IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2021] NZERA 250
3059233

	BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
	AND	HIGHLY FLAMMABLE LIMITED First Respondent
	AND	LOGAN ALEXANDER JAMES ELLIOT Second Respondent
Member of Authority:	Michele Ryan	
Representatives:	Clair English, counsel for the Applicant Steph Dyhrberg and Macaela Joyes, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions [and further Information] Received:	20 March 2020 for the Applicant 3 April 2020 for the Respondent 9 April 2020 for the Applicant	
Date of Determination:	11 June 2021	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, Highly Flammable Limited (HF) operates a creative entertainment business, supplying performers (such as jugglers and stilt walkers) for events at multiple locations throughout New Zealand. Most, but not all of HF's performers, are employed on a casual basis. Mr Logan Elliot is the managing director and a majority shareholder of HF.

[2] Prompted by a complaint alleging, amongst other things, that six HF employees had not been paid for each hour worked but paid a lump sum for performances, a labour inspector (the inspector) commenced an investigation into HF's employment practices in respect of these individuals.

[3] In a report dated 25 February 2019, the inspector concluded HF had breached various provisions under the Employment Relations Act 2000 (the Act), the Holidays Act 2003 (the HA), the Minimum Wages Act (the MWA) and the Wages Protection Act (the MPA).

[4] HF was relatively quick to respond to the report and conceded it had breached a range of statutory employment standards.

[5] The parties have since reached settlement in respect of all claims.

[6] The inspector now seeks $70,000 in penalties from HF in connection with the identified breaches. The inspector also asks the Authority to find Mr Elliot liable for penalties on grounds that he was a person "*involved in a breach*" of an employment standard under s 142W of the Act.

[7] Soon after the parties had each provided submissions to the Authority on the issue as to Mr Elliot's liability, the Court of Appeal granted leave in another case to determine the level of knowledge required to establish liability under s 142W of the Act. The Court's judgment may impact on the claim against Mr Elliot and this matter is therefore adjourned until that question is decided.

[8] With the agreement of the parties, the subject matter of this determination: whether penalties should be imposed against HF and if so, what sum should be ordered, has been determined on the papers.

[9] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[10] As permitted by s 174C(4) under the Act, the Chief of the Authority had determined exceptional circumstances exist to allow a written determination of findings at a later date and this determination has been issued outside the three month timeframe required by s 174C(3) under the Act.

The approach to assessing liability and quantum

[11] It is not in contention that HF's actions and/or omissions led to statutory breaches for which a penalty might apply. In assessing whether penalties should be imposed against HF and the quantum of any order, s 133A of the Act requires I have regard to its object, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps taken to mitigate effects of the breach, circumstances of the breach and any vulnerability and previous conduct.

[12] The considerations listed at s 133A do not limit the factors that may be relevant to an inquiry into penalties, and my assessment in this matter has been assisted by the four-step framework set out in *Borsboom v Preet PTV Ltd*,[1] which provides a methodology by which to appropriately quantify penalties to the material circumstances.

Statutory Considerations

The object of the Act

[13] The Act's objects, which include effective enforcement of employment standards, are particularly relevant to this case where the majority of the penalties sought by the inspector are in relation to breaches of employment standards as defined by the Act.

Nature and extent of breaches

[14] The parties agree there are 33 identifiable statutory breaches as follows. HF failed to:

(i) provide compliant employment agreements for 5 employees, - s 65 of the Act;
(ii) keep compliant wage and time records for 6 employees, - s 130 of the Act;
(iii) keep compliant holiday and leave records for 6 employees - s 81 of the HA;
(iv) pay the minimum wage for 6 employees - s 6 of the MWA;
(v) calculate and pay annual holidays for 1 employee - s 27 of the HA;
(vi) pay sick leave to 1 employee - s 27 of the HA;
(vii) pay for an unworked public holiday for 1 employee - s 49 of the HA;
(viii) pay for alternative holiday for 1 employee - s 60 of the HA;
(ix) pay time and half for work on a public holiday for 5 employees -s 50 of the HA;

[1] See *Borsboom v Preet PTV Ltd* [2016] NZEmpC 143, at [151]

(x) comply with s 4 WPA by unlawfully deducting wages for 1 employee resulting in a breach of s 6 of the MWA

[15] Each of the relevant Acts allow for penalties to be imposed.[2] The maximum penalty for a single breach by a company is $20,000. With 33 breaches, HF has a potential liability of $660,000 in penalties as a consequence of the breaches.

Whether the breaches were intentional, inadvertent or negligent.

[16] HF says any failings were not intentional. It submits it was unaware that the way it remunerated staff did not comply with the minimum standards until it received the labour inspector's draft report. It points to the existence of employment agreements and its payroll system to demonstrate that it sought to comply with its obligations, although it accepts there were errors in its documentation.

[17] HF says it was further unaware that its arrangement with Ms Liu to halve her wage payments for a period of time (4-5 months) and repay this when the business was more solvent was unlawful. There is no dispute HF reimbursed Ms Liu with the monies owed to her prior to the inspector's involvement but this action breached the MWA.

[18] The inspector submits that HF's breaches have stemmed from its business set-up and has led to systemic underpayments for all affected employees. Employees were paid using a formula set out in a document entitled the Team Payment Guide. The formula provided employees be paid a fixed rate depending on the role undertaken during an event. Time taken for rehearsals and training, set-ups and pack-downs at an event, and out of town travel were not remunerated. With the exception of piece rate payments for extended performance times, wages were not linked to the time the employee was required to be available to work.

[19] There is a suggestion the remuneration system recorded in the Team Payment Guide was not wholly determined by HF but drafted by a staff member who later complained to the Labour Inspectorate. How the remuneration system came into being is not a matter that needs to be decided in this decision.

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[2] For breaches of the Employment Relations Act 2000 at s 135(2)(b); Minimum Wage Act 1983 at s 10(4) & s 135(2)(b) of the Employment Relations Act; Holidays Act 2003 at s 75(1)(b).

[20] In any event, it is accepted that Mr Elliot gave final approval to the Team Payment Guide and HF utilized the formula to assess what wages were owed to its employees.

[21] The formula applied under the Team Payment Guide resulted in instances where hours of work were not recorded for the purpose of calculating wages and payments did not always meet the relevant minimum wage rate. Together, those omissions impacted not only on the accuracy and compliance of wage and time records, but also on holiday and leave records, and the calculation and payment of corresponding entitlements.

[22] HF says it was further unaware that its arrangement with Ms Liu to halve her wage payments for a period of time and repay this when the business was more solvent was unlawful. There is no dispute HF reimbursed Ms Liu with the monies owed to her prior to the inspector's involvement but this action breached the MWA.

[23] There is insufficient evidence to reasonably conclude HF intended to breach its statutory obligations. But nor can HF's failings be fairly characterised as inadvertent.

[24] Mr Elliot's evidence leaves an impression that HF was inattentive to its obligations as an employer. Ignorance of the law does not provide HF with a defence against the imposition of penalties and HF must take responsibility the breaches that flowed as a consequence result.

The nature and extent of loss or damage suffered by the worker(s)

[25] The failure to pay minimum wages for all hours worked deprived each of the employees of income they were entitled to receive at the time the sums were due. The failure to ensure leave entitlements were available and paid correctly disadvantaged the employees.

What steps have been taken in mitigation

[26] The Authority is required to consider whether a respondent employer has paid compensation, reparation or restitution, or taken other steps to avoid or mitigate the actual or potential adverse effects of the breaches.

[27] HF has paid statutory arrears of $19,544.78 to the six employees. Almost two thirds of this sum was paid before it became apparent to HF that the inspector had lodged proceedings with the Authority. HF paid the remainder over the following two months' or thereabouts. I shall return to these matters.

Vulnerability of the employees, previous conduct.

[28] I am not persuaded the employees in this matter could objectively be regarded as vulnerable, and HF has no previous history of similar conduct.

Preet Step 1- Nature and number of breaches

[29] In *Preet* the Employment Court observed it may be appropriate to consider whether multiple but materially identical breaches arising from a particular course of conduct should be treated as a global single breach (noting care should be taken to ensure a global approach does not result in an artificially low penalty).[3]

[30] As already noted, 33 breaches of 10 statutory obligations were identified.

[31] As to what breaches in this case might be globalised, both parties view eight breaches of various statutory leave provisions (separate to the breach to provide annual leave) should be regarded as 6 breaches where each of the 6 employees may have been affected in some way by the omissions.[4] The parties diverge on how to treat a breach action (or omission) that is repeated across a number of employees. For example, and noting that in *Preet* the Court calculated the quantum of breaches on a per-employee basis, the inspectorate submits the failure to keep wage and time records for 6 employees should be regarded as 6 breaches. HF submits the failure should be seen as a single breach.

[32] In *Labour Inspector v Parihar* the Court accepted the parties' proposed approach to globalisation and viewed the obligations to keep wages and time records, and keep holiday and leave records, as a single breach per employee.[5] The Court accepted the parties' proposed approach to globalisation and viewed the obligations to keep wages and time records, and keep holiday and leave records, as a single breach per employee. Notably in this case Judge Perkins expressed his concern about the final quantum of penalties if some breaches are not globalised, in the following way: "*If the maximum penalty is related to each breach, an enormous total is reached, requiring an artificial approach to discounting to reach an artificial approach to discounting to reach a realistic level of eventual penalties.*"[6]

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3 *Preet*, above at n1 at [141]

4 Applicant's submissions dated 20 March 2020 at para.25.6; Respondent's submissions dated 3 April 2020

5 *Labour Inspector v Parihar* [2019] NZEmpC 145 at [39]

6 Above at [39]

[33] In *Labour Inspector v Matangi Berry Farm Limited* the Court shifted away from tying the number of breaches to the number of employees affected. Rather, the conduct leading to the breach(es) formed the basis on which the Court assessed the quantum of penalties available.[7] By way of example, the failure to keep proper records concerning 207 employees was treated as a single breach by the Court.

[34] Focusing primarily on the nature of the breaches and applying aspects of the methodologies used in *Parihar* and *Matangi*, I have grouped the various breaches in the following way. The failure to:

(a) provide compliant employment agreements = 1 breach

(b) keep compliant wage and time, and holiday and leave records = 1 breach

(c) pay the minimum wage = 1 breach

(d) calculate and pay annual holidays = 1 breach

(e) failing to pay sick leave to 1 employee = 1 breach

(f) failing to provide/pay entitlements associated with public holidays = 1 breach

(g) comply with s 4 WPA by unlawfully deducting wages for 1 employee resulting in a breach of s 6 MWA = 1 breach

[35] There are now seven breaches for which corresponding penalties may now be imposed as a consequence. This approach leads to a potential maximum liability $140,000 for HF.

Preet Step 2- Severity of the breaches

[36] This step examines the severity of the breaches taking into account both aggravating and ameliorating factors.

[37] Firstly, the importance of the employment standards cannot be underestimated. That one of the Act's stated objectives is to promote effective enforcement of those standards, leads me to conclude that HF's breaches must, on the face of it, be considered serious.

[38] HF submits the breaches should be considered against the context in which the failings occurred. It notes the failure to pay minimum wages occurred largely as a result of failing to

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[7] *Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43

pay employees for time spent travelling. The employment agreements were deemed non-compliant because (a) the rate of pay was not definitively expressed, rather they recorded a wage range, and (b) did not refer to time period in which a personal grievance must be raised or the services available to resolve employment relationship problems.

[39] It points also to those breaches that solely concerned the General Manager (who was the most affected as HF's omissions) and notes: the arrangement to withhold a portion of her pay was with her agreement; it was her preference to receive holiday pay as-you-go, and; she never requested paid sick leave.

[40] The inference I understand HF wishes the Authority to take is that, its conduct does not reflect wholesale breaches of the duties it owed but that it made discrete errors which should be seen as less serious.

[41] The inspector's report indicates HF's omission to pay minimum wages for every hour worked was not common to every payment, never-the-less payment of minimum wage is a fundamental imperative in an employment relationship. Neither HF's approach to transporting staff, nor the deductions from the General Manager's wages can be viewed as one-off events. These actions and omissions demonstrate ongoing and systemic failures.

[42] Following the guidance in *Preet*[8] the two separate breaches to minimum wages obligations (see [34](a) and (g) above) should each be assessed at 80% of the maximum penalty. (Two breaches x $16,000 per breach = $32,000).

[43] Turning to leave entitlements, I am not persuaded the breaches were minor. That the General Manager did not seek to take sick leave does not lead to a conclusion that the breach can only be regarded as theoretical in this instance. The content of her affidavit tends to undermine that position.

