

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 279
3107014

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	KIRAN CUISINE LIMITED First Respondent
AND	MADHAN BISHT Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michelle Brown, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	29 June 2021 at Auckland
Submissions [and further Information] Received:	28 June 2021 from the Applicant None from the Respondent
Date of Determination:	30 June 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, a Labour Inspector, seeks remedies and penalties against the First Respondent Kiran Cuisine Limited (KCL) and the Second Respondent, Mr Madhan Bisht, for breaches of the Minimum Wages Act 1983 (MWA), the Holidays Act 2003 (HA), and the Employment Relations Act 2000 (ERA).

[2] The Labour Inspector is seeking recovery of minimum wage arrears, annual holiday pay arrears, and public holiday pay owed to Mr Susey George, a former employee of KCL.

- [3] The Labour Inspector claims penalties in respect of the following breaches:
- (i) for the failure to pay the minimum wage to an employee pursuant to s 11 of the MWA and a penalty pursuant to s 10 of the MWA;
 - (ii) for the failure to pay annual leave to an employee pursuant to s 16, 24, 25 and 27 of the HA and a penalty pursuant to s 75 of the HA;
 - (iii) for the failure to pay public holiday entitlements, including time and a half, alternative holidays and payment for unworked public holidays as required under s 40, 49, 50, 55, 56, and 60 of the HA, and a penalty pursuant to s 75 HA;
 - (iv) for failure to keep compliant wages and time records for an employee pursuant to s 130 of the ERA; and
 - (v) for failure to keep compliant holiday and leave records for an employee as required by s 81 of the HA, pursuant to s 75 of the HA.

Issues

- [4] The issues for determination are:
- (a) Did KCL fail to comply with s 6 of the MWA?
 - (b) Did KCL fail to comply with s 16, 24, 25 and 27 of the HA?
 - (c) Did KCL fail to comply with s 40, 49, 50, 55, 56, and 60 of the HA?
 - (d) Should Mr Bisht be made liable for the default in the arrears payments?
 - (e) Should penalties be imposed on Mr Bisht as a person involved with the breaches?

Note

[5] No Statement in Reply was received from the Respondents, however the Second Respondent, Mr Bisht, attended a case management conference on 11 November 2020. Following the case management conference a Minute was issued by the Authority confirming the date set down for the Investigation Meeting, and confirming the timetable for witness statements to be served and filed. A Notice of Investigation Meeting was sent to the Respondents on 10 March 2021.

[6] The Respondents failed to follow directions of the Authority. No statement in reply was filed despite this being notified to the Respondents. Nor did the Respondents file witness statements as

required and set out in the Minute dated 11 November 2020 following the case management conference attended by Mr Bisht representing KCL.

[7] The investigation meeting was set down to be held on 29 and 30 June 2021. The date was confirmed to the parties by means of a Minute dated 11 November 2020 and by means of a Notice of Investigation Meeting dated 10 March 2021.

[8] On 22 June 2021 Mr Bisht emailed the Authority stating that he had leg injuries and would not be attending the investigation. There was no medical evidence provided in support. The Authority provided Mr Bisht with a link in order that he could attend the investigation by Zoom, but there was no response to that email.

[9] A week before this email on 15 June 2021 an Authority Officer had telephoned Mr Bisht to remind him that the expected witness statements had not been received. Mr Bisht was aggressive and offensive to the Authority Officer in response.

[10] Mr Bisht did not attend the investigation meeting in person and an Authority Officer was unable to contact Mr Bisht by telephone on the day of the investigation meeting.

[11] I was satisfied that no good cause had been shown for the Respondents' failure to attend and I consequently proceeded with the investigation meeting pursuant to clause 2 of Schedule 3 of the Employment Relations Act 2000 (the Act).

Background Facts

[12] Mr Bisht is the sole director and shareholder of KCL. Mr Bisht was the representative of KCL involved in the conduct of the case against both KCL and himself as second respondent. The Liquidator of KCL has consented to these proceedings continuing and the Liquidator's report demonstrates that KCL is unable to pay its debts.

