

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 501
3061279

BETWEEN A LABOUR INSPECTOR
 Applicant

AND PREEMINENT ENTERPRISE
 LIMITED
 First Respondent

AND AKASH PATEL
 Second Respondent

Member of Authority: Robin Arthur

Representatives: Martin Denyer, counsel for the Applicant
 Arunjeev Singh, counsel for the Respondents

Investigation Meeting: 23 and 24 June 2021

Submissions: From the Applicant on 30 January 2020, 17 February
 2020, 23 July and 12 August 2021 and from the
 Respondents on 10 February 2020 and 6 August 2021

Determination: 12 November 2021

DETERMINATION OF THE AUTHORITY

- A. For breaches of employment standards Preeminent Enterprise Limited (PEL) must pay penalties of \$25,000 to the Authority within 28 days of the date of this determination.**
- B. For involvement in those breaches PEL director Akash Patel must also pay a penalty of \$9,000 to the Authority within 28 days of the date of this determination.**
- C. Costs are reserved with a timetable set for lodging memorandum if a determination of costs by the Authority is needed.**

Employment relationship problem

[1] This determination resolves an application by Labour Inspector Margaret Meafua seeking findings Preeminent Enterprise Limited (PEL) breached employment standards and its director Akash Patel was involved in those breaches. If those findings were made, the Inspector sought orders requiring PEL and Mr Patel to pay penalties.

[2] PEL operates liquor stores in Pukekohe and Waimauku. The Inspector's application concerned shortcomings in the payment of wages and holiday pay to three employees. One of those workers, Mandeep Bullar Singh, had made a complaint to the Labour Inspectorate after his employment with PEL ended. He had worked for the company from February 2017 to February 2018. The two other workers are referred to only by their initials in this determination. SJS worked as a duty manager for PEL from November 2015 to August 2017. MCS was employed as a casual worker from November 2017 to January 2018.

[3] These proceedings have a long history. The Inspector first lodged a statement of problem in May 2019. She lodged an amended statement of problem on 16 January 2020. In turn PEL and Mr Patel first lodged a statement in reply on 5 June 2019, then a first amended statement in reply on 30 October 2019 and a second amended statement in reply on 23 January 2020.

The Authority's investigation

[4] In December 2019 counsel for the Inspector and a lawyer who was, at that time, acting for PEL and Mr Patel lodged a joint memorandum proposing the Authority resolve the issue of penalties 'on the papers'. They made this proposal because the parties had agreed to settle issues regarding minimum wage and holiday entitlements by PEL, without admitting liability, paying total arrears of \$3,565.44. The agreed arrears were \$1,743.63 due to Mr Singh, \$1,694.55 due to SJS and \$127.26 due to MCS. PEL subsequently paid those amounts.

[5] Although the Authority agreed to the parties' joint proposal for determining penalties, its utility proved illusory. The affidavits lodged by the witnesses, and the parties' respective submissions about what was said in them, contained too much difference to satisfactorily be used in determining penalties on those papers alone. An investigation meeting to test some of the evidence was needed. Changes in PEL's representation then contributed to delay in making the necessary arrangements.

[6] At the investigation meeting the following witnesses answered questions about their written evidence: the Inspector, Mr Singh, Mr Patel, his wife and fellow PEL shareholder Rupal Patel, and a former employee of PEL, Ajinkya Kadam.

[7] Mr Singh and Mr Kadam each gave their evidence by audio-visual link from separate locations in India. An interpreter of Hindi was available to assist witnesses, where needed, to translate questions asked of them and the answers they gave.

[8] The parties provided further written submissions following the investigation meeting. They also relied on earlier submissions lodged at the time they had proposed that the matter of penalties could be determined on the papers.

The evidence

[9] As permitted by s 174E of the Employment Relations Act 2000 (the ER Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[10] The statutory scheme for identifying breaches and penalties resulted in an extensive list of issues requiring resolution in this determination but the case really turned on one central and fiercely contested point of fact. It concerned whether Mr Singh did or did not work a certain number of days for which he was not paid or at least was not paid enough to meet the requirements of the Minimum Wage Act 1983 (the MWA). Other findings flow on from how that point has been resolved.

[11] PEL admitted some shortcomings had occurred in its record keeping and payments. These were said to have been inadvertent. On other contested shortcomings the evidence against PEL and Mr Patel had to meet the civil standard of proof, that is the balance of probabilities. This balance weighs what is more likely than not to have occurred. It is not as high as the criminal standard, which requires matters to be proved beyond reasonable doubt.

[12] Some evidence attempting to cast doubt on the motivation for, and therefore credibility of, Mr Singh's evidence was of little assistance. This was to the effect that he had only complained because he was disappointed not to have had more support from PEL and Mr Patel in pursuing an application for a work visa, so that his complaint

to the Inspector was motivated by pique rather than principle. Ultimately Mr Patel's views about Mr Singh's motivation were not relevant in applying the objective standard of evidence to which the Inspector's investigation and claim had to be held – that is whether or not there was sufficient reliable information to show that, on balance, it was more likely than not that PEL had failed to meet the statutory standards for paying wages and holiday entitlements to Mr Singh, SJS and MCS.

[13] In turn this focussed attention in the Authority's investigation on whether three sets of records in the evidence were relevant and could be relied on to support or negate evidence offered by the various witnesses.

Bank records

[14] Firstly, the Inspector had relied on Mr Singh's bank records which showed he made transactions at or near his workplace on days during which he said he worked but was not paid. This led the Inspector to conclude that what Mr Singh told her was more likely to be correct than what was shown in PEL's pay and roster records which refer to him working on those days. For reasons detailed later in this determination, the Inspector's conclusion in respect of at least eight of those days is accepted as reasonably reached. This determination has reached the same finding on the same reasoning.

A Google Maps record

[15] Secondly, Mr Singh provided a Google Maps record which he said showed he had gone to Mr Patel's home address on 22 May 2017. Mr Singh said he went there that morning and was then taken to the Pukekohe store to work on a stocktake, not returning to his own home until the early hours of the following morning. In their evidence Mr Patel and Mrs Patel disputed that account. They said a stocktake at the Pukekohe store occurred on another date and Mr Singh was not involved in it. They accepted Mr Singh had visited their home that day, as he had several other times, but said his visit that day was only to talk to Mr Patel about supporting his application for a new work visa, not to carry out any duties for the company. Mr Singh's earlier visa had expired and he was on an interim visa at the time.

[16] Mr Singh has sent the map in question to the Inspector after he returned to India. His evidence was that he recovered it from his mobile phone. The map included a locator pin, identifying the Patels' residential address, and a time stamp. There were however queries about the time shown of 1.58am at 22 May 2017. Mr Singh said he

had gone to the Patel's home address around 7am that morning. He suggested the time stamp could have been automatically adjusted for the Indian time zone operating on his phone at the time that he provided a copy of that record to the Inspector.

[17] Counsel for both parties were provided with an opportunity to further explore the time stamp issue and address it in their submissions. The Inspector's submissions accepted the document was capable of being edited. It was supplied to her from a distance, at a later date, so the Inspector was not able to check the phone as she might have done if Mr Singh were in New Zealand and had given it to her at the time of her inquiries in October 2018. These doubts meant the map could not be relied on to support Mr Singh's account. While possible, what he said about being required to go to work at PEL's Pukekohe store that day, therefore lacked sufficient, objective supporting evidence to tip the balance of probability.

An audio recording

[18] Thirdly, Mr Singh provided an audio recording he said he made secretly during a conversation with Mr Patel in February 2018. He said he made the recording on his last day of work, using a phone in his pocket. Mr Singh had not given the Inspector this recording at the time of her investigation of his complaint in October 2018. He did not send the recording to her until January 2021. His explanation for the delay was that he had accidentally deleted the recording on his phone and he believed it could not be recovered. However, after returning to India, Mr Singh said a friend who was a software engineer helped him restore the deleted recording.

[19] The Inspector provided the Authority with a copy of the recording, in three audio files as it had been sent to her by Mr Singh. The voices heard on those files spoke largely in Hindi and partly in English. A transcript translating most of what could be heard in Hindi was also provided.

[20] Mr Patel agreed his voice could be heard on the tape and it did record, at least in part, a conversation he had with Mr Singh in February 2018. However Mr Patel alleged the recording was tampered with or had been edited in some way. He said the recording did not include everything Mr Singh had said and that what he said had been placed in a different order so that it appeared Mr Patel agreed with or accepted certain comments Mr Singh made. Those comments referred to Mr Singh being paid only \$10 an hour for the most of the time he worked for PEL.

[21] Admissibility of the recording was considered as a preliminary matter during the investigation meeting. Objections to its admission, made on three grounds, were rejected.

[22] Firstly, while the recordings were not available to the Inspector during her inquiries and decision-making, later discovered or disclosed information may still be considered by the Authority in determining the issues before it.

[23] Secondly, privacy principles and criminal law did not prevent disclosure of the recording in this case. The conversation between Mr Singh and Mr Patel heard on the audio files was relevant to proceedings before the Authority so the Inspector, on receiving it from Mr Singh, took the reasonable step of disclosing it.¹ Mr Singh's recording was not illegal as the Crimes Act does not prohibit a person who is party to a conversation, rather than only an eavesdropper, from recording that conversation.² While such recordings made in the context of an employment relationship may be a breach of good faith obligations regarding open communication, this particular recording was relevant in assessing evidence about whether employment standards had been breached. It was admissible for that purpose.

[24] Thirdly, Mr Patel's allegation that the order of what could be heard on the audio file must have been manipulated was simply that – an allegation. There was no independent or technical evidence offered to support or corroborate that suggestion.

[25] There were some changes in volume in parts of the recording. This was, as a matter of likelihood, explained by Mr Patel and Mr Singh moving closer to or further away from where Mr Singh had his phone during their conversation. The recording occurred while both were standing in the Waimauku store and their conversation was interrupted, at some points, by customers coming and going. At one point they can be heard exchanging pleasantries with a customer.

[26] Accordingly, the recording was admitted as part of the evidence and was the subject of questioning during the investigation meeting. However it has not been used in this determination as the sole evidence for any finding which is unfavourable to PEL or Mr Patel. Rather, it has given weight only to some findings reached on the basis of

¹ Privacy Act 2020, ss 22 Information privacy principle 10, 1(e).

² Crimes Act 1961, s 216C(2)(a).

other evidence. Specifically this refers to findings that Mr Singh most likely did work on certain days because his bank records or other information showed he was in the proximity of the workplace on those days, despite PEL's wage and time records or rosters showing he was not at work then.

[27] Two points needed to be noted about what can be heard in the recording and read in the translation provided of it.

[28] Firstly, Mr Patel talked with Mr Singh about the termination of his ongoing employment with PEL. Mr Patel told Mr Singh about arrangements for his last pay, including payment of two weeks' notice and his annual leave. They also talked about Mr Singh continuing to work for a short period on a casual basis while he looked for other work. The propriety of that discussion and outcome were not at issue in this Authority proceeding as it concerned enforcement of employment standards by the Inspector, not a personal grievance application by Mr Singh.

[29] Secondly, Mr Singh could be heard at several points in the conversation referring to working for \$10 an hour during his employment by PEL. In the relevant period the minimum wage was \$15.25 an hour, increasing to \$15.75 from April 2017. He referred to being paid \$11 an hour for two weeks in the early part of 2018.

[30] The transcript of the recording included the following exchange between Mr Singh and Mr Patel after they had talked about payment of notice and annual leave:

Mr Singh ... Whatever you want to do. It's OK that you will give me this money but what about for the whole year that I worked? What will you do about the year that I worked on 10 dollars? Will you do anything or not?

Mr Patel: You ... I don't know. I will see what I can do.

Mr Singh: I am just asking you normally, will you do something or not? Just tell me because I can plan something else otherwise. I have many things on my mind.

Mr Patel: What are you planning on?

Mr Singh: I was planning on going to India before, then I thought let's see what happens first.

[31] The significance of the reference to Mr Singh being paid only \$10 an hour, in this passage and at other points in the conversation, is that Mr Patel does not appear at any point to contradict the veracity of what Mr Singh says. In his evidence to the

Authority investigation Mr Patel insisted this was not the payment arrangement under which Mr Singh worked.

Work on additional days, not recorded as worked or having been paid for

[32] The Inspector's claims against PEL and Mr Patel relied on her findings from inquiries she had begun on 12 October 2018. She analysed pay records and interviewed former and present employees, Mr Patel and PEL's accountant. From text messages, emails and Mr Singh's bank statements the Inspector concluded Mr Singh had worked on the following days for which he was not paid: 24 March, 31 March, 22 May, 28 August, 31 October, 13 November, 4 December, 11 December, 12 December, 18 December, 19 December in 2017 and on 16 January 2018. This led the Inspector to therefore conclude PEL had failed to pay Mr Singh at least the minimum wage in the relevant periods. This founded her claim that PEL had breached the MWA and the record-keeping requirements of the ER Act.

[33] In her evidence the Inspector said she had looked "holistically" at the information available to her. Mr Singh's bank statements showed he had made eftpos transactions at a convenience store, a café and a pharmacy adjacent to his workplace in Waimauku on various days that PEL denied he had worked in its liquor store there. Similar transactions, made on other days which PEL's records showed Mr Singh been at work, established he often made purchases from those neighbouring premises during breaks while he was on duty at the store.

[34] Mr Singh's home address was around 30 minutes' drive away from his workplace. There was said to be no reason for him to be at or near the Waimauku liquor store on days and times he was not working. From this the Inspector inferred Mr Singh made those transactions at neighbouring premises only because he was at work that day.

[35] Mr Patel's evidence closely scrutinised the basis for her conclusions. In respect of three days – 13 November, 12 and 19 December 2017 – the Inspector conceded a closer look at Mr Singh's bank statements and a text message probably did not support the inference for those particular days. For example, the eftpos transactions recorded on his bank statement for 13 November showed they were for purchases made on 10 November, a day on which Mr Singh was not said to have worked unpaid. The

Inspector's confidence in the inference drawn about the other nine days remained unshaken.

[36] Mr Patel advanced some other possibilities to explain Mr Singh's presence and to suggest, if at work, Mr Singh was likely paid for the day. He said some of those days may have been occasions when Mr Singh had swapped a shift with another employee but not recorded the change on the store roster. Payment for those days was not listed in PEL's wage and time records for Mr Singh but Mr Patel pointed to some entries in Mr Singh's bank statements showing payments from PEL for what was described as "salary overtime". Mr Patel suggested those payments were for work on the days that the Inspector suspected had gone unpaid. He also blamed SJS for inadequacies in the records, alleging some had been deliberately removed to sabotage PEL's business.

[37] Those explanations and allegations by Mr Patel lacked any corroborating information sufficient to displace the inference drawn by the Inspector from the other contemporaneous information, including the bank statements. Those statements were not susceptible to tampering of the type with which Mr Patel sought to impugn the other evidence.

[38] It was possible Mr Singh had visited the Waimauku liquor store on some of the days in question simply for the purpose of social contact with other employees or to talk further with Mr Patel about his immigration application. Mr Singh denied doing so, saying he worked on those days and more besides. However this aspect of the evidence was not simply a matter of what was denied or accepted by Mr Patel or Mr Singh. The account of Mr Singh working on those rested on which could be objectively discerned by inference from other records.

[39] Even if PEL's suggestion of employees regularly swapping shifts was correct, the Inspector compellingly submitted this did not change the total number of hours worked and for which there were no records kept. The failure to keep and provide adequate records of all hours and days worked by all employees had prejudiced the Inspector's ability to accurately assess the extent of arrears due as minimum wages. Allowing PEL to rely on inaccuracy and inadequacy of its own records in order to deny liability to pay Mr Singh for all hours worked would have enabled the company to benefit from its own failure to meet the statutory obligations to keep full records.

[40] Accordingly the Inspector had, at the time of her own inquiries and during the Authority investigation, established on the balance of probabilities that Mr Singh had more likely than not worked on more days than he was paid for, with the result that PEL did not pay him at least the minimum wage for all hours worked. Excluded from that conclusion, for reasons already given, are the days of 22 May, 13 November, 12 December and 19 December 2017. The tally of unpaid days is therefore eight.

Findings on the breaches, penalties and Mr Patel's involvement

[41] In light of the evidence on the foregoing points and additional evidence referred to below, the following findings are made about breaches of employment standards and liability for penalties.

Failure to pay the minimum wage

[42] On at least eight days in 2017 and 2018 PEL failed to pay Mr Singh the minimum wage for all the hours he worked. PEL's inadequate or incomplete records meant the Inspector could not accurately calculate the exact amount due to Mr Singh but the parties had agreed an amount for arrears and this had been paid to him.

[43] The failure to pay Mr Singh for all hours worked at least the minimum wage, at the time those wages were due, was a breach of s 6 of the MW Act. PEL was liable to a penalty for that breach.

Failure to keep time and wage record for hours worked and paid

[44] The Inspector's evidence established PEL had failed to keep time and wage records that accurately listed all the hours Mr Singh and SJS worked. It was not a sufficient answer to the statutory obligation to keep and provide this information in an easily accessible form to say, as Mr Patel did, that PEL's failure was the fault of SJS. The obligation rested with PEL. When asked, the company could not comply with the statutory requirement. It was liable to a penalty for a breach of s 130 of the ER Act.

Failure to correctly calculate and pay MBS for leave taken in advance

[45] The Inspector's analysis of PEL's records showed Mr Singh was paid \$219.12 less than he was entitled to for annual leave entitlements taken in advance. The shortfall was included in the subsequent payment of arrears the Inspector had agreed with PEL

but the company remained liable for a breach of s 22 of the Holidays Act 2000 (the HA).

Failure to correctly calculate and pay MCS and SJS for holiday pay

[46] The Inspector's analysis of PEL's records showed breaches of three sections of the HA in the payment of holiday pay entitlements to MCS and SJS at the end of their employment. The shortfalls were covered by payments of arrears agreed by the Inspector but PEL remained liable to a penalty for breaches of s 23, s 25 and s 27 of the HA in relation to payments due to those workers. They are treated as one breach of each section in this determination.

Failure to pay MBS time and a half for work on a public holiday

[47] The Inspector's analysis of PEL's records identified a shortfall of \$2.25 in a payment due to Mr Singh for work on a public holiday. In light of the very small amount, and the ability to address overall shortfalls in calculations and record keeping by other penalties, the Inspector's request for a penalty to be imposed for that particular breach of s 50 of the HA is declined.

Failure to pay alternative holiday pay to SJS and Mr Singh

[48] The Inspector's analysis of PEL's records showed shortfalls in payment of alternative holiday pay due to SJS and Mr Singh. The amounts of \$567 identified as due to SJS and \$17.25 due to Mr Singh were covered in the arrears payments the Inspector agreed with PEL. The company was however still liable to a penalty for breach of s 60 of the HA for those failures.

Failure to keep a holiday and leave record showing mandatory information for MBS

[49] The Inspector's analysis of PEL's holiday and leave records showed the company failed to record dates Mr Singh took sick leave. This breached the obligation under s 81 of the HA to keep a record of that information "at all times". PEL was liable to a penalty for that breach.

Involvement of Mr Patel

[50] The Inspector's inquiries established Mr Patel was responsible for the day-to-day operation and management of PEL's business of running the liquor stores. The company did have another director, Nareshkumar Rana, but Mr Patel described him as

a silent partner in the business. Mr Rana had also told the Inspector that Mr Patel had complete oversight of the business.

[51] Mr Patel's own evidence also confirmed this. While PEL had engaged an accountant to process all payroll matters, the accountant acted on information and instructions Mr Patel provided on a weekly basis about hours of work and leave.

[52] The ER Act, the HA and the MWA each allow for a Labour Inspector to seek a penalty against a person involved in breaches of standards set in those statutes.³ Those standards include the requirement to pay minimum wages under the MW Act, to pay holiday and leave entitlements under the HA and to keep wages and holiday records under the ER Act and the HA.

[53] Involvement in breaches of those standards includes situations where a director of a company procured the breach or was, in any way directly or indirectly, knowingly concerned in the breach. Mr Patel's actions and involvement in the day-to-day affairs of the business run by PEL established that he was a person involved in the breaches found in this determination to have occurred in respect of the employment of Mr Singh, MCS and SJS. Accordingly, Mr Patel was liable to a penalty under s 142X of the ER Act as a person involved in breaches of employment standards.

Factors in setting penalties for breaching employment standards

[54] Twelve factors are recognised as relevant in determining appropriate penalties for breaches of employment standards:⁴

- The object stated in s 3 of the ER Act (statutory consideration 1);
- the nature and extent of the breach or involvement in the breach (statutory consideration 2);
- whether the breach was intentional, inadvertent or negligent (statutory consideration 3);
- the nature and extent of any loss or damage suffered by the affected employees or gains made or losses avoided by a company or a

³ Employment Relations Act 2000, s 142X(2); Holidays Act 2000, s 75(1) and the Minimum Wage Act 1983, s 10(2)(b).

⁴ See Employment Relations Act 2000, s 133A and *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

person involved because of the breach or involvement in the breach (statutory consideration 4);

- whether the company or person involved in the breach had paid an amount in compensation, reparation or restitution, or had taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5);
- the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6);
- previous conduct (statutory consideration 7);
- deterrence, particular and general (additional consideration 1);
- culpability (additional consideration 2);
- consistency of penalty awards in similar cases (additional consideration 3);
- ability of a company or person involved in the breach to pay (additional consideration 4); and
- proportionality of outcome to breach (additional consideration 5).

Assessing penalties for PEL

Object of the ER Act

[55] The object of the ER Act includes promoting good faith behaviour, promoting effective enforcement of employment standards and addressing the inherent inequality of power in employment relationships. The evidence in this case showed PEL's failure to observe employment standards was not consistent with those aspects of the ER Act's object.

The nature and extent of the breaches

[56] From the findings made PEL was liable to penalties for the following breaches:

- Failure to pay one employee minimum wages in breach of s 6 of the MW Act (one breach);
- Failure to keep time and wage records for two employees in breach of s 130 of the ER Act (two breaches);
- Failure to correctly calculate and pay leave for one employee in breach of s 22 of the HA (one breach):

- Failure to correctly calculate and pay holiday pay for one employee in breach of s 23 of the HA (one breach);
- Failure to correctly calculate and pay holiday pay for one employee in breach of s 25 of the HA (one breach);
- Failure to pay annual holiday to two employees in breach of s 25 of the HA (two breaches);
- Failure to pay alternative holiday pay to two employees in breach of s 60 of the HA (two breaches); and
- Failure to keep an adequate holiday and leave record for one employee in breach of s 81 of the HA (one breach).

[57] The maximum penalty for each breach in the case of a company is \$20,000. In this case the maximum liability for those 11 breaches was therefore \$220,000. Those breaches could, in this case, appropriately be globalised in respect of breaches under each Act to the following six:

- One breach of the MW Act regarding minimum wages;
- One breach of the ER Act regarding record keeping;
- Three breaches of the HA regarding payment of holiday pay and annual leave entitlement (one breach per employee); and
- One breach of the HA regarding record keeping.

[58] For those six breaches the provisional penalties could therefore total as much as \$120,000.

Intentional breaches

[59] The Labour Inspectorate had previously investigated PEL in August 2016 regarding compliance with employment standards. That investigation was resolved on the basis of PEL undertaking to meet its obligations under the MW Act and for record keeping under the ER Act and the HA.

[60] Failure to meet those and other employment standards, as established from the Inspector's October 2018 investigation, could therefore not be attributed to a lack of awareness. This was sufficient to establish those shortcomings were an intentional outcome of how PEL ran its business and dealt with its employees.

[61] While PEL sought to shift blame for the absence of some records to SJS, Mr Patel was in charge of the operation and PEL was the legal entity responsible for meeting its statutory obligations in that regard.

Damage done and gains made

[62] PEL's actions deprived three low-paid workers of money they were entitled to have at the time it fell due, either during or at the end of their employment. In running its business in that way PEL had the benefit of retaining money to which it was not entitled, assisting its cash flow, and gained an unfair competitive advantage compared to other businesses that properly met the full cost of observing employment standards.

Restitution, mitigation and remorse

[63] While PEL eventually agreed to pay arrears to the three workers, this only occurred only after extensive activity and effort by the Inspector. No credit in setting penalties was warranted for PEL's belated and reluctant action of paying those arrears, done only on the basis of not admitting any liability. PEL, through the evidence of Mr Patel, demonstrated no insight or remorse for its actions. Mr Patel persisted throughout in minimising both the nature of the breaches and their effect.

Vulnerability of employees

[64] An aggravating aspect of the circumstances of these breaches was the involvement of migrant workers working under visas which tied their employment to PEL. Even if they were aware of their statutory rights, they were not able to freely press their employer to observe those rights and PEL took advantage of that situation.

Previous conduct

[65] As already noted PEL's business practices had previously been the subject of attention by the Labour Inspector and failed to sustain improvements it had promised.

Deterrence

[66] Imposing significant penalties for PEL's action was necessary to deter such actions in the future, either by that company or by other employers generally.

Culpability

[67] PEL was entirely responsible for its failures.

Consistency

[68] Weighing the factors already considered, and allowing for the highest penalties to be reserved for the worst cases, a downward adjustment of the total provisional penalty to 25 per cent of the maximum was appropriate to be consistent with the approach taken and range of outcomes reached by the Authority in other similar cases. This adjustment allowed for some difference in the importance or relative severity of the breaches, for example the failure to pay minimum wages over an extended period was a more serious breach than failure to record a small number of days of sick leave. It resulted in a provisional penalty of \$40,000 for the six breaches.

Ability to pay

[69] There was no information indicating PEL could not meet a significant penalty, if imposed, either over time or by taking a loan. The company remained a currently legal entity registered with the Companies Office. Mr Patel, in his oral evidence, said he could not close the company because of these proceedings. He continued to operate the liquor store business.

Proportionality

[70] As a final cross check, a provisional penalty of \$40,000 for the six breaches is assessed for proportionality in achieving the purpose of penalties and the extent of harm, financial or otherwise, resulting from the breaches. In this case a proportionate outcome was a penalty of \$25,000 for the six breaches. This is the amount that PEL must pay to the Authority within 28 days of the date of the Authority's determination as penalties for the identified breaches of employment standards.

Assessing penalties for Mr Patel

[71] A more concise description can be given of the assessment of an appropriate penalty to be imposed on Mr Patel as a person involved in breaches of employment standards.

[72] The same consideration regarding the object of the Act and the nature of the breaches applied to him as to the company. Globalised to six breaches, under the three Acts, his maximum liability as an individual was \$60,000, that is \$10,000 per breach.

[73] As the effective ‘mind’ of PEL in operation of its liquor store business, his involvement in the breaches exhibited the same intention, culpability and lack of remorse as identified for the company. Deterrence of any similar future action by him as an individual business person was an important factor because, as disclosed in his oral evidence, he was operating at least one liquor store through another company that he had registered in 2019 after the Inspector’s investigation. As Mr Patel continues to operate his liquor store business, he also had access to the means to meet a penalty, either over time or through a loan from family, friends or a financial institution.

[74] Awards of penalties should be broadly consistent while allowing for variation in the particular circumstances of each case in the number, nature, duration and impact of breaches. Assessment of a penalty to be imposed on Mr Patel included comparison with other cases where the breaches affected a small number of migrant workers. A sample of similar cases show penalties ranging from \$13,000 to \$50,000.⁵ The variation results from the matrix of factors being assessed.

[75] Weighing consistency with other similar cases and the particular number of breaches, number of employees involved and the amount of arrears settled upon in this case, an adjustment to 15 per cent of the provisional penalty was appropriate. Weighing all other factors, imposing a penalty of \$9,000 on Mr Patel was a sufficient and proportionate amount to support the effective enforcement of employment standards and to deter others from engaging in such breaches in future. This is the amount that Mr Patel must pay to the Authority within 28 days of the date of the Authority’s determination as a penalty for his involvement in the identified breaches of employment standards.

Recovery and transfer of penalties

[76] On recovery of the penalties due from PEL and Mr Patel, those amounts are to be transferred to the Crown Account. In closing submissions the Inspector suggested some of the penalties awarded could be awarded to Mr Singh but I did not consider that appropriate or necessary in this case.

⁵ *Labour Inspector v La Wheat Ltd* [2019] NZERA 50 (\$10,000 penalty each for two involved persons); *Labour Inspector v Xu* [2019] NZERA 22 (\$30,000); *Labour Inspector v SS & PK Jador Ltd* (\$20,000); *Labour Inspector v Kiran Cuisine Ltd* [2021] NZERA 279 (\$50,000); *A Labour Inspector v Saloni Holdings Ltd* [2021] NZERA 236 (\$15,000); *A Labour Inspector v Janson Trading Ltd* [2021] NZERA 5 (\$13,000); and *A Labour Inspector v Doma* [2021] NZERA 469 (\$28,000).

[77] If PEL or Mr Patel do not comply with the orders made for the payment of penalties, the Labour Inspector or the Chief Executive of the Ministry of Business, Innovation and Employment may recover the penalty in the District Court as a debt due to the Crown.⁶

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and an Authority determination on costs is needed the Inspector may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum PEL and Mr Patel would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[80] The parties could expect the Authority to determine costs, if asked to do so, on its usual rate for a two-day investigation meeting, that is \$8,000, unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Robin Arthur
Member of the Employment Relations Authority

⁶ Employment Relations Act 2000, s 135A.

⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].