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DETERMINATION.

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 509  
3088692

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

A N D NEKITA ENTERPRISES  
LIMITED  
First Respondent

AND HARJIT SINGH  
Second Respondent

AND SHEREEEN VANDANA  
SINGH  
Third Respondent

Member of Authority: Peter van Keulen

Representatives: Alistair Miller, counsel for Applicant  
Blair Edwards and Madeleine Lister, counsel for the  
Respondents

Investigation Meeting: 24 and 25 September 2020

Submissions Received: 30 October 2020 and 20 November 2020 from the  
Applicant  
13 November 2020 and 2 December 2020 from the  
Respondent

Date of Determination: 8 December 2020

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] Nekita Enterprises Limited is owned by Harjit Singh and Shereen Singh; Mr and Mrs Singh are also the two directors of Nekita. Nekita was established in 2002 and since that time it has owned and operated various bottles stores, growing its business and holdings such that it had franchise agreements for 10 stores with Super Liquor Holdings in 2020.

[2] It was the operation of Nekita's Super Liquor bottle stores that came to the Labour Inspector's attention in early 2019 when a former employee contacted the Inspectorate and alleged that Nekita paid its employees less than the minimum wage and that it failed to keep accurate employment records.

[3] The Labour Inspector responded to this complaint by conducting a full investigation, which Nekita participated in. In November 2019 the Labour Inspector issued a report of its findings from the investigation. In his report the Labour Inspector concluded that:

- (a) Nekita had operated a dual payment system whereby only part of the hours worked by employees were recorded and paid for through the payroll system and the additional hours were paid in cash from store tills at a reduced rate. This dual payment system operated for a number of years, with information showing it was in operation as early as 2012 and that it was stopped in late 2016. The effect of the dual payment system was that employees were not paid minimum wage for some of the hours they worked.
- (b) The dual payment system was replaced with a "cashback" scheme in which Nekita would pay employees at the correct rate for all hours worked through its payroll system but would demand repayment of some of the wages paid. This cashback scheme was regarded as seeking a premium for employment.<sup>1</sup>
- (c) Nekita had failed to keep correct wage and time records<sup>2</sup> as its records failed to record mandatory information being the employee's address, the kind of work on which the employee is usually employed and the number of hours worked each day in a pay period.

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<sup>1</sup> Contrary to s 12A of the Wages Protection Act 1983.

<sup>2</sup> As required under s 130 of the Employment Relations Act 2000.

- (d) Nekita failed to keep holiday and leave records<sup>3</sup> as the records kept failed to record mandatory information which essentially accounts for annual leave entitlements, holiday pay paid, public holiday payment entitlements and amounts paid for public holidays worked or taken as holidays.
- (e) The operation of the dual payment system and Nekita's failure to keep accurate employment records meant it was likely that employees had not been paid correctly for annual leave and public holidays including alternative holidays.
- (f) Nekita had cooperated with the investigation and had offered to pay any wage arrears owed to employees; however, the recommendation was that the only appropriate course of action was to apply to the Employment Relations Authority for penalties, including penalties against Mr and Mrs Singh as persons involved in the breaches.<sup>4</sup>

[4] Whilst the Labour Inspector's report suggested wide ranging breaches by Nekita the statement of problem lodged with the Authority claimed that:

- (a) Nekita failed to pay four of its employees the minimum hourly wage totalling \$19,805.89.
- (b) Nekita failed to pay holiday pay on the minimum wage arrears for the four employees totalling \$1,584.48.
- (c) Nekita sought premiums from three employees.
- (d) Nekita failed to keep wage and time records and holiday and leave records for 59 employees.

[5] The Labour Inspector sought payment of the wage arrears and holiday pay from Nekita. And the Labour Inspector sought penalties against Nekita and Mr and Mrs Singh for:

- (a) Failing to pay minimum wage and associated holiday pay for four employees.<sup>5</sup>

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<sup>3</sup> As required under s 81 of the Holidays Act 2003.

<sup>4</sup> Under s 142W of the Employment Relations Act 2000.

<sup>5</sup> Section 10 of the Minimum Wage Act 1983.

