IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 365
3108392

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	BONZ GROUP (NZ) LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Greg La Hood, Counsel for the Applicant Janet Copeland, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	29 April and 24 May 2021 from the Applicant 18 May 2021 from the Respondent
Date of Determination:	17 August 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, asserts that BONZ Group (NZ) Limited (BONZ), has breached sections 49, 50, 56 and 81(2) of the Holidays Act 2003 (HA) and section 130 of the Employment Relations Act 2000 (the Act) by failing to pay employees their correct public holiday entitlements and keep adequate wage, time and holiday and leave records. The

Labour Inspector seeks to recover arrears and the imposition of penalties for the identified breaches.

[2] The parties submitted an Agreed Statement of Facts that greatly assisted my investigation. This included calculations for arrears allegedly owed to nineteen employees and it identified a difference between the respective calculations of $5,701.44. The Labour Inspector claimed $14,754.80 was owing on 15 April 2021 and BONZ calculated the sum owed as $9,053.36 on 15 March 2021. As of the date of the agreed statement (21 April 2021) it was acknowledged that some or all of the arrears had been paid by BONZ and that BONZ agreed to "pay any outstanding money owed once it is determined the actual amount owed for each employee".

[3] On this basis of an acceptance of culpability for the arrears (pending calculation of such) both parties agreed that the outstanding matters including consideration of penalties sought, be dealt with 'on the papers' without the need to convene an investigation meeting.

The Authority Process

[4] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions on matters to resolve the identified issues and make orders but I do not record all evidence and submissions received.

Issues

[5] The Authority has to determine the quantum of outstanding disputed arrears by utilising factors set out in s 12(3) HA and penalties that the respondent may incur for the identified breaches by applying relevant legal principles.

What caused the breaches?

[6] BONZ is an established (since 1985), limited liability company operating a retail, luxury clothing/apparel store in Queenstown and a design studio and factory in Invercargill.

[7] In July 2019, BONZ was investigated in response to a claim by a former employee that existing employees were required to 'sign away' their entitlements to be paid time and a half for hours worked on a public holiday. The Labour Inspector obtained wage and time, holiday and leave records (provided in a timely manner) and interviewed affected past and

present employees and a BONZ director. In addition, an employee's employment agreement was obtained from Immigration New Zealand that had been in place since 29 May 2017 and it included a provision "I acknowledge I will not receive time and a half on a public holiday…." A further 2013 employment agreement pertaining to another employee also provided for the same denial of penal rate entitlement on a public holiday.

[8] In addition, the Labour Inspector found 22 employment agreements pertaining to part-time employees that had a public holiday provision indicating that to qualify for time and a half and time in lieu for working a public holiday they must have "worked 3 consecutive weeks on the same day as the Statutory Day".

[9] The Labour Inspector noted that BONZ "updated" their employment agreements around the time of the investigation commencing and upon being apprised of investigation findings, BONZ engaged an external company to audit and rectify identified systemic breaches.

[10] The investigation concluded that on "at least 32 occasions (out of 35 reviewed)" BONZ had failed to pay five employees time and a half and on one occasion an alternative holiday had not been provided to an employee. Four occasions where employees had not been paid for public holidays not worked that allegedly would otherwise have been working days were also identified.

[11] BONZ on 11 October 2019, conceded thirty two breaches of s50 HA involving five employees not being paid correctly for public holidays had occurred. Arrears owed to those employees involved were paid.

[12] The Labour Inspector on request and in a timely fashion, was then provided with additional records covering the period 15 October 2013 until 15 October 2019 that had been reviewed by BONZ's external consultant.

[13] The Labour Inspector's review of the provided records found (in summary) that:

(a) at least 39 employees were not paid time and a half for hours worked on at least one public holiday;

(b) at least 23 were not paid for unworked public holidays that would otherwise be working days due to rostering irregularities;

(c) at least 24 were not provided alternative holidays after working at least one public holiday and the parties dispute whether an otherwise working day existed;

(d) at least two employees were not paid for public holidays that fell during periods of annual leave.

[14] Based on the above review, the Labour Inspector calculated arrears owed of $42,332.52. However, the external company engaged by BONZ disputed the Labour Inspector's calculation methodology and scope of their review identifying BONZ's liability as $38,819.05 as of 20 April 2021. BONZ has indicated a willingness to reimburse the individual employees the difference in the amounts once determined by the Authority.

The disputed breaches: otherwise working days

[15] The parties dispute what constitutes what would otherwise be a working day as a threshold qualifying factor for an employee being able to claim to be paid for a public holiday not worked.

[16] BONZ has conceded that a provision of the employment agreements applying to part-timers requiring them to have worked three consecutive weeks "on the same days the statutory holiday" falls is unlawful. It is in fact inconsistent with s 6 HA[1] BONZ correctly cited the Court of Appeal decision *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union (2007)* and the Employment Court decision of *BW Murdoch Ltd v Horn* as indicators that in applying section 12(3) HA and assessing "relevant factors", [2] an "intensely practical" [3] approach is required (i.e. "how the relationship worked in practice")

[1] Section 6(3) Holidays Act 2003 indicates an employment agreement excluding, reducing or restricting an employee's entitlements "has no effect to the extent it does so".
[2] Section 12 Holidays Act 2003.
[3] *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union (2007)* [2006] ERNZ 1109.

with each public holiday needing to be examined "separately in light of the work patterns around it". [4]

[17] Whilst work patterns are a significant indicator, s 12(3) HA lists other factors that must and should be taken into account for the parties to reach agreement – they are as follows:

> (a) The employee's employment agreement:
> (b) The employee's work patterns:
> (c) Any other relevant factors, including —
> (i) whether the employee works for the employer only when work is available:
> (ii) the employer's rosters or other similar systems:
> (iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.
> (d) Whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.

The contextual nature of the relationship

[18] Being a retail outlet in a busy tourist location, BONZ's employees' span of hours are 9am–10 pm, on all seven days per week. There was a provision in the standard individual employment agreement provided (cl 11) that BONZ "may require you to work on a public holiday on a day that would otherwise have been a working day". This provision is extended to include "or as additional hours where you are required to be available in accordance with this agreement". A standard schedule to the employment agreement contains the provision (cl 2.2): "We may require you to work additional hours including on days outside of your agreed hours" and that the employee "agrees" to "work such additional hours as reasonably required" including "evenings, weekends and public holidays".

[19] For hourly paid workers the work was rostered to produce a "fixed work pattern" but days worked were subject to employer control to meet needs such as seasonal work peaks. It is noted that the employment agreements in force after 1 April 2016 do not include

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[4] *BW Murdoch v Horn* [2008] ERNZ 38 at [32]-[33] that also cited *Progressive Meats Limited v Meat and Related Trades Workers Union of Aotearoa Inc* (2008) 5 NZELR 219 as taking a similar approach to examine the "particular patterns of work".

availability provisions as per s67D of the Act and the employees involved although unlikely to be aware of such, could refuse to make themselves available for additional hours "as reasonably required" without "reasonable compensation for making himself or herself available to perform work under the availability provision". [5]

[20] The upshot being under the employment agreements' hours of work provisions, the employer has significant or effectively total control over the days and hours worked by its employees as long as they can demonstrate the hours are "reasonably required" to run the business. So, in considering the employment agreement when applying s 12(3) HA, I am obliged to consider the balance of power and control between the parties.

[21] I observe that the employment agreement overwhelmingly favours BONZ with no restraint on compelling an employee to be available to meet business demands. In applying the object of the Employment Relations Act a contextual factor that would apply here is to acknowledge and address the inherent inequality of power in an employment relationship, [6] it is not a stretch, I believe, to reason that restoring some balance in the relationship is to err on the side of the employee when considering an agreement that has significant one way benefit. Thus in applying the factor of what does the employment agreement provide I consider that an otherwise working day can effectively be imposed upon the employee.

The rosters

[22] Hours of work are generally set by roster with specified guaranteed hours up to 40 hours per week depending upon status (full or part-time). As a result, actual days of work differ depending upon a variety of individual factors but BONZ's counsel in submission conceded that:

> … neither full time or part time employees have set days in which they work, rather all work was assigned in accordance with the roster on any of the seven days of the week.

[23] The Labour Inspector asserted this was "not a situation where employees were only rostered when work was available to them". However whilst accepting this premise, this observation is overly simplistic and has to be qualified by the vagaries of any seven day week

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[5] Section 67D - 67E Employment Relations Act 2000 as inserted by section 9 Employment Relations Amendment Act (2016 No 9) and see *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2019] NZEmpC 47.
[6] Section 3(a)(ii) Employment Relations Act 2000.

rostering system and individual circumstances that may include sharing weekend work, filling in for absences/leave periods, individuals swapping days, a requirement for more staff during busy days or some workers having 'set' days of work due to availability issues (although on the latter, BONZ indicated no employees requested set days). BONZ also indicated the rosters provided that each employee would get two consecutive days off per rostered week.

[24] The only way to determine 'patterns' of work is to look at each individual. To complicate matters, the Labour Inspector suggested that a person responsible for rostering had been encouraged to manipulate the roster having regard to the "3 week rule" so that public holiday obligations could be avoided. Given this matter was dealt with 'on the papers' albeit by agreement, without witness evidence being led, I cannot safely rely upon such assertions. BONZ overall suggested that the consultant's report approached the analysis of rosters to determine otherwise working days in a broader fashion by taking into account additional evidence as "some rosters and other key documents were missing".

[25] That leaves me with a dilemma of either considering a reasonable fixed period of time to determine a pattern of work or merely being guided by the employment agreement's stricture that the employees make themselves available on any working day so all constitute what would otherwise be a working day.

Alternative working days?

[26] I am somewhat assisted by *Wendco (NZ) Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* where Member Hickey albeit in considering an alternative day for the purpose of access to an alternative holiday for employees working on public holidays, had to grapple with what would be a reasonable time period to assess a pattern of work after rejecting a three week qualification period the employer sought to contractually impose.

[27] After traversing the relevant case law [7] with a codicil that there "is no case law on precisely the issue" under scrutiny and, accepting the question of what was otherwise a working day was unclear, Member Hickey made the observation that a three week test could be unfair and open to manipulation and contrary to the HA. Member Hickey then suggested

[7] *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union (2007)* [2006] ERNZ 1109; *Transit Coachlines Wairarapa Limited v Morgan* [2013] ERNZ 638 and *BW Murdoch v Horn* [2008] ERNZ 38.

(rejecting twelve months) a minimum of three months and maximum of six months was deemed a reasonable time frame to assess a pattern of work. However, in granting orders Member Hickey left open the question of a specific time period for assessment of work patterns and the question of how many days during the time period under scrutiny are required, to tip the balance ether way. Member Hickey in the context of the remedies sought by the Labour Inspector, did not adjudicate the issue but directed the employer to apply "all the relevant factors in s 12 of the Holidays Act 2003" impliedly in the light of the comments made on what would be a reasonable approach.

[28] Here I am being asked to determine a dispute after both parties have claimed to apply all the relevant factors. In doing so, I note s 12(3)(a) and (b) are specific considerations (the employment agreement and work patterns) but s 12(3)(c) details three other "example" relevant factors, leaving open an ability to consider wider issues such as the objects of both the HA and Employment Relations Act. On the former, s 3 "Purpose" of the HA, it is employee focussed and seeks to "promote balance between work and other aspects of employees' lives"[8]. I do accept this is generally aimed at the provision of days off for recreation and that the act appears to have been written with a traditional Monday – Friday working week in mind but nevertheless where an employer has significant control, I consider some balance has to be brought to bear in the 'work bargain'.

[29] If my finding occasionally leads to an employee being paid an additional day over their otherwise normal rostered pay period when a public holiday falls, then this is simply the function of the roster that at times could be disruptive to an employee's individual circumstances or alternative plans for a day their employer imposes as a working day.

Assessment/finding

[30] In considering the parties relative positions and balancing s 12(3) HA factors and the object of the Employment Relations Act including equity and good conscience considerations, I agree broadly with the Labour Inspector's submissions and find that too little emphasis has been placed upon the advantage gained by BONZ in how the employment relationship is structured. Given that any day can be deemed an ordinary working day, I find that in applying mandatory and other relevant factors set out in s12(3)(a)-(c) HA in a balanced

[8] Section 3 Holidays Act 2003.

manner, that provided an employee is found to have worked on the day that the public holiday falls within the last six months, on at least one occasion, then that employee should be paid for the public holiday as an otherwise working day. This is a finding that as a minimum, the total arrears difference identified by the Labour inspector is payable by BONZ.

[31] I also record that the above finding on determining otherwise working days should apply for the purpose of determining whether an alternative holiday be granted to employees who work on public holidays.

Breaches and potential penalties

[32] In the agreed statement of facts it was accepted that the following identified alleged 'globalised' statutory breaches fall to be considered by the Authority:

- Section 49 HA (26 globalised breaches) – a failure to pay identified employees for a public holiday not worked that would otherwise be a working day. .
- Section 50 HA (35 globalised breaches) – a failure to provide in employment agreements (now rectified) and pay, identified employees time and a half for working on public holidays.
- Section 56 HA (21 globalised breaches) – a failure to record and provide identified employees with alternative holidays for those employees who worked on public holidays that fell on otherwise working days.
- Section 130(1) the Act – (42 globalised breaches) – a failure to keep compliant wage and time records (due to missing rosters and some employees not being recorded on rosters hampering the Labour Inspector's investigation).
- Section 81(2) HA - (46 globalised breaches) – failure to keep compliant holiday and leave records.

What level of penalties are appropriate in the circumstance of the breaches?

[33] The approach I intend to adopt is consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited* [9] and I am also guided by Judge Corkill's decision *A Labour Inspector v Matangi Berry Farm Limited* [10]. *Preet* identified a four-step framework to fixing penalties where multiple breaches of minimum standards are evident:

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
>
> Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
>
> Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
>
> Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances. [11]

[34] To ensure consistency I use an approach adopted in a recent Authority determination (*Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd*) that first considered the statutory framework and then assessed the quantum of remedies based on the four steps identified above. [12]

The object of the Act

[35] Section 3(a) of the Act sets out relevant 'aspirational' matters I must consider. These include the need to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment", "acknowledging and addressing the inherent inequality of power in employment relationships" and promoting effective enforcement of "employment standards" by Labour Inspectors.

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[9] *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.
[10] *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 40.
[11] At [151].
[12] *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

The nature and extent of the breaches

[36] There were 170 accepted globalised breaches involving BONZ for which penalties are sought (see above para 32).

[37] Whilst the breaches are admitted by BONZ and have been rectified once identified, the Labour Inspector submits that they arose from deliberate attempts to either minimise entitlements or extinguish such and most of the employees affected were migrants. By contrast, BONZ's counsel suggested carelessness of payroll officers and incorrect legal advice were causative factors and that the mistakes were randomly distributed.

The nature and extent of any loss or damages suffered

[38] The loss or damage incurred by 64 employees over a seven year period involved is quantified cumulatively by the Labour Inspector as $44,520.24 (taking into account my finding on payment of public holidays not worked).

[39] Spread around the impacted employees (many being owed less than $1,000) BONZ suggests that the breaches are at the "minor end of the scale". Whilst the amounts the employees were deprived of appear relatively low I do take into account they would not be insignificant to moderately paid migrants living in a notoriously expensive tourist location.

Were the breaches intentional, inadvertent or negligent?

[40] Given the breaches were admitted and BONZ did not give evidence I can only draw inferences from the reported conduct as outlined in the parties respective claims, reports and submissions.

[41] I conclude from such that BONZ failed to exercise due diligence in regard to Holiday Act obligations and unquestionably followed incorrect legal advice that had the effect of minimising obligations – such advice should have been more carefully scrutinised particularly on the question of denying penal rates for employees working public holidays. The latter is a clear breach of an arguably well-known and plainly expressed statutory obligation that I note was the subject of specific wording in an employment agreement that the employees' concerned would "not receive time and a half on a public holiday" that evidences knowledge that the provision exists and deliberation in excluding the entitlement.

[42] I do however acknowledge that the question of what is 'otherwise a working day' is somewhat opaque but nevertheless, BONZ chose to impose an ill-conceived, unfair and unlawful approach to this question (the three week threshold).

[43] I conclude the repeated breach of not paying penal rates was deliberate and intentional with a clear financial advantage to BONZ. A similar finding on the approach to the 'otherwise working day' threshold is not made out. I conclude negligence in that BONZ did not inquire further on the fairness of the superficially attractive three week qualifying provision.

What steps have been taken in mitigation?

[44] The Labour Inspector is satisfied on documentation provided, that the 'compliance' matters have been promptly rectified and significant arrears were paid to the employees concerned in a timely manner (in October 2019) and that BONZ is committed to abiding by an Authority ruling on the modest amount left outstanding. I acknowledge that appropriate professional assistance on a new payroll system and legal support has been accessed to produce legally compliant employment agreements and suspect the cost of such would not be insignificant. Credit should go to an employer who has comprehensively tackled compliance matters.

