

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 236
3066572

BETWEEN	A LABOUR INSPECTOR Applicant
AND	SALONI ENTERPRISES LIMITED First Respondent
	SALONI HOLDINGS LIMITED Second Respondent
	B ENTERPRISES LIMITED Third Respondent
	BALWINDER SINGH Fourth Respondent
	JASWINDER KAUR Fifth Respondent

Member of Authority: Vicki Campbell

Representatives: Rebecca Denmead, counsel for Applicant
Neomal Perera, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 11 March 2021 from Applicant
26 March 2021 from Respondent

Determination: 1 June 2021

SECOND DETERMINATION OF THE AUTHORITY

- A.** Within 28 days of the date of this determination the following penalties must be paid to the Authority:
- i. \$20,000 by Saloni Enterprises Limited;

- ii. \$7,000 by Saloni Holdings Limited;
- iii. \$10,000 by B Enterprises Limited;
- iv. \$15,000 by Mr Singh; and
- v. \$5,000 by Ms Jaswinder Kaur.

B. Costs are reserved.

Employment relationship problem

[1] The Labour Inspector lodged an application with the Authority claiming arrears of wages and breaches of minimum standards. The parties have resolved a number of issues between them and this was recorded by the Authority in a determination issued on 6 December 2019.¹

[2] This determination deals with the Labour Inspector's application for penalties which was not addressed in the earlier determination of the Authority.

[3] The Labour Inspector claims penalties against Saloni Enterprises Limited (SEL), Saloni Holdings Limited (SHL), and B Enterprises Limited (BEL). The Labour Inspector claims each entity breached the following minimum standards:

SEL

- (a) Two breaches of s 6 of the Minimum Wage Act 1983 (MWA) for failing to pay the minimum wages for each hour worked;
- (b) Two breaches of ss 27, 50, 60 and 81 of the Holidays Act 2003 (HA) for failing to correctly pay annual holidays, public holidays, alternate holidays and failing to maintain accurate holiday and leave records;
- (c) Two breaches of s 130 of the Employment Relations Act 2000 (ERA) for failing to maintain accurate wages and time records and one breach of s 65 of the ERA for failure to provide an employment agreement;
- (d) Two breaches of s 12A of the Wages Protection Act 1983 (WPA), when cash payments in premiums for employment were sought and received.

¹ *A Labour Inspector v Saloni Enterprises Limited & 4 ors* [2019] NZERA 697.

SHL

- (a) One breach of s 6 of the MWA for failing to pay the minimum wages for each hour worked;
- (b) One breach of ss 27 and 81 of the HA for failing to correctly pay annual holidays, and failing to maintain accurate holiday and leave records;
- (c) One breach of s 130 of the ERA for failing to maintain accurate wages and time records.
- (d) One breach of s 12A of the WPA when cash payments in premiums for employment were sought and received.

BEL

- (a) One breach of s 6 of the MWA for failing to pay the minimum wages for each hour worked;
- (b) One breach of ss 27, 50, 60 and 81 of the HA for failing to correctly pay annual holidays, public holidays, alternative holidays and failing to maintain accurate holiday and leave records;
- (c) One breach of ss 65 and 130 of the ERA for failing to provide an employment agreement and to maintain accurate wages and time records;

[4] The Labour Inspector also claims penalties against Mr Balwinder Singh and Ms Jaswinder Kaur being persons involved in the foregoing breaches. The Labour Inspector claims Mr Singh was a person involved in his capacity as sole director of SEL, SHL and BEL and Jaswinder is the wife of Mr Singh who exercised significant influence over the administration and management of SEL, SHL and BEL.

[5] The breaches set out above affected two employees, Mr Akshay Kumar and Ms Sarabjit Kaur.

[6] Mr Kumar was employed by SEL from 5 November 2015 until 30 November 2017. He was also employed by JH Discount Store in Mangere from October 2016. The store was operated by SHL. He was then employed by Mount Smart Fresh Supermarket in Onehunga from 1 December 2017 until 27 May 2018. This store was

operated by BEL. Mr Singh and Jaswinder Kaur were persons involved in each of the three separate legal entities employing Mr Kumar.

[7] Ms Kaur was employed by SEL from September 2014 until 23 January 2019.

[8] The breaches set out above, have been acknowledged by each of the respondents and this acknowledgement was set out in the earlier determination.²

Issues

[9] In order to resolve the Labour Inspector's application I must determine the quantum of penalties to be imposed.

[10] The parties have consented to this matter being dealt with on the papers before the Authority which includes the statements of problem and in reply, associated documents and submissions from the parties.

[11] As permitted by s 174E of the ERA 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 information received I have carefully considered all relevant material lodged with the Authority.

Penalties

[12] The framework for assessing and fixing penalties is contained in s 133A of the ERA and set out in *Borsboom v Preet PVT Limited*.³ 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 considerations using the four step process in *Preet* to quantify the penalty.⁴ I have followed that approach in reaching my conclusions as to penalties in this case.

Statutory Considerations

Objects of the Act

[13] The ERA's declared objects include building productive employment relationships, addressing the inherent inequality of power in those relationships and

² *A Labour Inspector* above n 1 at [6].

³ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

⁴ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43; [2020] ERNZ 67; (2020) 17 NZELR 353.

promoting effective enforcement of employment standards.⁵ Those objects support the need to impose penalties on SEL, SHL, BEL, Mr Singh and Jaswinder Kaur for failing to meet minimum standards.

[14] Both of the affected employees were migrant workers whose circumstances put them in a category of employee whom the Employment Court has characterised as inherently vulnerable. The actions of SEL, SHL and BEL have undermined employment standards.

Nature and extent of the breaches

[15] I have set out the various breaches in paragraph [3] above. The breaches were ongoing during the respective periods of employment of both affected workers. The period spanned over four years.

[16] Maximum penalties available under s 135 of the ERA in the case of a company is \$20,000 for each breach and in the case of an individual, \$10,000 for each breach.

[17] There is no dispute that both Mr Singh and Jaswinder Kaur were persons involved in the breaches.

[18] The breaches apply to two employees and the total maximum penalties available are:

- (a) SEL \$300,000 in respect of 15 breaches;
- (b) SHL \$100,000 in respect of 5 breaches;
- (c) BEL \$140,000 in respect of 7 breaches;
- (d) Mr Singh \$270,000 in respect of 27 breaches; and
- (e) Jaswinder Kaur \$270,000 in respect of 27 breaches.

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

[19] In assessing the severity of the breaches, it is necessary to consider the nature and extent of loss or damage. The arrears owed to the two affected employees were

⁵ Employment Relations Act 2000, s 3.

difficult to quantify precisely due to the length of employment and lack of accurate records.

[20] The Authority recorded in its earlier determination that SEL, SHL and BEL acknowledged a joint liability to Mr Kumar of \$40,000 in respect of arrears of wages, holiday pay, public holiday pay and alternative holiday pay. SEL acknowledged it owed Ms Kaur \$50,000 in arrears of wages, holiday pay, public holiday pay and alternative holiday pay.

[21] The affected employees were denied the benefit of at least \$90,000. This money has since been paid to the Labour Inspector. The respondents benefited financially by not paying the entitlements when they became due.

Whether the breaches were intentional, inadvertent or negligent

[22] The Labour Inspector submitted that the factual background surrounding the breaches are indicative of intentional conduct by the respondents. By way of example Ms Kaur was paid wages into her bank accounts by SEL. These wages were calculated at a rate of \$18 per hour. The wages were then recalculated at a rate of \$7 per hour and the difference was required to be paid back in cash. The \$18 per hour rate met the Immigration New Zealand (INZ) policy for the work visa that was sponsored by SEL.

[23] Both Mr Singh and Jaswinder Kaur had oversight of the businesses and have entered into arrangements that fell short of employment standards.

[24] Weighing the information available to me I am satisfied on balance that 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 SEL, SHL, BEL, Mr Singh or Jaswinder Kaur.⁶

What steps have been taken in mitigation?

[25] All arrears owing to both Mr Kumar and Ms Kaur have now been paid. While SEL, SHL and BEL are entitled to credit for making the payment this only occurred after proceedings were commenced by the Labour Inspector and following the involvement of the Authority and constituted late performance of a duty.⁷

⁶ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [29].

⁷ *Daleson*, above n 5, at [33] – [35].

[26] I have taken into account that SEL and SHL co-operated with the Labour Inspector's investigation and have accepted responsibility for the breaches, albeit after proceedings were lodged. The Labour Inspector submitted that during the Labour Inspectors investigation Mr Singh was at times evasive and attempts were made to frustrate the investigation when he denied Mr Kumar had ever worked for BEL. Mr Singh also denied Ms Kaur had been paid \$7 per hour and that she was required to pay back some of her wages. These claims have since been accepted by Mr Singh.

Circumstances of the breach and vulnerability

[27] I have accepted the Labour Inspectors submissions that:

- (a) This case typifies the reality of the increasingly common exploitation of migrant workers. Both Mr Kumar and Ms Kaur were Indian nationals who came to New Zealand in search of employment opportunities;
- (b) The inherent power inequality in employer/employee relationships was amplified by the fact that Mr Kumar and Ms Kaur were relying on the support of their employers in respect of their immigration status;
- (c) At times during Mr Kumar's employment he was unlawfully in New Zealand. During these times bank records show that no wages were paid into his bank account in an attempt to deceive INZ and to show compliance with the overall responsibilities on employers. During these periods Mr Kumar continued to work and his wages were paid in cash; and
- (d) These breaches highlight the vulnerability of migrant workers who possess a limited understanding of New Zealand's employment law in respect of minimum entitlements. When combined with the already significant power imbalance between employers and employees, this scenario is one of increased worker vulnerability.

Previous conduct

[28] None of the respondents have previous history of similar conduct in the Authority.

Preet Step 1 – Nature and number of the breaches

[29] 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.⁸

[30] I have considered whether the breaches should be globalised across the two employees. In this case it is not appropriate to do so because both Mr Kumar and Ms Kaur were impacted significantly by each of the breaches.

[31] I consider the following breaches can be globalised and treated as one breach:

- a) The breaches relating to being paid incorrectly for annual holidays, public holidays and alternative holidays;
- b) The failure to keep and maintain wages and time and holiday and leave records.

[32] This has the effect of reducing the total breaches as follows:

- a) SEL – 9 breaches equating to potential total penalties of \$180,000;
- b) SHL – 4 breaches equating to potential total penalties of \$80,000;
- c) BEL – 4 breaches equating to potential total penalties of \$80,000;
- d) Mr Singh – 17 breaches equating to potential total penalties of \$170,000;
and
- e) Jaswinder Kaur – 17 breaches equating to potential total penalties of \$170,000.

[33] I believe this reflects the conduct and provides a realistic starting point for quantifying remedies.

⁸ *A Labour Inspector v Parihar* [2019] NZEmpC 145 at [39].

Preet Step 2 – Severity of the breaches

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

[35] The breaches in this case are of minimum standards. As such it is important that a penalty is set at a level where it deters employers from delaying payments of minimum entitlements to a time that suits the employer or when they are put under pressure by the Labour Inspector.

[36] The degree of culpability of is high. As already stated this case involves a vulnerable employees and intentional breaches of minimum standards.

[37] The aggravating features of this case are some of the most serious conceivable breaches. The Labour Inspector submitted that the quantum of arrears owing by SHL were significantly less than those of SEL and BEL. This was due in large part to the lesser period of employment of Mr Kumar by SHI. Accordingly the level of culpability should be reflected in the penalties imposed.

[38] The Labour Inspector submitted and I agree, an appropriate starting point should be 50 per cent for the breaches of record keeping and 70 per cent in relation to all other breaches which leads to potential penalties of:

- (a) SEL – \$118,000;
- (b) SHL – \$52,000;
- (c) BEL – \$52,000;
- (d) Mr Singh – \$110,000; and
- (e) Ms Kaur – \$110,000

[39] In regard to ameliorating factors, I have taken into account that the arrears of wages and holiday pay have now been paid to Mr Kumar and Ms Kaur and that the period of offending by SHL was a shorter period than both SEL and BEL. Each of the respondents have acknowledged their liability for penalties.

[40] I have reduced the resulting figure by a further 60 per cent for SHL and 50 per cent for all other respondents having regard to the ameliorating factors including the recognition that all respondents were “first offenders”.⁹ This leads to potential penalties of:

- (a) SEL – \$59,000;
- (b) SHL – \$20,800;
- (c) BEL – \$26,000;
- (d) Mr Singh – \$55,500; and
- (e) Jaswinder Kaur – \$55,500

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

[41] The submissions lodged with the Authority on behalf of the respondents focussed on the ability to pay. I have taken into account the following submissions:

SEL

- (a) SEL has limited ability to pay penalties;
- (b) The accounts submitted for SEL shows stock valued at \$108,000 and a balance of \$21 in its bank account, fixed assets valued at \$5,000 and a government loan of \$23,000; and
- (c) SEL has not traded for the last six months due to a fire which caused extensive damage.

SHL

- (a) The DH Discount store operated by SHL has been closed and is no longer operational;
- (b) The premises from which it operated were sold in January 2019; and
- (c) The proceeds from the sale (of just over \$384,000) were transferred into Mr Singh’s bank account;

⁹ *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

BEL

- (a) This is a loss making venture incurring a net loss of \$3,623 for the year ended 2020; and
- (b) BEL is not in a strong financial position and is only operational for the sustenance of Mr Singh and his family.

Mr Singh

- (a) Of the \$384,000 proceeds from the sale of the DH Discount store premises \$90,000 was used to pay the arrears of wages and a further \$170,000 was utilised to pay off a mortgage on the family home.
- (b) The balance has been used for day to day expenses and has now been largely depleted; and
- (c) Mr Singh manages BEL to sustain the family as a supplement to Jaswinder Kaur's income.

Jaswinder Kaur

- (a) Jaswinder Kaur's income is approximately \$630 per week and is used to support the families expenses; and
- (b) Jaswinder Kaur's income assists in meeting current mortgage payments of approximately \$2,000 per month in addition to other household and living expenses.

[42] The Labour Inspector has referred me to the Court's judgment in *Daleson* where the Court stated:¹⁰

...mere financial incapacity, without more, is unlikely to be regarded as warranting a penalty reduction to nil, or next to nil, having regard to the relevant statutory scheme and its underlying objectives.

[43] None of the respondents have sought to have penalties paid by instalment accordingly no order to that effect will be made.

[44] I am prepared to allow a reduction for the ability to pay of a further 20 per cent. This leaves my penalty assessment at:

¹⁰ *Daleson*, above n 5, at [44].

- (a) SEL – \$47,200;
- (b) SHL – \$14,560;
- (c) BEL – \$20,800;
- (d) Mr Singh – \$44,400; and
- (e) Jaswinder Kaur – \$44,400.

Preet Step 4 – Proportionality

[45] This step is about the ensuring the final amount of any penalty is proportional to the breaches and in line with other penalty amounts for multiple similar seriousness. The level of penalties should not be set at such a substantial level that a liable party simply could not pay them.

[46] Here the provisional penalties for the three companies, two of which are no longer trading, total \$82,560 and the provisional combined total for Mr Singh and Jaswinder Kaur amounts to \$88,800. This level of penalty has very little prospect of being paid.

[47] I am satisfied the optimum deterrent effect does not require a total level of penalties at the provisionally assessed levels, either to specifically deter the respondents from acting again in the same way or to generally deter other employers from breaching employment standards.

[48] I have considered other cases in which breaches ranged in number from 10 to 39 and resulted in penalties ranging from \$5,000 to 86,400.¹¹ The end result of the comparisons and my reflection on proportionality is that I am satisfied a further reduction is appropriate:

- (a) SEL – \$20,000;
- (b) SHL – \$7,000

¹¹ *A Labour Inspector v Indian Cuisine NZ Ltd (In Liquidation) & 3 Ors* [2021] NZERA 3; *A Labour Inspector v Sok Hoirng Choir in partnership with Rattanak Heng Trading as The Bakehouse Café & 1 Or* [2020] NZEmpC 203; *A Labour Inspector v Matangi Berry Farm Ltd & 1 Or* [2020] NZEmpC 43; *A Labour Inspector v Raj Kiwi Ltd & 1 Or* [2020] NZERA 493; *A Labour Inspector v Olde Berry Farm NZ Ltd & 2 Ors* [2020] NZERA 105.

(c) BEL – \$10,000;

(d) Mr Singh – \$15,000; and

(e) Jaswinder Kaur – \$5,000.

[49] The final penalties are proportionate to the severity of the breaches, the harm or loss caused and the prospects of recovery. The level of penalties imposed also provides a substantial deterrent to employers who might consider or risk breaches of employment standards.

[50] Within 28 days of the date of this determination the following penalties must be paid to the Authority:

(a) \$20,000 by Saloni Enterprises Limited for the identified breaches of employment standards;

(b) \$7,000 by Saloni Holdings Limited for the identified breaches of employment standards;

(c) \$10,000 by B Enterprises Limited for the identified breaches of employment standards;

(d) \$15,000 by Mr Singh, as a person involved in the breaches; and

(e) \$5,000 by Ms Jaswinder Kaur, as a person involved in the breaches.

[51] On receipt, the penalties will then be paid into a Crown bank account.

Costs

[52] Costs are reserved. The parties are encourage 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. The respondents 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.

[53] 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 adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority