

**An interim non-publication order
made by the Authority in these
proceedings has been rescinded
at [73]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 479
3047333

BETWEEN	A LABOUR INSPECTOR Applicant
AND	ANESLY JOY SAMUEL First Respondent
AND	ROMEECO CARS LIMITED Second Respondent
AND	WADDUWAGE NIROSHA DILRUKSHI PERERA Third Respondent

Member of the Authority:	Andrew Dallas
Representatives:	Catherine Milnes, counsel for the Applicant Werner van Harselaar, counsel for the Respondents
Investigation Meeting:	11 and 12 May 2021 at Christchurch
Submissions	10 June 2021 and 29 July 2021 for the Applicant 12 July 2021 for the Respondent
Determination:	1 November 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By lodgement of a statement of problem, Labour Inspectors Sacha Hodgson and Nicola Rowe sought findings of breaches of minimum standards, arrears of minimum standards

entitlements, and penalties against Anesly Joy Samuel, his wife, Wadduwage Nirosha Dilrukshi Perera and Romeeco Cars Limited (Romeeco).

[2] Charaka Madushana Wijesundara, Don Kasun Gayan De Seram and Shasika Chanthaka Ellawala (the workers) were employed as bakers at various times to work at the “Romeeco Bakery”, which is located in Dunedin’s central business district. A second bakery also operated, during material times, in South Dunedin.

[3] The Labour Inspector says the workers were paid wages for 40 hours per week regardless of the total number of hours worked. The Labour Inspector said that the workers worked, at the request or with the consent of the employer, more than 80 hours over six days per week. The Labour Inspector said that as a consequence the remuneration actually paid to the workers did not meet the applicable statutory minimum wage rate when having regard to the total number of hours worked.

[4] The Labour Inspector said the employer also failed to comply with the Holidays Act 2003 (H Act) by depriving the workers of their sick and holiday pay and also the use of that remuneration. And, the employer failed to maintain and keep holiday and leave records and wage and time records for the workers in breach of the H Act and the Employment Relations Act 2000 (the Act).

[5] Romeecco is a company controlled by Mr Samuel. He is the sole director and shareholder. It has a colourful corporate history as a car sales business on Portsmouth Drive, South Dunedin, a trucking operation and, potentially, as a bakery.¹ The Labour Inspector says Romeecco, insofar as it was involved with the operation of the bakery, is relevant at all material times to the matters at issue between the parties, unless Mr Samuel is found to be the employer of the workers.

[6] The Labour Inspector says her primary position is that Mr Samuel was the employer of the workers and this is supported by the existence of employment agreements which identify Mr Samuel as the employer. However, the position is complicated to some extent wage

¹ Romeecco Cars Limited, now known as “Romeecco Trucking Limited” (from 14 March 2019) was previously known as “Romeeco Cars Limited” (from 15 May 2018 to 14 Mar 2019), “Romeeco Limited” (from 29 Nov 2017 to 15 May 2018) and “Romeeco Top Cars Limited” (from 17 Jun 2016 to 29 Nov 2017).

payments being made from bank accounts in the name of “Romeeco Bakery”, which at that point, at least, was not a legal entity.²

[7] The Labour Inspector says regardless of the true identity of the employer, Ms Perera was involved in the running of the bakery business including telling investigating Labour Inspectors that she was an owner of the business, was familiar with the operation of the business and regularly assisted at the bakery. The Labour Inspector says Ms Perera was aware of the breaches and was a person involved in breaches of minimum standards.

The Authority’s investigation

[8] During the investigation meeting, I heard evidence from Labour Inspector Sacha Hodgson. Labour Inspector Nicola Rowe provided relevant and helpful material for the investigation meeting but, by agreement between the Authority and the parties, it was not necessary for her to be examined or cross-examined about this. In addition I heard evidence from the workers (including one via audio-visual link from Sri Lanka), Mr Samuel and Ms Perera.

[9] It was anticipated that several further witnesses were to give evidence in support of the respondents. However, not all did. During questioning by the Authority and cross-examination by the Labour Inspector’s counsel it became clear that the circumstances by which some of these witnesses had come to give evidence was less than satisfactory: they were not aware that the proceedings were being brought by the Labour Inspectorate. As the investigation meeting proceeded, Mr Samuel decided not to seek to rely at all on the evidence of one such witness and their statement was set aside. Overall the circumstances by which these witnesses became involved in these proceedings raised questions about the veracity of the evidence given (or to be given). For completeness, it is important to observe, however, this is not to be taken as a criticism of counsel for the respondents given the limited scope of his instructions.

[10] Having regard to s 174E of the Employment Relations Act 2000 (the Act), in this determination I do not refer to all the evidence received during my investigation of the Labour

² Since the Labour Inspectorate commenced its investigation, Mr Samuel has started two further companies: Romeeco Bakery Limited and Knox Cafe and Bakery Limited.

Inspector's employment relationship problem. While I have not referred to all submissions advanced by the parties during the investigation meeting, I have fully considered them.

Issues

[11] This issues for determination:

- (i) who was the employer of the workers;
- (ii) are workers owed unpaid wages, unpaid holiday pay, unpaid public holiday pay, alternative holiday pay and unpaid final holiday pay;
- (iii) is Mr Wijesundara owed sick leave arrears;
- (iv) is the employer liable for penalties for breaches of minimum standards and, if so in what amount;
- (v) subject to a finding in (ii) above, if Mr Samuel is not the employer of the workers is he a person involved in breaches of minimum standards who should be joined to these proceedings;
- (vi) is Ms Perera a person involved in breaches of minimum standards who should be joined to these proceedings;
- (vii) did Mr Samuel obstruct the Labour Inspector's investigation; and
- (viii) should the interim non-publication order be rescinded or made permanent;
- (ix) should either party contribute to the costs of representation of the other?

The Labour Inspector's investigation

[12] In June 2017, the Ministry of Business Innovation and Employment's contact centre received an anonymous complaint from a person who knew one of the employees at Romeeco Bakery. It was alleged employees at the bakery were working without correct pay or other minimum standards. It was also alleged a "premium" had been paid in exchange for employment.

[13] The information was passed to the Labour Inspectorate. On 13 November 2017 Labour Inspectors Sacha Hodgson and Kim Baldwin conducted an unannounced visit to Romeeco Bakery. One employee (Dinusha Thotage) was working along with Ms Perera.

[14] During an interview, Ms Perera provided Ms Hodgson with an overview about business practices and employee entitlements but advised there were no timesheets for employees. Ms Perera also advised that she was the business owner. Mr Thotage was separately interviewed including about his hours of work.

[15] Labour Inspectors conducted a further unannounced visit to the bakery on 15 November 2017 and found Mr Thotage working outside of the hours that he and Mr Perera had told the Labour Inspector. When Ms Perera was asked about Mr Thotage's working hours again by the Labour Inspector, she provided different working hours than those provided two days earlier.

[16] As a result of these early interactions, the Labour Inspector commenced an investigation into the bakery's employment practices and systems. Ms Hodgson requested that Mr Samuel provide her with a list of employees. A subsequent request was made for the records of two former employees. The Labour Inspector said that on their face these records appeared to indicate the employees only worked 40 hours per week and the wage records had the appearance of after the fact reconstruction about them.

[17] The workers, and Mr Thotage, were paid \$424.10 (nett) per week as confirmed by deposits in their bank accounts. The Labour Inspector said on rare occasions different payments were made. The workers subsequently provided statements to the Labour Inspector stating they were working in excess of 80 hours per week but were only being paid for 40 hours. The workers also stated they worked public holidays and were not paid at time and a half payments, provided with an alternative day, or paid their holiday pay correctly.

[18] On 12 February 2018, the Labour Inspector issued Romeeco with an infringement notice in the amount of \$2,000.00 for failure to keep full and accurate holiday and leave records as required by the H Act. This notice was paid in full with a transfer reference of 'Romeeco Top Cars, Romeeco Limited' to the Crown bank account.

[19] During an interview with the Labour Inspectorate on 27 March 2018, Mr Samuel provided information that was in conflict with that provided by Ms Perera and the workers. Mr Samuel said a deduction was being made from the workers' weekly wages for accommodation and food. This accorded with the wage and time records supplied to Ms Hodgson.

[20] However, a review of the workers' bank accounts also showed that “rent” was being paid to Mr Samuel's bank account via Mr Thotage. The workers said this was this was rent and that no deduction from wages was occurring. The Labour Inspector said this indicates that wage and time records supplied by Mr Samuel had been falsified because they show what was described as a “fictitious” weekly deduction from the workers’ pay for 'accommodation and food'.

[21] On 6 December 2017, one of the workers, Mr De Seram, advised the inspectorate that Ms Samuel had telephoned and advised him to provide false, misleading information to the Labour Inspector and/or Immigration New Zealand. This was said to include information on minimum wages, public holiday payments, annual holiday entitlements and location of work.

[22] On 11 March 2018, Mr De Seram provided the Labour Inspector with a recorded telephone conversation where Ms Samuel seemingly suggests Mr Thotage is responsible for the complaint to the inspectorate and that he will arrange to have someone kill or cut off Mr Thotage's limbs and harm his family.

[23] On 25 April 2018, Mr De Seram provided the Labour Inspector with another recorded telephone conversation where Mr Samuel tells Mr De Seram that he believes that Mr De Seram made the complaint to the inspectorate and he needs to prepare for his parents’ funeral in Sri Lanka. During the above call, Ms Perera takes over the call at one point and the Labour Inspector says this supports the contention that she is a person involved in the breaches of minimum standards.

[24] On 2 May 2018, Mr De Seram provided a further recorded telephone conversation to the Labour Inspector. This time the call is between Mr De Seram and a business associate of Mr Samuel. During the call, the business associate urges Mr De Seram to 'drop the case'. The business associate also advises Mr De Seram, who by this time was resident in Auckland, that people were watching him and that it would be "very bad "for he and his wife if Mr De Seram went ahead with the case.

[25] On 22 June 2018, the Labour Inspector provided Mr Samuel with a copy of her draft investigation report and invited comment. On 3 July 2018, a response was received from Mr Samuel’s then legal advisor.

[26] Mr Samuel was then provided with a copy of the final investigation report by the Labour Inspector. However, details of who provided information to the Labour Inspectorate were withheld on the advice of Police given the telephonic threats made to Mr De Seram.

[27] The Labour Inspector subsequently lodged a statement of problem in the Authority. A number of delays were occasioned by the respondents including those matters set out in an earlier determination of the Authority.³

Who was the employer of the workers?

[28] In the statement in reply lodged on behalf of Mr Samuel, Ms Perera and Romeeco, it was pleaded that Mr Samuel was the employer of the workers. Mr Samuel also accepted that he was their employer in his evidence to and before the Authority. Based on these admissions, which are consistent with the Labour Inspector's view about the identity of the employer, I make the finding that Mr Samuel was in fact and law the employer of the workers. This finding, in turns, resolves the issue as to whether Ms Samuel is a person involved in breaches of minimum standards. As employer, subject to any findings about arrears beyond, Mr Samuel would have caused the breaches of minimum standards.

[29] The Labour Inspector said that if it was accepted that Mr Samuel was the employer, Romeeco could be removed as a party to these proceedings. However, while the ability to remove parties from proceedings is available to the Authority under s 221(a) of the Act, I have decided this is an unnecessary step to take at this stage. The Labour Inspector says regardless of who the employer is found by the Authority to be, Ms Perera was a person involved in the employer's breaches. Suffice to say, this is strongly resisted by both Mr Perera and Mr Samuel.

[30] Having found Mr Samuel is the employer of the workers, we now turn to consider the Labour Inspector's claims for arrears and penalties.

³ *A Labour Inspector v ABC* [2019] NZERA 483

The Labour Inspector's claim for arrears

[31] The Labour Inspector quantified the claims for arrears by the workers against Mr Samuel as follows:

- (i) minimum wage arrears of \$193,765.93 comprising:
 - a) \$82,387.46 to Mr Wijesundara;
 - b) \$34,216.71 to Mr Ellawala; and
 - c) \$77,161.77 to Mr De Seram.
- (ii) public holiday arrears of \$3,668.90 comprising:
 - a) \$2,317.00 to Mr Wijesundara;
 - b) \$579.37 to Mr Ellawala; and
 - c) \$772.53 to Mr De Seram.
- (iii) unworked public holiday arrears of \$1,537.56 comprising:
 - a) \$420.00 to Mr Wijesundara;
 - b) \$457.50 to Mr Ellawala; and
 - c) \$660.06 to Mr De Seram.
- (iv) alternative holiday arrears of \$7,584.31 comprising:
 - a) \$4,851.00 to Mr Wijesundara;
 - b) \$1,158.75 to Mr Ellawala; and
 - c) \$1,574.56 to Mr De Seram.
- (v) annual holiday arrears of \$4,530.84 comprising:
 - a) \$2,683.18 to Mr Wijesundara; and
 - b) \$1,847.66 to Mr De Seram.
- (vi) final holiday arrears of \$21,883.19 comprised of the following:
 - a) \$9,853.90 to Mr Wijesundara;

- b) \$4,625.55 to Mr Ellawala; and
- c) \$7,403.74 to Mr De Seram.

(vi) sick leave arrears for Mr Wijesundara in the amount of \$1,067.50.

[32] Mr Samuel accepted in his evidence before the Authority, and during the Labour Inspector's investigation, that the workers performed more hours per week than the forty hours specified in their employment agreements. Consequently he further accepts that the workers are owed arrears but that such arrears are less than that calculated by the Labour Inspector.

[33] Mr Samuel said that the hours claimed by the workers should be "scaled down" to 10 hours per day in recognition that his businesses did not generate sufficient work or revenue to justify the workers' claims for arrears. Mr Samuel also said that it was the workers' "personal choice" they stayed longer at work than their contracted hours to "wait for their flatmates" or "to enjoy the free high-speed internet access provided" rather than for the purposes of performing work.

[34] The Labour Inspector rejected this "business model" argument. The Labour Inspector accepted that some traction could be gained here if the workers were being paid the minimum wage for every hour they worked but they were not and free or unpaid labour did not affect Mr Samuel's business' bottom line in the same way. The Labour Inspector said there was sufficient work to do for four bakers with two bakeries and contracts to supply product to other businesses including a local supermarket. The Labour Inspector said even when the South Dunedin bakery closed, additional alternative work was found for one of the workers at the car yard.

[35] The Labour Inspector said that in the absence of wage and time records for the workers, the starting point was s 132 of the Act, which provides that where an employee is prejudiced by the failure to keep wage and time records the Authority may accept as proven all claims about the wages actually paid to the employee and the hours, days and times worked by the employee unless the employer proves the claims are incorrect. Mr Samuel, for his part, acknowledged that the "reverse onus" contained in s 132 was a "powerful tool to ensure compliance" which should not be used in an "unreasonable manner".

[36] Based on the evidence before the Authority, I accept the workers were prejudiced in their ability to bring arrears claims as a result of Mr Samuel's failure to keep wage and time records. Consequently, the road to s 132 of the Act is open.

[37] The Labour Inspector said that Mr Samuel has failed to prove the workers' arrears were incorrect and I accept this submission. The circumstances of some of the witnesses giving evidence has already been commented on above. In summary, the evidence that was given was haphazard, contradicted by other witnesses or the workers themselves and lacked any credible specificity about the extent of, or pattern for, the work performed by the workers.

[38] To the extent that one witness "tempered" his evidence about his hours of work, I accept the Labour Inspector's submission that not all of these hours were included in her arrears calculations for that worker, and the fact that he could not initially recall his hours is actually evidence of the prejudice caused by the failure of Mr Samuel to keep wage and time records.

[39] Turning now to Mr Samuel's evidence. The Labour Inspector said Mr Samuel had very little credibility rendering his evidence "tenuous" and not capable of being relied on to establish, on the balance of probabilities, that the workers' claims were incorrect. The Labour Inspector pointed to a number of, what were described as, lies told to her during the inspectorate's investigation. These included:

- (i) the hours worked by the workers;
- (ii) the bakery being closed over Christmas for three weeks;
- (iii) public holidays were not worked;
- (iv) the workers were not paid less than the minimum wage; and
- (v) one of the workers never worked in the car yard.

[40] The Labour Inspector also pointed to: (1) his direction to one of the workers to lie to her during the inspectorate's investigation; (2) the provision of an inaccurate plan of the bakery to the Authority; (3) the systematic "theft" of the workers' wages to pay for accommodation and food; (4) the appalling conditions in which the workers were expected to live; (5) the \$10,000 premium taken from one of the workers; and (6) the attempts to transfer blame for his actions onto his accountant, his previous lawyer and the workers themselves; including unsubstantiated, convenient allegations of theft from the South Dunedin bakery.

[41] The Labour Inspector said that nothing in the evidence given by Mr Samuel or on his behalf displaces the presumption in s 132 of the Act and, if anything, the evidence supports a finding that more hours were actually worked than have been responsibly brought by the Labour Inspector to the Authority.

[42] I accept the submissions of the Labour Inspector and find that Mr Samuel is unable to displace the presumption in s 132 of the Act. Therefore, I further find and accept as proven, as I am entitled to do, the workers claims about the wages actually paid to them and the hours, days and times worked for Mr Samuel by them.

[43] While I have been invited by Mr Samuel the “scale” down the hours worked by the workers (notwithstanding his own admission they worked more hours than they were contracted to work), I am not prepared to do so. It would require a significant element of guess work unsupported by either evidence or principle. It is not the role of the Authority to, using a colloquialism, “make stuff up”; particularly in circumstances where s 132 of the Act is operative and available.

[44] I find Mr Samuel owes the workers the arrears set out in paragraph [31] above. These amounts, less any monies already paid, must be paid to the Labour Inspector for subsequent payment to the workers within 28 days of this determination.

The Labour Inspector’s claim for penalties

[45] Having reviewed the Labour Inspector’s investigation report, the submissions of the parties and taken account of the concessions made by Mr Samuel about his liability for the imposition of penalties, I find it is appropriate in the all the circumstances to impose penalties on him for breaches of minimum standards.

[46] In determining the quantum of penalties to be imposed under the Act, if any, s 133A of the Act sets out the relevant matters the Authority is to have regard to. Section 133A could equally apply, by analogy, to consideration of penalties under other Acts, for example the H Act and Minimum Wage Act, for which jurisdiction to do so is derived under the ER Act.⁴ While

⁴ Employment Relations Act, s 161(1)(m)

decisions of the court, for example, *Borsboom v Preet PVT Limited*⁵ and others have sought to provide guidance⁶, there is an elegant simplicity in s 133A and the focus, in my view, for any penalties consideration ought to now squarely be on the requirements s 133A and established principles in relation to recurrent liability; often referred to as “globalisation”.

[47] Section 133A of the Act relevant provides:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[48] However, as this was not argued by the parties, the present approach to considering the imposition of penalties in the Authority is will be applied in this determination.

Nature and number of breaches

[49] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.⁹ The maximum penalty for an individual, such as Mr Samuel, found liable for a penalty is \$10,000 per breach.¹⁰

⁵ [2016] NZEmpC 143 (Chief Judge Colgan, Judge Corkill, Judge Smith).