The circumstances of the breach and any vulnerability factors

[45] Little was advanced about the individual vulnerabilities of the employees other than their migrant status but to this extent I consider it to be an aggravated feature. Migrant workers as the Authority has repeatedly found, are in an inherently vulnerable situation reliant on their employers being compliant with relevant statute law. BONZ is an established company working in an environment where familiarity with holiday and employment legislation is essential given the flexibility and span of business opening hours they adopt. I note there was careful drafting of the employment agreement to ensure the employees make themselves available for work 24/7. Such an approach to reciprocal obligations was absent.

Previous conduct

[46] BONZ has not previously appeared before the Authority and the Labour Inspector disclosed no history of any other concerns or investigations.

Impact of stand-down period

[47] An issue for consideration is the impact of Immigration NZ's (INZ) policy if a penalty is imposed, of issuing a mandatory stand-down period of twelve months on any business. This restricts a business from supporting new visa applications and renewal of any existing applications during the stand-down period. BONZ's counsel suggested the impact of such a ban would prevent BONZ engaging vital migrant employees with language proficiency vital to the business and that factor would disproportionately impact BONZ's business to the extent no penalty should be considered as it amounted to something akin to 'double jeopardy'.

[48] The Labour Inspector pointed to the incongruity this approach would create whereby such a finding would unfairly create a different lower standard for compliance for those employing migrant labour. The Labour Inspector also cited Authority decisions where assessment factors of penalty quantum should not be used to "reduce the effects of a government policy"[13]. Whilst I take on board the point made by the Labour Inspector that BONZ can continue to employ New Zealand citizens and existing permanent residence holders, I do think some consideration in this context is warranted. However, such consideration in current times with borders closed for a reasonable period is largely academic. The countervailing argument around consistency in the Authority's approach must in my opinion on balance prevail.

[49] I find that the factor of the imposition of a mandatory INZ imposed stand down if a penalty is imposed is not a matter I should take into account when assessing a penalty arising from a breach or a factor pertaining to the quantum of such on current case law.

***Preet* step one – nature and number of breaches**

[50] The approach to quantification in *Preet* allows me to consider whether any of the breaches can be 'globalised' for the purpose of quantifying a penalty so that one breach may reflect two or more. [14] In applying a globalised approach in *Preet* the Court noted:

> 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-

[13] Including *A Labour Inspector v Silviculture Solutions Limited* [2018] NZERA Auckland 402 at [35].
[14] At [100].

> 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. [15]

[51] The effect of the above approach is where multiple breaches occur in respect of multiple employees, globalising can allow the application of one penalty for such. Here as in *Preet*, the breaches of s 81 HA and s 130 of the Act although different statutes are related to each other both concerning record keeping for the purposes of calculating entitlements under the HA and apply to the same number of employees.

[52] This approach was affirmed by the Court in *A Labour Inspector v Parihar* where Judge Perkins allowed that a failure to keep wage and time records and holiday and leave records relates to the general breach of failure to keep adequate records and should be treated as one breach per impacted employee. [16]

[53] Judge Corkill pragmatically refined the latter approach in *A Labour Inspector v Matangi Berry Farm Limited* [17] where faced with multiple employees and identical breaches (532), he focused on the nature of the breach rather than the frequency per employee; reducing such to a single breach for each type of default. Whilst the reasoning applying was to avoid 'artificiality" of discounting as Judge Perkins reasoned in *Parihar* "if the maximum penalty is related to each breach, an enormous total is reached", [18] I see the sense in this analysis and adopt it.

[54] Taking the approach in *Matangi* and focussing broadly on the nature of the breaches rather than the frequency or each specific statutory transgression, allows me to reduce 47 breaches to two, for the transgressions of both s 49 and 56 HA.

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[15] At [141].
[16] *A Labour Inspector v Parihar* [2019] NZEmpC 43.
[17] *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43
[18] At [39].

[55] However the breach is not related and needs to be treated separately: so, s 50 HA (failing to pay time and half to two employees working on a public holiday) I will treat as one additional breach (taking a globalised approach). This amounts to four identified breaches at this stage.

[56] The global approach I have applied above, now reduces the various breaches to four and provides a sensible starting point to define potential maximum penalties before I apply further analysis of other factors using guidance from *Preet.* So at this stage, the potential maximum penalties I can impose on BONZ using a globalised approach, are $20,000 per breach[19] which for the four accumulated breaches identified above amounts to $80,000.

