IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2020] NZERA 72
3050892

BETWEEN	A LABOUR INSPECTOR Applicant
AND	HIRAM KUMAR CHIMANBHAI PATEL IN PARTNESHIP WITH HWEMLATA PATEL trading as 4 Square Jellicoe Street First Respondent
AND	HEMLATA PATEL IN PARTNESHIP WITH HIRAM KUMAR CHIMANBHAI PATEL trading as 4 Square Jellicoe Street Second Respondent

Member of Authority:	Michael Loftus
Representatives:	Claire English, counsel for the Applicant Nikkii Flint, counsel for the Respondents
Investigation Meeting:	By telephone and on the papers with input up to and including 20 November 2019
Date of Determination:	19 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter stems from an application by a Labour Inspector which involved claims of underpayment of holiday pay (annual holidays, time and a half for working on public holidays and payment for alternate holidays) for a number of ex-staff. There were also claims regarding inadequate record keeping.

[2] The Inspector sought arrears and penalties.

[3] The parties proceeded to mediation. They resolved most of the issues and subsequently advised that:

a. The respondents accept the breaches set out in the statement of problem.

b. Although all breaches are accepted, the applicant accepts that it failed to notify the respondents of the breaches referred to in paragraph's 2.6 to 2.12 of the statement of problem, prior to filing same.

c. Following the filing of the Statement of Problem and Statement in Reply, the respondents have made repayments to the affected employees of the outstanding arrears of wages and holiday pay as set out in the Statement of Problem. The Labour Inspector has been provided with evidence of these repayments, and accepts and agrees that this has occurred.

d. The respondents have taken professional advice on their business systems with a focus on ensuring on-going compliance going forwards. This includes legal advice as to appropriate individual employment agreements, accounting advice, and the installation of a new payroll system. The Labour Inspector has been provided with evidence of these changes, and accepts and agrees that this has occurred.

[4] Only two matters remained outstanding. One is the determination of penalties. The second is an application there be a permanent prohibition on the publication of anything which might identity the respondents.

Penalties

[5] With respect to penalties the parties have done considerable work and reached agreement on the number of breaches and an appropriate way in which these breaches can be globalised with a view to recognising the underlying systems issues that led to the breaches.

[6] The parties provided the Authority with their analysis, together with a suggested outcome. Their analysis follows the steps set out by the Employment Court in its judgment of *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington*

Discount Tobacco Limited,[1] as well as the additional analysis performed by the Court in the cases of *Prabh*[2] and *Daleson Investment*.[3] The analysis, provided by counsel via a joint memorandum, is quoted in paragraphs [7] to [42] inclusive.

[7] The information required in support of penalty claims for breaches of minimum employment standards, and the assessment of the nature and severity of the breaches is as follows:

> Statutory Consideration 1 – The object of the Act
> Statutory Consideration 2 – The nature and extent of the breach
> - Identify the nature of breaches.
> - Identify the number of breaches.
> - Identify the maximum penalty available in respect of each identified breach.
> - Identify the provisional starting point for each penalty.
> - Consider whether global penalties are appropriate.
>
> Statutory Consideration 3 – Whether the breach was intentional, inadvertent, or negligent
> - Assess the severity of the breach.
>
> Statutory Consideration 4 – The nature and extent of any loss or damage
> Statutory Consideration 5 – Steps to mitigate effects of the breach
> Statutory Consideration 6 – Circumstances of the breach, and any vulnerability
> Statutory Consideration 7 – Previous Conduct
> Additional Consideration 8 – Deterrence
> Additional Consideration 9– Culpability
> Additional Consideration 10 – Consistency
> Additional Consideration 11 – Ability to Pay
> - Consider the means and ability of the person in breach to pay any penalty.
>
> Additional Consideration 12 – Proportionality of Outcome
> - Consider the proportionality of the penalty in relation to the harm caused.

Statutory Consideration 1 – the Object of the Act

[8] Section 3 of the Employment Relations Act 2000 states that the objects of the Act are, relevantly, to: Section 3 of the Employment Relations Act 2000 states that the objects of the Act are, relevantly, to:

a. promote good faith in all aspects of the employment environment and the employment relationship;

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[1] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[2] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[3] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

b. promote the effective enforcement of employment standards, in particular by Labour Inspectors.

[9] Section 3 of the Holidays Act 2003 provides that the purpose of that Act is to promote balance between work and other aspects of employee's lives, and to provide minimum entitlements which will allow this to happen.

[10] The Court has found that these objects are particularly relevant in penalty matters involving migrant employees. Failures to provide minimum standards directly disadvantages employees, and arise in circumstances which the Court has described as *involving a distinct power imbalance*.[4]

[11] In these circumstances, migrant employees have been deprived of their rights to paid leave, both when taking leave during employment, and when the employer failed to provide the value of that untaken annual leave at the end of employment. In two instances, minimum wages were not paid.

[12] The respondents were owner-operators, who had responsibility for both work done and leave taken, and for payment.

[13] The applicant accepts that once the issues were identified to the respondent's, steps were taken to rectify any deficiencies. No improvement notice was ever issued.

Statutory Consideration 2 – the Nature and Extent of the Breach

[14] <u>Identifying the nature of breaches</u>. There are seven types of breaches that have been committed by the respondent:

a. Failure to calculate and pay for annual holidays taken during employment, for 6 employees;

b. Failure to calculate and pay annual leave on termination of employment, for 6 employees;

c. Failure to pay time and a half for work done on public holidays, for 5 employees;

d. Failure provide alternative holidays, for 5 employees;

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[4] *A Labour Inspector v Daleson Investment Limited,* above n 3, at para [27].

e. Failure to keep holiday and leave records, for 9 employees;

f. Failure to keep wage and time records, for 9 employees; and

g. Failures to pay, at least, minimum wages for each hour actually worked, for 2 employees.

[15] Identifying the number of breaches liable for penalty. There are nine employees affected by the respondent's breaches, as set out above, with a total of 48 separate breaches resulting.

[16] Identifying the maximum penalty available in respect of the breaches of statute committed by the respondent. The maximum penalty available against an individual (including operating as a partnership) is $10,000, as follows:

a. in respect of breaches of the Minimum Wage Act 1983, section 10(4) of the Minimum Wage Act 1983 and section 135(2)(a) of the Employment Relations Act 2000.

b. in respect of breaches of the Employment Relation Act, section 135(2)(a) of the Employment Relations Act 2000.

c. in respect of breaches of the Holidays Act 2000 is $20,000 per breach, awardable against a company in accordance with section 75(1)(a) of the Holidays Act.

[17] Consider whether global penalties are appropriate. The parties submit that it is appropriate to *globalise* the 48 separate breaches set out above as follows, with a focus on the underlying systems issues that led to these breaches occurring. However, it is not appropriate to further globalise as penalties should be approached on a per-employee basis.[5]

a. Failures to calculate and pay for annual holiday entitlements, both during employment and on termination of employment, for 6 employees, being a total maximum of $60,000.

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[5] *Borsboom (Labour Inspector) v Preet PVT Limited*, above n 1, at [139]. See also *A Labour Inspector v Bahn Thai Restaurant Limited* [2016] NZERA Christchurch 222 at [21]

b. Failures to provide for public holidays either by payment at time the relevant time, or by provision of alternative days on termination of employment, for 5 employees, being a total maximum of $50,000.

c. Failures to keep compliant employment records (both wage and time records and holiday and leave records) for 9 employees, being a total maximum of $90,000.

d. Failures to pay at least the current minimum wage for each hour actually worked, for 2 employees, being a total maximum of $20,000.

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

[18] The breaches resulted from the employer's business set-up, and resulted in systemic underpayments to all employees affected.

[19] The Court has commented in circumstances where an underpayment to an employee resulted from a degree of ignorance of the law as to rules around payments, that this does not provide an excuse[6].

[20] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[7], or failed to take reasonable steps to fulfil their legal obligations.[8]

[21] It is accepted that the respondents did not act intentionally, however, as above, ignorance is not an excuse.

Assessment of the Severity of Breaches

[22] The judgement of the Court in *Preet* suggests that failures to pay minimum entitlements should be assessed at 70%[9]. This is because such failures have the potential to result in financial advantage to the employer, who received labour without

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[6] *A Labour Inspector v Daleson Investment Limited,* above n 3, at para [29]
[7] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383
[8] *El-Agez v Comprede Limited,* TT 4121553, at para 18
[9] See *Preet,* at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

having to fully and properly pay for that labour. It also reflects the direct adverse effect of underpayment on employees and their dignity and quality of life.

[23] For failures to keep compliant records, the correct starting point is 50%[10]. Accurate record-keeping and the provision of compliant employment agreements are a longstanding and clear obligation of employers.

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

[24] The employees have lost the use of the money they were entitled to at the time it became due[11].

[25] The employer has reduced its costs.[12]

Statutory Consideration 5 – Steps to mitigate effects of the breach

[26] Arrears have been paid in full[13], and were paid as soon as the applicant brought the breaches to the respondents' attention.

[27] Active steps have been taken to ensure that the business is run in a compliant way in the future[14].

[28] No improvement notice was issued. The Labour Inspector notes she is not required to issue an improvement notice. The respondent believes that this prevented the respondent's from having the opportunity to rectify any issues identified without further litigation.

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

[29] The affected employees are migrant workers dependent on visas tied to the respondent and are inherently vulnerable, particularly because they can be expected to be unfamiliar with New Zealand laws and regulations[15].

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[10] See *Preet,* at paragraph [173].
[11] *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [31]
[12] Ibid.
[13]However, the Court has held that payment of monies owing is not evidence of contrition, and amounts to no more than the late performance of a duty - Ibid at para [33] to [35].
[14] See the cautions urged by the Court in *A Labour Inspector v Daleson Investment Limited,* above n 3*,* at para [35].
[15] The Court has noted, in *A Labour Inspector v Prabh Limited* at para [10] that in relation to the affected employees' immigration status: "I do not regard the collateral material relating to the employees' attempts to improve their immigration status as in any way absolving the defendants from the appalling way the employees were treated over the entire period of their employment. In some

Statutory Consideration 7 – Previous Conduct

[30] The respondents have not previously appeared before the Authority.

Additional Consideration 8 – Deterrence

[31] The breaches in this case are minimum standards. As such there is a need to "bring home" to the employer the standards it is required to meet[16].

[32] The respondent's actions after being put on notice of the issues by the applicant, were to immediately rectify the underpayments and to seek professional assistance in ensuring all further business met required standards. The applicant is satisfied that with the respondent's actions.

Additional Consideration 9– Culpability

[33] This is a relatively small business, run not only by the affected employees, but by the two respondents personally. They are actively involved in the business, and have taken responsibility for it.

Additional Consideration 10 – Consistency

[34] 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.

a. In *Preet* and *Prabh*, penalties of $100,000 were imposed.

b. In three recent decisions each involving 2 migrant workers, the Authority awarded over $100,000 in penalties in one instance[17], $20,000 in the second instance[18] and $30,000 where the employee was a sole trader (and therefore only liable for half the maximum amount compared to a company)[19].

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ways, the situation was aggravated in that the defendants took advantage of the employees' vulnerability over immigration status."

[16] *A Labour Inspector v Daleson Investments Limited,* above n 3, at para [39]

[17] *A Labour Inspector & Ors v Pegasus Energy Limited & Anor* [2018] NZERA Wellington 26

[18] *A Labour Inspector v Mittal & Son Limited and Ors* [2019] NZERA Auckland 406

[19] *A Labour Inspector v Xu t/a Golden Spring Takeaway* [2019] NZERA Wellington 22

[35] The applicant submits that, weighing the relevant aggravating and mitigating factors, a reduction is warranted in the present case of 50%, in recognition of the arrears paid and the active steps taken to update the relevant business systems.

Additional Consideration 11 – Ability to Pay

[36] The onus is on the employer to provide the Authority with up-to-date and accurate information in support of any submission that the employer is financially unable to meet a potential penalty award. In addition:

> *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 statuary scheme and its underlying objectives.*[20]

[37] The employer continues to trade, but advises that any penalties will need to be paid out of cash flow, as a matter of practicality.

[38] The Labour Inspector accepts this, and notes that it is appropriate that true issues around ability to pay should be dealt with by way of payment by instalments[21].

[39] The applicant submits that a reduction of say 50% could be made under this head if the Authority were so minded.[22]

Additional Consideration 12 – Proportionality of Outcome

[40] Penalties should not be reduced so as to create perverse incentives for employers, and inadvertently encourage non-payment[23].

[41] The applicant accepts that in the present case, the application of the proportionality test will lead to some reduction in penalties properly and fairly payable.

[42] The Authority will need to take into account whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a

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[20] *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [44]
[21] Ibid at para [46]
[22] See for example the reduction at this stage of the enquiry in *Borsboom (Labour Inspector) v Preet PVT Limited & Anor*, above n 1, at para [186]; *A Labour Inspector v Prabh Limited*, above n 2, at para [70]; and *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [44]
[23] *A Labour Inspector v Daleson Investment Limited,* above n 3, at para [47]

real risk that it could be of such magnitude as to create a significant risk of non-payment.[24]

Conclusion

[43] The above points were then rendered into tabular form and the parties concluded by submitting:

> For the above reasons, the parties respectfully suggest that the final amount of penalties awarded be $30,000, as summarised in the table at Appendix One, to be paid in six equal instalments of $5,000 per month, into the appropriate Crown account.

[44] That however raises one further point from *Preet* which is the Court's comment:

> We should note, finally, on the matter of the proceedings before the Authority, that if the parties had reached any consensus about penalties, whether to award these and, if so, the amounts, could only have been determined by the Authority, even if by consent of the parties. Penalties could not have been imposed or fixed solely by the consent of the parties. The Authority would have to be satisfied of the appropriateness of any awards and the amounts of them. It will be an unusual case where the Authority will leave questions of penalty to the parties to attempt to resolve, given the penal and public law nature of such orders.[25]

[45] I have noted the above comment but conclude this is a situation in which the party's recommendation can be applied. I reach that conclusion as their approach has been formulated by experienced counsel acting on behalf of the parties. It has rigour, considers each step of the Court ordained process then applies agreed facts in order to inform a viable conclusion.

[46] Having reviewed the joint memorandum and considered other information available from both the file and input by the parties I am satisfied the recommended penalty is both justifiable and appropriate. I shall therefore apply the party's suggestion and will make orders accordingly.

Non Publication Order

[47] The respondents seek an order prohibiting the publication of their names and any features which might identify them.

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[24] Ibid at [88] – [89]

[25] *Borsboom (Labour Inspector) v Preet PVT Limited*, above n 1, at [41].

[48] They do so on the grounds that:

a. While the respondents are in partnership the second respondent plays no part in the business;

b. The business is not large and located in a small community which means publication is likely to do irreparable damage to the business and the respondent's livelihood and reputation. It is said this would be inequitable as the errors which led to the inspector's application were both inadvertent and were rectified as soon as they were brought to the first respondent's attention. That rectification saw full payments being made to all identified staff;

c. It is also noted the first respondent took further steps to ensure, to the inspector's satisfaction, that processes are in place to prevent a reoccurrence; and

d. The errors which were found arose during the investigation of a complaint that was not substantiated.

[49] It is submitted the question is therefore whether the public interest in publishing outweighs the damage that might cause and that the answer is no given rectification and the impact on innocent parties such as the second respondent and her son. It is submitted publication *would be purely punitive and serve no public or deterrent, purpose.*

[50] Reliance is placed on various decisions but in particular *H v A Ltd*[26] which concerned the effect on innocent parties and *Labour Inspector v ABC, RST and WXY*[27] where identifying one of the parties would make identification of another, innocent, party very easy.

[51] Reference is also made to *XYZ v ABC*[28] where an interim non-publication order was made in order to protect professional reputation. It was submitted the present situation can be compared and differentiated from *XYZ* as:

> This principle [of open justice] would not be diminished by non-publication as the respondents are a small, private, family-owned

[26] *H v A Ltd* [2014] NZEMPC 92

[27] *Labour Inspector v ABC, RST and WXY* [2019] NZERA 483

[28] *XYZ v ABC* [2017] NZEMPC 40

> and operated business which significantly contributes to its small community both financially and culturally.

[52] Finally it is submitted:

> There is a real risk that publication will adversely affect not only the respondents' reputations but damage their business. This is likely to impact on trade, with flow on effects to the respondents' financial security. As the agreement reached with the applicant in relation to penalties is reliant on payment out of cash flow, publication of the respondents' identities is likely to adversely affect the respondents' ability to meet the instalment agreement. This will also impact on the respondents' ability to continue to contribute meaningfully to their community through sponsorship.

[53] The Inspector opposes the application saying the order is sought *in circumstances where there are established and agreed breaches of minimum employment standards*. It is then asserted *There is no particular evidence given as to harm resulting from publication, and significantly, no medical evidence, which has been relevant in other cases where such orders have been granted*.[29]

[54] The Inspector goes on to summarise its approach by saying:

> The threshold required for the Respondent to discharge the burden of proof for the making a non-publication order is high. An application on its face goes against the principle of open justice
>
> Generally, the reasons for non-publication orders being made in the Authority have been in relation to protecting non-parties, co-workers and employees who are in a position of vulnerability. This can be seen in respect of the cases identified below. The applicant submits that no such reasons apply in this case. Instead it appears that the respondent seeks to protect their personal reputations from the consequences of agreed breaches. The applicant submits that this is strongly analogous to applications made for protection of commercial reputation, which should rarely be granted, and can be distinguished from these cases.[30]

[55] The Inspector then canvasses various cases, as did the respondent, but the detail thereof need not be recorded here.[31]

[56] It is paragraph 5 of the Inspector's submission ([53] above), later expanded upon, that in my view encapsulates the determining point. The starting point is a presumption of open justice with the process being conducted in public and the outcome freely available.

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[29] Applicants submission of 13 November 2019 at [5]
[30] Ibid at [6] and [7]
[31] Section174E(b)(ii) of the Employment Relations Act 2000

[57] If that principle is to be set aside the party seeking the exemption carries the onus of justification.

[58] As the Inspector submitted *The burden will not be discharged by asserting that an order is necessary. The application must be supported by credible material and preferably formal evidence.*[32]

[59] The issue here is that there is little evidence supporting various assertions the respondent has made about negative outcomes. Other than the assertion, there is no evidence to support a contention the respondent's son may suffer detriment at school and definitely nothing with the detail exhibited successfully in *H v A*, when there should in fact be *proof of real and substantial likelihood of undue harm*.[33]

[60] The argument concerning the second respondent also fails to convince. She is, both legally and practically, a partner in the business. As the Inspector submits, *the respondents having chosen to run their business as a partnership should not be able to disclaim their chosen business structure where it suits*.

[61] There is then the issue of financial harm. While the party's agreement instalment payments are appropriate indicates at least a cash-flow issue, there is no further evidence supporting this contention and the assertions regarding future income can, given the evidence tendered, be considered nothing more than speculative. In addition I am sufficiently au-fait with the locality in question to know local competition is sparse and in the absence of evidence I question this claims veracity.

[62] With respect to the reputational damage I note that while dissenting the current Chief Judge expressed an uncontested view reputational damage alone is not grounds for a non-publication order.[34] I also note in this regard that the issues addressed here are not egregious ones involving premiums and the abuse of migrant labour which are now seen all too frequently. They involve issues concerning the calculation of holiday pay and as has been widely reported of late, problems with that have even afflicted large government departments. Indeed the fact the respondents addressed the deficiencies in an appropriate way and with alacrity may well reflect positively on them and their business.

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[32] Applicants submission of 13 November 2019 at [16]
[33] *H v A* [2014] NZEmpC 92, above n 26, at [53]
[34] *H v A* [2014] NZEmpC 92, above n 26, at [57]

[63] In summary I consider the evidence tendered is insufficient and does not support an application for a permanent order suppressing publication of the identity of the respondents. It is declined.

[64] That said I accept the issue of suppression is the only one that remains contentious between the parties. The respondents may well take issue with this conclusion and challenge but once publication occurs, it cannot be reversed. To that end and to allow the parties to properly consider this conclusion I order a temporary prohibition on publication of anything which might identify the respondents for a further 35 days beyond the issuing of this determination.

Conclusion and Orders

[65] The respondents, Hiran and Hemlata Patel, are jointly liable for payment, to the Crown via the Authority, of penalties totalling $30,000.00 (thirty thousand dollars). Payment is to be made via six monthly instalments of $5,000 made on the 17th of each month with the first payable on Tuesday 17 March 2020.

[66] There is a temporary order preventing the publication of anything that might identify the respondents which shall remain in force until 25 March 2020. During this time a copy of the determination must not be added to MBIE's Employment Law Database.

[67] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority