

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 505
3077952

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

AND SHAH ENTERPRISE NZ
 LIMITED
 First Respondent

AND SAPAN JAGDISHBHAI SHAH
 Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Greg La Hood, counsel for the Applicant
 No appearance for the Respondents

Investigation Meeting: 14 October 2020 at Tauranga

Submissions [and further 20 October 2020 from the Applicant
Information] Received: Nothing from the Respondents

Date of Determination: 7 December 2020

DETERMINATION OF THE AUTHORITY

- A. The first respondent, Shah Enterprise Limited (Shah Enterprise) breached the Minimum Wage Act 1983(MWA), the Holidays Act 2003 (HA) and the Employment Relations Act 2000 (ERA).**
- B. Shah Enterprise is to pay the following sums to the Labour Inspector within 28 days of the date of this determination, to be forwarded to the employee, Mr Hardik Maradiya:**
- (i) \$11,648.51 gross for minimum wage arrears;**
 - (ii) \$2,239.86 gross for annual holiday pay;**
 - (iii) Interest on the above sums as set out in this determination.**

- C. The second respondent, Mr Sapan Jagdishbhai Shah is a person involved in the breaches of minimum code legislation by Shah Enterprise.**
- D. Within 42 days of the date of this determination if Shah Enterprise has not paid the sums in paragraph B(i) and (ii) above, Mr Shah is to pay those sums to the Labour Inspector together with interest as set out in this determination.**
- E. The following penalties are to be paid to the Employment Relations Authority within 28 days of the date of this determination with 30 percent to be forwarded to the employee, Mr Maradiya, and the remainder to the Crown Bank account:**
- (i) \$32,000 by Shah Enterprise**
 - (ii) \$16,000 by Mr Shah**
- G. Costs are reserved.**

Employment Relationship Problem

Claims against Shah Enterprise NZ Limited

[1] The Labour Inspector, Mr George Shorrocks has filed a range of claims in the Authority against the first respondent Shah Enterprise NZ Limited (Shah Enterprise), and the second respondent Mr Sapan Jagdishbhai Shah, the sole director and shareholder of Shah Enterprise. The claims relate to various alleged breaches by Shah Enterprise of minimum code legislation and employment standards in respect of its former employee, Mr Hardik Maradiya (the employee).

[2] The Labour Inspector seeks payment of arrears of minimum wages, and arrears for annual holiday pay which it says is owed to the employee by Shah Enterprise. The Labour Inspector also seeks penalties against Shah Enterprise, in respect of its alleged failure to comply with the Minimum Wage Act 1983 (MWA) and the Holidays Act 2003 (HA). The Labour Inspector claims Shah Enterprise failed to keep wages and time records and holiday and leave records for the employee in breach of both the Employment Relations Act 2000 (ERA) and the HA. The Labour Inspector seeks penalties against Shah Enterprise for these alleged breaches.

Claims against Mr Shah

[3] The Labour Inspector further claims that Mr Shah is a person involved, under s 142W of the ERA, in some or all of the various alleged breaches of minimum code legislation and employment standards by Shah Enterprise.

[4] The Labour Inspector seeks to recover from Mr Shah under section 142Y of the ERA, all arrears of minimum wages and annual holiday pay it says are owing to the employee, to the extent Shah Enterprise is unable to pay these amounts. The Labour Inspector seeks penalties against Mr Shah as “a person involved in connection” with the breaches by Shah Enterprise of the MWA, HA and the ERA.¹

Non-appearance at Investigation meeting

[5] A statement in reply to the statement of problem was filed. Mr Shah participated in case management conferences held by the Authority, was in email communication with the Authority and was aware of the date and place of the investigation meeting. Mr Shah failed to attend the Authority’s investigation meeting. Being satisfied that Shah Enterprise and Mr Shah had been served with all of the necessary pleadings and documentation including the Notice of Investigation meeting, I proceeded to investigate the Labour Inspector’s claims.

Investigation Meeting

[6] For the Authority’s investigation, the Labour Inspector and the employee filed witness statements. Mr Shah sent an email to the Authority on 26 August 2020 which appeared to be his witness statement. The Labour Inspector and the employee each affirmed or swore on oath that their evidence was true and correct. They were also given the opportunity to provide any additional comments and information and did so. Mr Shah did not attend the investigation meeting to affirm or swear on oath that his statement was true and correct. However, Mr Shah’s statement was considered by the Authority.

[7] As permitted by s 174E of the Act, this determination has not set out all the evidence received. The determination states findings, relevant facts and legal issues and makes conclusions in order to efficiently dispose of the matters.

