

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 87
3075134

BETWEEN A LABOUR INSPECTOR
Applicant

AND GREYWACKE FARMS LIMITED
First Respondent

AND DIETMAR KOPETSCHNY
Second Respondent

3075143

BETWEEN A LABOUR INSPECTOR
Applicant

AND DIETMAR KOPETSCHNY
Respondent

Member of Authority: David G Beck

Representatives: Claire English, counsel for the Applicant
Amy Keir, counsel for the Respondents

Investigation Meeting: On the papers

Submissions Received: 15 October 2020 from the applicant
6 November 2020 from the respondents

Further information: 2 December 2020 from the applicant

Date of Determination: 3 March 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector lodged two proceedings in the Authority against Greywacke Farms Limited and Dietmar Kopetschny. It is asserted that the Respondents breached obligations contained in the Holidays Act 2003 (“HA”), Employment Relations Act 2000 (“The Act”), the Minimum Wage Act 1983 (“MWA”) and the Wages Protection Act 1983 (“WPA”).

[2] Mr Kopetschny was joined to the proceedings in his capacity as a person involved in breaches as defined in s 142W of the Act and separate proceedings, in his capacity as a sole trader for the same breaches with the exception that as a sole trader, Mr Kopetschny did not breach the MWA.

[3] Following the parties attending mediation the Respondents in both proceedings came to a mutual agreement that: narrowed issues in dispute, admits identified breaches and allows the Authority to only deal with the question of what appropriate penalties should apply and the level of such.

The admitted breaches

[4] **Greywacke Farms** accepted that they breached:

- (i) Section 4 B and 130 of the Act by failing to keep compliant wage and time records for nine identified employees.
- (ii) Section 81 of the HA by failing to keep compliant holiday and leave records for seventeen identified employees.
- (iii) Section 23 of the HA by failing to correctly calculate and pay final holiday pays for eight identified employees.
- (iv) Section 5 of the WPA being a failure to obtain consent for the deduction from wages of one identified employee.
- (v) Section 6 of the MWA by failing to pay minimum hourly wage rates to one identified employee.

[5] **Dietmar Kopetschny** accepted that he was “a person involved in a breach” as defined in s 142W of the Act and in this capacity he accepts his involvement and liability for all of the above identified breaches.

[6] **Dietmar Kopetschny as a sole trader** accepted that he breached:

- (i) Section 130 of the Act by failing to keep compliant wage and time records for five identified employees.
- (ii) Section 81 of the HA by failing to keep compliant holiday and leave records for six identified employees.
- (iii) Section 5 of the WPA by failing to obtain consent for deductions from wages of three identified employees.

The Authority’s investigation

[7] With the agreement of the parties, the Authority heard this matter “on the papers”. Having regard to s 174E of the Employment Relations Act 2000 (the Act), I do not refer in this determination to all the submissions advanced by counsel, however, I have fully considered them.

Issues

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

What caused the breaches?

[9] Greywacke Farms, a limited liability company, operates two dairy farms at Winchester in South Canterbury employing eighteen employees. Mr Kopetschny is the sole director and shareholder of Greywacke Farms and he recruited and instructed employees on a day to day basis and was responsible for administering, calculating and paying wages.

[10] All employees identified by the Labour Inspector work or have worked on both farms. Mr Kopetschny also operates as a sole trader (being a share-milker contracted to another company) and in this capacity he was also an employer of six employees involved in these proceedings. Greywacke Farms employed migrant workers on a variety of visa types. The two farms have around 450 cows and supply milk to Fonterra.

[11] In early 2019 the Labour Inspector received complaints from previous and current employees identifying that: they had not been paid final holiday pay, were aware of existing employees being paid under the minimum wage, amounts had been deducted from wages without consent and that appropriate penal rates were not being paid for employees' working on a public holiday.

[12] The Labour Inspector apprised Mr Kopetschny on 11 March 2019 of the concerns raised and requested: a list of employees, employment agreements, wage, time, holiday and leave records.

[13] Mr Kopetschny responded on 18 and 26 March by providing hand written records that raised concerns about completeness and accuracy and an issue of unauthorised deductions from an employee's final pay.

[14] The Labour Inspector visited Mr Kopetschny on 3 April 2019, to discuss concerns raised and was assured that missing records would be provided. However, a follow up email from Mr Kopetschny shortly after the visit, said the additional records were missing.

[15] Exchanges over various potential breach issues and lack of disclosed employee records continued until the Labour Inspector produced a 1 August 2019 Investigation Report. The report identified thirteen potential breaches and signalled that enforcement action in the Authority was going to proceed. The report concluded:

Dietmar KOPETSCHNY's unusual method of calculating holiday pay has resulted in majority of the breaches of employment standards. There are also serious issues regarding non-compliant record keeping which potentially masks the existence of several employees as well as breaches of minimum wage legislation. Dietmar KOPETSCHNY appears to have hired at least one migrant worker and allowed them to breach their visa conditions to work for him for cash payments, which also contributes to potential minimum wage breaches. Finally, Dietmar KOPETSCHNY appears to regularly deduct wages from employees without their written consent.

[16] Mr Kopetschny's response to the report was to highlight his commitment to the community and helping those in need and that he has been engaging Wwoofers (willing

workers on organic farms) seeking wider farm life experiences and that he had had sought to try and manage people in a “simple yet fair way”. Mr Kopetschny also cited the unique seasonal nature of farm work suggesting that it made compliance with employment legislation problematic.

[17] In summary, Mr Kopetschny believed that he had practiced “substantial compliance with the laws in question” and he thought he should not be submitted to any enforcement action. However, when the matter proceeded to be filed in the Authority Mr Kopetschny acknowledged that he had failed to invest in administrative systems and that he relied on manually recorded payroll and leave data.

[18] The Labour Inspector highlighted difficulties in calculating the costs of non-compliance commenting that Mr Kopetschny appeared to “operate a hybrid system whereby employees are WOOFers for some of the time they work and when designated such they were not paid their final holiday pays”.

[19] Without dwelling on how the breaches occurred or commenting upon the status of Wwoofers, I note that by the time of my investigation, Mr Kopetschny was prepared to concede the identified breaches and I shall now deal with what appropriate penalties should apply.

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

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

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

¹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

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

final penalty is just in all the circumstances.³

[21] 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.⁴

The object of the Act

[22] 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

[23] The conceded breaches involve twenty four employees (eighteen employed by Greywacke Farms and six by Mr Kopetschny operating as a sole trader). The Labour Inspector did not provide a calculation or estimate of the cost of all of the breaches borne by the employees apart from a few individual examples. In regard to evident minimum wage breaches, the Labour Inspector noted that due to record keeping deficiencies: “it is not possible to accurately calculate how often minimum wage breaches occurred and what the arrears would be”.

[24] Viewing the nature and extent of the breaches, I estimate that the sums involved are likely to be reasonably significant and I must have regard of the value to the employees concerned of not getting additional paid days off for working on public holidays and that as low paid employees the value of wages forgone or part thereof, can cause significant material hardship. I also consider that in industries that are at times labour intensive the reduction of the cost of labour overheads by illegitimate means gives the perpetrator an unfair competitive advantage over businesses that comply with legal obligations.

³ At [151].

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

Were the breaches intentional, inadvertent or negligent?

[25] Given the conceded breaches, I can only assess and draw inferences from the untested affidavit provided by Mr Kopetschny, disclosed correspondence and submissions, including the Labour Inspector's report and interview notes.

[26] I conclude that Mr Kopetschny devised his own alternative system around rostering and days off that had no basis in legislation and that he thus confused and complicated matters in a manner that was described as "complex and opaque". He claims it was "advantageous to employees" and that this firm belief he held demonstrated his lack of intent to circumvent employee rights.

[27] Ms Keir has also suggested that the farm operation was a small-scale family business with debt and cash flow issues (although no documentation was provided to support this assertion) and that a deliberate decision to reduce overheads had been made that involved doing wages 'in-house' rather than using accounting support. The result of such as Ms Keir conceded, was a "rudimentary payroll system was entirely manual, with hours of work and pay entitlements recorded in calendar and exercise book, and manually calculated for every pay period". Further, there was a claim that recording of time had been other managers' responsibility that had led to records being lost or destroyed.

[28] The responses and the tone of such to the Labour Inspector's investigation and Authority proceedings however, display a degree of belligerence and misguided disregard of legislative provision and employee rights. I find that the ongoing and repeated breaches were impliedly intentional and could have been easily resolved by getting easily accessible advice on compliance (two readily available sources are MBIE's public website or Federated Farmers) on running or purchasing a more efficient and compliant 'in-house' payroll system.

