

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 3  
3082900 & 3082901

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              INDIAN CUISINE NZ  
LIMITED (IN  
LIQUIDATION)  
First Respondent

AND                              PREMIER BRANDS  
LIMITED  
Second Respondent

AND                              RONEEL SURAJ SINGH  
Third Respondent

AND                              REENA ROSHINI LATA  
Fourth Respondent

Member of Authority:      Robin Arthur

Representatives:              Tim Gray, counsel for the Applicant  
Imran Kamal, liquidator of the First Respondent  
Roneel Singh, director of Second Respondent and in  
person as Third Respondent  
Reena Lata, in person as Fourth Respondent

Submissions:                      On 20 November 2020 from the Inspector and on 14  
December 2020 from the Second, Third and Fourth  
Respondents.

Determination:                      11 January 2021

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     A consent determination issued on 2 November 2020 set out the nature and number of breaches of employment standards committed by Indian Cuisine NZ Limited (ICNZL) and Premier Brands Limited (PBL) and the involvement in those breaches by Roneel Suraj Singh, the sole director and sole shareholder of both companies, and his

wife Reena Roshini Lata, in her role calculating and processing wage and holiday payments to the employees of both companies.<sup>1</sup> The parties had also agreed a total of \$32,638.13 was due as wage arrears in various amounts to 12 former employees. Orders were made for payment of the arrears. The Labour Inspector, through counsel, has since confirmed payment of the full arrears amount was received from Mr Singh on 11 December 2020.

[2] Reserved for determination, on the papers, was the question of what amount should be imposed as penalties for the breaches of employment standards. A timetable was set for submissions on that issue. This determination relies on submissions made on behalf of the Inspector and, by Mr Singh, on behalf of himself, Ms Lata and PBL. The liquidator of ICNZL had consented to proceedings in the Authority continuing against that company but has not participated in this stage of the matter.

[3] While the submissions lodged have been considered carefully, this determination has not recorded or summarised all of what was said in them.<sup>2</sup>

### **The breaches of minimum employment standards**

[4] The breaches concern failures to comply with the Minimum Wage Act 1983 (the MWA), failures to provide alternative holidays and holiday pay due under various provisions of the Holidays Act 2003 (the HA) and failures to provide employment agreements and to keep adequate records required under the Employment Relations Act 2000 (the ERA).

[5] A schedule attached to the consent determination issued last year summarised the agreed nature and number of those breaches committed by each of the four respondents. The schedule listed the specific sections of the relevant legislation breached.

[6] In summary, those breaches comprised: six by ICNZL affecting one employee before 1 April 2016; 17 by ICNZL affecting three employees after 1 April 2016; 86 by PBL affecting 21 employees; and 87 affecting 21 employees in which Mr Singh and Ms Lata were each persons involved in those breaches of minimum standards.

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<sup>1</sup> *Labour Inspector v Indian Cuisine (NZ) Limited (in liquidation) & Ors* [2020] NZERA 449.

<sup>2</sup> Employment Relations Act 2000, s 174E.

## **The Inspector's claim for penalties**

[7] The following factors, identified in ERA s 133A and in Employment Court decisions applying the statutory criteria, are to be weighed in assessing penalties in the circumstances of each case.<sup>3</sup>

- The object stated in s 3 of the ERA (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 any person or gains made or losses avoided by the person because of the breach or involvement in the breach (statutory consideration 4);
- whether the person in breach has paid an amount in compensation, reparation or restitution, or has 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, both particular and general (additional consideration 1);
- culpability (additional consideration 2);
- consistency of penalty awards in similar cases (additional consideration 3);
- ability to pay (additional consideration 4); and
- proportionality of outcome to breach (additional consideration 5).

[8] In detailed submissions considering those factors the Inspector proposed the appropriate levels of penalties to impose were: \$52,500 against ICNZL for the breaches committed after 1 April 2016; \$60,000 against PBL; \$26,650 against Mr Singh; and \$7,875 against Ms Lata. This proposed outcome was subject to whatever adjustment

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<sup>3</sup> *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].

was appropriate if the ordered wage arrears were paid, which they were, and what the respondents might say in their submissions about their ability to pay any penalties ordered.

[9] Submissions lodged by Mr Singh, signed by him and Ms Lata, accepted responsibility for the breaches of minimum employment standards but asked, in a covering email, for “no fines” to be imposed on the companies. They said they had “lost everything” in the restaurant business they purchased in 2014 and closed down in November 2019. Their losses were said to include \$335,000 borrowed to buy the business, with the loan secured against the value of their residential home. The money to pay the ordered wage arrears was borrowed from a relative.

### **Assessing the penalties**

[10] The remainder of this determination considers the relevant factors in assessing penalties and what level of penalty should be imposed on each respondent party.

#### *Object of the Act*

[11] The object of the Act includes recognising good faith behaviour in employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.

[12] As submitted by the Inspector the accepted breaches showed the companies, its director Mr Singh, and Ms Lata in her payroll administration capacity, had each failed to meet the expected standards of good faith behaviour and had taken advantage of inherent inequality in the employment relationships by failing to pay the affected workers their correct entitlements.

#### *Nature and extent of the breaches*

[13] The identified breaches, as set out in the schedule referred to earlier, were sustained and systemic, spanning a period of more than four years. They occurred from December 2014, when ICNZL took over the restaurant, and continued with its transfer to PBL in June 2018 and up until closure of the business in late 2019.

[14] Applying the maximum available penalties for those breaches, the starting point in assessing total provisional penalties was as follows: \$340,000 against ICNZL for the 17 breaches after 1 April 2016; \$1,720,000 against PBL for 86 breaches; \$870,000

against Mr Singh, as a person involved in 87 breaches; and \$870,000 against Ms Lata, as a person also involved in those 87 breaches. The Inspector did not seek penalties against ICNZL for pre-1 April 2016 breaches.

### *Intention*

[15] The Inspector's submissions described the breaches as reflecting a mixture of intention and inadvertence, with Mr Singh and Ms Lata operating the business through the two companies in the way they believed it was previously run. As Mr Singh accepted in his submissions they had failed to adequately educate themselves in their obligations as employers or to seek sufficient advice about the relevant employment rules and regulations.

[16] However that acknowledgement of an element of naivety about running a business in New Zealand needed to be balanced against the evidence that the workers had pressed their employer for payment of holiday pay and some steps were taken to meet those requests, albeit in a way that later caused other problems over how it was paid.

[17] Mr Singh and Ms Lata were employed in jobs of their own elsewhere for much of this time, operating the restaurant as what Mr Singh called "a side business". In Ms Lata's case this was with a health board. They both therefore had some direct personal experience as employees and what could be expected from an employer.

[18] The transfer of the business and its operation from one registered company, ICNZL, to another, PBL, also exhibited some knowledge in managing and minimising liability.

[19] As submitted by the Inspector, the evidence viewed overall supported an inference that the breaches committed over an extended period were "somewhat intentional".

### *Loss or damage suffered, gains made, losses avoided?*

[20] The Inspector's inquiries had established some 21 workers were affected by breaches of their entitlements while employed at the restaurant. Shortfalls in payments due to nine of them were remedied by the respondents but 12 workers were still owed arrears by the time of the Authority's earlier determination on liability was issued in

November 2020. All 21 affected workers had, for some period of time, lost the use of money they were entitled to and PBL benefited by retaining use of monies during that period.

*Steps taken to mitigate adverse effects*

[21] Two elements indicated some steps by the respondents to mitigate the effects of their breaches.

[22] Firstly, arrears were paid following the Inspector's investigation, partly on a voluntary basis and partly by compliance with an order of the Authority. This weighed in the respondents' favour to a limited degree. As noted by the Employment Court however, the degree of adjustment of penalties should take care not to create the perverse incentive of encouraging an employer to sit on its hands until forced to pay what was previously due.<sup>4</sup> To do so would simply reward late performance of a duty.

[23] Secondly, the Inspector acknowledged two of the worst affected workers had benefited from provision of accommodation, food and payment of some bills. This covered costs those workers would otherwise have had to meet for themselves. While this did not excuse the breach of statutory standards by not paying wages or holiday pay due to them, those provisions did offset to some degree the effect on those workers of those breaches.

[24] Another aspect for consideration was the degree of remorse or contrition shown by the respondents. This needed to be assessed objectively, that is from what could be seen to have been done to mitigate adverse effects, rather than from mere expressions of regret by a liable party after the event. In this case the submissions lodged by Mr Singh included fulsome apologies and statements of remorse for the effects on the workers. However those submissions were largely counter balanced by equally fulsome excuses he made about how others were really to blame for the predicament that he, Ms Lata and the two companies faced. In varying degrees those excuses blamed the restaurant chefs and other employees, the business' accountant, Mr Singh's lawyer, the liquidator of ICNZL and the previous owner of the business. Overall the degree of objectively observable contrition or remorse was limited. Only the two factors already identified – that is late payment of arrears due and some other benefits provided to some

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<sup>4</sup> *Daleson*, above n 3, at [32].

workers during their employment – needed to be weighed in adjusting the penalties to acknowledge steps mitigating adverse effects of the breaches.

*Circumstances of the breach, including the vulnerability of employees involved*

[25] The Inspector's submissions noted that the affected workers were recruited locally but some were dependent on support of their employer to renew work visas or to gain residence visas. The provision of accommodation to some of them, while in part a benefit, also increased their reliance on their employer and consequently their vulnerability to misuse of power in the employment relationship.

[26] Mr Singh submitted some of those workers were more experienced and knowledgeable about New Zealand employment rules than him and Ms Lata. In the case of the chefs he also said they had job offers to work in other businesses so were not dependent on PBL. The number of breaches and the extended period in which they occurred, despite some efforts by the workers to have them remedied, established the reality was as described by the Inspector rather than as by Mr Singh.

*Previous breaches or penalties*

[27] There were no previous identified instances of breaches by the respondent companies or any other businesses in which Mr Singh or Ms Lata may have been involved.

*Deterrence*

[28] The Inspector sought penalties sufficient to bring home to the respondents and, more generally, to other employers of migrant workers that misuse of power in the employment relationship through breaching minimum employment standards would not be tolerated.

*Culpability*

[29] The Inspector accepted there were grounds for accepting a lower degree of culpability by Ms Lata. While the Inspector's investigation had established Ms Lata was responsible for calculating and processing wage and holiday payments due to the workers, the parties agreed she had acted throughout on the instructions and under the supervision of Mr Singh, director of the two companies.

### *Consistency*

[30] Awards of penalties should be broadly consistent while allowing for the variation in the particular circumstances of each case in the number, nature, duration and impact of breaches. In this case the Inspector submitted globalisation of breaches according to their nature rather than the number of employees involved was appropriate.<sup>5</sup> This required adjustment of the “potentially enormous” provisional penalties noted at the outset of the analysis in this determination in order to reach reasonable penalty amounts that were broadly consistent with comparable cases. Those adjustments are incorporated in the calculations made later in this determination.

### *Ability to pay*

[31] Mr Singh’s submissions set out an account of liabilities and circumstances he said would affect the ability of himself, Ms Lata, ICNZL and PBL to pay any penalties. ICNZL was said to have accumulated tax losses of \$176,688. PBL was said to have a deficit of \$147,072 recorded in accounts of its last year of operation of the business and to have assets worth less than \$250. His residential property was said to be subject to loans totalling \$427,370. Mr Singh said his financial obligations included liability for a personal commercial loan of \$19,000 taken out to buy restaurant chattels and fittings; a loan of \$45,000 from a relative used to pay the wage arrears and liquidation and legal fees; and a student loan of \$32,000. He also said he was presently unemployed, relying on a WINZ benefit, while Ms Lata was employed on a casual, part-time basis only. Both had health difficulties. He also referred to health and education expenses for their three children.

[32] Mr Singh provided no independent evidence or documentation to verify his account of those circumstances. For instance, there was no information about the present value of his residential property compared to the loans secured against it.

[33] Consequently there was no documentary evidence to confirm or negate the prospects that enforcement or liquidation processes might disclose funds or assets sufficient to meet some or all of the value of whatever penalties were imposed on each party. The restaurant operated initially through ICNZL and then PBL had closed by late 2019 so there was no currently operating business generating revenue.

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<sup>5</sup> *Preet*, above n 3, at [100]; *Labour Inspector v Parihar* [2019] NZEmpC 145 at [39] and *Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43 at [48].

[34] A party's ability to pay a penalty does not absolutely dictate whether one is imposed or its amount. Ability to pay is one relevant consideration among others in the circumstances of any particular case. As a matter of principle penalties should not be awarded when genuine impecuniosity of a party, properly established, means there is little real prospect of compliance.<sup>6</sup> However mere financial incapacity alone is unlikely to warrant reducing a penalty to "next to nil" given the relevant statutory scheme and its underlying objectives. The fortunes of a liable party may ebb and flow. A finding of liability and an order to pay a penalty of a certain amount is different from its subsequent and eventual enforcement.<sup>7</sup>

[35] In the particular circumstances of this case, with no verified evidence on the ability of each party to pay an appropriately adjusted penalty, only a limited downward adjustment based on inference was warranted. The other relevant factors for consideration still required imposition of significant penalties, even if there were doubt about whatever enforcement or liquidation processes might be necessary might eventually yield.

#### *Adjustment of total provisional penalties*

[36] Against that background, substantial adjustments could reasonably be made to the potential maximum penalties calculated earlier in this determination. These comprise a downward adjustment to set an appropriate level of penalty for aggravating factors and further downward adjustment to account for ameliorating factors and the parties' financial circumstances. A final cross check and adjustment is made to ensure the level of penalty imposed is proportionate to the seriousness of the breaches, the level of harm done, the amounts unlawfully held from the workers, the parties' ability to pay and for the optimum deterrent effect of those penalties.

[37] For ICNL, PBL and Mr Singh a 60 per cent reduction is applied to the element relating to aggravating factors, based on the overall seriousness of the breaches. A further 30 per cent reduction is applied in respect of ameliorating factors, largely related to payment of arrears due. A further reduction of 20 per cent is made to allow a margin for the ability of each of those three parties to pay the penalty imposed. The result is ICNZL's provisional total penalty is reduced from \$340,000 to \$136,000 for aggravating factors, a further reduction to \$95,200 for ameliorating factors, and a

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<sup>6</sup> *Preet*, above n 3, at [191].

<sup>7</sup> *Daleson*, above n 3, at [44]-[45].

further reduction to \$76,160 in relation to ability to pay. For PBL the provisional total is reduced from \$1,720,000 to \$688,000 for aggravating factors, a further reduction to \$481,600 for ameliorating factors and a further reduction to \$385,280 in relation to ability to pay. For Mr Singh the provisional total is reduced from \$870,000 to \$348,000 for aggravating factors, a further reduction to \$243,600 for ameliorating factors and a further reduction to \$194,880 in relation to ability to pay.

[38] In relation to penalties for Ms Lata the Inspector proposed a reduction of 70 per cent in the first step accounting for aggravating factors. This level of reduction recognised her lower level of culpability in the breaches of employment standards as she was accepted to have acted under the supervision of Mr Singh as director. The following adjustment adopts that proposed reduction and applies a further 30 per cent for ameliorating factors and a further 20 per cent in relation to ability to pay. The provisional total of \$870,000 is reduced to \$261,000 for aggravating factors, to \$182,700 for ameliorating factors and to \$146,160 in relation to ability to pay.

#### *Proportionality*

[39] The result of the adjustments made, applying the complex matrix developed by the Employment Court for use in these cases, resulted in a provisional level of penalty for each party which clearly required further adjustment.

[40] Firstly, as noted by the court in the *Preet* case, penalties imposed should be proportionate to the amounts of money unlawfully withheld from workers at a result of the breaches.<sup>8</sup> In *Preet* those amounts were \$73,000 for which penalties totalling \$100,000 were imposed on two companies after an adjustment for proportionality. In the present case the assessment to this point has identified provisional penalties totalling more than \$400,000 for ICNZL and PBL in relation to breaches that resulted in an order for payment of wages arrears of less than \$40,000. Penalties at that level would plainly be disproportionate.

[41] Secondly, again following a factor identified in *Preet* regarding a proportionate and just outcome, the final level of penalties set should not be at such a substantial level that a liable party simply could not pay them. Here penalties for the two companies provisionally totalling more than \$400,000, where one company was in liquidation and

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<sup>8</sup> *Preet*, above n 3, at [190].

the other had ceased trading, had little real prospect of being paid. Similarly penalties on Mr Singh and Ms Lata totalling more than \$300,000, for their personal roles in committing the breaches, were also unrealistic.

[42] Thirdly, an optimum deterrent effect did 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.

[43] The Inspector's submissions recognised the need for a substantial adjustment to set a final penalty proportionate to the severity of the breaches and other relevant factors. The amounts proposed by the Inspector are noted in paragraph [8] above.

[44] Weighing all the factors identified in making appropriate adjustments for proportionality I concluded the following final penalties should be imposed in all the circumstances of this case: \$20,000 for ICNZL; \$30,000 for PBL; \$25,000 for Mr Singh and \$5,000 for Ms Lata. This outcome was within the range of penalties imposed in 12 cases recently analysed in the Authority's determination in *A Labour Inspector v Nekita Enterprises Limited* [2020] NZERA 509 at [63].<sup>9</sup> The breaches in those cases ranged in number from more than 10 to around 1000 and resulted in penalties of as little as \$4,000 and as much as \$160,000.

[45] In the present case I considered the final penalties to be imposed were proportionate to the severity of the breaches, the harm or loss caused and the prospects of recovery and also provided a substantial deterrent to employers who might consider or risk breaches of employment standards.

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<sup>9</sup> *A Labour Inspector v Raj Kiwi Limited* [2020] NZERA 493; *A Labour Inspector v H4M Corporation Limited* [2020] NZERA 406; *A Labour Inspector v Sail City Venture Limited* [2020] NZERA 268; *A Labour Inspector v Hawkes Bay Seafoods Limited* [2020] NZERA 133; *A Labour Inspector v Chait & Bish Hospitality Limited* [2020] NZERA 105; *A Labour Inspector v Indian Heaven Limited* [2019] NZERA 597; *A Labour Inspector v New Zealand Mountain Hunting Limited* [2019] NZERA 568; *A Labour Inspector v Mittal & Sons Limited* [2019] NZERA 406; *A Labour Inspector v Shalini Limited* [2019] NZERA 334; *A Labour Inspector v Dhanoa Transport Ltd* [2018] NZERA Wellington 32; *A Labour Inspector v Double Seven Services Limited* [2018] NZERA Christchurch 195; and *A Labour Inspector v Alps Travel Company Ltd* [2018] NZERA Christchurch 22.

## **Orders**

[46] Within 28 days of the date of this determination the following penalties must be paid to the Labour Inspector:

- (i) \$20,000 by ICNZL, for the identified breaches of employment standards;  
and
- (ii) \$30,000 by PBL, for the identified breaches of employment standards;  
and
- (iii) \$25,000 by Mr Singh, as a person involved in the breaches; and
- (iv) \$5,000 by Ms Lata, as a person involved in the breaches.

## **Costs**

[47] Costs are reserved. The parties are however encouraged to agree any issue of costs between themselves if they can. If they cannot and an Authority determination of costs is sought by the Inspector, counsel should be lodge and serve a memorandum on the issue within 28 days of the date of this determination. The respondents would then have 14 days to lodge any reply memorandum. Any application for costs is to be determined on the papers.

Robin Arthur  
Member of the Employment Relations Authority