¹ s142W, Employment Relations Act 2000.

Relevant Facts

[8] Shah Enterprise was incorporated on 26 May 2016. Its registered office is 1313 Cameron Road, Gate Pa, Tauranga, 3112. Mr Shah is its sole director and shareholder. Shah Enterprise operates a Superette in Tauranga trading as Greerton Foodmarket.

Complaint to Labour Inspector

[9] On 23 January 2019, the Labour Inspector received information from the employee who had previously been employed by Shah Enterprise. The complaint was made by way of the Contact Centre of the Ministry of Business Innovation and Employment (MBIE). The record of the complaint included:

...Has a written employment agreement but was told he was a casual employee and was refused this. No payslips and no access to pay records. Was working 7 days a week from 6.30am until 8.30 night (70-80 hours per week). Was only being paid for 20 hours of work. Employer asked for the employee to pay back tax that he says the employee owed... No breaks given and even lunch breaks interrupted. Only given 2 days off in the work period. Would not allow him time off for driver's license. Final payment was never calculated properly...

Labour Inspector's Investigation

[10] Upon receipt of the complaint, the Labour Inspector initiated an investigation. On 10 April 2019, the Labour Inspector and his colleague, Labour Inspector Nicole Kendrick conducted a site visit at Shah Enterprise's premises. Mr Shah was interviewed during the course of the site visit. The Labour Inspector took notes of his interview with Mr Shah.

[11] The Labour Inspector's notes of his interview with Mr Shah record that Shah Enterprise is a retail business with one full time employee, Mr Shah's wife. The business operates 7 days a week. In summer the business is open between 6.30am and 8/8.30pm a day and during winter it operates between 6.30am/7am and 7.30/8pm each day. Mr Shah is responsible for the record keeping of Shah Enterprise.

[12] The Labour Inspector's notes of the interview with Mr Shah record that the employee was employed by Shah Enterprise from February 2018 until approximately November 2018. He was employed as a retail assistant, had an employment agreement, and worked for up to 20 hours a week anytime between the hours of 6.30 am to 8pm, 7 days a week. Mr Shah informed the Labour Inspector that the employee lived with him for the entire period of his employment and paid no rent. When the employee resigned from his employment with Shah Enterprise he was not paid for any holiday. The Labour Inspector's notes recorded that Mr Shah told him this

was because the employee had not worked on any public holidays and therefore he was not entitled to be paid for them.

[13] During the course of the site visit the Labour Inspector was provided with “Western Union” transaction receipts dated from August 2018 until November 2018. Shah Enterprise had become the agent for Western Union and the receipts were a record of financial transactions made by Shah Enterprise on behalf of customers wishing to make international money transfers.

Notice to produce documents

[14] At the site visit on 10 April 2019, the Labour Inspector issued a general inspection letter and notice to Shah Enterprise to produce employment agreements, wages and time records and holiday and leave records in respect of the employee. The Labour Inspector requested that the documents be provided to him by 4 pm Wednesday 27 April 2019. On 17 April 2019, Mr Shah sent an email to the Labour Inspector attaching PAYE and employment records held by Shah Enterprise in respect of the employee. The Labour Inspector was of the view that the monthly schedules provided by Shah Enterprise did not comply with s 130 of the ERA or s 81(2) of the HA.

[15] On 18 April 2019, the Labour Inspector sent an email to Mr Shah requesting any further wages and time records and holiday and leave records held by Shah Enterprise for the employee, and for Mr Shah’s wife, Mrs Chandandi Shah, to be provided to the Labour Inspector by 4 pm Monday 29 April 2019.

[16] On 28 April 2019, Mr Shah sent an email to the Labour Inspector informing him that Shah Enterprise did not hold any further records. Mr Shah informed the Labour Inspector that his business was:

a small family business therefore we do not have any further record as you requested. We both me and my wife took the wages from the company as it is our family business therefore we do not keep the record. Since Hardik [the employee] left mostly I work by my own and occasionally my wife help me. I hope that will clarify.

Labour Inspector’s interview with the employee

[17] As part of the Labour Inspector’s investigation, he met with and interviewed the employee on 28 May 2019. The Labour Inspector obtained a statement from the employee

regarding his employment by Shah Enterprise. The employee said that he had worked for Shah Enterprise from 15 February 2018 to 18 November 2018, in the position of Store Assistant. The employee stated that he signed an employment agreement on 15 February 2018 but was not provided with a copy of it and was paid the minimum wage of \$15.75 an hour. The employee says at the time of his employment he was on a student visa and only legally allowed to work for 20 hours. He worked part time hours from February to May 2018. Payment of his wages was made into his bank account. The employee stated that he was offered and accepted accommodation by Mr Shah and was not charged rent, power, internet or for water. He was expected to cook meals and did so.