[44] The right to obtain and be paid various leave entitlements under the Holidays Act are important to employees. That policies regarding time and a half payment for public holidays were not followed by middle management staff does not absolve HF's liability. Similar also to the findings in *Preet,* I consider the four breaches to leave entitlements (see [34](d) to (f)

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8 Above n1 at [167]

above)) should each be assessed at 70% of the maximum.[9] (Four breaches x $14,000 per breach = $56,000).

[45] Despite the inadequacies of the wage and time, and holiday and leave records, I find the breach (see [34](b)) should be assessed at 40% of the maximum where other records held by HF made it possible for the inspector to assess the employees' corresponding entitlements which effectively softened the breach. I accept the inspector's submission that 40% of the maximum penalty for non-compliant employment agreements is appropriate. (Two breaches x 8,000 per breach = $16,000).

[46] These calculations bring the provisional penalty total to $104,000.

[47] As already noted HF paid the six affected employees their minimum statutory entitlements relatively soon after becoming aware of the shortfalls. Credit must be given to HF in this regard.

[48] I have also taken into account that HF fully cooperated with the inspector's investigation and accepted responsibility for the breaches.

[49] I have no reason also to doubt Mr Elliot's statements that following the inspector's report HF took action to ensure future compliance with its obligations including altering its approach to how it assesses and pays wages, and how it calculates leave entitlements. I understand also that its employment agreements now record the statutory minimum.

[50] Submissions provided on behalf of the inspector acknowledge HF's efforts to mitigate the effects of its breaches and suggest a 50% reduction in the penalty quantum might be appropriate. I find that is a fair assessment. The total penalty sum at this point then is $52,000.

Preet step 3 – Means and ability to pay

[51] An affidavit furnished by HF's accountant records the company was technically insolvent in or around the time New Zealand commenced its Level 4 lockdown. Accompanying copies of company accounts affirm HF as running at a loss at that time and I accept the submission that Covid-19 pandemic conditions have negatively and significantly impacted on its core business activity.

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9 Above n1 at [171]

[52] The inspectorate accepts HF is experiencing financial difficulties and its analysis makes allowance for a further 60% reduction in recognition of those circumstances and that it is a small business with a single owner operator.

[53] I agree the statutory scheme and underlying objectives of the Act could easily become meaningless if the quantum of penalty was reduced to a nominal sum on the basis of financial incapacity alone. HF continues to trade and I accept the submission that HF's concerns about its ability to pay could be dealt with by way of instalment payments. I shall return to that matter.

[54] In all the circumstances, a further 60% reduction to the penalty quantum is appropriate. The provisional final penalty is now $20,800.

Step 4 - Proportionality of outcome

[55] "Proportionality of outcome" involves assessing whether the provisional penalty is proportionate to the established breaches in this matter, and consistent with current cases involving similar breaches.

[56] In *Labour Inspector v Nekita Enterprises Limited and Ors* the Authority assessed similar cases whereby multiple breaches of employment standards (said to be in excess of 10 and up to 1075) by an employer were found.[10] A review of cases issued between 2018 and 2020 found penalties from $4,000 up to $160,000 were imposed.[11]

[57] It is clear the provisional penalty sum of $20,800 is within the range of current penalty orders made by the Authority and the Court.

[58] Penalties associated with breach(es) of minimum standards should be set at level which both punishes a party for it corresponding omissions and deters it from future non-compliance.

[59] Standing back and rounding the quantum to $20,000, I am satisfied this sum is proportional to the nature of the breaches in the case, and reflects the gravity by which the law should regard HF's failure to comply with minimum employment standards. Further reduction is not warranted.

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[10] *Labour Inspector v Nekita Enterprises Limited and Ors* [2020] NZERA 509 at [63] and n23

Conclusion

[60] Highly Flammable Ltd is ordered to pay penalties of $20,000 to the Labour Inspector. This sum must be paid by it into the Crown Bank account.

[61] At this juncture no order has been made as to whether or not that sum should be met by way of instalment. The parties should attempt to reach an arrangement as to payment within 28 days beginning on the day this determination is issued. Leave is reserved for either party to return to the Authority for orders if they are unable to reach agreement.

Costs

[62] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority