

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 204
3091492

BETWEEN A LABOUR INSPECTOR
Applicant

AND TASTE ORIGINAL NEW
ZEALAND LIMITED
First Respondent

XIN MI
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Sarah Blick, counsel for Applicant
Michael Mi, for Respondents

Investigation Meeting: 13 May 2021

Submissions Received: 9 October 2020 and 13 May 2021 from Applicant and
Respondents

Oral Determination: 13 May 2021

Written Record Issued: 13 May 2021

ORAL DETERMINATION OF THE AUTHORITY

- A. Taste Original New Zealand Limited breached the Employment Relations Act 2000, the Minimum Wage Act 1983 and the Wages Protection Act 1983. Mr Mi was a person involved in the breaches of minimum standards.**
- B. Taste Original New Zealand Limited is ordered to pay penalties to the Authority totalling \$5,000 within 28 days of the date of this determination.**

C. Mr Mi is ordered to pay penalties to the Authority totalling \$1,000 within 28 days of the date of this determination.

D. Costs are reserved.

Authority's process

[1] The Labour Inspector lodged a statement of problem with the Authority on 12 February 2020. The statement of problem was served on both respondents on 18 February 2020 at 12.39 pm. No statement in reply was received. In order to progress matters I issued a Notice of Direction on 29 September 2020 setting out my understanding of the issues and proposing to deal with the matter on the papers.

[2] The parties were invited to advise the Authority within seven days if the list of issues was incomplete or otherwise incorrect and/or to oppose the proposed process and seek modification to any aspects of the proposed timetable including whether the matter should be dealt with on the papers.

[3] The respondents were advised that if they wished to reply or respond to the Labour Inspector's application they would require leave of the Authority pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000.

[4] The respondents engaged with the Authority and a case management call took place on 9 February 2021. Mr Mi attended on behalf of himself and Taste Original New Zealand Limited (TONZL).

[5] During the case management call Mr Mi was directed to lodge an application seeking leave to respond to the Labour Inspector's application by 5 pm on 15 February 2021. Mr Mi was advised the application could be made by email asking for leave to respond and setting out the reasons why the respondents had failed to lodge and serve a statement in reply.

[6] A Notice of Direction confirming the directions given during the case management call dated 9 February 2021 was served on TONZL and Mr Mi at 8.06 am on 11 February 2021 together with a Notice of Investigation Meeting. No application for leave was received.

[7] Mr Mi attended at the commencement of the investigation meeting and sought leave to respond to the Labour Inspector's application. Leave was granted on the grounds that it is always preferable to hear from both parties in an application.

Employment relationship problem

[8] The Labour Inspector claims TONZL failed to comply with minimum employment standards and that Mr Mi was a person involved under s 142W of the Employment Relations Act (the Act). The Labour Inspector seeks penalties against both respondents.

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Background

[10] TONZL owns and operates a Subway franchise in Auckland. Mr Mi is a director and shareholder of the company.

[11] On 13 February 2019 the Labour Inspector commenced an investigation into TONZL to determine if compliance had been achieved concerning holiday and leave record keeping and public holiday related breaches. These issues had been identified in a previous investigation in 2018.

[12] TONZL was issued with a request for records under s 229 of the Act and s 82 of the Holidays Act 2003 (the HA). The records included any written employment agreements, wages and time, and holiday and leave records for six employees.

[13] Between 8 March and 7 June 2019 TONZL supplied electronic copies of documents in accordance with the Labour Inspector's request. The records relating to one employee gave cause for concern.

[14] The employee held a student work visa which allowed the employee to work for a maximum of 20 hours each week except during summer and other scheduled semester breaks.

[15] The Labour Inspector's investigation found that Mr Mi and the employee had entered into an arrangement whereby a portion of the employee's wages would be accrued if the work performed each week exceeded the 20 hours. The outstanding wages were paid to the employee during semester breaks when the employee was permitted to work beyond the 20 hour per week limit.

[16] During the Labour Inspector's investigation he found two separate records had been maintained for the employee. One displayed the adjusted wages and hours of work performed in each pay period to comply with the employee's student visa conditions. The second record showed the actual hours worked in each pay period and recorded a balance of all the hours accrued and paid. The former set of records was produced in June 2019 while the latter set of records was supplied in December 2019.

[17] The Labour Inspector issued a report in January 2020 outlining the breaches he had established as a result of his investigation. The breaches included:

- (a) TONZL breached of s 6 of the Minimum Wage Act 1983 (the MWA) when it failed to pay the employee at least the minimum wage for all hours worked for each pay period;
- (b) TONZL failed to pay entire wages when due in breach s 4 of the Wages Protection Act 1983 (the WPA) when TONZL retained a portion of the employee's wages to be paid at a later date. This was in relation to the arrangement to pay only the legal number of hours under the student visa for the employee during a semester;
- (c) TONZL failed to comply with s 229(1)(d) of the Act when it provided inaccurate records in relation to the employee's wages paid and hours worked.

[18] The Labour Inspector reported his conclusion that Mr Mi was a person involved in the breaches on the grounds that:

- (a) he maintained the wages and time records for TONZL and paid the wages to its employees; and
- (b) he was involved in the decision making functions relating to the practices put in place in relation to the employee's payment for hours worked. Mr Mi

was directly involved in the withholding of the employee's wages over a number of pay periods.

Issue

The issues for determination include the following questions:

- (a) Did TONZL breach minimum employment standards?
- (b) If TONZL breached minimum employment standards, was Mr Mi involved in the breaches?
- (c) What if any penalties should be imposed?

Did TONZL breach minimum employment standards?

[19] I am satisfied the Labour Inspector has established breaches by TONZL of the Act, the MWA and the WPA.

Was Mr Mi a person involved in the breaches?

[20] The Labour Inspector sought a finding that Mr Mi was a person involved in the breaches of minimum employment standards as defined in s 142W of the Act. The relevant employment standards were the failure to pay minimum wages and the failure to pay the entire amount of wages when due.

[21] Mr Mi was a director of TONZL. He was also responsible for the payment of wages to the employee. He was accordingly, a person involved in a breach of employment standards under s 142W of the Act.

Penalties

[22] I am satisfied penalties should be imposed on both TONZL and Mr Mi.

[23] The framework for assessing and fixing penalties is contained in s 133A of the ERA and set out in *Borsboom v Preet PVT Limited*.¹ In *A Labour Inspector v Matangi Berry Farm Limited* Judge Corkill applied an approach to penalty setting which assessed the factors in s 133A of the ERA and then applied those and other

¹ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

considerations using the four step process in *Preet* to quantify the penalty.² I have followed that approach in reaching my conclusions as to penalties in this case.

Statutory Considerations

Objects of the Act

[24] The Act's declared objects include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.³ Those objects support the need to impose a penalty on TONZL for its actions in failing to meet minimum standards.

[25] The employee is a migrant worker whose circumstances put him in a category of employee whom the Employment Court has characterised as inherently vulnerable. TONZL's actions undermined employment standards.

Nature and extent of the breaches

[26] TONZL has committed the following three breaches:

- a) A breach of the MWA for failing to pay the statutory minimum wage;
- b) A breach of the WPA for failing to pay the entire amount of wages when due; and
- c) A breach of s 229 of the Act when it knowingly produced inaccurate records to the Labour Inspector.

[27] The breaches apply to one employee. The total maximum penalty available to be imposed on TONZL in respect of the three breaches is \$60,000 being \$20,000 per breach.

[28] Mr Mi was a person involved in two breaches being the breaches of the MWA and the WPA. The total maximum penalty available to be imposed on Mr Mi in respect of the two breaches is \$20,000 being \$10,000 per breach.

² *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43; [2020] ERNZ 67; (2020) 17 NZELR 353.

³ Employment Relations Act 2000, s 3.

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

[29] The failure to pay minimum wages and at the time payment was due deprived the employee of income he was entitled to receive at the time it became due. The arrears were paid during each semester break when the employee was legally entitled to work more than 20 hours each week.

[30] While TONZL had the benefit of the money by not paying it when it was due, I am not satisfied it gained an unfair advantage over its competitors. The money was accounted for and paid to the employee during the semester breaks.

[31] The Labour Inspector submits his ability to fully investigate any breaches was hindered by being provided with misleading and inaccurate set of records initially produced by TONZL and Mr Mi. The Labour Inspector calculated the arrears of wages at the time of his investigation amounted to \$7,118.68 gross.

Whether the breaches were intentional, inadvertent or negligent

[32] TONZL acknowledged during the Labour Inspector's investigation that part of the employee's wages were not paid when they became payable. TONZL deliberately failed to pay wages when due. While this may have been with the employee's agreement, it was unlawful.

[33] TONZL also deliberately provided a set of records that did not accurately reflect the hours worked by the employee and were misleading.

[34] Mr Mi had oversight of TONZL's business and entered into an arrangement that fell short of employment standards.

[35] Weighing the information available to me I find it is likely the breaches were intentional. If I am mistaken in that view and the breaches were as a result of ignorance of the rules about payment of minimum standards, this does not excuse TONZL or Mr Mi.⁴

What steps have been taken in mitigation?

[36] TONZL has paid all arrears owing to the employee. TONZL is entitled to credit for making the payments, however this was no more than late performance of a duty.⁵

⁴ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [29].

⁵ *Daleson*, above n 5, at [33] – [35].

[37] I have taken into account that TONZL fully co-operated with the Labour Inspector's investigation and has taken responsibility for the breaches.

Circumstances of the breach and vulnerability

[38] The factors under this heading have largely already been referred to. The employee was a migrant worker dependent on a student visa tied to TONZL for the period of employment covered by this determination. I have also taken into account Mr Mi's evidence that he did not enter into the arrangement with the motivation to exploit the employee, but rather to provide him financial assistance.

Previous conduct

[39] TONZL has previously come to the attention of the Labour Inspectorate resulting in the issuing of an Infringement Notice and an Improvement Notice. Neither TONZL nor Mr Mi have been before the Authority previously.

Preet Step 1 – Nature and number of the breaches

[40] The first step in *Preet* requires me to consider whether any of the breaches should be globalised so that a single breach may reflect two or more of the breaches forming the Labour Inspector's claim. Globalisation is about reducing the number of breaches for penalty purposes so that the actionable breaches are representative of the overall conduct and the starting point for penalties is realistic.⁶

[41] I do not consider that any of the breaches should be globalised. The breaches were breaches of different legislation and were distinct breaches. This means the starting point for quantifying penalties amounts to \$60,000 for TONZL and \$20,000 for Mr Mi.

Preet Step 2 – Severity of the breaches

[42] This step involves a consideration of the severity of the breaches including deterrence, culpability and aggravating and ameliorating factors.

[43] The breaches in this case are of minimum employment standards. As such it is important that a penalty is set at a level where it deters employers from delaying payments of minimum entitlements.

⁶ *A Labour Inspector v Parihar* [2019] NZEmpC 145 at [39].

[44] In this case the degree of culpability of is low. While this case involves a vulnerable employee and intentional breaches of minimum standards I have accepted Mr Mi's evidence that he never benefitted from the arrangement and always paid the outstanding balance during the semester breaks.

[45] The aggravating features of this case are not the most serious conceivable breaches so the starting point for deductions or credits should not be the maximum penalty.⁷

[46] The Labour Inspector submits that the breaches of the MWA and the WPA should have a starting point of 50 per cent of the total and for the failure to provide accurate records at 75 per cent of the total.

[47] I do not agree with the Labour Inspectors approach. I have concluded that a 50 per cent reduction should be applied to each of the breaches which results in a starting point of total provisional penalties of \$30,000 for TONZL and \$10,000 for Mr Mi.

[48] In regard to ameliorating factors, I have taken into account that all outstanding wages were paid to the employee during each semester break and that the arrears of wages was fully accounted for at all times.

[49] I have reduced the resulting figure by a further 50 per cent having regard to the ameliorating factors including the recognition that the company was a "first offender" in the Authority.⁸ This leads to potential penalties of \$15,000 for TONZL and \$5,000 for Mr Mi.

Preet Step 3 – Means and ability of the respondent to pay

[50] Mr Mi gave evidence that TONZL has been significantly impacted by the Covid-19 lockdowns. He told me the business is doing better at this time than last year but during 2020 had to negotiate a 50 per cent rent reduction on the premises in order to remain viable.

[51] Mr Mi operates three businesses all within the hospitality sector and owns his own home which is subject to a mortgage.

⁷ *Preet*, above n 2, at [167].

⁸ *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

[52] I am prepared to allow a reduction for the ability to pay of a further 20 per cent. This leaves my penalty assessment at \$12,000 for TONZL and \$4,000 for Mr Mi.

Preet Step 4 – Proportionality

[53] This step is about ensuring the final amount of any penalty is proportional to the breaches and in line with other penalty amounts for similar seriousness.

[54] I have considered other cases which are to a significant degree distinguishable on their facts.⁹ For example a number of cases include breaches occurring over extended periods of time, breaches affecting very vulnerable employees and more than one employee.

[55] The end result of the comparisons and my reflection on proportionality is that I am satisfied a further reduction to \$5,000 for TONZL and \$1,000 for Mr Mi is appropriate.

[56] Taste Original New Zealand Limited is ordered to pay penalties to the Authority totalling \$5,000 within 28 days of the date of this determination. On receipt the penalties will then be paid into a Crown bank account.

[57] Mr Mi is ordered to pay penalties to the Authority totalling \$1,000 within 28 days of the date of this determination. On receipt the penalties will then be paid into a Crown bank account.

Costs

[58] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Labour Inspector shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. TONZL and Mr Mi shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[59] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an

⁹ *Labour Inspector v Symrose Ltd & 1 Or* [2019] NZERA 94; *Labour Inspector v Dansan Investments Limited & 2 Ors* [2020] NZERA 379.

adjustment upwards or downwards. The investigation meeting took two hours including the issuing of this oral determination.

Vicki Campbell
Member of the Employment Relations Authority