[18] From May to November 2018, the employee told the Labour Inspector that he worked the following hours:

6.30am to 8.30pm, Monday to Friday,

7am to 8pm, Saturdays,

7.30 am to 8pm on Sundays

[19] The employee told the Labour Inspector that despite working these long hours he continued only to be paid 20 hours a week. When the employee asked Mr Shah why he was not being paid for all the hours he was working, Mr Shah told him if he wanted to be paid for all the hours worked, he would need to repay Shah Enterprise the tax it had paid on his behalf since he commenced employment.

[20] Neither the employee nor Shah Enterprise kept a record of hours worked.

Labour Inspector's preliminary report

[21] On 5 July 2019, the Labour Inspector prepared a draft investigation report setting out his preliminary findings. This draft report was sent to Mr Shah for comment. The Labour Inspector's preliminary views were that Shah Enterprise had committed a number of breaches of employment standards legislation and that Mr Shah had been involved in those breaches. Further, the Labour Inspector concluded that the employee had worked well in excess of 20 hours per week and was owed arrears of wages. The Labour Inspector found that the employee

had not received any holiday pay and that Shah Enterprise had failed to keep wage and time and holiday and leave records. This report was finalised on 18 July 2019.²

The Labour Inspector's conclusions

Failure to comply with section 6 of the MWA - failure to pay the minimum wage

[22] The Labour Inspector's report concluded that it was more likely than not that the employee worked the hours he stated based on the information obtained during the investigation. The Labour Inspector took into account the dates and times on the Western Union transaction receipts which had been signed by the employee, to establish the employee's hours of work. The Labour Inspector concluded that Shah Enterprise had failed to comply with s6 of the MWA 1983 and that the employee was owed minimum wage arrears.

[23] The Labour Inspector applied a discount to the arrears of wages he calculated as owing by Shah Enterprise pursuant to s7 of the MWA, to take into account board and lodgings owed to Mr Shah by the employee. The discount applied was at the rate of 15 percent being at the higher end of the amount that could be deducted under the MWA.

Credibility

[24] I found the employee to be a credible witness. At the Authority's investigation meeting, the employee explained the circumstances in which he met Mr Shah and that he had been asked by Mr Shah to apply for a liquor licence so that he was able to sell liquor at the superette. Mr Shah obtained a liquor licence in order to be able to do so. The employee also explained in detail the duties he performed at the superette, including dealing with Western Union transactions for customers. The employee's signature on the Western Union transactions supported the employee's evidence that he was working significant hours at the superette and was not being paid the minimum wage.

Hours worked

[25] During the course of the Authority's investigation it became evident that the hours worked by the employee were significantly greater than initially sought by the Labour Inspector, who relied on the signed Western Union transactions to establish hours of work. The employee's oral evidence about the work he was required to do and the hours worked was

² Investigation Report, Labour Inspectorate, 18 July 2019.

credible and not contested by Shah Enterprise or Mr Shah. It is my view that the employee worked significantly longer hours than the initial claim made by the Labour Inspector on his behalf. The Labour Inspector has provided the Authority with a breakdown of hours worked by the employee following evidence at the investigation meeting.

[26] Based on the employee's evidence and the evidence obtained during the Labour Inspector's investigation, the employee earned \$12,150 gross for the period from March to November 2018. However, the hours the employee actually worked for that period were significantly higher. The employee was entitled to the sum of \$27,998.25 gross in total based on the hours actually worked by him. After deducting 15 percent for the cost of boarding (\$4,199.74) from the total gross minimum wage arrears owing of \$27,998.25, the subtotal is \$23,798.51. Following the deduction of the sum of \$12,150 gross paid to the employee, the amount owing to the employee is \$11,648.51 gross.

[27] A schedule prepared by the Labour Inspector is attached as **Appendix One** setting out the hours of work performed by the employee during his employment by Shah Enterprise and the arrears of wages owing to him.³

Order as to minimum wage payments

[28] I find that Shah Enterprise owes the employee minimum wage payments as calculated by the Labour Inspector. I order Shah Enterprise to pay to the Labour Inspector the sum of \$11,648.51 gross within 28 days of the date of this determination, to be forwarded to the employee, Mr Maradiya.