***Preet* Step 2 – severity of breaches**

[57] On top of statutory considerations (the aims of the Act) I am obliged, following *Preet,* to examine the extent of the respondents' culpability and as emphasised by the Labour Inspector, take the public interest factor of using the penalty regime as a legitimate deterrent to others.

[58] Considering the above and the aggravating feature that the non-payment of penal rates for those working on a public holiday was deliberate and, despite the relatively small amount of money the employees were deprived of, deterrence where several vulnerable individuals are involved is a key consideration. Taking the latter considerations into account I conclude that the breaches are reasonably significant and I deem 75% of the maximum accumulated penalty to be a 'starting point' ($60,000).

[59] In mitigation, the company has promptly and comprehensively rectified the breaches and paid the employees a significant proportion of their entitlements and engaged professional assistance to ensure ongoing compliance. I also note a submission that BONZ pays above minimum wage rates and documentation evidenced this.

[60] In the circumstances, I consider a further 10% reduction of the maximum penalty is warranted which reduces it to $54,000.

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[19] Section 75(1)(b) Holidays Act 2003.

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

[61] In considering this factor I have to as submitted, assess the significant impact COVID has had on BONZ's business that it says is heavily reliant upon international tourism. Counsel for BONZ provided general information including referencing that the Queenstown Lakes District has suffered a disproportionate drop in GDP during the COVID lockdown period. [20]

[62] Some of the negative economic impact was mitigated by the payment of the government's wage subsidy to BONZ ($111,302) and I note evidence that BONZ's wage and salary costs were reduced by just over 40% year on year and shareholder salaries increased (due to an additional family member joining as a director and shareholder).

[63] However, the financial statement prepared by BONZ's chartered accountant up to March 202 showed comparison wise, a loss in revenue of almost 60% on the previous year and that the owners had taken on some debt to keep the business operating. Whilst the situation for overseas tourism is still uncertain I note that domestic tourism has recently provided a significant boost to the Queenstown economy but the future of international tourism remains uncertain in the short to medium term.

[64] In these circumstances, I will take BONZ's uncertain financial situation into account in assessing the quantum of the penalty I intend to impose.

***Preet* step 4 - Proportionality**

[65] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such that involved several employees. Four Authority cases I have contrasted involve breaches of a similar nature involving small businesses. [21] I also sought guidance from a recent Authority case (*Labour Inspector v Basra & Khella Limited*) that has a useful analysis of past

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[20] Infometrics *Quarterly Economic Moniter- Queenstown Lakes District* December 2020, https://gem.infometrics.co.nz/queenstown-lakes-district/indicators/gdp?compare=new-zealand

[21] *Labour Inspector v Sharma and Sons (2009) Ltd and Sharma and Sons Ltd* [2016] NZERA Auckland 128; *Labour Inspector v IXL Petroleum and Gas Ltd* [2017] NZERA Auckland 128, *Labour Inspector v Dhanoa* [2018] NZERA Wellington 32 and *A Labour Inspector v Janson Trading Limited t/a SBA Thames and Jaswant Singh* [2021] NZERA 5.

authorities and amounts awarded. [22] The cases show penalties imposed on the companies involved, range from $12,000 to $ 21,000 depending on various contextual factors.

[66] Taking into account the totality of factors I have explored and that applying proportionality to my analysis I find it is just in the circumstances that BONZ should pay a modest penalty of $12,000.

Conclusion on penalties

[67] Within 28 days of the date of this determination BONZ Group (NZ) Limited must pay to the Labour Inspector for transfer to a Crown bank account: penalties in the sum of $12,000.

Further direction on 'otherwise working day' issue

[68] I direct BONZ Group (NZ) Limited to:

(a) Apply an approach to the question of what would 'otherwise be a working day' for the purposes of calculating arrears of pay in dispute for a public holiday not worked of: examining the identified impacted employees' rosters for the period of six months prior to the public holiday date and then determining eligibility for payment on the basis of at least one qualifying day identical to the day the holiday falls on having been worked during the six months period.

(b) Use the above approach to calculating an 'otherwise working day' on an ongoing basis to comply with section 49 of the Holidays Act 2003.

Costs

[69] The parties are encouraged to come to an agreement on costs but if they are unable to do so and I have to determine costs, the Labour Inspector has a period of 14 days from the date of this determination to make a submission to the Authority and BONZ has a further 14 days to provide a response in reply.

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[22] *A Labour Inspector v Basra & Khella Limited* [2020] NZERA 534 at [211].

David G Beck
Member of the Employment Relations Authority