⁶ *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 (Chief Judge Inglis)

⁹ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].(Chief Judge Goddard)

¹⁰ Employment Relations Act, s 135(2)(a)

[50] The Labour Inspector seeks penalties for breaches of the Minimum Wage Act and the H Act. Each breach relates to all the workers, except the penalty sought for failure to pay sick leave which relates to Mr Wijesundara. The penalties are as follows:

- (i) failure to pay minimum wages x 3 = \$30,000 (maximum)
- (ii) failure to pay time-and-a-half x 3 = \$30,000 (maximum)
- (iii) failure to pay unworked public holidays x 3 = \$30,000 (maximum)
- (iv) failure to provide alternative holiday x 3 = \$30,000 (maximum)
- (v) failure to pay total annual holidays x 3 = \$30,000 (maximum)
- (vi) failure to pay final holiday arrears x 3 = \$30,000 (maximum)
- (vii) failure to pay sick leave x 1 = \$10,000 (maximum)

Total: \$190,000

[51] Mr Samuel did not dispute the number of breaches identified by the Labour Inspector nor the maximum penalties that could be imposed.

Aggravating features

[52] The Labour Inspector submitted there were a number of aggravating features in this case which warranted the imposition of penalties at the higher end of the scale. The sources of aggravation are set out in paragraphs [21], [22], [23], [24], [39] and [40] above.

[53] Mr Samuel acknowledged there were a number of aggravating features but submitted his mental health at the time of the breaches and, notwithstanding his conduct during the Labour Inspector's investigation, his view that the breaches were "inadvertent and unintentional" should be taken into account at this stage of the penalties consideration.

[54] Dealing with the last contention first, this is completely overwhelmed by the evidence before the Authority and requires, and deserves, no further consideration.

[55] In respect of Mr Samuel's mental health, the Labour Inspector submits, and I agree, that the medical evidence provided to the Authority was temporal – that is, as at the date of consultation - and was not capable of application or extrapolation to explain or contextualise prior circumstances and conduct.

[56] The Labour Inspector submitted, despite the late acceptance of some of the Labour Inspector's arrears claims during the first investigation meeting (which had to be abandoned due to Mr Samuel's mental health claims) that the penalties applicable to the accepted claims could be discounted by twenty percent. However, the Labour Inspector maintained her claim for the maximum penalties to be imposed for failure to pay minimum wages. I accept these submissions.

[57] So then, at this point the proposed penalties to be imposed on Mr Samuel are \$158,000.

Financial circumstances of Mr Samuel

[58] Mr Samuel provided some information relevant to consideration of his financial circumstances in the imposition of penalties. This included financial year accounts for two of his businesses: Romeeco Bakery Limited and Knox Café and Bakery Limited. A commentary by his accountant was also provided.

[59] Mr Samuel said these businesses were not in a strong financial position and he had been unable to obtain a mortgage to buy a house by conventional means and had to rely on the financial support of friends, which would have to be repaid. Mr Samuel said if penalties were imposed on him that he was unable to meet, he will likely have to cease trading meaning that the workers "would be less likely to receive the compensation they deserved".

[60] Mr Samuel sought a 70% reduction on penalties based on his financial circumstances. He also requested that the Authority order "a longer-term structure for the penalty payments, to enable Mr Samuel to make more financial arrangements and to increase the likelihood that Mr Samuel is able to meet the payments".

[61] The Labour Inspector said she had reviewed the financial material provided by the Mr Samuel and made the following observations:

- (i) the financial statements are unsigned and contained no resolutions;
- (ii) the accountants included a significant disclaimer that they did not accept any liability "for the reliability, accuracy or completeness of the compiled financial information contained in the financial statements";

- (iii) because of this, the absence of one cash deposit in the bank statements provided and Mr Samuel's recording keeping, as before the Authority, the financial statements should be viewed with caution;
- (iv) between Romeeco Bakery Limited and Knox Café and Bakery Limited Mr Samuel has managed to advance these businesses \$220,965 (in \$132,710 in the preceding 12 months);
- (v) Mr Samuel's shareholder salary payments and drawings for personal use total \$70,082;
- (vi) given one-off start-up costs (or the costs of morphing his previous bakery business with his new one) and the effects of COVID, it is unrealistic to view these financial results as indicative of the business or its future.

[62] The Labour Inspector also referred to the increase in market value for Mr Samuel's house which is in the order of \$250,000 since purchased in 2017. The Labour Inspector also referred to Mr Samuel's recorded comments about how he would avoid the imposition of significant penalties.

[63] Having carefully considered the material placed before the Authority and the parties submissions, and having regard to circumstances of this case, including Mr Samuel's egregious conduct, I am not prepared to make a further deduction of penalties based on financial consideration nor order "a longer-term structure for the penalty payments". Mr Samuel has been on notice for a long time that one day he would likely face the prospect of having significant penalties imposed on him and/or his businesses (and, potentially, his wife) by the Authority. That day has now arrived (insofar as Mr Samuel is personally concerned).

[64] At this point then, the proposed penalties to be imposed on Mr Samuel are: \$158,000.

Proportionality of outcome

[65] The penalties are proportional to the arrears found to be owing by the Authority. Indeed, if anything, Mr Samuel has benefited significantly from the generous approach of the Labour Inspector to seek only one representative breach of the MW Wage Act for each of the three

workers. The Labour Inspector suggested a “rounding” could occur at this point but I am not prepared to entertain further discounts, even for rounding, in the circumstances of this matter.

Result

[66] Taking these submissions in account, and having regard to all the circumstances of the case, it is appropriate to impose significant, but proportionate, penalties of \$158,000 on Mr Samuel.

[67] The Labour Inspector said she does not oppose a portion of the penalties being paid to the affected workers. Mr Samuel (and the other respondents) did not provide any submissions on this issue. In the circumstances of this matter, including the aggravating circumstances set out above, I have decided that a proportion of these penalties should be payable to the workers. Each worker is to receive a \$1000 penalty for each of the breaches of minimum standards they were subject.

[68] Mr Samuel must pay the Labour Inspector \$158,000 within 28 days of this determination. Of this amount, the Labour Inspector is to pay Mr Wijesundara penalties totally \$7,000; Mr Ellawala and Mr De Seram penalties totally \$6,000. The remaining penalties sum of \$139,000 is to be paid by the Labour Inspector into a Crown bank account.

Other issues

[69] There are two further substantive issues to be investigated by the Authority:

- (i) is Ms Perera a person involved in breaches of minimum standards who should be joined to these proceedings; and
- (ii) did Mr Samuel obstruct the Labour Inspector’s investigation?

Is Ms Perera a person involved?

[70] Ms Perera strongly denied the Labour Inspector’s contention that she was a person involved in a breach of minimum standards for the workers. However, and in any event that issue cannot be resolved at this time.

[71] This part of the Labour Inspector’s proceedings is adjourned pending disposal by the Court of Appeal of a Labour Inspector’s appeal against a judgment of the court regarding the requisite level of knowledge required for a person be found to be involved in breaches of minimum standards.¹¹ The court found “intent” was required.¹² The Authority had earlier found in the same matter that “wilful blindness” was sufficient.¹³

Obstruction of a Labour Inspector

[72] While not directly sought, the Labour Inspector invited the Authority to consider, at its own motion, whether Mr Samuel had obstructed the investigation. Based on the evidence before the Authority there is a certainly a prima facie case against Mr Samuel. Without determining whether an own motion endeavour is necessary, there may be a jurisdiction question about whether such an action is currently required to be brought elsewhere. However, and in any event, the penalties imposed by this determination have taken into account Mr Samuel’s conduct during the Labour Inspector’s investigation and this may be considered a sufficient sanction in the circumstances.

Non-publication

Interim order rescinded

[73] The interim non-publication order made in favour of the Mr Samuel, Ms Perera and Romeeco by the Authority on 16 August 2019 is rescinded.¹⁴ The circumstances giving rise to that interim order, based on evidence now before the Authority, cannot be sustained.¹⁵

Permanent order declined

[74] The application for a permanent non-publication order is declined. There is an overwhelming public interest in compliance with, and enforcement of, minimum employment standards. Errant behaviour of the type exhibited in this determination should not be shielded from the public gaze by a conveniently constructed legal blanket. While acknowledging the letters provided to the Authority from members of Mr Samuel’s family in support of non-

¹¹ *A Labour Inspector v Southern Taxis Limited* [2020] NZCA 337 (CA)

¹² *A Labour Inspector v Southern Taxis Limited* [2020] NZEmpC 63 at [187] (Judge Corkill)

¹³ *A Labour Inspector v Southern Taxis Limited* [2019] NZERA at [47]

¹⁴ *A Labour Inspector v ABC* [2019] NZERA 483

¹⁵ At [14]; [21] and [22]

publication, and appreciating that publication is disconcerting for those involved, including directly and/or culpably, Mr Samuel, in particular, must accept he is the architect of this state of affairs.

Costs

[75] Costs are reserved pending resolution of all matters before the Authority.

Andrew Dallas
Chief of the Employment Relations Authority

Schedule of Awards

Determination [2021] NZERA 479 dated 1 November 2021

1. Arrears

	Minimum Wage Arrears	Public Holiday Arrears	Unworked Public Holiday Arrears	Alternative Holiday Arrears	Annual Holiday Arrears	Final Holiday Arrears	Sick Leave Arrears	TOTAL
Charaka Madushana Wijesundara	\$82,387.46	\$2,317.00	\$420.00	\$4,851.00	\$2,683.18	\$9,853.90	\$1,067.50	\$103,580.04
Shasika Chanthaka Ellawala	\$34,216.71	\$579.37	\$457.50	\$1,158.75	N/A	\$4,625.55	N/A	\$41,037.88
Don Kasun Gayan De Seram	\$77,161.77	\$772.53	\$660.06	\$1,574.56	\$1,847.66	\$7,403.74	N/A	\$89,420.32

Subtotal of arrears for payment by Anesly Joy Samuel to the Labour Inspectorate for distribution to the employees

\$ 234,038.24

2. Penalties

Charaka Madushana Wijesundara								\$ 7,000.00
Shasika Chanthaka Ellawala								\$ 6,000.00
Don Kasun Gayan De Seram								\$ 6,000.00
Labour Inspectorate								\$ 139,000.00

Subtotal of penalties for payment by Anesly Joy Samuel to the Labour Inspectorate for distribution

\$ 158,000.00

TOTAL of awards to be paid by Anesly Joy Samuel to the Labour Inspectorate within 28 days

\$ 392,038.24

	A	B	C	D
1	APPENDIX ONE			
2	PENALTY ANALYSIS			
3				
4	Step 1 – Nature and Number of Breaches – Potential Maximum Penalties			
5				
6	No.	Breach	Affected Employees	Individual (\$10,000)
7	1	Failue to Pay Minimum Wage	3	\$ 30,000.00
8	2	Failure to Pay Time-and-a-half	3	\$ 30,000.00
9	3	Failure to Pay unworked public holidays	3	\$ 30,000.00
10	4	Failure to provide alternative holiday	3	\$ 30,000.00
11	5	Failure to pay total annual holidays	3	\$ 30,000.00
12	6	Failure to pay final holiday arrears	3	\$ 30,000.00
13	7	Failure to pay sick leave	1	\$ 10,000.00
14				
15	Subtotal			\$ 190,000.00
16				
17	Step 2 – Aggravating Factors as a proportion of maxima in Step 1			
18				
19	1	Failue to Pay Minimum Wage	100%	\$ 30,000.00
20	2	Failure to Pay Time-and-a-half	80%	\$ 24,000.00
21	3	Failure to Pay unworked public holidays	80%	\$ 24,000.00
22	4	Failure to provide alternative holiday	80%	\$ 24,000.00
23	5	Failure to pay total annual holidays	80%	\$ 24,000.00
24	6	Failure to pay final holiday arrears	80%	\$ 24,000.00
25	7	Failure to pay sick leave	80%	\$ 8,000.00
26	Subtotal			\$ 158,000.00
27				
28				
29				
30	Step 3 – Defendant’s Financial Circumstances			
31				
32				
33	Subtotal			\$ 158,000.00
34				
35	Step 4 - Proportionality			
36				
37	1	Reduce by Rounding		
38	TOTAL			\$155,000