Failure to comply with ss 23 and 27 HA – Failure to pay holiday pay and holiday pay upon termination of employment

[29] The Labour Inspector concluded in his report that the employee had not been paid holiday pay. Having examined the documentary evidence and heard the witnesses, I find that the employee was not paid holiday pay either during his employment or on its termination. Holiday pay arrears amount to \$2,239.86 gross.⁴

³ Schedule A showing hours worked and wage arrears owing.
⁴ Fn3.

Order as to holiday pay

[30] I order Shah Enterprise to pay the Labour Inspector the sum of \$2,239.86 gross within 28 days of the date of this determination, to be forwarded to the employee.

Is the director, Mr Shah, liable for arrears?

[31] The Labour Inspector seeks an order under s 142Y of the ERA that Mr Shah pay arrears owing to the employee, to the extent Shah Enterprise is unable to do so. The arrears sought regarding the employee relate to minimum wage and holiday entitlements.

[32] Mr Shah was directly involved in the breaches of the MWA and HA, by aiding and abetting Shah Enterprise in terms of its failure to pay the employee the minimum wage and holiday pay. Mr Shah was aware of the hours worked by the employee. Mr Shah was also involved in calculating wages and payments to the employee. When the employee asked Mr Shah to pay him for all hours worked, the employee was told that he would have to repay tax which had been paid by Shah Enterprise for income already earned. Mr Shah was a person involved as defined in s 142W of the ERA.

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

[34] There has been a default in payment by Shah Enterprise to the employee of wages and holiday pay owing to him. I have allowed Shah Enterprise 28 days to make that payment. In the event that it fails to do so, Mr Shah shall have 42 days from the date of this determination to pay the sums of \$11,648.51 gross for arrears of wages and \$2,239.86 gross for holiday pay, to the Labour Inspector to be forwarded to the employee.

Interest

[35] The Labour Inspector seeks the payment of interest by Shah Enterprise on arrears of minimum wages and holiday pay owing to the employee. I order Shah Enterprise to pay interest as follows, calculated using the Civil Debt interest calculator:

- (a) On total arrears of wages and holiday pay amounting to \$13,888.37 gross, from 18 November 2018 (when the last weekly pay was received) until payment.⁵

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

[36] Mr Shah is ordered to pay interest on the sum of \$13,888.37, if it is not paid by Shah Enterprise within 42 days of the date of this determination.⁶

Penalties claimed against Shah Enterprise

[37] The Labour Inspector seeks penalties against Shah Enterprise in respect of its statutory breaches as set out above. Its actions were deliberate and penalties are appropriate. The following breaches of statutory obligations were established on the balance of probabilities, after examining the documentary evidence and hearing from the witnesses:

- (a) Shah Enterprise failed to keep wages and time and holiday and leave records as required by s 130 of the ERA and s 81(2) of the HA.
- (b) The employee was not paid minimum wages for work performed by him (s 6 MWA);
- (c) The employee was not paid holiday pay (ss23, 27 HA);

Penalties sought against the director, Mr Shah

[38] The Labour Inspector seeks penalties against Mr Shah. Where the employer is a company, as is the case here, officers of the company may be treated as persons involved in a breach.⁷ Mr Shah is a director of Shah Enterprise and so that requirement is met.⁸

[39] As Mr Shah is a person involved in Shah Enterprise's breaches of minimum entitlements owed to the employee, he is liable under s142Y of the ERA, on application by the Labour Inspector. Before imposing penalties, I must be satisfied the breaches were intentional purposeful actions by Mr Shah.⁹

[40] The evidence established that Mr Shah was directly responsible for calculating and arranging the employee's wages and holidays. Mr Shah was aware of his obligation to pay minimum wages and holiday pay. When the Labour Inspector interviewed Mr Shah, he stated that because the employee had been staying with Mr Shah and was not charged for anything, he had not paid any holiday pay. This conduct discloses intentional purposeful action by

⁶ Clause 11, Schedule 2 Employment Relations Act 2000 and *Labour Inspector v Fernando* [2020] NZEmpC66.

⁷ Section 142W(2) of the ERA.

⁸ Section 142W(3)(a) of the ERA.

⁹ *Southern Taxis Limited v A Labour Inspector* [2020] NZEmpC63 at [187] and *Tolson v Potter* [2020] NZEmpC 98 at [15].

Mr Shah in respect of non-payment of minimum wages and holiday pay. Mr Shah knew what his obligations were but decided purposefully not to discharge those obligations because he was providing the employee with accommodation.

[41] In a *Labour Inspector v Sampan Restaurants Limited & Yu Ouyang*, the Employment Court held that it would be a mistake to conclude that the actions of an employer and the person involved are necessarily the same.¹⁰ The employer has liability for a breach of the relevant employment standard itself, whereas the actions of the person involved are collateral to that breach. Therefore, the Authority must consider Shah Enterprise's actions separately from those of Mr Shah. The penalties against Mr Shah are sought by the Labour Inspector under all the same provisions as the penalties sought against Shah Enterprise. I consider that Mr Shah should be required to pay penalties. This is a situation involving deliberate actions by him which in regards to the employee, occurred over an extended period and caused him considerable distress.

Penalties - Applicable law

[42] The legal framework for assessing and fixing a penalty, having regard to the statutory requirements in s 133A of the ERA and the full Court's judgment in *Borsboom v Preet*, was summarised by the Court in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.¹¹

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

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

¹⁰ [2018] NZEmpC 69 at [17].

¹¹ *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19] *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143.

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

Statutory consideration 1 – the object of the ERA

[44] The objects of the ERA are set out in s 3. Objects include:

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. Further, the promotion of effective enforcement of employment standards, in particular, by conferring enforcement powers on Labour Inspectors, the Authority and the Court.

[45] The actions in this case involve undermining employment standards. There was a significant imbalance of power. The employee was a young migrant, unfamiliar with New Zealand laws, living in accommodation with Mr Shah and his wife and being required to cook their meals. Shah Enterprise failed to keep compliant employment records which put the employee at a distinct disadvantage. The failure to pay minimum wages and holiday pay gave Shah Enterprise an advantage in the marketplace and resulted in negative consequences for the employee. The employee was not able to save money which may have enabled him to be able to move out of the accommodation with Mr and Mrs Shah and have his own accommodation away from work.

Statutory consideration 2 – the nature and extent of the breach

[46] An analysis under this step involves four sub-steps – identify the number of breaches; identify the nature of each breach; identify the maximum penalty for each of the identified breaches; and consider whether global penalties should apply.¹²

[47] There are four types of breaches affecting the employee:

- (a) Section 6 of the MWA, being a failure to pay an employee at not less than the minimum rate of wages for all hours worked;
- (b) Section 23 of the HA, being a failure to pay annual holiday pay;
- (c) Section 81 of the HA, being a failure to compliant holiday and leave records;
- (d) Section 130 of the ERA, being a failure to keep compliant wage and time records.

Identifying the number of breaches

[48] There is one employee affected by Shah Enterprise’s four breaches.

Identifying the maximum penalty available in respect of the breaches committed by Shah Enterprise.

Maximum penalties

[49] The maximum penalty available in respect of a breach of the MWA is \$20,000 per breach pursuant to s 10 of the MWA and s 135(2)(b) of the ERA.

[50] The maximum penalty available in respect of the HA is \$20,000 per breach, awardable against Shah Enterprise in accordance with s 75 of the HA and s 135(2)(b) of the ERA.

[51] The maximum penalty available in respect of breach of the ERA is \$20,000 per breach, awardable against Shah Enterprise in accordance with s 135(2)(b) of the ERA.

[52] I find there were four breaches. Failure to pay the minimum wage, failure to pay holiday pay, failure to keep holiday and leave records and failure to keep wage and time records.

¹² *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [20].

[53] The maximum penalties available for each offence committed by Shah Enterprise is \$20,000, resulting in maximum penalties totalling \$80,000.

[54] The maximum penalties available for each offence committed by Mr Shah is \$10,000. The maximum total penalties therefore amounts to \$40,000.

Global penalties

[55] There are four separate breaches. Shah Enterprise faces total maximum penalties of \$80,000 and Mr Shah faces total maximum penalties of \$40,000. The breaches relating to the keeping of wages and time records and holiday and leave records should be globalised into one breach as they relate to the obligation to keep employment records.

[56] Therefore, there are 3 breaches, totalling a maximum penalty of \$60,000 for Shah Enterprise and \$30,000 for Mr Shah.

Statutory consideration 3 – whether the breach was intentional, inadvertent, or negligent

[57] I accept the submission made on behalf of the Labour Inspector that the breaches were as a result of Shah Enterprise's and Mr Shah's deliberate business decisions.

[58] Shah Enterprise and Mr Shah are effectively one and the same, given Mr Shah's responsibility for the decision making and implementation of business practices.

[59] Mr Shah was aware that he was underpaying the employee because when the employee asked to be paid for all hours he was working, he was told that he would be required to pay back tax paid by Shah Enterprise.

[60] Shah Enterprise failed to keep records and this made it challenging for the employee and the Labour Inspector to determine the hours worked and the extent of underpayments while providing a benefit to Shah Enterprise and Mr Shah. I accept the submissions made on behalf of the Labour Inspector that Mr Shah deliberately paid the employee for only 20 hours of work when the employee was working well over that number of hours.

Assessment of the severity of the breaches

[61] I agree with the submission made for the Labour Inspector, citing *Preet*, which suggests a starting point of 80% for minimum wage breaches, a starting point of 70% for failures to pay HA entitlements and 50% for failures to keep compliant records.¹³

[62] Therefore the starting point for the minimum wage breach is \$16,000 for Shah Enterprise and \$8,000 for Mr Shah.

[63] Moving to the HA breaches, the starting point is 70% of the maximum penalty of \$20,000. For Shah Enterprise this amounts to \$14,000 and for Mr Shah \$7,000.

[64] The failure to provide compliant employment records has as starting point of 50%. For Shah Enterprise this amounts to \$10,000 and for Mr Shah \$5,000.

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

[65] The employee has lost the use of money he was entitled to at the time it became due and was deprived of wages during a period of vulnerability. This caused difficulty in respect of the employee's immigration status, his personal life and employment opportunities. However, Shah Enterprise has reduced its costs, and gained an unfair advantage over its competitors. Shah Enterprise gained financially by retaining use of moneys owed to the employee. Through these practices Shah Enterprise was able to reduce its expenses and therefore increase its profit.

Statutory consideration 5 – steps to mitigate effects of the breach

[66] Shah Enterprise has not paid the employee arrears of wages and holiday due to him, despite being aware of its obligations. Mr Shah did not take part in the investigation meeting. From the documentary evidence it does not appear Mr Shah had any insight into the effects of the breaches or that indeed minimum entitlements were breached.

Statutory consideration 6 – circumstances of the breach, and any vulnerability

[67] I have already considered the circumstances of the breach and any vulnerability under statutory heads 1 and 2.

¹³ Fn 11 at para [167],[171] and [173].

Statutory consideration 7 – previous conduct

[68] There is no evidence that either Shah Enterprise or Mr Shah have previously appeared before the Authority.

Additional consideration 8 – deterrence

[69] The breaches in this case are minimum standards. As such it is important that a penalty is set at a level where it deters employers from delaying payment of minimum entitlements to a time that suits the employer or when they are put under pressure by the Labour Inspector.¹⁴

***Preet* additional consideration 2 – degree of culpability**

[70] A consideration of the severity of the breach is necessary to establish a provisional starting point for the penalty. This includes an adjustment for aggravating and mitigating factors in relation to the breaches. There are a number of factors which increase Shah Enterprise's culpability, including as follows:

- (a) Mr Shah is the decision maker for Shah Enterprise;
- (b) The affected employee was a migrant worker;
- (c) Shah Enterprise's practice of deliberately denying leave, breaks and time off;
- (d) The requirement that the employee work excessive hours with significant underpayments in wages due;
- (e) Shah Enterprise's misuse of power in the employment relationship and exploiting/exploitation by underpaying and overworking a vulnerable low-wage migrant employee with few options and requiring that he cook meals for Mr Shah and his wife.

Additional consideration 10 – consistency

[71] A review of Court and Authority imposed penalties show a number of significant orders where breaches of minimum wage and holiday pay have occurred.'

¹⁴ *Daleson* above note 3 at [39].

[72] *Preet* involved two breaches of the MWA, four breaches of the HA and two other breaches. The Court ordered the employers of the five employees to pay a combined penalty of \$100,000.

[73] In *A Labour Inspector v Prabh Limited & Anor* – Prabh was ordered to pay \$100,000 for, inter alia, two breaches of minimum entitlement provisions contained in the MWA and the HA relating to its employees.¹⁵

Additional consideration 11 – ability to pay

[74] The onus is on Shah Enterprise to provide the Authority with up to date and accurate information in support of any submission that it is financially unable to meet a potential penalty award. Further, as was observed in *Daleson* mere financial incapacity without more, is unlikely to be regarded as warranting a penalty reduction to nil, or next to nil, having regard to the relevant statutory scheme and its underlying objectives.¹⁶ Mr Shah is a person involved in the breaches by Shah Enterprise and neither he nor Shah Enterprise have provided information regarding ability to pay. Shah Enterprise continues to operate and Mr Shah continues to be its director.

[75] The Court in *Daleson* went on to hold that liability to pay a penalty is different from subsequent enforcement, and that the financial circumstances of a defaulting party is not a factor that Parliament considers pivotal to the penalty-setting exercise.¹⁷ In *Prabh*, the non-compliant employer received only a moderate 20 percent reduction at this stage of the inquiry, despite a finding that the employer’s financial statements showed it to be in a “difficult financial position”.¹⁸ Mr Shah informed the Labour Inspector that Shah Enterprise was “a small family business” and that he worked alone in the business and occasionally his wife would help him. I consider a reduction of just 20 percent to be appropriate under this head.

[76] Therefore provisional penalties at this stage are as follows;

- (a) In respect of minimum wage breaches; \$12,800 for Shah Enterprise and \$6,400 for Mr Shah;
- (b) In respect of HA breaches: \$11,200 for Shah Enterprise and \$5,600 for Mr Shah;

¹⁵ *A Labour Inspector v Prabh Limited & Anor* [2018] NZEmpC 110.

¹⁶ *Daleson* at para [44].

¹⁷ Counsel for Labour Inspector submission and *Daleson* at para [45].

¹⁸ *A Labour Inspector v Prabh Limited* at fn 15 paras [64]-[68].

- (c) In respect of failures to keep compliant employment records; \$8,000 for Shah Enterprise and \$4,000 for Mr Shah.

Additional consideration 12 – Proportionality of outcome

[77] This final step involves the proportionality or totality test, in which the Authority must consider whether the provision or penalty reached is proportionate to the seriousness of the breaches, and harm occasioned by them. This step is to ensure that the imposition of a penalty in the amount of it is just in all the circumstances.

[78] Standing back, and assessing the figure proposed to be imposed on Shah Enterprises, I conclude that no further reduction is required.

[79] A table of the calculations is annexed as **Appendix Two**.

Conclusion on quantum

[80] Shah Enterprise is ordered to pay \$32,000 by way of penalty for breaches of the MWA, HA and ERA. Mr Shah, as a person involved in Shah Enterprises' breaches, is ordered to pay \$16,000 by way of penalty. These respective sums are to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay these sums into a Crown bank account. Payments of the penalties ordered against Shah Enterprise and Mr Shah respectively are to be made within 28 days of the date of this determination.

[81] I consider it is appropriate that part of these penalties be paid to the employee as he has suffered the impact of the breaches¹⁹. For this reason, upon receipt of the penalties, the Crown is directed to pay 30 percent of the penalties to the employee. Therefore, for Shah Enterprise the amount to be paid by the Crown to the employee (being 30 percent of the total of \$32,000) is \$9600. For Mr Shah the amount to be paid by the Crown to the employee (being 30 percent of the total of \$16,000) is \$4800.

Costs

[82] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

¹⁹ S136 ERA.

[83] If they are not able to do so, and an Authority determination on costs is required, the Labour Inspector may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum, Shah Enterprise and Mr Shah will then have 14 days to lodge any reply memoranda.

[84] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.²⁰

Anna Fitzgibbon
Member of the Employment Relations Authority

²⁰ *PBO Limited v Da Cruz* [2005] 1 ERNZ 808, 819-820.

APPENDIX 1

Adjusted hours worked – Hardik MARADIYA							
Return Period	PAYE Gross Earnings	Monthly earnings based on adjusted hours worked	Estimated arrears owed to EE (Minus IRD Earnings)				
Mar-18	\$1,260.00						
Apr-18	\$1,320.00						
May-18	\$1,650.00	\$5,049.00	\$3,399.00				
Jun-18	\$990.00	\$5,049.00	\$4,059.00				
Jul-18	\$1,320.00	\$5,049.00	\$3,729.00				
Aug-18	\$1,650.00	\$6,311.25	\$4,661.25				
Sep-18	\$1,320.00	\$5,049.00	\$3,729.00				
Oct-18	\$1,320.00	\$5,049.00	\$3,729.00				
Nov-18	\$1,320.00	\$3,786.75	\$2,466.75				
	PAYE Total Gross Earnings	Monthly earnings based on adjusted hours worked	Estimated minimum wage arrears owed to EE May – Aug 2018	Total Gross Earnings (PAYE and Minimum Wage Arrears)	Accommodation in costs @ 15% of total gross earnings	Total minimum gross wage arrears minus accommodation costs	8% Holiday Pay (Gross)
	\$12,150.00	\$20,196.00	\$15,848.25	\$27,988.25	\$4,199.74	\$11,648.51	\$2,239.86

Total gross minimum wage arrears calculated as follows: Total gross earnings (PAYE and Minimum Wage Arrears) – Accommodation costs = Total minimum wage arrears minus accommodation costs

8% Holiday pay total calculated prior to accommodation costs/deduction from Total Gross Earnings (PAYE and Minimum Wage Arrears)

Week Ending	Hours worked Monday to Friday	Hours worked Saturday to Sunday	Total hours worked	Minimum wage	Total Earnings (Weekly) Minimum Wage (Gross)	Monthly Earnings (Gross)
13/05/2018	52	24.50	76.50	\$16.50	\$1,262.25	
20/05/2018	52	24.50	76.50	\$16.50	\$1,262.25	
27/05/2018	52	24.50	76.50	\$16.50	\$1,262.25	
03/06/2018	52	24.50	76.50	\$16.50	\$1,262.25	\$5,049.00
10/06/2018	52	24.50	76.50	\$16.50	\$1,262.25	
17/06/2018	52	24.50	76.50	\$16.50	\$1,262.25	
24/06/2018	52	24.50	76.50	\$16.50	\$1,262.25	
01/07/2018	52	24.50	76.50	\$16.50	\$1,262.25	\$5,049.00
08/07/2018	52	24.50	76.50	\$16.50	\$1,262.25	
15/07/2018	52	24.50	76.50	\$16.50	\$1,262.25	
22/07/2019	52	24.50	76.50	\$16.50	\$1,262.25	
29/07/2018	52	24.50	76.50	\$16.50	\$1,262.25	\$5,049.00
5/08/2018	52	24.50	76.50	\$16.50	\$1,262.25	
12/08/2018	52	24.50	76.50	\$16.50	\$1,262.25	
19/08/2018	52	24.50	76.50	\$16.50	\$1,262.25	
26/08/2018	52	24.50	76.50	\$16.50	\$1,262.25	
2/09/2018	52	24.50	76.50	\$16.50	\$1,262.25	\$6,311.25
9/09/2018	52	24.50	76.50	\$16.50	\$1,262.25	
16/09/2018	52	24.50	76.50	\$16.50	\$1,262.25	
23/09/2018	52	24.50	76.50	\$16.50	\$1,262.25	
30/09/2018	52	24.50	76.50	\$16.50	\$1,262.25	\$5,049.00
07/10/2018	52	24.50	76.50	\$16.50	\$1,262.25	
14/10/2018	52	24.50	76.50	\$16.50	\$1,262.25	
21/10/2018	52	24.50	76.50	\$16.50	\$1,262.25	
28/10/2018	52	24.50	76.50	\$16.50	\$1,262.25	\$5,049.00
4/11/2018	52	24.50	76.50	\$16.50	\$1,262.25	
11/11/2018	52	24.50	76.50	\$16.50	\$1,262.25	
18/11/2018	52	24.50	76.50	\$16.50	\$1,262.25	\$3,786.75
Note – Hardik Maradiya advised that he commenced full time employment in early May 2018 – calculations based from 2 nd week in May						
Note - Hours worked Mondays to Friday are hours agreed to during the investigation meeting held 14/10/2020.						
Note – Saturday and Sunday hours have 30 min deducted each day for lunch break as Hardik Maradiya advised that the employer sometimes brought food in for his lunch on the weekend						

APPENDIX 2 – PENALTY ANALYSIS

Step 1 – Nature and Number of breaches – Potential Maximum Penalties				
		<i>Affected Employees</i>	<i>Company</i>	<i>Individual</i>
1.	Failure to keep compliant wage and time records	1	\$20,000	\$10,000
	Failure to keep compliant holiday and leave pay records	<i>Globalised with 1</i>		
2.	Failure to pay at least the minimum wage	1	\$20,000	\$10,000
3.	Failure to pay annual holidays	1	\$20,000	\$10,000
		<i>Subtotal</i>	<i>\$60,000</i>	<i>\$30,000</i>
Step 2 – Aggravating Factors as a proportion of maxima in Step 1				
1.	Failure to keep compliant wage and time records.	50%	\$10,000	\$5,000
	Failure to keep compliant holiday and leave pay records	<i>Globalised with 1</i>		
2.	Failure to pay at least the minimum wage	80%	\$16,000	\$8,000
3.	Failure to pay annual holidays	70%	\$14,000	\$7,000
		<i>Subtotal</i>	<i>\$40,000</i>	<i>\$20,000</i>
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)				
	No deduction	<i>Subtotal</i>	<i>\$40,000.00</i>	<i>\$20,000</i>
Step 3 – Defendant’s Financial Circumstances				
	Less 20% of above subtotal in recognition of small business with a single owner-operator and financial circumstances	<i>Subtotal</i>	<i>\$32,000.00</i>	<i>\$16,000.00</i>
Step 4 – Proportionality				
	Consideration for the Authority – noting deductions above for ameliorating factors and financial circumstances	TOTAL	<i>\$32,000</i>	<i>\$16,000</i>