

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 99
3103793

BETWEEN A LABOUR INSPECTOR
Applicant

AND SUPER VENTURES
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Joseph Perrott, counsel for Applicant
Tim Oldfield, counsel for Respondent

Investigation Meeting: On the Papers

Submissions and other 4 December 2020 and 15 and 25 January 2021 from
information Received: Applicant
18 December 2020 from Respondent

Determination: 11 March 2021

DETERMINATION OF THE AUTHORITY

- A. Super Ventures Limited is liable for penalties and is ordered to pay the sum of \$10,000 to the Authority within 28 days of the date of this determination.**
- B. Costs are reserved.**

Employment relationship problem

[1] Super Ventures Limited (SVL) owned and operated a Super Liquor outlet until 9 May 2019 when it changed the outlet's name to Brews Mt Albert. On or about 7

May 2019 the Labour Inspectorate became aware through a posting on social media of possible migrant exploitation by SVL. Labour Inspector commenced an investigation by conducting a site visit on 9 May 2019 to check SVL's compliance with minimum employment standards and entitlements. During his visit the Labour Inspector issued a notice to produce records including the employment agreements, wages and time records, and holiday and leave records for all of SVL's employees. The records were provided to the Labour Inspector with the exception of the employment agreement for Mr Goyal, an ex-employee of SVL.

[2] On 10 May 2019 the contact centre for the Ministry of Business, Innovation and Employment (MBIE) received a complaint from Mr Goyal. Mr Goyal alleged he had:

- a) worked long hours without being paid the minimum wage;
- b) not been paid the correct payments for working on public holidays;
- c) been asked to repay public holiday pay and annual leave to SVL due to his work visa being sponsored by SVL.

[3] In May 2019 a further complaint was received by the Labour Inspectorate from a second ex-employee. This employee withdrew his complaint on 3 September 2019 after reaching a settlement with SVL and no further action was taken by the Labour Inspectorate in respect of his claims.

[4] On 6 June 2019 Mr Goyal lodged his own application with the Authority against SVL and Mr Bansal, a director and shareholder for SVL, seeking arrears of wages and penalties for alleged breaches of the Minimum Wage Act 1983 (MWA), Holidays Act 2003 (HA), Employment Relations Act 2000 (ERA), Wages Protection Act 1983 (WPA) and of the employment agreement.

[5] The parties attended mediation and the Authority was advised on 28 January 2020 that Mr Goyal had resolved his employment relationship problems with SVL and Mr Bansal and withdrew his application with the Authority. At the same time Mr Goyal withdrew his complaint to the Labour Inspector.

[6] The Labour Inspector conducted his investigation from 9 May 2019 until January 2020. Despite Mr Goyal withdrawing his complaint from the Labour Inspector, the Labour Inspector published a formal report on 20 March 2020.

[7] In his report the Labour Inspector recorded his findings that SVL had breached the following minimum standards in respect of Mr Goyal's employment:

- a) Section 6 of the MWA – when SVL failed to pay the minimum wage for all hours worked;
- b) Sections 27, 50, 56 and 81 of the HA – when SVL failed to:
 - i. correctly calculate and pay annual holiday pay;
 - ii. pay holiday pay on termination of employment;
 - iii. pay time and a half for hours worked on a public holiday;
 - iv. provide an alternative holiday for public holidays worked;
 - v. maintain a compliant holiday and leave record; and
- c) Section 130 of the ERA – SVL failed to maintain compliant wages and time records.

[8] As noted earlier in this determination SVL has resolved Mr Goyal's arrears of wages claim through a settlement reached between Mr Goyal, SVL and Mr Bansal outside of the Labour Inspector's involvement.

[9] The Labour Inspector accepts the arrears of wages claims have been resolved but wishes to have an application for penalties dealt with by the Authority.

[10] In its statement in reply SVL raised a defence relying on s 135(5) of the ERA and sought to have the application dismissed on the grounds that the Labour Inspector's claim was an abuse of process.