[13] The Labour Inspector was assigned a file on 25 June 2019 which involved a complaint made by a former employee, Mr George, regarding his former employer KCL. The complaint alleged issues involving payments of wages and annual holidays.

The Labour Inspector's investigation

[14] The Labour Inspector contacted Mr George by phone and email to obtain further information regarding his involvement with KCL. She also requested that Mr George send all documents and any evidence he had to support the allegations made about KCL. The Labour Inspector said Mr George provided the following:

- a. Two employment agreements;
- b. Bank statements covering the period of his employment with KCL;
- c. A resignation letter;
- d. An email relating to a leave request; and
- e. A sample of his Google timeline.

[15] The Labour Inspector said she had considered the information that she had gathered and decided that a site visit to KCL's business premises, The Curry Leaf Restaurant, was necessary. This was carried out on 15 August 2019 when the Labour Inspector was accompanied by another Labour Inspector.

[16] The Labour Inspectors interviewed two employees and Mr Bisht. The Labour Inspector said that she left with Mr Bisht a site visit letter and a request for a list of all current and former workers during the previous six years.

[17] On 20 August the Labour Inspector said she received email correspondence from a taxation accountant who stated that they acted for KCL, and who requested an extension of approximately six weeks for the completion of the list of current and former workers. She corresponded with the taxation accountant by email and telephone and provided an extension of seven days, this totalled two weeks to provide the information requested.

[18] The Labour Inspector advised that if the requested list was not provided then a notice to supply records would be issued. The Labour Inspector said that to date no list has been received.

[19] The Labour Inspector issued KCL with a notice on 30 August 2019 requiring the supply of copies of employment agreements, wage and time records, and holiday and leave records for all current and former employees for the period of 30 August 2013 to 30 August 2019 pursuant to s 229 of the ERA.

[20] On 30 August 2019 the Labour Inspector received email correspondence from a legal associate who stated that they acted for KCL and explained KCL was unable to provide the requested records within the given timeframe due to a dispute over the location where the records were held. The Labour Inspector requested a clarification from the associate but did not receive a response.

[21] The Labour Inspector sent several emails to KCL and Mr Bisht with regard to the notice to supply records in the period between 10 and 23 September 2019 but received no response from either respondent. On 20 September 2019 the Labour Inspector advised the first and second respondents that she would be continuing with her investigation without the records and would contact them in due course to schedule an interview.

[22] The Labour Inspector interviewed Mr George on 10 December 2019.

Mr George's evidence

[23] Mr George was interviewed by Zoom during the Investigation Meeting because he is now resident in Indian.

[24] Mr George said that he had made his complaint about his former employment with KCL to the Labour Inspectorate on 5 June 2019.

[25] He explained he had heard about a vacancy at KCL from a friend who had seen an advertisement and he had contacted Mr Bisht, whom he also knew as Maxx. Following an interview with Mr Bisht he was offered a job as a Chef.

[26] Mr George said Mr Bisht helped him to apply for an employer sponsored work visa and once this was granted he started working for KCL. He worked for KCL from approximately December 2015 to 30 December 2018.

[27] Mr George said he received two employment agreements during his period of employment with KCL. The first employment agreement stated he would be paid \$17.50 per hour for 35 hours per week. The second employment agreement said he would be paid \$18 per hour for 36 hours per week.

[28] For most of his employment Mr George said he lived at accommodation provided by Mr Bisht. This was not salubrious accommodation and eventually he moved to live at Mr Bisht's home which was slightly better. Mr George said he had wanted to live in his own accommodation but Mr Bisht told him he had to stay at a place chosen by him.

[29] When he had days off work, Mr George said Mr Bisht would call him to check out where he was and what he was doing. If he failed to answer the calls Mr Bisht would ring Mr George's nephew to find out where he was.

[30] Mr George did not pay rent and there were no deductions in respect of accommodation made from his wages. He told the Labour Inspector that he may have been paid a lower rate of pay to reflect the accommodation, but she noted there was no reference to that in the Employment Agreements.

