

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 44  
3090053

BETWEEN	A LABOUR INSPECTOR Applicant
AND	JOCELYN AND L LIMITED First Respondent
AND	DONG YUAN Second Respondent
AND	YOU ZHOU Third Respondent

Member of Authority:	David G Beck
Representatives:	Joseph Perrott, Counsel for the Applicant James Crichton, Counsel for the Respondents
Investigation Meeting:	On the papers
Submissions Received:	4 and 23 December 2020 from the Applicant 14 December 2020 from the Respondents
Date of Determination:	10 February 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] A Labour Inspector, asserts that the first respondent Jocelyn and L Limited, has breached obligations contained in the Holidays Act 2003 (“HA”) including record keeping deficiencies, lack of compliance with payment provisions relating to public

and annual holidays and the provision of alternative holidays involving three employees.

[2] The Labour Inspector says that the second and third respondents (Dong Yuan and You Zhou) were involved in the first respondent's breaches pursuant to s 142W of the Employment Relations Act 2000 ("the Act").

[3] The Labour Inspector seeks to recover penalties for the identified breaches. The respondents in submissions "agree with the applicant's contention that the only matter outstanding, on which the Authority is asked to rule is the quantum of penalties in the instant case" and that "the statement of facts included in the submissions of the applicant sets out the history of the matter accurately".

[4] On this basis of an acceptance of culpability for the breaches, both parties agreed that the matter be dealt with 'on the papers' without the need to convene an investigation meeting. I was also provided with an affidavit sworn by Ms Lepper attesting to a property, vehicle and debt Infolog search that she had conducted on the respondents.

### **The Authority Process**

[5] Pursuant to s 174E of the Act I make findings of fact and law and outline conclusions on matters to resolve the identified issues and make orders but I do not record all evidence and submissions received.

### **Issues**

[6] The Authority has to determine the quantum of penalties that the respondents should incur for the identified and uncontested breaches by applying relevant legal principles.

### **What caused the breaches?**

[7] Jocelyn and L Limited is a limited liability company operating a Super Liquor franchised bottle store, located at Clendon Park in Auckland. Dong Yuan is one of two directors of the company and she administers the employee payroll system including maintaining holiday and leave records. The other director her husband You Zhou, also has limited involvement in the administration of employee payroll matters and he has an influence over employment policies and practices. Both directors have

conceded that they were involved in breaches of the identified “employment standards” in terms of a 142W of the Act that the Labour Inspector detailed in a statement of problem filed with the Authority on 31 January 2020 – no factual matters are contested.

[8] As context, on 16 January 2017, Jocelyn and L Limited was investigated concerning wage, time and holiday record keeping under s 130 of the Act and s 81 HA, holiday pay irregularities and an issue of insufficient compensation for employees working on public holidays. The investigation resulted in an Improvement Notice being issued pursuant to s 223D of the Act. The company was directed to rectify the identified breaches.

[9] By letter of 6 June 2017, the Labour Inspector after reviewing provided documentation, indicated satisfaction with the actions Jocelyn and L Limited had taken and said no further action was contemplated and that “this file is now closed”. The letter reiterated what needed to be done to maintain ongoing compliance and warned of the possible financial penalties that could follow enforcement action should the breaches be repeated.

[10] A ‘follow up’ Labour Inspector audit of Jocelyn and L Limited issued a letter of 13 February 2019 requesting employment agreements and records for the period 1 March 2017 – 13 February 2019. You Zhou responded to the request pertaining to three employees which led to an investigation that identified the following statutory breaches:

- s 81 HA – a failure to record the dates on which employees became entitled to an alternative holiday dating back to January 2017.
- s 50 HA – a failure to pay two separate employees time and a half for respectively working on Boxing Day and Auckland Anniversary Day.
- s 56 HA – a failure to record and provide three employees with alternative holidays for when they worked on public holidays that fell on otherwise working days – cumulatively this involved twenty five days spread between the three employees.
- s 49 HA – three employees not being paid for otherwise working days that fell on public holidays (being Christmas Day, Good Friday and Queen’s Birthday).

- s 28A HA – in contravention of this provision (that provides for a maximum of one week’s leave to be “cashed up”), one employee was allowed without supporting documentation of a request to ‘cash up’ four weeks annual leave in the period 15 February 2019 – 8 March 2019.

[11] On 18 August 2019 the Labour Inspector provided the respondents with an Investigation Report detailing the breaches. In the report’s “Executive Summary” it outlined that “failings include repeated breaches that were identified in the investigation from 2017” and that proceedings in the Authority were being contemplated to seek penalties for the identified breaches. The respondents’ did not provide any comment on the report findings and background matters.

[12] A second Improvement Notice was issued on 25 September 2019 seeking that the respondents address the report’s identified breaches and rectify such.

[13] However as rectification did not occur, the Labour Inspector met with the respondents on 18 December 2019 to signal that the second Improvement Notice was being withdrawn in accord with s 223G of the Act. An email of 19 December confirmed that the Labour Inspector was proceeding with an action in the Authority seeking compliance orders and penalties (that was then filed on 31 January 2020).

[14] The respondents’ took no steps to remedy the breaches until just prior to an unsuccessful mediation on 1 May 2020. In an open letter of 7 October 2020 Jocelyn and L Limited then made an open offer to address the Labour Inspector’s unresolved penalty claims and gave assurances that they had engaged employment consultants to “ensure it remains compliant in the future”.

[15] The offer was rejected.

### **What level of penalties are appropriate in the circumstance of the breaches?**

[16] The approach I intend to adopt is consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited*<sup>1</sup> and I am also guided by Judge Corkill’s decision *A Labour Inspector v Matangi Berry Farm Limited*<sup>2</sup>. *Preet* identified a four-step framework to fixing penalties where multiple breaches of minimum standards are evident:

---

<sup>1</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

<sup>2</sup> *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 40.

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.<sup>3</sup>

[17] To ensure consistency I use an approach adopted in a recent Authority determination (*Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd*) that first considered the statutory framework and then assessed the quantum of remedies based on the four steps identified above.<sup>4</sup>

### **The object of the Act**

[18] Section 3(a) of the Act sets out relevant ‘aspirational’ matters I must consider these include the need to “build productive employment relationships through the promotion of good faith in all aspects of the employment environment”, acknowledging and addressing the inherent inequality of power in employment relationships” and promoting effective enforcement of “employment standards” by Labour Inspectors.

### **The nature and extent of the breaches**

[19] There were twelve admitted breaches involving the respondents for which penalties are sought, to recap they are:

- (a) Two breaches of s 50 HA for failing to pay time and a half for two employees working on public holidays.
- (b) Three breaches of s 56 HA for failing to provide three employees with alternative holidays when they worked on public holidays that were otherwise their working days.

---

<sup>3</sup> At [151].

<sup>4</sup> *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

- (c) Three breaches of s 81 HA for failing to keep accurate holiday and leave records for three employees.
- (d) Three Breaches of s 49 HA for a failure to pay three employees for otherwise working days that fell on public holidays.
- (e) One breach of s 28A HA for failing to comply with statutory obligations relating to 'cashing up' holiday pay.

[20] Whilst the breaches are admitted by the three respondents, the Labour Inspector's report indicates that they arose from both a negligent operation of an electronic payroll system and a questionable claim that the respondents' directors were unaware of designated public holidays (Auckland Anniversary Day and Boxing Day being cited). Overall, the Labour Inspector sought penalties as the respondents had not sustained compliance with the first Improvement Notice issued in 2017.

#### **The nature and extent of any loss or damages suffered**

[21] The loss or damage incurred by the three employees involved relating to breaches of the HA is quantified cumulatively as \$1,860.60. Whilst this is a modest sum it does not include the value to the employees concerned of getting additional paid days off for working on public holidays or that one employee potentially lost an opportunity to take four weeks paid leave for rest and recreation.

#### **Were the breaches intentional, inadvertent or negligent?**

[22] Given the breaches were admitted and that the second and third respondents did not give evidence I can only draw inferences from their reported conduct as outlined in disclosed correspondence including the Labour Inspector's report and interview notes.

[23] I conclude from such that the respondents failed to have due regard to the ongoing breaches detailed after the first and subsequent interactions with the Labour Inspectors from January 2017 to December 2019 and that the ongoing and repeated breaches were impliedly intentional or wilfully negligent.

### **What steps have been taken in mitigation?**

[24] The Labour Inspector is satisfied on documentation provided, that the ‘compliance’ matters have now been rectified and arrears were paid to the employees concerned but not in a timely manner (being some eight months after the Investigation report was issued). This displays a worrying element of neglect by the second and third respondents given that the sums involved were not disputed and are relatively small and likely would have been of greater value to their modestly remunerated employees.

### **The circumstances of the breach and any vulnerability factors**

[25] Very little was advanced about the specific vulnerabilities of the three employees involved other than noting that they were engaged on sponsored visas. However, this is sufficient to draw an inference that as migrant employees they would likely be unaware of their rights and reluctant to pursue such in a small workplace where their income and residency were potentially at stake. I find the employees were vulnerable.

[26] I also take into account a broad contextual factor that significant and prominent publicity has accompanied similar breaches involving bottle stores including those in the Super Liquor franchise. It is unlikely that the second and third respondents, who had been in the business since 2015, would have been unaware of such developments and/or that the franchisor had not brought this to their attention.

[27] The respondents’ counsel suggested generally, that language and cultural barriers may have existed for the second and third respondent but he provided no supporting evidence of this or the extent of their language difficulties. I note that at the meeting of 18 December 2019 the Labour Inspector used a Mandarin speaker from a reputable translation service and the unchallenged notes of the meeting do not appear to show that Dong Yuan failed to co-operate and comprehend the direction of the meeting. At several points in the meeting she freely concedes the breaches and appears to understand the nature of such. This included a disclosure that the second and third respondents had not read all of the labour Inspector’s report and that they knew they should have taken steps to have it translated and/or better explained to them but were “too busy” to find the time to complete this task or to get legal or accounting advice on their obligations or appreciate the seriousness of such.

[28] I also observe that compliance resources in other languages (including Mandarin) are available on Employment New Zealand's website.

### **Previous conduct**

[29] Although not having appeared before the Authority before, the breaches identified were repeated and the subject of two Labour Inspector initiated improvement notices.

### ***Preet* step one – nature and number of breaches**

[30] The approach to quantification in *Preet* allows me to consider whether any of the breaches can be 'globalised' for the purpose of quantifying a penalty so that one breach may reflect two or more.<sup>5</sup> In applying a globalised approach in *Preet* the Court noted:

Still under Step 1, once the nature and number of breaches have been identified, the Court or the Authority should give consideration to whether global penalties may be appropriate in the particular case. If, for example, there are multiple and very similar breaches such as the repeated non-payment or below-minimum payment of wages to an employee, it may be an appropriate case for the imposition of a global penalty for these. This may include cases where the breaches are part of a consistent pattern of breach of a particular statutory requirement. The Authority or the Court should be careful to ensure that the globalisation of a penalty does not diminish the significance of a repeated and/or long-running series of breaches. Ultimately, this global penalty assessment will be subject to cross-checking and confirmation or potential reconsideration when the Authority or the Court applies what we call the proportionality test under Step 4.<sup>6</sup>

[31] The effect of the above approach is where multiple breaches occur in respect of multiple employees, globalising can allow the application of one penalty for such. Here as in *Preet*, the breaches all relate to one statute (HA) and the Labour Inspector has conceded in submissions that breaches of s 49 and s 56 HA are substantially related to each other and relate to the same number of employees. This approach was affirmed by the Court in *A Labour Inspector v Parihar* where Judge Perkins allowed that a failure to keep wage and time records and holiday and leave records although

---

<sup>5</sup> At [100].

<sup>6</sup> At [141].

required under two separate statutes, relates to the general breach of failure to keep adequate records and should be treated as one breach per impacted employee.<sup>7</sup>

[32] Judge Corkill pragmatically refined the latter approach in *A Labour Inspector v Matangi Berry Farm Limited*<sup>8</sup> where faced with multiple employees and identical breaches (532), he focused on the nature of the breach rather than the frequency per employee reducing such to a single breach for each type of default. Whilst the reasoning applying was to avoid ‘artificiality’ of discounting as Judge Perkins reasoned in *Parihar* “if the maximum penalty is related to each breach, an enormous total is reached”,<sup>9</sup> I see no reason why the approach confirmed in *Matangi* cannot be utilised for cases involving fewer employees.

[33] Taking the approach in *Matanga* and focussing broadly on the nature of the breaches rather than the frequency or each specific statutory transgression, allows me to reduce six breaches to one, for the transgressions of both s 49 and 56 HA. However the other breaches are not related and need to be treated separately: so, s 50 HA failing to pay time and half to two employees working on a public holiday I will treat as one additional breach (taking a globalised approach). Likewise, with the same breaches of s 81 HA involving failing to keep accurate holiday and leave records for three employees I will treat as one breach amounting to three breaches at this stage.

[34] This leaves an unrelated single breach of s 28A HA that involved allowing one employee to ‘cash up’ a portion of outstanding holiday entitlement in excess of what the HA permits.

[35] The global approach I have applied above, now reduces the various breaches to four and provides a sensible starting point to define potential maximum penalties before I apply further analysis of other factors using guidance from *Preet*. So at this stage, the potential maximum penalties I can impose on Jocelyn and L Limited using a globalised approach, are \$20,000 per breach<sup>10</sup> which for the four accumulated breaches identified above amounts to \$80,000.

---

<sup>7</sup> *A Labour Inspector v Parihar* [2019] NZEmpC 43.

<sup>8</sup> *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43

<sup>9</sup> At [39].

<sup>10</sup> Section 75(1)(b) Holidays Act 2003.

### ***Preet Step 2 – severity of breaches***

[36] On top of statutory considerations (the aims of the Act) I am obliged, following *Preet*, to examine the extent of the respondents' culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[37] Considering the above and the aggravating features that the breaches were: ongoing after the company was the subject of two improvement notices, that the breaches were easily resolvable had the company taken heed of the Labour Inspector's Improvement Notices and an investigation report and, despite the relatively small amount of money the employees were deprived of, I believe deterrence where vulnerable individuals are involved, is a key consideration. Taking the later considerations into account I conclude that the breaches are reasonably significant and I deem 75% of the maximum accumulated penalty to be a 'starting point' (\$60,000).

[38] In mitigation, the company has rectified the breaches and paid the employees their entitlements and committed in submissions to using an employment consultancy to ensure ongoing compliance. However, the extent of the respondents' remorse is not evidenced by the unexplained delay in meeting the payments due and I was not wholly convinced that they took adequate steps to overcome their professed language difficulties.

[39] In the circumstances, I consider a further 10% reduction of the maximum penalty is warranted which reduces it to \$54,000.

### ***Preet step 3 – means and ability of the respondent to pay***

[40] I was initially provided insufficient information in submissions to accurately assess the respondent's ability to pay any penalties other than they operate a single bottle store in a moderately densely populated West Auckland suburb. I was given access to draft company accounts up to March 2020 that provided a picture of a business apparently struggling with indebtedness and cash-flow issues but no updated documentation evidencing the extent of such and how the business was coping with COVID issues.

[41] I also record I was misled in the initial submission by the second and third respondents claiming that the bottle store was their only source of income (but I accept that on closer scrutiny they disclosed an interest in another commercial building business when interviewed by the Labour Inspector).

[42] In addition, the Labour Inspector highlighted that the business accounts depreciation schedule shows the purchase of a Mercedes Benz vehicle for \$121,387 during the period the respondents were under investigation that placed the first respondent in a negative equity situation. No explanation was given in submissions as to the utility of the vehicle and its relationship to the operation of the business.

[43] In response, when afforded time to make further submissions on their financial position (on 25 January 2021) the respondents declined to do so, beyond disclosure of an email between their accountant and counsel of 11 January 2021 conceding the extent of the respondents property portfolio including: an unencumbered family home a rental generating property and a commercial building that appears on a Google search to be tenanted by a GP Practice and pharmacy although it was not disclosed if rental income was being earned from the latter property (some outstanding mortgage amounts were detailed but no valuations were provided) and an indicative amount that they could afford to pay.

[44] In these circumstances, in the absence of an update on current cash-flow and a comprehensive valuation of all assets, I am unable to apportion a further discount on the basis of inability to pay as no compelling hardship reasons have been identified to enable me to consider such a discount.

#### ***Preet* step 4 - Proportionality**

[45] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such where here three employees were involved. Four Authority cases I have contrasted involve breaches of a similar nature involving small businesses with three or fewer employees <sup>11</sup> and I also sought guidance from a recent

---

<sup>11</sup> *Labour Inspector v Sharma and Sons (2009) Ltd and Sharma and Sons Ltd* [2016] NZERA Auckland 128; *Labour Inspector v IXL Petroleum and Gas Ltd* [2017] NZERA Auckland 128, *Labour Inspector v Dhanoa* [2018] NZERA Wellington 32 and *A Labour Inspector v Janson Trading Limited t/a SBA Thames and Jaswant Singh* [2021] NZERA 5.

case involving a bottle store that has a useful analysis of past authorities and amounts awarded.<sup>12</sup> The cases show penalties imposed on the companies involved, range from \$12,000 to \$ 21,000 depending on various contextual factors.

[46] Taking into account the totality of factors I have explored and that applying proportionality to my analysis should lead to a further reduction, I find it just in the circumstances that Jocelyn and L Limited should pay a penalty of \$20,000.

### **What penalty should I impose on Dong Yuan?**

[47] Dong Yuan a co-director of Jocelyn and L Limited, has conceded that she was involved in the breaches identified. Dong Yuan attended interviews with the Labour Inspector during their investigation where it was found that she was solely responsible for record keeping and remunerating hourly paid employees including administration of an externally provided payroll system (that was not identified as causative of the breaches). I find these admissions sufficient to bring Dong Yuan within the scope of s 142W(1)(c) of the Act.<sup>13</sup>

[48] The starting point for individual penalties is in s 75(1)(a) HA that specifies a maximum of \$10,000 for each identified breach of the provisions detailed in the Labour Inspector's claims. For consistency I adopt the four step *Preet* approach that inevitably has a significant degree of the same conclusions.

#### ***Preet* step 1 – nature and number of breaches**

[49] Utilising the same globalised approach to multiple breaches as I have used for the first respondent company above, it reduces the breaches to four with an accumulated maximum penalty of \$40,000 as a starting point.

#### ***Preet* step 2 – severity of breaches**

[50] As with my findings in regard to the company I have considered the same level of severity should be imputed to Dong Yuan and I adopt an identical approach to penalty discounting (55% of the maximum) that leaves it at \$22,000.

---

<sup>12</sup> *A Labour Inspector v Basra & Khella Limited* [2020] NZERA 534 at [211].

<sup>13</sup> Section 142W(1)(c) Employment Relations Act 2000 that specifies a person is involved in a breach where that person “has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach”.

### ***Preet* step 3 – means and ability to pay**

[51] Given the intermingling of the property holdings and assets and lack of full disclosure on the value of such, I am not convinced of a reason to allow any reduction for ability to pay.

### ***Preet* step 4 - proportionality**

[52] In applying proportionality and consistency I round down Dong Yuan's final penalty to \$10,000.

### **What penalty should I impose on You Zhou?**

[53] You Zhou has conceded that he was involved in the breaches but as I am charged with investigating this I do have to consider on material provided, to what extent he took part in the breaches and whether he could be seen as neglecting to ensure that the breaches were remedied.

[54] Although Dong Yuan has indicated that she was in sole charge of payroll administration and record keeping (and attended the 18 December meeting with the Labour Inspector alone), she did indicate her husband, You Zhou, had on occasion briefly operated the payroll system when she was absent. Whilst this may reasonably lead to a conclusion that he may not have been fully cognisant of record keeping issues, it was clear that You Zhou was otherwise involved in the business including dealing with suppliers and ordering stock and he is recorded in the Investigation Report as attending earlier meetings.

[55] I find it implausible that You Zhou would not be aware of the breaches and that he had as a co-director, the ability to instruct Dong Yuan to rectify such as he had equal access to correspondence with the Labour Inspector.

[56] In terms of potential language issues, I have the same problem in assessing such being the lack of evidence to detail the extent of this factor.

[57] I will consider what penalty should be imposed on You Zhou by adopting the steps set out in *Preet* as follows, as he is also individually liable and his admissions have brought him within the scope of s 142W of the Act.

***Preet step 1 – nature and number of breaches***

[58] This is the same analysis I have used for the first and second respondents and for four breaches I set an accumulated penalty maximum of \$40,000 as a starting point.

***Preet step 2 – severity of breaches***

[59] I am obliged in this consideration, to apply the same factors as I have to the first and second respondents and come to the same conclusions. However, taken into account You Zhou's likely lesser knowledge of the complexity of the payroll system, I am prepared to apply a 70% discount that would leave a maximum of \$12,000.

***Preet step 3 – Means and ability to pay***

[60] As above, due to the intermingling of the property holdings and assets I am not convinced of a reason to allow any reduction for ability to pay.

***Preet step 4 - proportionality***

[61] In applying proportionality and consistency I round down You Zhou's final penalty to \$8,000.

***Conclusion on penalties***

[62] Within 28 days of the date of this determination Jocelyn an L Limited must pay to the Labour Inspector for transfer to a Crown bank account: penalties in the sum of \$20,000

[63] On the same terms as above: Dong Yuan must pay a penalty in the sum of \$10,000 and You Zhou must pay a penalty in the sum of \$8,000.

***Costs***

[64] The parties are encouraged to come to an agreement on costs but if they are unable to do so and I have to determine costs, the Labour Inspector has a period of 14 days from the date of this determination to make a submission to the Authority and the respondents' have 14 days to provide a response to lodge a reply.

David G Beck  
Member of the Employment Relations Authority