[11] After receiving relevant documents and submissions from the Labour Inspector, SVL lodged and served its submissions. It did not address, in its submissions, the question raised in the statement in reply about whether the recovery of penalties had been commenced within the 12 month period required under s 135 of the Act. SVL was invited to lodge further submissions addressing this issue but declined the

opportunity and advised the Authority it no longer relied on s 135 of the ERA as a defence to the Labour Inspector's claim.

Issues

[12] In order to resolve the Labour Inspector's application I must determine the following questions:

- a) Is the action seeking recovery of penalties an abuse of process?
- b) If the answer to a) is no, what, if any penalties, should be awarded?

[13] The parties have consented to this matter being dealt with on the papers before the Authority which includes the statements of problem and in reply, associated documents, an affidavit from Mr Bansal and submissions from each of the parties.

[14] As permitted by s 174E of the ERA this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the information received I have carefully considered all relevant material lodged with the Authority.

Abuse of process

[15] SVL says it would be an abuse of process to proceed to investigate and determine the claim for penalties in circumstances where Mr Goyal had made claims for penalties in his own application which was subsequently settled without the Authority investigating and determining the matter.

[16] SVL says the Labour Inspector cannot bring proceedings based on the same matters and the same penalty provisions if an employee has already brought a claim, particularly where that claim has settled.

[17] In the affidavit produced by Mr Bansal, he referred to and appended a copy of the settlement agreement between SVL and Mr Goyal to support SVL's assertion that the penalties claim was part of the settlement reached in mediation.

[18] Section 149 (3)(b) of the ERA prohibits the bringing of the terms of settlement before the Authority whether by appeal, application for review or otherwise except for enforcement purposes. I do not understand SVL to be seeking enforcement of its

settlement agreement with Mr Goyal. For this reason I have not viewed the settlement agreement and in reaching my conclusions in this matter have relied on other information before the Authority.

[19] In any event, I do not accept Mr Goyal and SVL could have settled any issue with respect to penalties. As noted by the Employment Court liability for and the quantum of any penalties sought, are matters not amenable to settlement. Any penalties imposed need to be set by the Authority exercising its discretion.¹

[20] SVL submitted that it would not make sense if both the employee and the Labour Inspector could seek penalties arising out of the same default because this would result in a double punishment for the same default. This would be akin to double jeopardy and with the exception of the penalty for breach of the HA the Labour Inspector's claims should be dismissed.

[21] There is no danger of double jeopardy in this case. Mr Goyal withdrew his claims for penalties before the Authority had the opportunity to investigate or determine whether penalties should be imposed.

[22] I have accepted the submissions of the Labour Inspector that there is nothing in the ERA preventing a Labour Inspector from seeking to recover penalties in respect of breaches concerning minimum entitlements covered by another claim. The function of a Labour Inspector is regulatory. This function is separate from the provisions of the ERA that allow employees to bring claims on their own behalf.

[23] The Labour Inspector is entitled to pursue his claims for penalties against SVL.

Penalties

[24] The framework for assessing and fixing penalties is contained in s 133A of the ERA and set out in *Borsboom v Preet PVT Limited*.² In *A Labour Inspector v Matangi Berry Farm Limited* Judge Corkill applied an approach to penalty setting which assessed the factors in s 133A of the ERA and then applied those and other considerations using the four step process in *Preet* to quantify the penalty.³ I have followed that approach in reaching my conclusions as to penalties in this case.

¹ *Labour Inspector v Matangi Berry Farm Limited & 2 Ors* [2019] NZEmpC 74 at [5].

² *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

³ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43; [2020] ERNZ 67; (2020) 17 NZELR 353.

Statutory Considerations

Objects of the Act

[25] The Act's declared objects include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.⁴ Those objects support the need to impose a penalty SVL for its actions in failing to meet minimum standards.

[26] Mr Goyal is a migrant worker whose circumstances put him in a category of employee whom the Employment Court has characterised as inherently vulnerable. SVL has accepted it did not pay minimum wages, holiday pay or maintained accurate employment records. These actions undermined employment standards.

Nature and extent of the breaches

[27] SVL has committed the following seven breaches:

- a) A breach of the MWA for failing to pay the statutory minimum wage;
- b) A breach of s 25 of the HA for failing to properly calculate annual holiday pay;
- c) A breach of s 27 of the HA for failing to pay annual holiday entitlements in Mr Goyal's final pay period;
- d) A breach of s 50 of the HA for failing to pay Mr Goyal time and a half for working on a public holiday;
- e) A breach of s 60 of the HA for failing to pay Mr Goyal his alternative holiday for working on a public holiday;
- f) A breach of s 130 of the ERA for failing to keep a wage and time record;
- g) A breach of s 81 of the HA for failing to keep an accurate holiday and leave record.

[28] The breaches apply only to one employee. The total maximum penalty available in respect of the seven breaches is \$140,000 being \$20,000 per breach.

⁴ Employment Relations Act 2000, s 3.

The nature and extent of loss or damage suffered by the worker

[29] The failure to pay minimum wages, holiday pay and payment for work on a public holiday deprived Mr Goyal of income he was entitled to receive at the time it became due. The arrears were paid only after claims were lodged with the Authority and the Labour Inspectorate had become involved.

[30] SVL had the benefit of the money and gained an unfair advantage over its competitors by not paying the entitlements when they became due.

[31] The Labour Inspector submits his ability to accurately determine the quantum of wages owing has been hindered by the lack of accurate record keeping by SVL. In his report the Labour Inspector calculates the arrears of wages as amounting to \$12,897 gross.

[32] The Labour Inspector checked the records of other employees and found there was not sufficient evidence to prove any similar breaches to other employees.

Whether the breaches were intentional, inadvertent or negligent

[33] In his report the Labour Inspector concluded that the wages and time records and holiday and leave records were not reliable. This is because CCTV footage showed Mr Goyal working on days when the records maintained by SVL showed Mr Goyal was not working. When the CCTV footage was provided to SVL for comment Mr Bansal accused Mr Goyal of fabricating timesheets to manufacture a claim against him and SVL and that Mr Goyal was using this to obtain residency.

[34] After further investigation the Labour Inspector concluded Mr Goyal had not fabricated the timesheets because the timesheets recorded less hours than could be viewed on the CCTV footage which showed the actual hours Mr Goyal worked.

[35] The Labour Inspector says the evidence suggests the breaches were intentional. He relies on the inaccurate timesheets to support his submission.

[36] It has been difficult to assess whether the breaches were inadvertent or intentional. Weighing the information available to me I find it is likely the breaches were intentional. If I am mistaken in that view and the breaches were as a result of ignorance of the rules about payment of minimum standards, this does not excuse SVL.⁵

⁵ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [29].

What steps have been taken in mitigation?

[37] SVL has now paid all arrears owing to Mr Goyal. Although SVL is entitled to credit for making the payment this only occurred after proceedings were commenced by Mr Goyal and following the involvement of the Labour Inspectorate and was no more than late performance of a duty.⁶

[38] Section 133A (e) of the ERA requires the Authority to have regard to whether SVL has paid an amount of compensation, reparation, or restitution to avoid or mitigate any actual adverse effects of the breaches.

[39] In submissions SVL says it has paid Mr Goyal a significant amount of money which includes his arrears of wages and compensation for the breaches. I have accepted SVL has mitigated the adverse effects of the breaches on Mr Goyal and SVL is entitled to credit for that.

[40] Another factor I have taken into account is that SVL co-operated with the Labour Inspector's investigation and has accepted responsibility for the breaches, albeit after proceedings were lodged.

Circumstances of the breach and vulnerability

[41] The factors under this heading have largely already been referred to. Mr Goyal was a migrant worker dependent on a visa tied to SVL for some of his employment period.

Previous conduct

[42] SVL has no previous history of similar conduct. As noted earlier, a review of other employee's records found no evidence of similar breaches.

Preet Step 1 – Nature and number of the breaches

[43] The first step in *Preet* requires me to consider whether any of the breaches should be globalised so that a single breach may reflect two or more of the breaches forming the Labour Inspector's claim. Globalisation is about reducing the number of breaches for penalty purposes so that the actionable breaches are representative of the overall conduct and the starting point for penalties is realistic.⁷

⁶ *Daleson*, above n 5, at [33] – [35].

⁷ *A Labour Inspector v Parihar* [2019] NZEmpC 145 at [39].

[44] I consider the following breaches can be globalised and treated as one breach (distinguishing between holiday pay and entitlements for public holidays):

- a) The breaches relating to being paid correctly for annual holidays;
- b) The breaches relating to being paid correctly for public holidays;
- c) The failure to keep and maintain wages and time and holiday and leave records.

[45] This has the effect of reducing the total breaches from seven to four when including the breach of the MWA. I believe this reflects the conduct and provides a realistic starting point for quantifying remedies which amount to \$80,000.

Preet Step 2 – Severity of the breaches

[46] This step involves a consideration of the severity of the breaches including deterrence, culpability and aggravating and ameliorating factors.

[47] The breaches in this case are of minimum standards. As such it is important that a penalty is set at a level where it deters employers from delaying payments of minimum entitlements to a time that suits the employer or when they are put under pressure by the Labour Inspector.

[48] In this case the degree of culpability is high. As already stated this case involves a vulnerable employee and intentional breaches of minimum standards.

[49] The aggravating features of this case, while serious, are not the most serious conceivable breaches so the starting point for deductions or credits should not be the maximum penalty.⁸

[50] I consider an appropriate starting point is 60 percent of the maximum penalties making a starting point of \$48,000.

[51] In regard to ameliorating factors, I have taken into account the significant sum paid to Mr Goyle in resolution of his arrears of wages. If the arrears were to the extent found by the Labour Inspector, being \$12,897, then the payment to Mr Goyle of a six

⁸ *Preet*, above n 2, at [167].

figure sum (according to SVL's submission and which was not challenged by the Labour Inspector), must be taken, at least in part, as compensating him for the effects of the breaches.

[52] I have reduced the resulting figure by a further 50 percent having regard to the ameliorating factors including the recognition that the company was a "first offender".⁹ This leads to a potential penalty of \$24,000.

Preet Step 3 – Means and ability of the respondent to pay

[53] Mr Bansal has deposed that SVL has not traded since 25 August 2019 and no longer operates the liquor store in which Mr Goyal was employed. SVL has provided financial statements in support this assertion.

[54] The financial statements suggest the company is still trading. In the notes to the provisional financial statements it records that the accounts have been prepared on the basis that the company is a going concern and has the continuing support of its shareholders.

[55] SVL has not sought to have penalties paid by instalment and so no order to that effect will be made.

[56] I am prepared to allow a small reduction for the ability to pay of a further 10 percent. This leaves my penalty assessment at \$21,600.

Preet Step 4 – Proportionality

[57] This step is about the ensuring the final amount of any penalty is proportional to the breaches and in line with other penalty amounts for multiple similar seriousness.

[58] I have considered other cases which are to a significant degree distinguishable on their facts.¹⁰ For example a number of cases include attempts to disguise non-compliance, breaches occurring over extended periods of time and breaches affecting very vulnerable employees. One factor which is significant in this case but not present

⁹ *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

¹⁰ *Labour Inspector v Gray & Anor* [2021] NZERA 59; *Labour Inspector v Janson Trading Limited & Anor* [2021] NZERA 5; *Labour Inspector v Basra & Khella Limited* [2020] NZERA 534; *Labour Inspector v Hanako Massage Therapy Limited* [2020] NZERA 526; *Labour Inspector v Nekita Enterprises Limited* [2020] NZERA 509; *Labour Inspector v H4M Corporation Limited & Anor* [2020] NZERA 406; *Labour Inspector v Dansan Investments Limited & 2 Ors* [2020] NZERA 379.

in others is the extent to which SVL has mitigated the effect on Mr Goyal as a result of its breaches.

[59] The end result of the comparisons and my reflection on proportionality is that I am satisfied a further reduction to \$10,000 is appropriate.

[60] Super Ventures Limited is ordered to pay penalties to the Authority totalling \$10,000 within 28 days of the date of this determination. On receipt the penalties will then be paid into a Crown bank account.

Costs

[61] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Labour Inspector shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. SVL shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[62] 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.

Vicki Campbell
Member of the Employment Relations Authority