[31] Mr George said despite the hours set down in the employment agreements he worked at least 60 hours per week. On average he worked 70 hours per week for seven days. Sporadically, about once every couple of weeks or months, he received a day off, normally on a Monday or Tuesday, however sometimes he worked for eight to ten weeks without any days off.

[32] Mr George said it was rare to finish at the restaurant's closing time. After the restaurant closed he had to do the dishes and prepare the food for the next day. The dishes took up to an hour and a half to prepare. Thursdays, Fridays and Saturdays were very busy days and sometimes he worked as late as 12am or 1am. Sometimes Mr Bisht also took him to his own home to do his personal home cleaning.

[33] Mr George said he received wage payments by bank transfers on a weekly basis, usually on a Monday. He was paid approximately \$520 net each week into his bank account, however, there were several times when he was not paid at all. When he queried this with Mr Bisht he responded that he had paid him.

[34] Mr George said the restaurant was open on all public holidays except Christmas Day and he worked on all the public holidays but did not receive any extra payment for working on the public holiday, nor did he receive an alternative day.

[35] Mr George said he went on leave twice during his employment, the first from 19 May 2016 for about eight weeks, and the second period from 14 July 2017 for about six weeks. He did not receive annual holiday pay for either period of leave. He did ask to be paid for the second period of leave and Mr Bisht agreed he would pay him later but failed to do so.

[36] Mr George said his mother was very sick in 2017 and he asked to take leave. He requested to take leave in January 2017 but Mr Bisht would not allow him to take leave until June 2017. Unfortunately his mother had passed away before he was able to take leave to visit her and he could not attend her funeral because he was not given permission by Mr Bisht to take leave to visit home.

[37] Mr George said he had requested to take sick leave on many occasions during his employment but Mr Bisht never granted him the sick leave. In fact, he was required to come into work when he was sick.

[38] Mr George gave notice of his resignation by email on 15 December 2018 and asked to be paid his outstanding holiday pay. His last day of work was 30 December 2018. Mr George said he was not paid for his last week of work and he did not receive any holiday pay.

[39] The Labour Inspector said that following the interview with Mr George she requested that he send her copies of his complete Google timeline for the period he worked for KCL. Mr George provided copies of his Google timeline between 19 December 2019 and 17 February 2020.

[40] The Labour Inspector contacted KCL and Mr Bisht via email on 11 December 2019 to schedule an interview. She then telephoned Mr Bisht to schedule an interview on 17 December 2019. During the call Mr Bisht stated that KCL had no records to provide. He also advised that KCL was no longer

operating. The Labour Inspector advised Mr Bisht that she would be continuing with the investigation, and following the phone call she sent Mr Bisht an email to schedule the appointment but received no response to this.

[41] The Labour Inspector said she noted that KCL had entered into voluntary liquidation as of 18 December 2019 and accordingly on 15 January 2020 she contacted the appointed liquidator of KCL, and informed him of the ongoing investigation. She advised that she would be in touch at a later date when the investigation had been included.

Calculation of arrears

[42] In the absence of employment records from KCL, the Labour Inspector said she relied on Mr George's bank statements, Google timeline and his witness statement to establish whether minimum employment entitlements had been provided to him. The Google timeline captured the hours that Mr George's mobile phone was at a given location.

[43] The Labour Inspector said she accepted that the Google timeline showed that Mr George was at the restaurant but did not necessarily show he was working. However, the Google timeline did establish a general pattern of the times Mr George was at the restaurant, which was consistent with his statement regarding his working hours, and therefore she felt confident in accepting Mr George's statement in regard to the days and times when there was no Google timeline available.

[44] She conducted an analysis of Mr George's working hours according to his Google timeline alongside the wages paid according to his bank statements. Where no Google timeline was available on a given day she relied on Mr George's statement regarding the hours he worked. She spent considerable time analysing available evidence to construct a view of Mr George's employment with KCL and found the following:

- a. The wages paid to Mr George were significantly below the applicable minimum wages for the hours worked. She calculated \$59,770.60 in minimum wages owed, subsequently amended to \$54,037.97.
- b. Mr George did not receive any annual holidays owed or on termination of his employment. She calculated \$13,549.92 in annual holidays owed.
- c. Mr George worked on public holidays but did not receive time and a half. She calculated \$2,089.88 in time and a half owed, subsequently amended to \$1,634.47.
- d. Mr George worked on public holidays which fell on otherwise working days but did not receive alternative holidays. She calculated \$4,881.01 in alternative holiday paid owed.

- e. Mr George worked on several public holidays which fell on otherwise working days but did not receive payment for these days. She calculated \$1,081.38 in public holiday pay owed, subsequently calculated as \$922.82.

[45] The Labour Inspector contacted the liquidator of KCL on 24 April 2020 and advised that the arrears had been identified as owing by KCL and sought consent to file proceedings against it in the Employment Relations Authority. The liquidator consent under s 248(1)(c) of the Companies Act 1993 for the action to be commenced against KCL in the Authority.

[46] On 30 April 2020 the Labour Inspector said she completed her investigation report and sent it via email to the respondents for comment. She also provided a copy of her analysis to KCL and Mr Bisht for reference. The Labour Inspector received a response from Mr Bisht via email on 1 May 2020. Mr Bisht explained they had a loss under KCL and consequently had liquidated the company. He also stated that they had no money. The Labour Inspector advised Mr Bisht that she still intended to pursue recovery of identified arrears in the Authority and offered KCL and Mr Bisht a second opportunity to provide comments on the breaches identified. However, to date she has received no further comments from either respondent.

[47] On 20 May 2020, the Labour Inspector filed a statement of problem in the Authority in respect of the issues regarding KCL and Mr Bisht seeking that the identified arrears be paid to Mr George and that she was also seeking penalties in respect of the breaches identified.

[48] The Labour Inspector confirmed that to date no monies have been received by the Labour Inspectorate or by Mr George in respect of the outstanding arrears owed.

[49] The Labour Inspector said that although KCL entered into liquidation as of 18 December 2019, she was aware that another legal entity, MMKKK Enterprises Limited, was registered on 18 November 2019. This company is directed by Manju Bisht, wife to Mr Bisht. To her knowledge, MMKKK Enterprises Limited began trading as Imaxx Indian Restaurant at 12 Commercial Road, Helensville, which is the same location as that previously occupied by the Curry Leaf Restaurant operated by KCL.

Did KCL fail to comply with s 6 of the MWA?

[50] Section 6 of the MWA states:

6 Payment of minimum wages

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[51] I find that the evidence clearly establishes that KCL failed to pay Mr George in accordance with the provisions of the MWA throughout the three years of his employment with it.

[52] I determine that KCL failed to comply with s 6 of the MWA.

Did KCL fail to comply with s 16, 24, 25 and 27 of the HA?

[53] I find that during his employment Mr George was not provided with, nor paid for, annual holidays by KCL as required by s 16, 24, 25 and 27 of the HA.

[54] I determine that KCL failed to comply with s 16, 24, 25 and 27 of the HA.

Did KCL fail to comply with s 40, 49, 50, 55, 56, and 60 of the HA?

[55] During his employment Mr George was not paid time and a half for working on public holidays, not provided with an alternative day, and not paid for unworked public holidays in breach of the requirements of s 40, 49, 50, 55, 56 and 60 of the HA.

[56] I determine that KCL failed to comply with s 40, 49, 50, 55, 56 and 60 of the HA.

Should Mr Bisht be made liable for the default in the arrears payments?

[57] KCL is in liquidation and therefore is unable to pay the arrears due to Mr George. Mr Bisht was the sole director of KCL and I am satisfied from the evidence that he was: “in a position to exercise significant influence over the management” of KCL.¹ Further, that he did in fact exercise such control.

[58] Pursuant to s 142Y of the ERA a Labour Inspector may recover from a person involved in the breach if that person is a person within the meaning of s 142W. Mr Bisht is a person involved in the breaches and may be held liable pursuant to s 142Y(2)(b) of the Act: “to the extent that the employer’s employer is unable to pay the arrears in wages or other money”.

[59] I determine that Mr Bisht is liable for the default in the arrears payments.

[60] **I order that Mr Bisht pay the following arrears to Mr George:**

\$54,037.97 gross in respect of minimum wage arrears

\$13,549.92 gross in respect of annual holiday arrears

\$1,634.47 gross in respect of time and a half arrears

¹ S 142W of the Employment Relations Act 2000

\$4,881.01 gross in respect of alternative holiday arrears

\$922.82 in respect of unworked public holiday arrears

Interest is to be paid on the arrears owed at the rate prescribed in the Interest on Money Claims Act 2016 until the arrears are paid in full.

Penalties

Submissions of Counsel for the applicant

[61] Counsel for the applicant claims penalties in addition to the arrears of wages against the first and second respondents.

[62] Following the completion of the liquidation of KCL the liquidator's final report recorded that there were no surplus assets, and the applicant received no distributions.

[63] Mr Bisht was the sole director of the first respondent at all material times.

[64] KCL was the employer of Mr George between December 2015 and 30 December 2018. The Labour Inspector was able to calculate by using the evidence provided by Mr George that he had not been paid minimum entitlements.

[65] It is submitted that Mr Bisht is a person involved in the breaches pursuant to s 142W(1)(c) of the ERA because he was directly or indirectly knowingly concerned in, or party to, the breaches. Mr Bisht was the sole director and shareholder of KCL.

[66] When interviewed by the Labour Inspector on 15 August 2019, Mr Bisht advised:

- He did the pay every week on Fridays;
- His accountant took care of keeping employment records;
- He didn't have a record of the hours his chef worked;
- The business was open on public holidays;
- If the employee worked on public holidays they got another day off but didn't get anything else;
- He gave his employees annual leave of four weeks after 12 months of employment.

[67] KCL's accountant advised that he did not hold employment records. When the information was requested from Mr Bisht he failed to provide anything and advised, through counsel, that the landlord

for the building where the records were kept had changed the locks and the respondents could not gain access. Mr Bisht subsequently advised that no records were held.

[68] Mr George identified Mr Bisht as the person responsible for wage payments and requests for holidays and leave.

[69] It is submitted that the above information establishes that Mr Bisht is a person involved in the breaches and accordingly he should be liable to pay the arrears owed to Mr George pursuant to s 11AA of the WMA, section 77A of the HA and s 142Y of the ERA.

[70] The Labour Inspector also submits that Mr Bisht should be liable for penalties pursuant to s 10(2A) of the WMA, section 75 of the HA and ss 142X and 142Y of the ERA.

[71] The Labour Inspector submits that on the evidence before the Authority it is proven on the balance of probabilities that the breaches have occurred.

Penalty analysis

[72] The Labour Inspector's position is that penalties should be awarded in respect of the breaches. The Labour Inspector's submissions followed the steps set out by the Employment Court in its Judgment of *Borsboom and Preet PVT Limited*, as well as the additional analysis performed by the Court in *Nicholson and Ford*.²

[73] It is a matter for the Authority to determine whether a penalty should be imposed following the breach of minimum employment standards. The purposes of penalties are:

- to punish those who breach minimum employment standards;
- to deter companies and individuals from committing breaches;
- to compensate victims of such breaches; and
- to eliminate unfair competition.

[74] When considering whether penalties are to be awarded and how to assess quantum, the Employment Court set out the steps to be taken and the information to be provided at paragraphs [137] to [151] in the appendix to the Judgment in *Preet*. The Employment Court then drew all the considerations together in *Nicholson and Ford*.

² *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson and Ford* [2018] NZEmpC 132.

[75] Counsel for the Labour Inspector has submitted a detailed and helpful analysis of penalties in accordance with the steps set out in *Preet* and *Nicolson and Ford*.

Statutory consideration 1 – the object of the Act

[76] Section 3 of the ERA states that the objects of the Act are to:

- Promote good faith in all aspects of the employment environment in the employment relationship
- Acknowledge and address the inherent inequality of power in employment relationships; and
- Promote the effective enforcement of employment standards, in particular by Labour Inspectors.

[77] The employee in this case was vulnerable and was required to reside at a property owned by Mr Bisht. In addition he was not permitted to time off for extended periods of time.

[78] It is submitted that the failures to pay minimum wages and holiday pay undermine employment standards and gave the employer an unfair advantage in the marketplace.

[79] I accept this submission in the circumstances of this case in which Mr George was deprived of his statutory minimum entitlements over a prolonged period of time.

Statutory consideration 2 – the nature and extent of the breach

[80] There are five types of breaches that have been committed by the respondents:

- A breach of s 6 of the Minimum Wage Act 1983, being a failure to pay employees at not less than the minimum rate of wages for all hours worked;
- Breaches of ss 16, 24, 25 and 27 of the HA relating to calculation and payment of annual holiday pay;
- Breaches of ss 40, 49, 50, 55, 56 and 60 of the HA relating to failing to pay one employee for unworked public holidays, failing to pay at least time and a half for working on public holidays, failing to provide an alternative day where the employee worked on a public holiday and failing to pay for alternative holidays;
- Breaches of s 81 of the HA relating to failing to maintain full holiday and leave records; and
- Breaches of s 130 of the ERA relating to failing to maintain full wage and time records.

Identifying the number of breaches

- One breach for failing to pay minimum wage to the complainant;
- Four breaches in respect of Mr George for failure to pay annual holiday entitlements and to pay holiday pay on termination, assessed on the basis of a separate breach for each provision of the HA;
- Six breaches for failing to pay Mr George for unworked public holidays, failing to pay at least time and a half for working on public holidays, failing to provide an alternative holiday where the employee worked on a public holiday, and failing to pay for alternative holidays;
- One breach for failing to maintain wage and time records in relation to Mr George; and
- One breach for failing to maintain holiday and leave records for Mr George.

Identifying the maximum penalties in respect of each of identified breach

- The maximum penalties available against Mr Bisht for failure to pay minimum wages are \$10,000;
- The maximum penalties available against Mr Bisht for failure to pay annual holiday pay (all types) are \$40,000;
- The maximum penalties available against Mr Bisht for failing to pay for unworked public holidays, failing to pay time and a half for working on public holidays, failing to provide an alternative holiday when the employee worked on a public holiday and failing to pay for alternative holidays are \$60,000;
- The maximum penalties available against Mr Bisht for failing to maintain wage and time records are \$10,000; and
- The maximum penalties available against Mr Bisht for failing to maintain holiday and leave records are \$10,000.

[81] In respect of whether or not global penalties are appropriate, it is submitted that the penalties should not be globalised across three different pieces of legislation.³

[82] The record keeping breaches under s 81 of the HA and section 130 of the ERA should be kept separate.

³ *Borsboom v Preet PVT Limited* (above n2) at [139]. See also *A Labour Inspector v Bahn Thai Restaurant Limited* [2016] NZERA Christchurch 222 at [21].

[83] The failure to pay minimum wage should be a single penalty.

[84] The four breaches regarding annual holiday entitlements may be globalised to one penalty.

[85] The four breaches relating to public holidays may be globalised to one penalty.

[86] The two breaches relating to providing and paying alternative holidays can be globalised to one penalty.

[87] This leads to a total of five breaches by Mr Bisht, reduced from an initial total of 13.

[88] Given that the breaches involve three different pieces of legislation I find that globalisation is not appropriate.

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

[89] The respondents failed to engage in the investigation process and have not accepted responsibility for any breaches.

[90] As observed by the Full Court in *Preet* it is a matter of common knowledge within the community generally, and the commercial and small business community in particular, that minimum wages, minimum holiday entitlements and other statutory minima are applicable to all employment.⁴

[91] I note that Mr Bisht during a site visit conducted by the Labour Inspector to the Curry Leaf Restaurant on 15 August 2019, advised her of his understanding of his obligations as an employer. That explanation made it apparent that Mr Bisht understood the obligations of an employer. As the sole director and shareholder of KCL, his knowledge can be imputed to KCL.

[92] I find that the breaches by KCL and Mr Bisht were intentional.

Assessment of the severity of the breaches

[93] It is submitted in respect of the severity of the breaches:

- The failure to pay minimum wages to Mr George was serious. Over the approximate three years of his employment he consistently worked more hours than he was contracted to but continued to be paid only for his contractual hours. The total arrears owed to Mr George post 1 April 2016 are \$54,037.97. Failure to pay minimum wage should be assessed at

⁴ *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

90 per cent. This is because the failure resulted in an obvious financial advantage to KCL, which received labour without having to fully and pay for that labour.

- The failure to pay holiday pay (including annual holidays, time and a half, and unworked public holidays), the Labour Inspector submits that an approximate starting point is 80 per cent. This is because the failure results from an obvious financial advantage to KCL, which received labour without having to fully and properly pay for it. KCL and Mr Bisht took advantage of Mr George and did not allow him to take annual holidays for the majority of his employment, he was not paid time and a half for public holidays worked, and he was not paid for unworked public holidays. This is a substantial abuse of the power imbalance between employer and employee.
- The failure to provide and pay alternative holidays when a public holiday was worked it is submitted that an appropriate starting point is 80 per cent for the reasons given above.
- Failures to maintain holiday and leave records should be assessed at 80 per cent. This reflects the fact that the breach is in respect of one employee. While Mr Bisht claimed that they kept records, they failed to provide any records following a notice to provide. It can only be assumed that records were not produced because they did not exist. It is further noted that these failures hindered the Labour Inspector in investigating and calculating arrears.
- For the same reasons failure to maintain wage and time records should be assessed at 80 per cent.

[94] I find there have been multiple breaches in respect of an employee who was vulnerable irrespective of his visa status, and find the level of severity is high.

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

[95] Mr George has lost the use of the money he was entitled to at the time it became due.⁵ He continues to be owed \$75,026.18 in arrears. The employer has reduced its costs and gained an unfair advantage over its competitors.⁶

[96] The record keeping breaches have hindered the Labour Inspector's investigation and mean it is unclear whether all arrears have been correctly identified.

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

⁶ Above note [5].

Statutory consideration 5 – steps to mitigate effects of the breach

[97] The respondents have taken no steps to mitigate the effects of the breach and have not cooperated with the investigation.

[98] I observe that Mr Bisht did not file a statement in reply or file witness statements or any documentary evidence. He has made no attempt to address the arrears directly and failed to either assist with, or attend, the scheduled investigation meeting on 29 June 2021.

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

[99] KCL was incorporated on 27 May 2018 and appears to have operated the Curry Leaf Restaurant until the company was placed into liquidation on 18 December 2019. The sole director and shareholder of this company is Manju Bisht, the second respondent's wife. On or about January 2020 Imaxx Indian Restaurant began trading from the same premises from which the Curry Leaf Restaurant had previously operated. It is understood that Mr Bisht is involved in the operation of this business. The breaches in this case were sustained over a period long period of time (three years).

[100] It is unclear whether Mr George was visa dependent on this job, however he was certainly a vulnerable employee. Mr George resided at a property controlled by Mr Bisht and when he expressed a desire to move, Mr Bisht pressurised him to stay.

[101] The wage arrears owed to Mr George are substantial, the amount sought by the Labour Inspector from Mr Bisht is \$75,026.18. If the arrears he was not paid before 1 April 2016 were sought, the total arrears would be \$81,372.78.

[102] I find that Mr George was vulnerable and the fact that another Indian restaurant is now being operated from the same premises as the Curry Leaf Restaurant which has a connection with Mr Bisht is of concern in light of the breaches.

Statutory consideration 7 – previous conduct

[103] The respondents have not previously come to the attention of the Inspectorate.

Additional consideration 8 – deterrence

[104] The breaches in this case are breaches of minimum standards. I consider that there is a need to enforce to employers the employment standards they are required to meet and that minimum entitlements are non-negotiable.

[105] It is acknowledged in submissions that KCL no longer trades and has been removed from the Companies Register, however it is noted that Mr Bisht appears to be involved in the operation of a similar business.

[106] I observe that when questioned during the Investigation Meeting the Labour Inspector's evidence was that although Mrs Bisht was noted on the Companies Office website as the director of the new restaurant Imaxx Indian Restaurant, it was Mr Bisht who was present and appeared to be working at it on the day she visited.

[107] In these circumstances I find it is important to ensure Mr Bisht is deterred from committing similar breaches in the future.

Statutory consideration 9 – culpability

[108] It is submitted that there are additional factors to those already set out above which increase Mr Bisht's culpability, including:

- Mr George continues to be affected by the breaches identified years after he ceased to be employed by KCL as he was substantially underpaid during his employment. He still has not been paid his outstanding entitlements and had to miss his mother's funeral because he was not permitted to take leave.
- The breaches were ongoing and repeated over a period of three years, leaving Mr George substantially out of pocket and exhausted due to an inability to take leave.

[109] I find Mr Bisht was aware of the need to meet minimum employment standards but failed to do so over a significant period of time. This in turn caused distress to Mr George and had health and safety implications. As such I find a high degree of culpability.

Additional consideration 10 – consistency

[110] The Court and the Authority has imposed relatively significant penalties in matters involving minimum wage and holiday pay breaches and a relatively small number of employees. In *Preet*, penalties of \$100,000 were imposed.

[111] In the present case, it is accepted that penalties cannot be sought against KCL. Any penalties awarded against Mr Bisht as a person involved will be lower.

[112] It is submitted that the proposed penalties in this case are consistent with the decisions in *A Labour Inspector v La Wheat Limited* and *A Labour Inspector v Shah Enterprise NZ Limited*.⁷ It is noted that some starting points differ due to the period of time over which the breaches occurred and the fact that the arrears in this case were higher.

[113] The proposed starting point of 90 per cent for a breach of the MWA is consistent with the position taken by the Authority in *La Wheat* in respect of one employee. This figure has been adopted due to the similarity of the breach.

[114] The starting points for breaches of the HA and recordkeeping breaches have been increased in this case to reflect the increased arrears amounts owed to Mr George, the length of time the breaches occurred over, and the lack of cooperation with the investigation. It is submitted that the penalty imposed should reflect this.

Additional consideration 11 – ability to pay

[115] 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.⁸

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 statutory scheme and its underlying objectives.

[116] Mr Bisht was the sole director and a shareholder of KCL which has been removed from the Companies Register following liquidation and is thus not in a position to pay a penalty.

[117] No evidence as to his personal circumstances or ability to pay has been provided by Mr Bisht and there is no adjustment made to the provisional penalties at this stage of the process.

Additional consideration 12 – proportionality of outcome

[118] Penalties should not be reduced so as to create perverse incentives for employers and inadvertently encourage non-payment.⁹

[119] The Labour Inspector submits that the substantial reduction already allowed for at the globalisation stage means that further adjustment for a proportionality is not likely to be necessary.

⁷ *A Labour Inspector v La Wheat Limited* [2019] NZERA 50; and *A Labour v Shah Enterprise NZ Limited* [2010] NZERA 505.

⁸ *A Labour Inspector v Daleson Investment Limited* in footnote 3 above, para [44]

⁹ *A Labour Inspector v Daleson Investment Limited* in footnote 3 above, para [47]

[120] Following globalisation the maximum penalty payable would be \$50,000 reduced from a total starting point of \$130,000.

[121] I have considered the need for proportionality. In accordance with *Preet*, penalties imposed should be in proportion to the amounts of money unlawfully withheld from the employee and the circumstances in which the breach took place.

[122] In the circumstances of this case, the arrears total a significant sum of which Mr George had been deprived during his period of employment with KCL and I do not find the level of penalty claimed to be disproportionate to the gravity of the breaches.

Should penalties be imposed on Mr Bisht as a person involved with the breaches?

[123] Mr Bisht was the person holding responsibility for the operation of KCL. As such he was responsible for all the breaches which occurred.

[124] **In respect of the breaches, I order Mr Bisht to pay a penalty of \$50,000.00 to the Authority which will then be paid into a Crown bank account.**

Costs

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

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

Eleanor Robinson
Member of the Employment Relations Authority