[29] I also take into account a submission made by Ms Keir that this is not a case of repeated breaches previously identified for rectification by a Labour Inspector.

What steps have been taken in mitigation?

[30] Whilst it is pleasing to see that Mr Kopetschny says he has stopped engaging Wwoofers and is now using an IT based payroll system he did not provide any documentation to demonstrate that he had paid wage arrears or made an effort to contact former employees to rectify such.

The circumstances of the breach and any vulnerability factors

[31] Ms Keir rightly observed that employees from overseas on temporary visas have a degree of vulnerability especially when accommodation is part of an employment package. The Labour Inspector pointed to the same factors indicating “half of the affected employees are migrant workers, tend to be on short-term visas, and do not have English as their first language”.

[32] The respondents’ counsel suggested generally that I balance vulnerability factors up by considering Mr Kopetschny’s “vulnerability” due to the difficulties he faced in recruiting and retaining employees. With all due respect to Mr Kopetschny’s situation, I do not find this is a factor to consider in weighing up the vulnerability and power imbalance in an employment context. I find that the vulnerability of the employees is at issue in my penalty consideration.

Previous conduct

[33] I accept that these breaches, although extensive, were not repeated and Greywacke Farms and Mr Kopetschny have not previously been before the Authority.

***Preet* step one – Greywacke Farms: the nature and number of breaches**

[34] 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 transgression may reflect two or more instances of breach.⁵ 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 4.⁶

⁵ At [100].

⁶ At [141].

[35] The effect of adopting the above approach, is that where multiple breaches occur in respect of multiple employees, globalising can allow the application of one penalty for such. Here however unlike *Preet*, the breaches do not relate to one statute but I shall consider the possibility of ‘grouping’ breaches that 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 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.⁷

[36] Judge Corkill pragmatically refined the latter approach in *A Labour Inspector v Matangi Berry Farm Limited*⁸ 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”,⁹ I see no reason why the approach confirmed in *Matangi* cannot be utilised for cases involving fewer employees.

Globalising breaches

[37] Taking the approach in *Matangi* and *Parihar* focussing broadly on the nature of the breaches rather than the frequency or each specific statutory transgression, allows me to first group breaches of s 4B and 130 of the Act and s 81 of the HA as a failure to keep adequate records of employee entitlements involving seventeen employees (nine of which were both failure to keep compliant wage, time and holiday and leave records). Adopting Judge Corkill’s pragmatic approach this allows me to reduce the breaches down to two representative breaches.

[38] However, the other breaches are not related and need to be treated separately: so, s 23 HA failing to correctly calculate and pay final holiday pay (for eight employees) I will treat as one additional breach. Likewise, with the breaches of s 81 HA involving failing to keep accurate holiday and leave records for three employees, I will treat as one breach. This, at this stage amounts to four breaches.

⁷ *A Labour Inspector v Parihar* [2019] NZEmpC 43.

⁸ *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43

⁹ At [39].

[39] This leaves two unrelated breaches of: s 6 MWA being a failure to pay minimum wages for each hour actually worked involving two employees and a breach of s 5 WPA being a failure to obtain consent for deductions from wages involving one employee.

[40] The global approach I have applied above, now reduces the various breaches to six and provides a sensible starting point to define potential maximum penalties before I apply further analysis of other factors using guidance from *Preet*.

[41] So at this stage, the potential maximum penalties I can impose on Greywacke Farms Limited using a globalised approach, are \$20,000 per breach¹⁰ which for the six accumulated breaches identified above amounts to \$120,000.

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

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

[43] Considering the above and the aggravating feature that the various breaches involved vulnerable employees in a weak bargaining situation with voluntary and paid employment being utilised interchangeably, that the breaches were easily resolvable had the company put in place a compliant payroll system and despite the relatively small amount of money the employees were likely deprived of, I believe deterrence 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 of \$120,000 to be a 'starting point' (\$90,000).

[44] In mitigation, the company has apparently rectified the breaches and committed to putting in place an IT based payroll system to ensure ongoing compliance. However, the extent of the respondents' remorse is not evident in their submissions but I do give them credit for coming to an agreement on conceded breaches.

[45] In the circumstances, I consider a further 10% discounting of the maximum penalty is warranted which reduces it to \$81,000 at this stage.

