

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 59
3069012

BETWEEN A LABOUR INSPECTOR
Applicant

AND CHRISTOPHER CHARLES
ALEXANDER GRAY
First Respondent

AND JENNIFER GRAY
Second Respondent

Member of Authority: Helen Doyle

Representatives: Alistair Miller, counsel for the Applicant
Penny Shaw, counsel for the Respondent

Investigation: On the papers

Submissions Received: 2 November and 14 December 2020 from the Applicant
30 November 2020 from the Respondent

Date of Determination: 19 February 2021

DETERMINATION NO.2 OF THE AUTHORITY

- A Christopher Gray is ordered to pay, subject to an arrangement as set out in B, the Crown a penalty of \$26,000 within 35 days of the date of this determination.**

- B Counsel are to attempt to come to an arrangement about payment of the penalty by instalment. Leave is reserved to return to the Authority if this is not possible.**

- C The Authority accepts the accuracy of the interest calculations provided by the Labour Inspector.**

- D Costs are reserved and failing agreement a timetable for an exchange of submissions has been set.**

Employment Relationship Problem

[1] Christopher Gray is a sole trader who operates a business that trades as Motukarara Asparagus.

[2] In its determination dated 12 October 2020, the Authority found that Mr Gray as an employer had breached s 6 of the Minimum Wage Act 1983 (MWA) s 5 of the Wages Protection Act 1983 (WPA) and ss. 49, 50, 56, 60 and 81 of the Holidays Act 2003 (HA).¹ Awards were made for reimbursement of minimum wage arrears, public holiday entitlements, unlawful deductions, holiday pay on arrears and there was an order for interest for the affected employees. The total arrears awarded to employees inclusive of interest as at 30 November 2020 is \$54,160.63.

[3] The second respondent, Mrs Gray, was not found to be a person involved in the breaches.

[4] The Labour Inspector now seeks penalties in respect of the breaches in the sum of \$100,000.

Should penalties be awarded?

[5] The breaches were of provisions in the HA, MWA and WPA. All three Acts contain minimum working conditions for employees and adherence to their provisions is important. For that reason, and for other reasons set out more fully in the body of the determination, I find that there should be consideration of the imposition of penalties.

The approach to the imposition of penalties

[6] In determining the issue of penalties, the Authority is required to consider the factors in s 133A of the Employment Relations Act 2000 (“the Act”) and additional factors set out by the Employment Court in *Labour Inspector v Preet*.² Those additional factors have continued to be considered in cases in the Employment Court and Authority.

¹ *A Labour Inspector v Christopher Charles Alexander Gray and Jennifer Frances Gray* [2020] NZERA 411.

² *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC 143.

The object of the Act

[7] The object of the Act is found in s 3. It is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and relationship. Failure to adhere to minimum standards does not advance the objects of the Act of good faith. In particular it does not acknowledge and address the inherent inequality of power in employment relationships, particularly where there are vulnerable employees.

[8] In her submissions, Ms Shaw accepted that there were a number of breaches but submits there was also compliance with and behaviour aligned to the purpose of the relevant Acts. In that respect she referred to provision of employment agreements protecting employees' to some extent in terms of any power imbalance. There is no dispute that employment agreements were provided although wages paid dropped below minimum wage for some of the hours worked. Ms Shaw submits that the breaches of minimum wages were related to part of the employees' work picking and not the work in the packing shed. I accept that.

[9] She also submits that wage and time records were kept that enabled the Labour Inspector to audit and understand the breaches including the minimum wage breaches. She correctly submits that the employees were not therefore required to provide evidence. I agree that this is not a case where the absence of records prevented the Labour Inspector being able to assess arrears owing and the quantum. There are some cases where there may be fewer breaches but records are either non-existent or so inadequate that a conclusion as to whether entitlements were provided or arrears are owing is unable to be reached.

[10] Ms Shaw submits that this was not a case with excessive hours and no balance between work and other aspects of an employee's life. I accept that there was nothing before the Authority to support excessive hours of work were required or worked.

The nature and extent of the breaches (statutory consideration 2)

[11] There are four types of breaches that have been committed by Mr Gray:

- (a) A failure to pay minimum wage for 12 employees;
- (b) A failure to obtain consent for deductions from wages for 11 employees;

- (c) A failure to provide for public holidays for 12 employees; and
- (d) A failure to keep compliant holiday and leave records for 12 employees.

[12] There are 13 employees affected and a total of 47 separate breaches relating to the first respondent.

[13] The maximum penalty for each breach is \$10,000 per breach as Mr Gray is an individual.

[14] Mr Miller on behalf of the Labour Inspector submits that each of the different breaches set out above is a breach of a different Act and relate to different minimum standards with different consequences. He submits the starting point is that penalties should be approached on a per-employee basis.

[15] A per-employee approach was taken by the Employment Court in *Preet*.³ The Employment Court observed in *Preet* that it may be appropriate to consider whether multiple, but materially identical breaches arising from a particular course of conduct, should be treated as a global single breach, noting care should be taken to ensure a global approach does not result in an artificially low penalty.⁴

[16] This was an approach adopted by the Employment Court in a recent judgment *Labour Inspector v Matangi Berry Farm Limited*.⁵ In that case, Judge Corkill globalised failures across 207 employees and 118 employees down to a single breach for each type of default. That reduced 532 breaches based on a per-employee affected count down to just 3. This was the approach adopted by Member van Keulen in a recent decision in *A Labour Inspector v Nekita Enterprises Limited*.⁶

[17] I intend to adopt that approach in this particular case. I do not consider it would result in an artificially low penalty. The breaches arising from a particular course of conduct are materially identical. If such an approach is not adopted then the penalties would have to be significantly discounted and that exercise can be artificial in arriving at a realistic, consistent

³ Above n2.

⁴ Above at n2 at (14).

⁵ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

⁶ *A Labour Inspector v Nekita Enterprises Limited and Harjit Singh and Shereen vandana Singh* [2020] NZERA 509.

and meaningful penalty. For example in this case, as a sole trader Mr Gray would potentially be liable for maximum penalties of \$470,000. The approach does not mean in this case a global approach is taken to breaches of different statutory provisions. That was cautioned against in *Preet*.⁷

[18] Therefore, for the purpose of assessing the number of breaches for which penalties should be considered in this matter, I find as below:

- (a) the failure to pay minimum wage under the MWA to 12 employees. Assessed as a separate single breach being \$10,000 in total;
- (b) the failure to obtain consent for deductions to wages under the WPA for 11 employees. Assessed as a single breach being \$10,000 in total; and
- (c) the failure to provide for public holidays under the HA for 12 employees. Assessed as a single breach being \$10,000 in total; and
- (d) the failure to keep compliant holiday and leave records under the HA for 12 employees. Assessed as a single breach being \$10,000 in total.

The severity of the breaches; whether the breaches are intentional, inadvertent, or negligent

[19] Ms Shaw on behalf of Mr Gray submits that this was not a situation of disregard for the law, but rather one of a sole trader with limited resources who is not technologically savvy. She submits his age made it difficult for him to obtain the right information. Properly, Ms Shaw recognises that ignorance of obligations is not an excuse but submits it is a mitigating factor. She submits that records were kept to identify non-payment for public holidays and that there were no obvious financial benefits to Mr Gray.

[20] The breaches resulted from Mr Gray's business set-up and caused systemic underpayments to the affected employees. Employees were paid a piece rate based on the amount of asparagus that they picked and there wasn't a system that ensured payments reached the relevant minimum wage rate. The holiday entitlements were not recognised and there were no holiday and leave records although I accept that the records kept for wage and time at least enabled the Labour Inspector to identify the non-payment of public holidays.

⁷ Above n2.

Public holiday entitlements were not recorded and one employee's entitlement to sick leave was not recorded.

[21] Signed consent forms for three employees to deductions were subsequently located after the Authority investigation meeting and provided to the Authority. The Authority found there were some legitimate deductions consented to and gave credit for those amounts. I cannot be completely satisfied that there were no other signed consent forms for deductions for other employees as well. A failure to retain and provide these resulted in an inability for Mr Gray to demonstrate written consent for most deductions made from employees' wages. An order for reimbursement for the majority of deductions was made which may well result in reimbursement for some employees for legitimate deductions previously consented to.

[22] The employees were workers in the main involved in the Recognised Seasonal Employer scheme (RSE) from Fiji. English was a second language and they were more vulnerable because they would be less likely to know what their entitlements were and if those entitlements were not being provided. There was assistance offered to Mr Gray on a number of occasions by the Labour Inspectorate and Immigration New Zealand to ensure compliance with necessary standards.

[23] Whilst I accept that Mr Gray was focused on other aspects of the business it was necessary that he understand and comply with the employment standards when employing vulnerable employees under the RSE scheme.

[24] Mr Gray may not have set out with the intention to deliberately operate in a way that did not comply with the minimum standards. He did however make a deliberate decision to pay employees for picking in a way that failed to ensure a system for payment of minimum wage for all hours worked. He did not pay public holidays entitlements and failed to keep holiday and leave records. The records for wage and time did enable the Labour Inspector to establish the failings for payment of public holidays and other entitlements. In operating his business, Mr Gray retained money that should have been paid to the employees. The employees were in the main vulnerable employees. They needed to place greater reliance in him than may otherwise have been the case to treat them fairly in accordance with the minimum standards.

[25] Mr Gray failed to satisfy the Labour Inspector that there was written consents for most of the deductions made from employees' wages.

[26] There was help available for Mr Gray available from the Labour Inspectorate and Immigration to check compliance with minimum statutory entitlements. Save as for the failure to satisfy the Labour Inspector that there were written consents for deductions for reasons already set out I do not conclude the breaches were not intentional. They were serious breaches and there were adverse consequences as a result.

Severity of the breaches

[27] Ms Shaw submits that the minimum wage breaches assessed at 80% of the maximum penalty is too high. I accept that the breach only applied to a portion of the wages for hours worked, and that the sums for breaches of minimum wage are relatively low. Breaches were not as serious as in some other cases. Weighed with that payment of minimum wage is a fundamental requirement and this was a systemic as opposed to a one-off failure. I accept that the failure to pay a minimum wage should be assessed at 80% of the maximum penalty.

[28] Mr Miller submits that the starting point for failure to pay holiday pay entitlements is 70% of the maximum, again with reference to *Preet*.⁸ I agree that there were fewer public holidays involved than in *Preet* but that simply reflected the seasonal and therefore limited period of employment. An assessment at 70% reflects the seriousness of the breach.

[29] Failure to keep compliant records should be assessed at 50% of the maximum as it is an important requirement.

[30] In the absence of production of the signed consent forms for all other than three employees, the Authority cannot be satisfied that there has been agreement to the majority of deductions. Deductions from wages without establishing employee consent are significant and serious breaches. I cannot however disregard in this case the likelihood because three deduction forms were able to be located there were other consent forms not retained. The failure to have a system to retain signed written consent forms supports a lack of sophistication on the part of Mr Gray in the operation of his business rather than something more calculated and serious. Assessment for the breach in all the circumstances should be at 60% of the maximum penalty.

The nature and extent of any loss or damage

⁸ Above n 2.

[31] Ms Shaw submits that the amount of loss/damage is not significant on a per employee basis. She submits that a key portion of the deduction was the cost of the airfare to bring the employees' to New Zealand. Further that the business made a loss that year.

[32] When the total arrears for each employee are considered, the amounts are not insignificant considering the limited period of employment and the fact that employees were working at the minimum wage rate. They were deprived of money that they were entitled to.

Steps to mitigate

[33] No steps were taken to mitigate the effect of the breaches and there is no further deduction.

Circumstances of the breaches and any vulnerability

[34] Ms Shaw submits that Mr Gray did not act irresponsibly towards the relevant regulators but he did not fully understand the process. The late production of the deduction forms for three employees, she submits, is not evidence of him acting irresponsibly. I do accept in relation to that matter that this was something that disadvantaged him rather than advantaged him. That information however should have been provided earlier. Mr Gray was not particularly co-operative to the Labour Inspectorate during the investigation in circumstances where he was employing vulnerable employees.

[35] The affected employees were vulnerable. Ten of the 13 employees came to New Zealand under the RSE scheme. They stayed briefly in New Zealand and were vulnerable to exploitation. Some support existed for the employees from a religious organisation in Christchurch that provided meals on occasion. It was limited support and there was more reliance in those circumstances on the respondent. The breaches were more egregious in the circumstances.

Previous Conduct

[36] It is accepted that Mr Gray has not appeared before the Authority.

Deterrence

[37] Ms Shaw submits that there has already been an impact on the first respondent because he was named in the earlier determination and has lost business as a result. He is not

able to continue to sell at the Lyttleton Markets. I accept that there has already been some impact on Mr Gray with the publicity about the breaches. I weigh with that the importance of adherence to minimum standards without the need for the Labour Inspector to become involved and the need to deter future breaches with a non-compliant business model.

Culpability

[38] Mr Gray ran the business and had overall responsibility for the employees and their working conditions.

Ability to pay

[39] Ms Shaw submits Mr Gray has limited income and has been financially impacted recently by a poor season. Given his age, he is unable to access capital through re-mortgaging together with the low income. She submits a significant penalty could force the first respondent to sell the farm and/or other assets needed to continue his business. In any event there is also an order sought for payment by instalment of \$50 per month.

[40] The Inspectorate is neutral about payment by instalment but in reply submissions Mr Miller wanted payment of arrears in full as a condition and noted at \$50 per week that was only a total of \$600 per year. Mr Miller submits that any issues about ability to pay can be dealt with by instalment.

[41] I do not make a further deduction under this head. Financial issues in this case can be dealt with by agreement to payment over a period of time.

Consistency with other cases and proportionality of outcome

[42] Consistency is important. Mr Miller referred the Authority to other cases which I have considered. Some were more serious and on that basis, distinguishable.

[43] The breaches in this case were serious and the level of co-operation with the Inspectorate was rather poor. The employees were vulnerable migrant workers.

[44] With the assessments of the aggravating features of the breaches as a percentage of the maximum penalties the provisional penalty the Authority has arrived at is \$26,000. There are no further reductions for ameliorating or financial reasons.

[45] Penalties are designed to punish and deter and should be set at a level to encourage compliance with minimum standards. The Authority has considered whether an award of \$26,000 is proportional to the seriousness of the breaches and harm occasioned. Globalisation at the first step has ensured the penalty ultimately arrived at is not out of proportion to the gravity of the breaches and does not therefore require reduction.

[46] I am satisfied that the award of \$26,000 is proportional.

[47] I order Christopher Gray to pay a penalty of \$26,000 to the Labour Inspector for payment to the Crown within 35 days of the date of this determination.

Payment by instalment

[48] I am not minded to make an order at this stage for payment by instalment but I direct that counsel attempt to come to an arrangement within 35 days. Leave is reserved for either party to return to the Authority if required for an amount to be fixed for payment by instalment.

Interest

[49] The Labour Inspector has calculated the interest payments on the basis of the orders made in the Authority. Calculations including accrued interest have been provided with the submissions.

[50] Ms Shaw confirmed in her submissions that the accuracy of the interest calculations is not disputed. The Authority accepts the accuracy of the interest calculations.

Costs

[51] I reserve the issue of costs and it may be that agreement can be reached about these. Failing agreement the Labour Inspector has until 5 March 2021 to lodge and serve submissions and Ms Shaw has until 19 March to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority

APPENDIX ONE – PENALTY ANALYSIS FOR THE FIRST RESPONDENT

Breaches and maximum penalties

Failure to pay minimum wage for 12 employees.	\$10,000
Failure to obtain consent for deductions from wages for 11 employees.	\$10,000
Failure to provide for public holiday entitlements for 12 employees.	\$10,000
Failure to keep compliant holiday and leave records for 12 employees.	\$10,000
Subtotal	\$40,000
Aggravating factors assessed against maximum as a percentage	
Failure to pay minimum wage 80%	\$8000
Failure to obtain consent for deductions 60%	\$6000
Failure to provide for public holidays 70%	\$7000
Failure to keep holiday and leave records 50%	\$5000
Subtotal	\$26,000
No reduction for ameliorating factors, financial factors or for proportionality of outcome.	\$0
Total	\$26,000