved in the breaches committed by Raj Kiwi. He was the sole director and shareholder of Raj Kiwi, responsible for payment of wages, record keeping the

operation of the business, recruitment and the provision and negotiation of employment agreements.

[66] It is submitted that an order should be made against Mr Chellappa as a person involved in the breaches pursuant to s 142W, and an order made pursuant to s 142Y that Mr Chellappa is liable for outstanding arrears to the extent that Raj Kiwi is unable to pay.

Submissions of the First and Second Respondent

[67] Mr Chellappa, on behalf of the First and Second Respondents submits that all required procedures were followed, although he accepts that monies are owed to Ms Roche and Mr Marin.

[68] Mr Chellappa submits that as a new entrant to business of one year's standing he has tried to learn and process all legal requirements.

Remedies

[69] I have found that Raj Kiwi breached minimum standard legislation in respect of a number of its employees.

Arrears

[70] I order that Raj Kiwi make the following payments as set out below:

Mr Eliseche: total arrears of \$627.70 gross which includes:

- outstanding minimum wage arrears of \$558.98 pursuant to s 11(2) of the MWA and s 131 of the Act includes;
- Outstanding holiday pay of \$68.72 pursuant to ss 23 and 77 of the HA and s 131 of the Act

Mr Berthelot: total arrears of \$790.78 gross which includes:

- outstanding minimum wage arrears of \$734.55 pursuant to s 11(2) of the MWA and s 131 of the Act includes;
- Outstanding holiday pay of \$56.23 pursuant to ss 23 and 77 of the HA and s 131 of the Act

Ms Roche: total arrears of \$790.78 gross which includes:

- outstanding minimum wage arrears of \$734.55 pursuant to s 11(2)of the MWA and s 131 of the Act includes;
- Outstanding holiday pay of \$56.23 pursuant to ss 23 and 77 of the HA and s 131 of the Act

Ms R Kaur: total arrears of \$3,865.63 gross which includes:

- outstanding minimum wage arrears of \$630.00 pursuant to s 11(2)of the MWA and s 131 of the Act includes;
- Outstanding holiday pay of \$2,098.11 pursuant to ss 23 and 77 of the HA and s 131 of the Act
- Outstanding public holiday pay of \$1,137.52 in accordance with ss 55 and 77 of the HA and s 131 of the Act.

Ms G Kaur: total arrears of \$1910.83 gross which includes:

- outstanding minimum wage arrears of \$586.69 pursuant to s 11(2)of the MWA and s 131 of the Act includes;
- Outstanding holiday pay of \$530.60 pursuant to ss 23 and 77 of the HA and s 131 of the Act
- Outstanding public holiday pay of \$793.54 in accordance with ss 55 and 77 of the HA and s 131 of the Act.

Mr M Singh: total arrears of \$15,643.17 gross which includes:

- outstanding minimum wage arrears of \$13,044.94 pursuant to s 11(2)of the MWA and s 131 of the Act includes;
- Outstanding holiday pay of \$1,367.58 pursuant to ss 23 and 77 of the HA and s 131 of the Act
- Outstanding public holiday pay of \$1,230.65 in accordance with ss 55 and 77 of the HA and s 131 of the Act.

Should any penalties be imposed on the Respondents, and if so, what quantum?

[71] In *Nicholson v Ford* Chief Judge Inglis summarised a comprehensive list of relevant penalty consideration as being:¹

- a. The object stated in s3; and
- b. The nature and extent of the breach or involvement in breach;
- c. Whether the breach was intentional, inadvertent or negligent;
- d. The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;
- e. Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, and has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- f. The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- g. Whether the person in breach or the person involved in the breach has previously been found by the Authority or the Court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct;
- h. Deterrence, both particular and general;
- i. Culpability;
- j. Consistency of penalty awards in similar cases
- k. Ability to pay; and
- l. Proportionality of outcome to breach.

¹ *Nickolson v Ford* [2018] NZEmpC at [18].

[72] In *Preet* the Full Court of the Employment Court set out a four step process as helpful when addressing penalties:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[73] The Labour Inspector submits that the steps set out in the Employment Court in *Borsboom (labour Inspector) v Preet PVT Limited* and *Warrington Discount Tobacco Limited* are appropriate.²

Statutory Consideration 1 – the object of the Act

[74] The objects of the Act as set out in s3 of the Act are to (i) promote good faith in all aspects of the employment relationship, (ii) to promote then effective enforcement of employment standards, in particular by Labour Inspectors, and (iii) to acknowledge and address the inherent inequality of power in employment relationships,

Statutory Consideration 2 – the Nature and Extent of the Breach

Nature of the breaches

[75] There are 11 employees affected by Raj Kiwi's breaches of the legislation with a total of 42 separate resulting breaches.

² *Borsboom (labour Inspector) v Preet PVT Limited*.

[76] There are 10 employees affected by Mr Chellappa's breaches of the legislation with a total of 39 resulting breaches (noting that Mr Chellappa ceased to be a director of Raj Kiwi on 20 August 2019).

[77] The breaches are as follows:

- Breaches of s 6 of the Minimum Wages Act 1983 (the MWA) – a failure to pay employees at not less than the minimum rate of wages for all hours worked;
- Breaches of ss 49, 50, and 60 of the HA, - a failure to pay public holiday pay;
- Breaches of ss 23 and 27 of the HA – a failure to pay annual holiday pay;
- Breaches of s 81 of the HA – a failure to keep compliant holiday and leave records;
- Breaches of s 130 of the act – a failure to keep compliant wage and time records;
- Breaches of s 229 of the Act – failing to supply a copy of wages and time records to the Labour Inspector (Raj Kiwi only as the notice under s 229 was issued on 20 August 2020 and Mr Chellappa ceased being a director of Raj Kiwi on 8 August 2020).
- Breaches of s 65 of the Act – a failure to include all mandatory information in written employment agreements.
- Breach of s 5 of the WPA – a failure to obtain the necessary written consent from an employee for deductions from their wages.

[78] Apart from the breaches committed under s 229 of the Act, Mr Chellappa was a person involved in all the breaches committed by Raj Kiwi.

[79] There are 11 employees affected by the breaches committed by Raj Kiwi:

- Six failures to pay the minimum wage (Gaelle Roche, Marin-Victor Berthelot, Matias Eliseche, Gaganjeet Kaur, Mandeep Singh and Ranjit Kaur);
- Six failures to pay annual holiday pay the minimum wage (Gaelle Roche, Marin-Victor Berthelot, Matias Eliseche, Gaganjeet Kaur, Mandeep Singh and Ranjit Kaur);
- Three failures to pay the public holiday pay (Gaganjeet Kaur, Mandeep Singh and Ranjit Kaur);
- Three failures to pay unworked public holiday that was an otherwise working day (Gaganjeet Kaur, Mandeep Singh and Ranjit Kaur);
- Three failures to pay alternative holidays in termination of employment (Gaganjeet Kaur, Mandeep Singh and Ranjit Kaur);
- Eight failures to keep a holiday and leave record (Marin-Victor Berthelot, Matias Eliseche, Gaganjeet Kaur, Mandeep Singh and Ranjit Kaur, Sergio Camacho-Luengo, Brayden Stephenson and Emily Malcow);
- Three failures to provide wages and time records (Gaelle Roche, Marin-Victor Berthelot, and Gaganjeet Kaur)(Raj Kiwi only);
- Six failures to provide compliant employment agreements (Gaelle Roche, Marin-Victor Berthelot, and Gaganjeet Kaur);
- One unlawful deduction in relation to Matias Eliseche.

[80] The breaches and the maximum penalties are as set out in the attached table.

[81] The maximum penalties available for each offence committed by Raj Kiwi is \$20,000. There are 42 breaches resulting in maximum penalties of \$840,000.

[82] The maximum penalty available for each offence committed by Mr Chellappa is \$10,000. There are 39 offences resulting in maximum penalties of \$390,000.

Statutory Consideration 3 – Whether the breach was intentional, inadvertent, or negligent

[83] Intention is not necessarily about whether the party in breach was aware that it was breaching the law, but rather whether or not it acted intentionally in the sense of intending to do the act in question, or failed to take reasonable steps to fulfil its legal obligations.

[84] The Labour Inspector submits that the breaches were a result of Raj Kiwi's deliberate business decisions.

[85] In this case at the relevant time Mr Chellappa and Raj Kiwi were effectively one and the same because Mr Chellappa made decisions concerning the employment of the relevant employees, and implemented the business practices of Raj Kiwi.

[86] The Labour Inspector submits that it is also clear from the evidence that Mr Chellappa was aware that he owed wages to Mr Berthelot and Ms Roche, but failed to pay them, and only accepted that wages were owing to other employees after a long period of non-compliance and avoidant behaviour in respect of the investigation carries out by the Labour Inspector.

[87] Mr Chellappa and Raj Kiwi failed to keep accurate and compliant wage and time records and made an unlawful deduction from an employee's wages. The Labour Inspector submits that there was a linkage between the breaches, in that the breaches arose from Raj Kiwi's business practice of being dishonest about hours of work, without consideration for how it met its minimum wage and holiday pay obligations in respect of its employees. It is noted that Mr Chellappa has spoken about not paying employees because of his concerns over costs.

[88] Mr Chellappa has submitted that he believed statutory holidays were a mandatory day off for the employees, and did not have annual leave deducted but took time off which was not recorded. In addition he submits that all employees had 8% holiday pay included as a component in the pay.

[89] The records examined by the Labour Inspector during her investigation did not support these claims.

[90] On that basis I find that Raj Kiwi failed to take reasonable steps to fulfil its legal obligations.

[91] I find that the breaches were intentional because Mr Chellappa, and therefore Raj Kiwi at the relevant time, was aware that he had underpaid employees.

Assessment of the severity of the breaches

[92] The Labour Inspector submits that based on observations in *Preet* failures to pay minimum entitlements should be assessed at 70% because such failures have the potential to result in financial advantage to the employer, who received labour without having to fully and properly pay for that labour.³ It also reflects the direct adverse effect of underpayment on employees and their dignity and quality of life.

[93] In respect of failures to keep compliant records, the starting point is 50%.⁴

Statutory Consideration 4 – the nature and extent of any loss or damage

[94] As observed in *A Labour Inspector v Daleson Investments Limited*: “the affected employees lost the use of the money they were entitled to at the time he became due”.⁵

[95] In this case the employers comprised a number of employees who were deprived of wages during periods when they were vulnerable. This in turn impacted upon their immigration status, travel plans and employment opportunities.

[96] In these circumstances I consider the indicated starting points in *Preet* to be appropriate.

Statutory Consideration 5 – Steps to mitigate effects of the breach

[97] Despite assurances by Mr Chellappa on behalf of Raj Kiwi that arrears would be paid, they have not been. It is noted that Mr Chellappa took part in the Authority’s investigation and provided assurances that the arrears would be paid. This has resulted in more delay for the employees.

³ Note 2 *Preet* at [167] and [171].

⁴ Note 2 *Preet* at [173].

⁵ *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [31].

[98] The Labour inspector submits that a reduction of no more than 10% in respect of mitigating factors is appropriate at this stage.

Statutory Consideration 6 – Circumstances of the breach, and any vulnerability

[99] Employers in New Zealand are reasonably expected to know the law regarding employment provisions and minimum standards.

[100] The breaches by Raj Kiwi and Mr Chellappa occurred over a prolonged period. As already noted the affected workers are migrant workers and inherently vulnerable. Two of the employees, had visas tied to their employer, the other employees either had working holiday or partnership visas and were also vulnerable with limited options in respect of alternative employment and conditions on their visas.

[101] These vulnerable employees should have been able to expect to be treated fairly in accordance with the statutory requirements that govern the employment of persons in New Zealand.

[102] The experience at Raj Kiwi resulted in the employees having a poor experience in New Zealand and/or having to leave before they had intended to do. I find this is not acceptable behaviour on the part of an employer. It is deplorable that Ms G Kaur had her visa cancelled without notice by Raj Kiwi which resulted in her being unable to return to New Zealand from India. This was very distressing for her and had a significant effect on her relationships and her immigration status.

Statutory Consideration 7 –Previous Conduct

[103] Raj Kiwi has not previously appeared before the Authority.

Statutory Consideration 8 - Deterrence

[104] Raj Kiwi has breached minimum standards. I consider that there is a need to enforce to employers the employment standards they are required to meet and that minimum entitlements are non-negotiable.

Statutory Consideration 9 - Culpability

[105] The Labour Inspector submits that there are a number of factors which increase Raj Kiwi's culpability, including:

- a. Mr Chellappa was the decision-maker for Raj Kiwi;
- b. The number of affected employees;
- c. Raj Kiwi's desire to preserve its own financial position;
- d. The affected workers were migrant workers;
- e. Raj Kiwi's practice of deliberately denying access to wage and time records and employees having to record their own hours; and
- f. Raj Kiwi's misuse of power in the employment relationship by underpaying and deducting wages from vulnerable low-wage migrant employees with few options.

Statutory Consideration 10 - Consistency

[106] The Labour Inspector submits that the Court and the Authority have imposed relatively significant penalties in matters involving minimum wage and record keeping breaches and relatively small numbers of employees.⁶

[107] Whilst the provisional penalty sought by the Labour Inspector is rather high in comparison with similar cases, I take into consideration Mr Chellappa's level of business experience and awareness of compliance requirements, together with the vulnerability of the employees.

Statutory Consideration 11 –Ability to Pay

[108] The onus is on the employer to provide the Authority with up to date and accurate information about and financial inability to pay a potential penalty award.

⁶ *Preet* note 2 above.

[109] In this case Mr Chellappa as a person involved in the breaches has provided a bank statement showing payments from work and income New Zealand to him into an account with a total of \$14,732.22.

[110] There is no further evidence in relation to Mr Chellappa's financial circumstances, and I am aware that it is possible he may have assets, other sources of income or other financial information which would affect his ability to pay any penalty. In addition, I observe that although Mr Chellappa had sold Raj Kiwi and ceased to be a director, he remains as director of two other businesses listed on the Companies Office website.⁷ This is a matter of concern should those businesses have employees and Mr Chellappa has not appreciated the necessity of complying with the statutory employment requirements.

[111] The Labour Inspector submits that a reduction of 20% could be made under this head but not more as Raj Kiwi continues to operate and Mr Chellappa had, or ought to have had prior knowledge of the legislative requirements but decided not to implement compliant systems.

[112] I consider that a 20% reduction, but not more, is appropriate in the circumstances.

Additional consideration 12 – Proportionality of Outcome

[113] Mr Chellappa has submitted that he believed statutory holidays were a mandatory day off for the employees, and the two employees in question did not have annual leave deducted but took time off which was not recorded. In addition he submits that all employees had 8% holiday pay included as a component in the pay.

[114] The records examined by the Labour Inspector during her investigation and the evidence of the employees did not support these claims.

Impact of Stand Down Period

[115] With effect from 1 April 2017, employers who incur a penalty for breaches of employment law have faced a mandatory stand-down period preventing them from recruiting migrant labour.

⁷ Raj Infotech NZ Limited and Raj Security NZ Limited.

[116] An employer would however still be able to employ New Zealand citizens and those who have a permanent residence visa.

[117] The Labour Inspector submits that the imposition of any stand-down period on an employer from recruiting migrant labour is not a relevant consideration for the Authority in determining whether or not a penalty should be imposed or the quantum of that penalty.

[118] It is submitted that the imposition of any stand-down by Immigration New Zealand (INZ) is also not a double penalty. Rather it is a consequence of a failure by an employer, facing such a stand-down to meet minimum employment standards that Parliament has declared and maintained over many decades and the Authority cannot reasonably curtail its own obligation to enforce those standards in order to enable a non-compliant employer to then avoid further commercial consequences.

[119] It is further submitted that whether the current director of Raj Kiwi was aware of the proceedings when he first became the director in August 2020 is not a matter for the Labour Inspector or the Authority i.e. whether there was a failure of due diligence by the new director or a matter of deception by Mr Chellappa or both. It is therefore submitted that a change in directorship after the proceedings were issued should not affect the level of penalties imposed on Raj Kiwi or Mr Chellappa.

[120] I consider that employers who face a stand-down period do so because they have not acted in compliance with the employment law of New Zealand. Often the failure to comply has had, as in this case, adverse effects upon migrant workers who are often in a vulnerable situation.

[121] As such I determine that it is appropriate that the possibility of the imposition of a stand-down period is not a relevant consideration for the Authority when determining the level of penalties.

Outcome on penalty issue

[122] In assessing the level of penalties to be awarded I consider that a balance needs to be made between being unduly punitive, noting that Mr Chellappa cooperating with the Authority's investigation process, and having sufficient regard to the severity of the breaches which are multiple.

[123] It is however important that the penalties serve the purpose of ensuring the Respondents recognise the importance of maintaining and adhering to the statutory requirements incumbent on an employer entering into an employment relationship. That is especially so in this case in which both Respondents continue to employ people in New Zealand, some of whom may be migrant workers.

Penalty Quantum

[124] **Raj Kiwi is ordered to pay a total sum of \$160,000.00 to the Authority to be paid to the Crown Trust Account. Payment is to be made within 14 days of the date of this Determination.**

[125] **Mr Chellappa is ordered to pay a total sum of \$70,000.00 to the Authority to be paid to the Crown Trust Account. Payment is to be made within 14 days of the date of this Determination.**

Filing Fee

[126] I further order that the Labour Inspector be reimbursed for the Authority's filing fee in the sum of \$71.56.

Costs

[127] Costs are reserved. In the event that costs are sought, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

[128] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority

Step 1 – Nature and Number of breaches – Potential Maximum Penalties				
		Affected Employees	Company	Individual
1.	Failure to provide wages and time and holiday and leave record	3	\$60,000	\$0
2.	Failure to provide compliant employment agreements	3	\$60,000	\$30,000
3	Failure to keep compliant wage and time records	6	\$120,000	\$60,000
4	Failure to keep compliant holiday and leave records	8	\$160,000	\$80,000
5	Failure to pay at least the minimum wage	6	\$120,000	\$60,000
6	Failure to pay annual holidays on termination of employment	6	\$120,000	\$60,000
7	Failure to pay for other leave during employment	3	\$60,000	\$30,000
8	Making unlawful deductions from wages	1	\$20,000	\$10,000
9	Globalised public holiday breaches	3 (reduced to 1)	\$60,000	\$30,000
		Subtotal	\$780,000	\$360,000
Step 2 – Aggravating Factors as a proportion of maxima in Step 1				
1	Failure to provide wages and time and holiday and leave record	50%	\$30,000	\$0
2.	Failure to provide compliant employment agreements	50%	\$30,000	\$15,000
3.	Failure to keep compliant wage and time records	50%	\$60,000	\$30,000
4.	Failure to keep compliant holiday and leave records	50%	\$80,000	\$40,000
5.	Failure to pay at least the minimum wage	70%	\$84,000	\$42,000
6.	Failure to pay annual holidays during employment	70%	\$84,000	\$42,000
7.	Failure to pay for other leave during employment	70%	\$42,000	\$21,000
8.	Making unlawful deductions from wages	80%	\$16,000	\$8,000
9	Globalised public holiday breaches	50%	\$30,000	\$15,000
		Subtotal	\$456,000	\$213,000
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)				

	Less 10% of partaking in hearing and admissions – noting no arrears paid	Subtotal	\$410,400	\$191,700
Step 3 – Defendant’s financial circumstances				
	Less 20% of above subtotal in recognition of small business with a single owner-operator and financial circumstances	Subtotal	\$328,320	\$153,360
Step 4 - Proportionality				
	Consideration for the Authority – noting the deductions above for ameliorating factors and financial circumstances	TOTAL	\$328,320	\$153,360