

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 5
3087512

BETWEEN	A LABOUR INSPECTOR Applicant
AND	JANSON TRADING LIMITED T/A SBA THAMES First Respondent
AND	JASWANT SINGH Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Joseph Perrott, counsel for the Applicant Jaswant Singh for the First Respondent and in person as Second Respondent
Investigation:	On the papers
Determination:	11 January 2021

DETERMINATION OF THE AUTHORITY

- A. As penalties for breaches of employment standards Janson Trading Limited must pay \$20,000 and Jaswant Singh must pay \$13,000 to the Labour Inspector within 28 days of the date of this determination.**
- B. Costs are reserved with a timetable set for lodging memorandum.**

Employment Relationship Problem

[1] Labour Inspector Leigh McGeedy applied to the Authority for findings that Janson Trading Limited (JTL) had breached minimum employment standards for two employees and its director, Jaswant Singh, was a person involved in those breaches. The Inspector sought orders for penalties against JTL and Mr Singh for eight breaches

– two of the Employment Relations Act 2000 (the ERA), four of the Holidays Act 2003 (the HA), one of the Wages Protection Act 1983 (the WPA) and one of the Minimum Wage Act 1983 (the MWA).

[2] The parties were able to reach agreement on a number of issues, including payment of arrears due to one worker totalling \$23,135.88. The money was due as arrears for minimum wages, annual holiday pay and public holiday pay. The parties' agreement was recorded and certified under s 149 of the ERA. JTL subsequently paid the agreed amount of arrears.

[3] Their agreement reserved the issue of penalties for determination by the Authority. Directions were agreed at a case management conference held by telephone with the parties' representatives for this determination to be done 'on the papers', including by considering an agreed statement of facts that the parties had signed and any written submissions they wished to lodge.

[4] The Inspector, through counsel, lodged and served submissions but Mr Singh, on behalf of JTL and himself, did not lodge any written submissions in response.

[5] As permitted under s 174E of the ERA this determination has not recorded all evidence and submissions received but has stated relevant findings, expressed conclusions and specified orders made.

The breaches

[6] JTL operates a business providing accounting services in Thames. An investigation by the Inspector established JTL had committed eight breaches of employment standards and Mr Singh, as its director, was a person involved in those breaches.

[7] A breach of s 64 of the ERA, by failing to keep a copy of a worker's employment agreement, affected one worker.

[8] The other seven breaches related to the treatment of a second worker, a Chinese national employed on a work visa and living in accommodation Mr Singh had arranged with a client of his business. Those breaches comprised:

- (i) Failure to pay the minimum wage (s 6 of the MWA); and

- (ii) Failure to properly calculate and pay annual holiday entitlement (s 21 of the HA); and
- (iii) Failure to properly calculate and pay annual holiday entitlement (s 21 of the HA); and
- (iv) Failure to have a written agreement for deductions from pay (s 5 of the WPA); and
- (v) Failure to properly calculate public holiday pay (s 49 of the HA); and
- (vi) Failure to keep a wage and time record (s 130 of the ERA); and
- (vii) Failure to keep an accurate holiday and leave record (s 81 of the HA).

[9] Mr Singh had recruited the second worker from Auckland to work in JTL's office in Thames. She moved there for the role and was employed from 27 February 2017 to 15 January 2019. Mr Singh paid \$200 a week directly to the second worker's landlord for her rent. The remainder of her wages was direct credited to her bank account each week with the amounts paid varying between \$100 and \$346.

[10] As well as her office duties the second worker told the Inspector that Mr Singh had asked her to give him massages. She said Mr Singh said to her: "I offer you a job, I offer you a house, what is your return to me?" In a record of hours she kept the second worker noted dates on which she said she had provided massages to Mr Singh. Her record appeared to show 12 such occasions over a four week period soon after she began the employment. Mr Singh, in his statement to the Inspector, denied he had made any such request.

[11] The Inspector acknowledged Mr Singh has co-operated in her investigation and in paying arrears calculated as due to the second worker. Mr Singh was responsible for JTL's human resources administration, including keeping records, carrying out recruiting and providing employment documentation such as employment agreements. In the agreed statement of facts Mr Singh accepted he was a person involved in the breaches of the employment standards legislation. As such he was liable to a penalty for his part in those breaches.

Assessment of penalties

[12] The following matters, identified in s 133A of the ERA and in Employment Court decisions applying the statutory criteria in that section, are to be weighed in assessing penalties in the circumstances of each case.¹

- 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).

[13] With the assistance of the Inspector's submissions those factors have been considered in assessing the penalties to be imposed on JTL and Mr Singh.

¹ *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].

Object of the Act

[14] 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.

[15] JTL's failure to provide the first worker with an employment agreement and its failure to give the second worker her minimum entitlements, and Mr Singh's role in those failures, were a misuse of power in the employment relationship and did not meet their obligations of good faith behaviour. This was demonstrated in the example of the failure to pay the minimum wage to the second worker. Her formal hours of work were 30 a week. Mr Singh acknowledged she was paid for only 20 hours but, in reality, she worked closer to 40 hours a week.

Nature and extent of the breaches

[16] The Inspector found, and JTL and Mr Singh accepted, that eight breaches affecting two workers were committed.

[17] The maximum penalties for JTL, at \$20,000 per breach, totalled \$160,000. For Mr Singh, at \$10,000 per breach, the potential maximum penalties would total \$80,000.

[18] In this assessment the breaches of s 21 and s 25 of the HA are globalised, that is treated as one breach.² Accordingly, the maximum potential penalty for those seven breaches totalled \$140,000 for JTL and \$70,000 for Mr Singh.

Intention

[19] As submitted by the Inspector the evidence showed what Mr Singh had done in the course of the employment relationship indicated the breaches were deliberate, intended actions. A statement he made to the Inspector disclosed that he deliberately paid the second worker for 20 hours a week rather than the 30 hours for which she was employed as he was not happy with her performance. He had not provided the first worker with an employment agreement on the commencement of her employment although he knew of the requirement to do so and he had provided such agreements to other employees.

² *Preet*, above n 1, at [100]; *Labour Inspector v Parihar* [2019] NZEmpC 145 at [39] and *Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43 at [48].

Loss or damage suffered, gains made, losses avoided?

[20] Short paying the second worker her wages and holiday pay deprived her of the use of a significant amount of money over an extended period. Through that time JTL's business gained an unfair competitive advantage of operating on lower costs than similar businesses.

Steps taken to mitigate adverse effects

[21] Mr Singh arranged payment of arrears due to the second worker only after the Inspector's investigation had quantified the amounts due to her. While that payment weighs in favour of JTL and Mr Singh as a step to mitigate adverse effects, the degree of adjustment to penalties must 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.³ To do so would simply reward late performance of a duty.

[22] There was no evidence of any significant contrition or remorse expressed on behalf of JTL or Mr Singh for the breaches or their effects.

Circumstances of the breach, including the vulnerability of employees involved

[23] As a migrant worker with a visa tied to her employment with JTL, the second worker was inherently vulnerable in the employment relationship. This vulnerability was increased by the arrangements for her accommodation with a client of its business and direct payment of her rent to that client. No tenancy agreement was completed and no written authority was sought or provided for deduction of rent from wages due to her. The degree of vulnerability was further exhibited by the request for massages.

Previous breaches or penalties

[24] JTL and Mr Singh have no previous history with the Labour Inspectorate.

Deterrence

[25] The Inspector sought penalties sufficient to bring home to the particular employer and employers generally that minimum employment standards must be met at all times, not only when financially convenient to the employer or when under scrutiny from a Labour Inspector.

³ *Daleson*, above n 1, at [32].

Culpability

[26] As submitted by the Inspector, four factors increased the respondents' culpability – the deliberate failure to pay the minimum wage; a coercive element in the expectation that the second worker would provide Mr Singh with massages as part of her job; payment of entitlements only being made only after the Inspector become involved; and the vulnerability of the second worker as a migrant.

Consistency

[27] 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.

[28] A sample of cases involving breaches of a similar nature and number, and involving three or fewer workers, show final penalties imposed on the employer company ranging from \$12,000 to \$21,000.⁴ The variation is accounted for by degrees of difference in the length, severity and harm caused by the breaches for which the penalties were imposed. Penalties for persons involved, such as directors or managers and administrators exercising significant influence, could generally be expected to be proportionate to the difference between the maximum penalties available for companies and individuals – that is around half that level.⁵ However there will, again, be degrees of difference in final penalty outcomes depending on the facts of what those individuals did and how that is accounted for in the various factors for assessment.

Ability to pay

[29] There was no evidence that JTL and Mr Singh were not able to pay penalties. The company appears to continue to trade in providing accounting services and has a resulting cash flow to meet the cost of penalties.

Adjustment of total provisional penalties

[30] Against that background, adjustments to the potential maximum penalties could be made by considering four aspects – aggravating features, mitigating features, the

⁴ *Labour Inspector v Sharmas and Sons (2009) Limited and Sharmas and Sons Limited* [2016] NZERA Auckland 169 (\$21,000); *Labour Inspector v IXL Petroleum and Gas Limited* [2017] NZERA Auckland 128 (\$14,000); *Labour Inspector v Dhanoa Transport Ltd and Dhanoa* [2018] NZERA Wellington 32 (\$12,000) and *A Labour Inspector v Basra & Khella Limited* [2020] NZERA 534 (\$18,000).

⁵ Employment Relations Act 2000, s 135(2).

means of the respondents to pay and, finally, a cross-check, for proportionality to ensure that the amount of each final penalty was just in all the circumstances.

[31] *Aggravating features:* Maximum penalties are reserved for the most severe cases. In this case the severity and extent of the seven breaches called for penalties, in this stage of the assessment, of 40 per cent of that maximum. The resulting provisional penalties were therefore reduced to \$84,000 for JTL and \$42,000 for Mr Singh.

[32] *Mitigating features:* Payment of the arrears, co-operation with the Inspector's investigation and no prior involvement with the Inspector were factors that taken together warranted a further 20 per cent reduction on the provisional penalties. For JTL this reduced the total to \$67,200 and for Mr Singh to \$33,600.

[33] *Ability to pay:* No grounds for reduction related to the ability to pay were established.

[34] *Proportionality:* Three factors favoured further reduction in the provisional penalty by applying a test for proportionality or totality of outcome.⁶

[35] Firstly, penalties imposed should be proportionate to the amounts of money unlawfully withheld from workers at a result of the breaches.⁷ 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 \$67,200 for JTL and \$33,600 for Mr Singh in relation to breaches that required an arrears payment of less \$24,000. Penalties of more than \$100,000 in this case would plainly be disproportionate to the loss to the worker which had eventually been made good. A margin above the value of the withheld amount may be appropriate to mark the harm caused by the breaches but, unless strongly warranted for other reasons, a penalty more than four times greater than the unlawfully withheld amount would be disproportionate.

[36] Secondly, similar cases referred to under the heading of consistency earlier in this determination resulted in orders for penalties of between \$12,000 and \$21,000 for breaches of the number and nature found in the present case. Consistency supported a penalty at the level of \$20,000 for JTL in this case. Mr Singh's personal culpability in

⁶ *Preet*, above n 1 at [151] and [187]-[193].

⁷ *Preet*, above n 1, at [190].

the breaches, particularly given the vulnerability of the second worker and the demands made of her by him, warranted a penalty reduced to no lower than \$13,000.

[37] Thirdly, penalties totalling \$33,000 for both respondents were significant and sufficient as a deterrent to specifically deter the respondents from acting again in the same way and to generally deter other employers who might otherwise risk breaching employment standards.

[38] Overall a penalty of \$20,000 for JTL and \$13,000 for Mr Singh personally 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.

Orders

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

- (i) \$20,000 by JTL, for the identified breaches of employment standards; and
- (ii) \$13,000 by Mr Singh, as a person involved in those breaches.

Costs

[40] Costs are reserved. The parties are 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 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