(b) Seeking a premium for employment from three employees.<sup>6</sup>

(c) Failing to keep wage and time records for 59 employees.<sup>7</sup>

(d) Failing to keep holiday and leave records for 59 employees.<sup>8</sup>

[6] Nekita accepted the alleged failure to pay four employees minimum wage entitlements and it paid \$19,805.89 as claimed by the Labour Inspector. Nekita also accepted the alleged failure to pay holiday pay on those minimum wage arrears and it paid \$1,584.48 as claimed by the Labour Inspector. Nekita also admitted its failure to keep wage and time records and holiday and leave records for 59 employees. However, Nekita denied the allegation that it sought premiums from three employees.

[7] These admissions simplified the claims before the Authority; my investigation dealt with, and this determination resolves, two questions:

(a) Did Nekita seek premiums as alleged from three employees?

(b) What penalties should be imposed against each of the respondents for the admitted breaches of minimum standards and for seeking premiums if I find this occurred?

### **Non-publication**

[8] Before I turn to consider the two questions I will first deal with an application for non-publication made by the respondents.

[9] The respondents have applied to have an order for non-publication prohibiting any reporting on the investigation meeting held in this matter. Counsel for the respondents submit this is appropriate because:

(a) The respondents have been subject to a sustained campaign by the media which they say has been biased and vindictive; the respondents concern is that any reporting of the investigation meeting is unlikely to be impartial and will likely include personal attacks on Mr and Mrs Singh.

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<sup>6</sup> Section 13 of the Wages protections Act 1983.

<sup>7</sup> Section 130(4) of the Employment Relations Act 2000.

<sup>8</sup> Section 75 of the Holidays Act 2003.

- (b) Allowing media to report on the investigation meeting is an inherently punitive act; penalties are punitive and therefore it is out of proportion to allow media to also report in a biased way on the investigation meeting.
- (c) The Labour Inspector will not suffer in any way by a non-publication order that relates to the investigation meeting.
- (d) Any findings related to penalties will be published by the Authority in the usual way through my determination and the media will be free to report on that; non-publication of additional information or evidence in the investigation meeting will mean the media will be limited to reporting on matters determined by the Authority and reporting will therefore be devoid of any emotion or personal bias.

[10] I have considered carefully counsels' submissions above and the additional submissions on the appropriate law to be applied.<sup>9</sup> Despite Counsels' attempt to persuade me that I should look to the lesser standard of *H v A limited*,<sup>10</sup> I believe the standard to apply in this case is that set out in *Erceg v Erceg*,<sup>11</sup> and I am not satisfied that high standard required before the interests of justice require a departure from the usual principle of open justice has been met here.

[11] I decline to make the orders sought by the respondents.

[12] However, given that the respondents may wish to challenge my refusal to grant non-publication orders I will grant an interim order to protect their position pending any decision they might make on challenge. I will therefore extend the order for non-publication I made at the start of the investigation meeting on an interim basis.

[13] The terms of the interim non-publication order made pursuant to clause 12 of schedule 2 of the Act are:

- (a) I prohibit from publication in any publicly accessible document or forum any information pertaining to this claim.

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<sup>9</sup> *H v A Limited* [2014] NZEmpC [2014]; *Erceg v Erceg* [2016] NZSC 135; and *XYZ v ABC* [2017] NZEmpC 40.

<sup>10</sup> *H v A Limited*, above n9.

<sup>11</sup> *Erceg v Erceg*, above at n9.

- (b) This order will remain in place for 28 days. The order will then lapse if the respondents do not challenge my determination on non-publication within that 28 days or, if the respondents do challenge my determination on non-publication it will remain in place until any order on non-publication is made by the Employment Court.
- (c) This order is made to prevent any public reporting of this matter for a 28 day period pending a decision on challenge to my determination on non-publication by the respondents. It does not prevent the parties or any other persons from discussing or sharing information relating to this matter for any purpose other than public reporting, such as enforcement or taking advice on challenge rights.

**Did Nekita seek premiums from three employees?**

[14] Four ex-employees of Nekita provided information and made statements to the Labour Inspector as part of the Inspectorate's investigation. Those four employees also gave evidence in my investigation. Their evidence about Nekita seeking a premium was not consistent, it lacked detail and when scrutinised it was not convincing.