¹⁰ Section 135(2)(b) Employment Relations Act 2000, Section 75(1)(b) Holidays Act 2003, Section 10 Minimum Wage Act 1983 and Section 13 Wages Protections Act 1983.

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

[46] I was provided with no information in submissions to accurately assess the respondent's ability to pay and the onus to provide supporting information is on the respondents. Ms Keir merely suggested that the respondents "are in a position to pay a fine, although instalments may be required".

[47] In these circumstances, in the absence of accounts information or an update on current cash-flow and a comprehensive valuation of assets for example, I am unable to apportion a further discount on the basis of inability to pay. No compelling hardship reasons have been identified to enable me to consider exercising my discretion to specify any penalty award be paid by instalments.

Preet step 4 - Proportionality

[48] 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 including the number of employees involved.

[49] Four Authority cases I have contrasted involve breaches of a similar nature involving small businesses ¹¹ and I also sought guidance from a recent case involving a bottle store that has a useful analysis of past authorities and amounts awarded. ¹² The cases show penalties imposed on the companies involved, range from \$12,000 to \$21,000 depending on various contextual factors.

[50] 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 Greywacke Farms Limited should pay a penalty of \$20,000.

What penalty should I impose on Dietmar Kopetschny for involvement in the breaches and should he also be penalised in his capacity as a sole trader?

[51] Mr Kopetschny a sole director of Greywacke Farms Limited, has conceded that he was involved in the breaches identified, including recruiting, devising and operating the

¹¹ *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.

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

payroll system, applying such and personally directing operational matters on the farms concerned. I find these admissions sufficient to bring Mr Kopetschny within the scope of s 142W(1)(c) of the Act.¹³

[52] I also have proceedings before me alleging that Mr Kopetschny is individually responsible as a sole trader in his share-milking operation in relation to eight employees for identical breaches (excepting no failure to pay final holiday pay and no minimum wage issues arose in this context). So, if I adopt a global approach to the record keeping breaches under the Act and the HA and a failure to obtain consent for deductions from pay under the WPA this amounts to three breaches.

[53] I was not specifically addressed in submissions on how the breaches of Mr Kopetschny acting in his capacity as a sole trader should be approached and I note that for the purposes of s 135 of the Act, the penalties I can consider in this context are in the nature of individual responsibility. I therefore for convenience sake, will consider Mr Kopetschny's potential liability as a sole trader alongside his liability as a person involved in breaches when considering maximum penalties.

[54] The starting point for individual penalties is found in s 75(1)(a) HA and s 135 of the Act 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**

[55] Utilising the same globalised approach to multiple breaches as I have used for the first respondent company above, it reduces the breaches to six for Mr Kopetschny's involvement in the breaches and three for him operating in his capacity as a sole trader with an accumulated maximum penalty of \$90,000 as a starting point.

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

[56] As with my findings in regard to the company I have considered the same level of severity should be imputed to Mr Kopetschny and I adopt a broadly similar approach to penalty discounting (here 50% of the maximum) that leaves it at \$45,000.

¹³ 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

[57] Given the lack of information alluded to, I am not convinced of a reason to allow any reduction for ability to pay.

Preet step 4 - proportionality

[58] In applying proportionality and consistency and recognising it would be out of proportion to treat Mr Kopetschny equally culpable in a further detailed breach analysis in his sole trader capacity I round down Mr Kopetschny's final penalty in both capacities to \$10,000.

Apportionment

[59] The Labour Inspector asked that my discretion to apportion part of the penalties awarded should be exercised in favour of three named complainants on the basis that no arrears were able to be calculated due to record keeping deficiencies. I have the discretion to do this under s 136(2) of the Act and am minded to do so as follows.

Conclusion on penalties

[60] **Within 28 days of the date of this determination being issued Greywacke Farms Limited must pay to the Labour Inspector for transfer to a Crown bank account: a penalty in the sum of \$20,000.**

[61] **On the same terms as above: Dietmar Kopetschny must also pay a penalty in the sum of \$10,000, payable as follows:**

- **To the Crown in the amount of \$2,500.**
- **To Rebecca Legat in the amount of \$2,500.**
- **To Ryan Dickey in the amount of \$2,500**
- **To Dimple Patel in the amount of \$2,500.**

Costs

[62] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 14 days from the date of this determination in which to file and serve a memorandum on costs. The Respondents' have a further 14 days in which to file and serve a memorandum in reply.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

David Beck
Member of the Employment Relations Authority