[15] Gurpreet Singh was first employed by Nekita as a team member in August 2011. Gurpreet was promoted to manager of the New Brighton Super Liquor store in 2015. Gurpreet resigned from Nekita in September 2018.

[16] Gurpreet's evidence on the premium issue included:

- (a) In his written evidence Gurpreet described how after the dual payment system ended in 2016 he was paid all of the hours he worked at his correct wage rate through payroll but Mr Singh would then ask for money back, which Gurpreet would take out of the bank and pay in cash.
- (b) In his oral evidence Gurpreet said Mr Singh only requested he pay back cash on three or four times and only \$200.00 or \$300.00. Gurpreet was very vague and evasive when asked about the detail of these payments and could not give me any detail of how the amount was calculated, how he knew what to pay,

where he went to get the cash, when he made these payment and how much he actually paid back.

(c) Gurpreet also said his bank statements showed that he had withdrawn amounts to pay Mr Singh cash under the cashback scheme but these statements were not submitted as evidence in my investigation.

(d) One final point about Gurpreet's evidence is that when he resigned in 2018 he sent an email to Nekita setting out a claim for payment of wages he said he was owed and this claim did not mention any demands for premiums or that he had paid back any of his wages in cash.

[17] Overall, Gurpreet's evidence on the premium issue was limited, vague and lacking any detail. I was not persuaded by him or his evidence and it lacked credibility.

[18] Manish Kumar was employed by Nekita from December 2015 until he resigned in March 2018. He worked as a team member until he also became a manager at the New Brighton Super Liquor store in 2017.

[19] Manish's evidence on the premiums issue included:

(a) In his written evidence Manish stated that once the dual payment system stopped in 2016 he was paid for all of the hours he worked at his correct wage thorough Nekita's payroll system. He was then required to pay back part of his wages at the rate of \$2.50 per hour, which increased to \$4.50 per hour when he went to work at the New Brighton store. Manish said these cash payments occurred monthly, that he was told what to pay either by one of the managers or Mr Singh after they had reviewed the hours he had worked for the month, which he had recorded in a notebook. He said he would then go to one of the two ATMs near the store, a Westpac ATM and a Kiwibank ATM, and he would get the required cash out and pay it to Mr Singh.

(b) In his oral evidence Manish said he paid money back up to 20 times and he also said he could and did calculate the amounts to be paid himself, as he knew what hours he had worked.

(c) Manish also provided bank statements, which were available in my investigation. These statements were inconclusive and did not provide any credible support for the allegation that premium were sought by way of a cashback system:

- i. The accounts show limited withdrawals of cash amounts and none of these were from a Westpac ATM.
- ii. Most of the amounts withdrawn that might correspond to the cashback payment scheme were amounts withdrawn at Paperplus, but these were infrequent and not monthly and do not add up to the amount of cash Manish says he was paying (at the rate of \$2.50 per hour and then \$4.50 per hour) for a period of 20 months.
- iii. The withdrawals from Paperplus and a few other outlets could have been for anything; they are not proof of money paid to Nekita. So, for example, the Paperplus store also dealt with Western Union money transfers, so the withdrawals could have been money transfers.

[20] Overall, whilst Manish's evidence was detailed it was not persuasive and in fact the detail does not hold together when assessed, particularly the amounts he said he paid over a lengthy period of time. There were also some inconsistent factors, such as no entries in the bank statements for withdrawals from a Westpac ATM despite Manish saying he used a Westpac ATM to withdraw cash to pay Mr Singh. The bank statements did not provide proof of the cashback scheme or that premiums were sought and paid, rather they undermined Manish's evidence.

[21] Gagandeep Dhaliwal was employed by Nekita from July 2012 until he was dismissed in June 2018. In his written evidence Gagandeep stated that when the dual payment system stopped in 2016, Mr Singh told employees that they would have to pay back some of their wages. In his oral evidence Gagandeep said he was never required to pay cash back to Nekita.

[22] Sukhnandan Singh was employed by Nekita from early 2012 until February 2015. Sukhnandan did not give any evidence about the premium issue.

[23] Mr Singh's evidence on the premium issue included very clear denials that he or Nekita operated a cashback system. He described it as completely untrue. His denial in evidence was backed up by an immediate denial to the Labour Inspector when the question of the cashback scheme was first put to him.

[24] In conclusion the evidence provided on the cashback scheme does not support the allegation that Nekita charged three employees a premium. Only three of the four employees provided evidence about the cashback scheme and their evidence was not credible or conclusive. One witness's evidence lacked detail and the witness was evasive when asked about detail. Another witness provided detail but this was not credible in terms of the amounts alleged to have been paid and his bank accounts. And the last witness provided simple evidence of employees being told they would have to pay back cash but he gave no detail about whether this actually happened and then he said in oral evidence that he was not asked to pay back any cash.

[25] Overall there is insufficient evidence to support allegation that Nekita sought a premium from three employees. And Mr Singh denies that this occurred, including from when he was first asked about it by the Labour Inspector.

**What penalty should I impose against Nekita for the breaches of minimum standards?**

[26] To recap, Nekita:

- (a) Failed to pay minimum wage including associated holiday pay to four employees in breach of s 6 of the Minimum Wage Act 1983. The minimum wage and holiday pay arrears total \$21,390.37.
- (b) Failed to keep wage and time records in breach of s 130 of the Employment Relations Act 2000 (the Act) for 59 employees.
- (c) Failed to keep holiday and leave records in breach of s 81 of the Holidays Act 2003 for 59 employees.

[27] The Labour Inspector seeks penalties against Nekita for these breaches of minimum employment standards.

[28] The exercise of quantifying penalties starts with section 133A of the Act, which sets out relevant considerations. How those considerations and other relevant matters are considered and applied is discussed in *Borsboom v Preet PVT Limited*,<sup>12</sup> where the Employment Court set out a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards:

- (a) Step 1 – Identify the nature and number of breaches.
- (b) Step 2 – Assess the severity of breaches considering both aggravating and mitigating features.
- (c) Step 3 – Consider the means and ability of the respondent to pay.
- (d) Step 4 – Ensure that the amount arrived at after the first three steps is proportionate to other cases and the extent of the breaches.

[29] In *A Labour Inspector v Matangi Berry Farm Limited*<sup>13</sup> Judge Corkill applied an approach to penalty setting which assessed the factors in section 133A of the Act and then applied those and other considerations identified in *Preet* using the four step process in *Preet* to quantify the penalty. This is the approach I will use; first I will consider the statutory requirements and then I will use that information to assess quantum based on the four steps in *Preet*.

#### *The object stated in s 3 of the Act*

[30] The objects of the Act include building productive employment relationships through the promotion of good faith and promoting effective enforcement of employment standards by Labour Inspectors.

#### *The nature and extent of the breaches*

[31] There are four breaches relating to payment of minimum wage and holiday pay and 118 breaches in relation to keeping mandatory employment records.

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<sup>12</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

<sup>13</sup> *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

[32] The four failures to pay minimum wage arise out of a dual payment system operated by Nekita. Under this system employees were paid correctly for set hours of work each week, that is, employees were paid for a set number of hours at their hourly wage rate (which was at or above minimum wage) through the Nekita payroll system. Then for any additional hours that employees worked they were paid cash by the store manager at a lower hourly rate. This lower rate was often below the applicable minimum wage rate but would be close to the net hourly wage rate the employee would receive when paid through the Nekita payroll.

[33] It appeared from the Labour Inspector's investigation and the evidence that I heard that this dual payment system occurred in many of Nekita's stores and operated for a number of years leading up to 2016. However, the Labour Inspector was only able to prove that the system operated in respect of four employees; this was based on the employees' statements to the Labour Inspector and an analysis of Nekita's employment records and store records that recorded cash payments made from tills.

[34] So for penalty setting purposes I have four breaches of minimum wage requirements relating to four employees arising out of the dual payment system which operated in respect of those employees for period of four years down to less than one year. This reflects ongoing, persistent and deliberate breaches of the minimum wage requirements for those four employees.

[35] The failures to keep wage and time records and holiday and leave records covered 59 employees of Nekita over a number of years. These failings were systemic, probably arising out of the likely widespread operation of the dual payment system and Nekita's practice of recording employment insufficient information. The failings were therefore repeated for each employee over the time each employee was employed.

*The nature and extent of any loss or damage suffered*

[36] The loss or damage suffered by the four employees in respect of the minimum wage payments is quantified as \$19,805.89.

[37] However, in my view this number is a little artificial for two reasons.

[38] First, the quantified loss is based on the number of hours worked by each employee for which they were paid cash at a rate below minimum wage. The loss is what the payment

for those hours based on the applicable minimum wage should have been less what was paid in cash. Then 8% is added to that amount to reflect holiday pay. In reality the difference between the cash rate and the minimum wage rate is not really an actual loss for the employees as in many cases that reflected the tax payable so the cash payment reflected the net payment the employees would have received had they been paid correctly. So, in some respects the \$19,805.89 is a windfall for the employees.

[39] However, the second aspects of loss for the four employees arising out of the dual payment system is that the extra hours, which were paid in cash, were not recorded for calculating holiday pay so it is likely that these four employees also lost a significant amount of holiday entitlement.

[40] The loss for the 59 employees subject to the record keeping breaches is not quantified but it is significant as the failure to accurately record hours, including hours worked on public holidays, means that it is likely that all employees were, in some way underpaid their holiday pay entitlements.

*Were the breaches were intentional, inadvertent or negligent?*

[41] I conclude that all of the breaches were intentional and were designed to minimise the gross amounts paid to employees and limit the amount of holiday pay paid.

*What steps have been taken in mitigation?*

[42] Nekita has paid the wage arrears sought by the Labour Inspector and has made appropriate admissions.

*The circumstances of the breach and any vulnerability*

[43] Many of Nekita's employees were migrant employees, requiring work visas. They were vulnerable employees, with little knowledge of their employment rights and reliant on Nekita not just for their jobs and income but their right to reside in New Zealand.

*Previous conduct*

[44] Nekita has had an enforceable undertaking issued to it by the Inspectorate for paying out more than one week's holiday pay.

*Preet step 1 – Nature and number of breaches*

[45] In terms of setting the quantum of the penalties imposed, this step requires me to consider whether any of the breaches should be globalised so that a single breach may reflect two or more breaches.

[46] In *Preet* the Court discussed globalising breaches and stated:<sup>14</sup>

[100] We agree that the Authority and the Court may impose ‘global penalties’ in appropriate cases. That means that where there are multiple breaches of several statutory provisions in respect of multiple employees, it may be appropriate for the Authority or the Court to assess an ultimately single penalty in respect of those. In other cases, especially where there are not such close associations between the circumstances in which breaches have occurred, it may be appropriate for the Authority or the Court to impose separately assessed penalties so expressed. But in all cases, including those where global penalties may be imposed, the Authority or the Court must identify justifiably the constituent elements of a global penalty. The methodology of doing so is set out at the conclusion of this case and, as will be seen, leads to the imposition of a partially global penalty sum against each of the two defendants.

[47] Then the Court applied the principles of globalisation to conclude in that case:<sup>15</sup>

[141] Still under Step 1, once the nature and number of breaches have been identified, the Court or the Authority should give consideration to whether global penalties may be appropriate in the particular case. If, for example, there are multiple and very similar breaches such as the repeated non-payment or below-minimum payment of wages to an employee, it may be an appropriate case for the imposition of a global penalty for these. This may include cases where the breaches are part of a consistent pattern of breach of a particular statutory requirement. The Authority or the Court should be careful to ensure that the globalisation of a penalty does not diminish the significance of a repeated and/or long-running series of breaches. Ultimately, this global penalty assessment will be subject to cross-checking and confirmation or potential reconsideration when the Authority or the Court applies what we call the proportionality test under Step 4.

[48] So, in *Preet* the Court contemplated that globalisation could apply where there are multiple breaches of statutory provisions in respect of multiple employees, reducing the number of breaches down to one single penalty. However in that case the Court only globalised the multiple and repeated breaches in respect of each employee for a single statute, such that the repeated failure to pay minimum wage was dealt with as one breach per employee.

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<sup>14</sup> *Borsboom v Preet PVT Limited*, above n12 at [100].

<sup>15</sup> *Borsboom v Preet PVT Limited*, above n12 at [141].

[49] The Labour Inspector has already accepted this globalisation in the penalties it seeks; for example, the claim is for one penalty per employee for repeated failures to pay the minimum wage rate.

[50] Then in *A Labour Inspector v Parihar*,<sup>16</sup> Judge Perkins accepted counsels' submissions on globalisation of penalties and globalised failures to keep wage and time records and holiday and leave records as one breach per employee rather than two breaches per employee.

[51] The Labour Inspector submits that this approach to globalisation is appropriate in this case meaning the 118 record keeping breaches are assessed as 59 breaches i.e. only one record-keeping breach per affected employee.

[52] The other decision of the Court that is instructive on globalising penalties is *A Labour Inspector v Matangi Berry Farm Limited*.<sup>17</sup> In *Matangi* Judge Corkill globalised failures across 207 employees and 118 employees down to a single breach for each type of default; failure to retain employment agreements, failure to keep holiday and leave records and failure to pay annual holiday pay. This meant globalisation reduced 532 breaches (based on a count per employee affected) down to just three.

[53] Counsel for the respondents submits that this is the appropriate globalisation to adopt in respect of the record keeping breaches so that 118 record keeping breaches are reduced to two.

[54] In assessing the extent to which I should globalise the breaches in this case I am persuaded by Judge Perkins' observation in *Parihar* where he said:<sup>18</sup>

If the maximum penalty is related to each breach, an enormous total is reached, requiring an artificial approach to discounting to reach a realistic level of eventual penalties.

[55] This is an issue I have addressed previously in determinations through step 4 of the *Preet* analysis, justifying large reductions in potential penalty amounts on the basis of proportionality and consistency. In particular I have applied ratios to align penalty amounts

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<sup>16</sup> *A Labour Inspector v Parihar* [2019] NZEmpC 145.

<sup>17</sup> *A Labour Inspector v Matangi Berry Farm Limited*, above n13.

<sup>18</sup> Above n16 at [39].

with the amount of money withheld<sup>19</sup> and looked at the final penalty amount reflecting a small percentage of the maximum penalty.<sup>20</sup> On reflection this is somewhat artificial and as Chief Judge Inglis commented in *A Labour Inspector v Daleson Investment Limited*,<sup>21</sup> applying a ratio or percentage-based reduction of potential penalty amounts undermines the need to assess the statutory requirements or apply the four step process in *Preet*. It seems to me that this is best addressed by the guidance from Judge Perkins in *Parihar*, which was also the approach taken by Judge Corkill in *Matangi* – using globalisation to ensure there is a sensible starting point in terms of maximum amount of penalty that can be imposed.

[56] In this case I accept it is appropriate to globalise the record keeping breaches as one breach per statute. So, there are 4 breaches related to failure to pay minimum wage and 2 breaches of record keeping. And therefore the maximum amount of penalties that can be imposed against Nekita is \$120,000.00.

#### *Preet step 2 – Severity of breaches*

[57] In addition to weighing up my consideration of the statutory considerations I must also consider the additional factors referred to in *Preet* of deterrence and culpability.

[58] After considering the aim of the Act, the deliberate and systemic nature of the breaches, the extent of vulnerable employees impacted and the loss incurred by those employees, as set out above, and adding to this Nekita's culpability and the need for deterrence, I conclude that the breaches are significant and consider 90% of maximum is an appropriate starting point.

[59] I then weigh against this the steps in mitigation and conclude that a minor reduction is appropriate to reflect payment of the minimum wage amounts amounts. As with Chief Judge Inglis' assessment in *Daleson*,<sup>22</sup> there is no evidence of remorse but Nekita has paid what was demanded, albeit that this has an element of being self-serving, so a reduction is warranted. However in this case there is no evidence that Nekita took further steps to consider how wide the dual payment system was applied and look at what other arrears could be owed to employees or if establishing loss to other employees was too difficult to calculate it could

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<sup>19</sup> *A Labour Inspector v White Developments Ltd* [2017] NZERA Christchurch 87.

<sup>20</sup> *A Labour Inspector v Double Seven Services Limited* [2018] NZERA Christchurch 195.

<sup>21</sup> *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [62].

<sup>22</sup> *A Labour Inspector v Daleson Investment Limited* above n21 at [35].

simply have made compensatory payments to all employees to reflect the fact that all employees subject to the dual payment system have in fact lost some remuneration. If Nekita was truly contrite for the wrongdoing and concerned about the losses employees may have suffered this would have been an appropriate step to take. Based on this I am only prepared to allow a minor reduction to the maximum penalty amount of 10%.

[60] So after considering the severity of the breaches and the minor acts of mitigation my penalty assessment stands at 80% of the maximum amount being \$96,000.00.

*Preet step 3 – Means and ability of the respondent to pay*

[61] I am not prepared to allow any reduction for the ability to pay. The reality is Nekita expanded its business significantly through the period of time that it operated the dual payment system and it appears on the face of it to have been profitable. It also continues now to own and operate various independent bottle stores.

*Preet step 4 – Proportionality*

[62] In applying proportionality I think it is helpful to look at consistency. The end amount of any penalty needs to be proportional to the breaches and in line with other penalty amounts for multiple breaches of similar seriousness.

[63] In this regard I have assessed various determinations of the Authority in which there have been penalties awarded where the starting point has been multiple breaches before globalisation (in excess of 10 and up to 1075)<sup>23</sup> and note that the penalties imposed range from \$4,000.00 up to \$160,000.00. I have also considered the amounts awarded in the Court cases I have referred to,<sup>24</sup> noting that some of those decisions involve pecuniary penalties.

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<sup>23</sup> *A Labour Inspector v Raj Kiwi Limited* [2020] NZERA 493; *A Labour Inspector v H4M Corporation Limited* [2020] NZERA 406; *A Labour Inspector v Sail City Venture Limited* [2020] NZERA 268; *A Labour Inspector v Hawkes Bay Seafoods Limited* [2020] NZERA 133; *A Labour Inspector v Chait & Bish Hospitality Limited* [2020] NZERA 105; *A Labour Inspector v Indian Heaven Limited* [2019] NZERA 597; *A Labour Inspector v New Zealand Mountain Hunting Limited* [2019] NZERA 568; *A Labour Inspector v Mittal & Sons Limited* [2019] NZERA 406; *A Labour Inspector v Shalini Limited* [2019] NZERA 334; *A Labour Inspector v Dhanoa Transport Ltd* [2018] NZERA Wellington 32; *A Labour Inspector v Double Seven Services Limited* [2018] NZERA Christchurch 195; and *A Labour Inspector v Alps Travel Company Ltd* [2018] NZERA Christchurch 22.

<sup>24</sup> *A Labour Inspector v Parihar*, above n16; *A Labour Inspector v Daleson Investment Limited* above n21; and *A Labour Inspector v Matangi Berry Farm Limited*, above n13.

[64] The end result of the comparisons, particularly to those that involve similar scope and severity of breaches, and my reflection on proportionality is that I am satisfied that a further small reduction is appropriate and I reduce the penalty amount to \$90,000.00.

**What penalty should I impose against Mr Singh for the breaches of minimum standards?**

[65] In terms of Mr Singh's personal liability for penalties, this is governed by sections 142W and 142X of the Act and the corresponding provisions under the Minimum Wage Act 1983 and the Holidays Act 2003.

[66] The starting point is to first establish if Mr Singh was a person involved in the breaches by Nekita. Mr Singh conceded he was a person involved in the breaches by Nekita but he stated he was unaware of the breaches.

[67] One of the managers of the New Brighton Super Liquor store, Kunal Gulati gave evidence to the effect that he started paying employees under the dual payment system of his own accord and that Mr Singh was not aware of the system. However, Kunal's oral evidence was not very credible in terms of explaining how he came to operate the scheme and how he operated it once he started paying cash to employees. Also the contemporaneous documents, including additional documents that I called for and reviewed after the investigation meeting, are not consistent with much of what Kunal said when he explained the operation of the dual payment system. I was not persuaded by Kunal that he was responsible for implementing the dual payment system, at least for one of the Super Liquor stores and that Mr Singh did not know about it.

[68] Whilst Mr Singh's evidence on his knowledge of the dual payment system was clear and he was forthright about his lack of knowledge, his explanation of the documents and what he knew about revenue, salary payments and cash flow through the accounts and various reports he received was not credible or realistic. I simply fail to see how in his position he was unaware of the dual payment system given what he knew about the revenue, costs and profit of Nekita's stores.

[69] Also, it does not make sense that as a director and shareholder of Nekita, Mr Singh did nothing about the dual payment system other than shut it down when it was supposedly

brought to his attention for the first time by the Labour Inspector, which was Mr Singh's evidence. This type of behaviour by managers was non-compliant with statutory requirements, potentially fraudulent in terms of Nekita's taxation obligations, had had a significant impact on employees' incomes, and on many levels left Nekita vulnerable to potentially high amounts of liability as well as bad publicity; yet despite all of this there was no evidence of an investigation by Nekita, no evidence of any disciplinary action being taken against the managers involved nor any evidence of attempts to compensate employees. This lack of action by Mr Singh indicates that he was aware of and complicit in the dual payment system.

[70] Further I accept the Labour Inspector's evidence that when first asked about the dual payment system Mr Singh acknowledged that it operated in Nekita.

[71] So I am satisfied that Mr Singh knew of the dual payment system and at least condoned it. And I am therefore satisfied that penalties should be imposed on him for his involvement in the breaches. I will consider the quantum by applying the four steps in *Preet*.

*Preet step 1 – Nature and number of breaches*

[72] This is the same as the analysis for Nekita's breaches and there are 4 breaches related to failure to pay minimum wage and 2 breaches of record keeping. And therefore the maximum amount of penalties that can be imposed against Mr Singh is \$60,000.00.

*Preet step 2 – Severity of breaches*

[73] As with Nekita, I have considered the aim of the Act, the deliberate and systemic nature of the breaches, the extent of vulnerable employees impacted and the loss incurred by those employees, as set out above, and added to this are Mr Singh's slightly lesser culpability and the need for deterrence, I conclude that the breaches are significant and consider 70% of maximum is an appropriate starting point.

[74] I also will allow a further 10% reduction for mitigating factors.

[75] So after assessing the severity of the breaches for Mr Singh I am left with a quantum of \$36,000.00.

*Preet step 3 – Means and ability of the respondent to pay*

[76] As with Nekita I am not prepared to allow any reduction for the ability to pay.

*Preet step 4 – Proportionality*

[77] In applying proportionality and consistency I consider it appropriate to round down the penalty amount to \$35,000.00.

**What penalty should I impose against Mrs Singh for the breaches of minimum standards?**

[78] Mrs Singh conceded in the statement in reply that she was a person involved in the breaches by Nekita. However, I have a duty to investigate and cannot simply rely on statements made by parties, including admissions. I am not bound by Mrs Singh's stated position rather I must look to the evidence in this matter to decide if she was in fact a person involved in the breaches by Nekita.

[79] In short, Mrs Singh's evidence, which I wholly accept, was that she was not involved in any aspects of Nekita's bottle stores and had no knowledge at all of the breaches.

[80] Therefore, I conclude that notwithstanding Mrs Singh's admission and based on my obligation to investigate rather than be led by parties' statements, that Mrs Singh was not a person involved in the breaches by Nekita and I will not impose any penalty against her.

**Conclusion on penalties**

[81] Within 28 days of the date of this determination, Nekita Enterprises Limited must pay to the Labour Inspector for transfer to a Crown Bank account penalties in the sum of \$90,000.00.

[82] Within 28 days of the date of this determination, Harjit Singh must pay to the Labour Inspector for transfer to a Crown Bank account penalties in the sum of \$35,000.00.

**Costs**

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

[84] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum

Peter van Keulen  
Member of the Employment Relations Authority