

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 54
3098252

BETWEEN	A LABOUR INSPECTOR Applicant
AND	OLIVE & JENN CO LTD First Respondent
AND	JUWON KWON Second Respondent
AND	YOUNG RYE CHUN Third Respondent

Member of Authority:	Pam Nuttall
Representatives:	Martin Denyer, counsel for the Applicant Brenda McDonald, advocate for the Respondent
Investigation Meeting:	On the papers
Submissions received:	22 May 2020 and 9 November 2021 from Applicant 3 December 2020 and 23 November 2021 from Respondent
Determination:	25 February 2022

DETERMINATION OF THE AUTHORITY

- A. (i) The first respondent is to pay \$40,000.00 and the second and third respondents are each to pay \$20,000.00 to the MBIE Trust account. Payment is to be made within 28 days of the date of this determination.**
- (ii) The first respondent is to add one day of leave to the leave balance for Jeewon Hwang and pay the sum of \$160.00 to Hyerim**

Lee. Payment is to be made within 28 days of the date of this determination.

B. The respondents are to pay the Labour Inspector \$2,250.00 towards legal costs and to reimburse the Authority's filing fee in the sum of \$71.56.

Employment Relationship Problem

[1] The applicant, a Labour Inspector, seeks penalties and arrears relating to breaches of the Holidays Act 2003 (HA 2003) and the Employment Relations Act 2000 (the Act) by failing to properly pay annual leave, failing to properly pay time and a half, failing to provide alternative holidays, failing to properly pay for unworked public holidays, and failing to maintain holiday and leave and wage and time records containing all required information.

[2] The first respondent is a limited liability company that operates a nail salon in Botany Town Centre, Auckland and is the employer of the employees.

[3] The second respondent is the husband of the third respondent. He has a background in accounting and was in charge of the first respondent's record keeping and determining what employees were paid. The second respondent had no outside assistance or advice and was solely in charge of administering these matters.

[4] The third respondent is the sole director and 100% shareholder of the first respondent. She was in charge of the day to day operations of the first respondent. She had general oversight and control of the first respondent and while she delegated the record keeping and payroll functions to the second respondent, she had access to, and the ability to control and decide, what records were kept and what employees were being paid.

[5] The first respondent has accepted full responsibility for all the statutory breaches.

[6] The second and third respondents have accepted that they are liable as persons involved in the breaches.

The Authority's investigation

[7] The parties have agreed that this matter can be dealt with on the papers by way of written penalty submissions and these submissions have been received from the applicant and the respondents.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[9] The issues before the Authority for determination were:

- whether all arrears of underpayments, as accepted by the respondents, have been paid to the entitled employees
- whether to award penalties for these admitted breaches and the quantum of any penalties
- how payment of any penalties awarded should be allocated between the respondents
- whether all or part of any penalties awarded should be paid to the complainant employees

Background

[10] The Labour Inspectorate previously investigated the first respondent and issued an Improvement Notice in December 2013. This was as a result of failures relating to minimum wage, record keeping, and holiday entitlements.

[11] The Labour Inspectorate carried out a compliance check on the first respondent in November 2016. Another Improvement Notice was issued as a result of failures relating to inadequate employment agreements, failure to pay time and a half, failure to provide alternative leave entitlements, and failure to keep compliant wages and time records and holiday and leave records.

[12] A follow up investigation was commenced by the Labour Inspectorate in February 2019. Records were requested and received from the first respondent and

analysed by the Inspectorate. The respondents were given the opportunity to comment on the Inspectorate's findings in interviews and in writing.

[13] This matter was filed in the Authority on 22 May 2020.

Accepted breaches and payment of arrears.

[14] Six employees were employed by the first respondent at the time of the Labour Inspector's investigation in 2019. These employees were Jung Ju Park, Suhee Kim, Hyerim Lee, Jeewon Hwang, Minhee Kim and Moonju Kwon.

[15] In an agreed summary of facts filed with the Authority on 15 April 2021 and in the respondents' submissions on penalties dated 11 November 2021 the following statutory breaches were accepted:

- One employee, Suhee Kim, was underpaid annual leave entitlements in breach of s 21 Holidays Act 2003 (HA 2003). Arrears of \$111.16 (gross) were to be paid to this employee.
- The same employee, Suhee Kim, was underpaid time and a half entitlements for working on a public holiday in breach of s50 HA 2003. Arrears of \$51.30 (gross) were to be paid to this employee.
- Two employees, Hyerim Lee and Jeewon Hwang, were not provided with alternative holidays as required by s56 HA 2003. Alternative holidays were to be provided to these two employees.
- Six employees were not paid entitlements in breach of s 49 HA 2003 for unworked public holidays. Arrears to be paid to the six employees were:
 - Jung Ju Park \$150.00 (gross)
 - Suhee Kim \$288.00 (gross)
 - Hyerim Lee \$320.00 (gross)
 - Jeewon Hwang \$144.00 (gross)
 - Minhee Kim \$144.00 (gross)
 - Moonju Kwon \$288.00 (gross)
- Full holiday and leave records were not kept for the 6 employees as required by s81 HA 2003.
- Full wage and time records were not kept for the 6 employees as required by s130 Employment Relations Act 2000 (ERA 2000).

[16] Copies of bank statements and pay advice notices for two of the employees have been provided to the Authority as evidence of payment of the arrears in entitlements. The documents show payments made on 31 December 2020 to:

- Jung Ju Park \$150
- Minhee Kim \$144
- Jeewon Hwang \$144

and on 18 February 2021 to:

- Moonju Kwon \$288.00
- Hyerim Lee \$320.00
- Suhee Kim \$450.46

These documents record payment in full of arrears owing to the six employees.

[17] Accordingly the order sought by the applicant for full payment of arrears is not required.

[18] No evidence has been provided that the two employees Hyerim Lee and Jeewon Hwang have been provided with alternative holidays. Since Jeewon Hwang is still employed by the respondents the matter is to be resolved by adding one day of leave to Ms Hwang's leave balance. Hyerim Lee is no longer employed by the respondents so payment of \$160 to Ms Lee is required.

[19] **I order that the first respondent add one day of leave to the leave balance for Jeewon Hwang and pays the sum of \$160.00 to Hyerim Lee. Payment is to be made within 28 days of the date of this determination.**

Penalties

[20] The first respondent accepts that it is liable for all breaches set out above in [13] and that it is liable to pay penalties for these breaches. The second and third respondent accept that they are liable as persons involved in these breaches and are also liable for penalties on this basis.

[21] The parties are in agreement about the nature and extent of the breaches and have requested that the Authority determine penalties.

[22] The quantum of any penalties awarded should be assessed by taking into account guidance from the Employment Court, in such cases as in its judgments of *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*¹, *A Labour Inspector v Prabh Limited*², and *A Labour Inspector v Daleson Investment Limited*³.

[23] In considering whether penalties are to be awarded, and how to assess quantum, the following steps are set out by the Employment Court in *Preet*⁴:

Statutory Consideration 1 – The object of the Act

Statutory Consideration 2 – The nature and extent of the breach

- Identify the nature of breaches.
- Identify the number of breaches.
- Identify the maximum penalty available in respect of each identified breach.
- Consider whether global penalties are appropriate.

Statutory Consideration 3 – Whether the breach was intentional, inadvertent, or negligent

- Assess the severity of the breach.

Statutory Consideration 4 – The nature and extent of any loss or damage

Statutory Consideration 5 – Steps to mitigate effects of the breach

Statutory Consideration 6 – Circumstances of the breach, and any vulnerability

Statutory Consideration 7 – Previous Conduct

Additional Consideration 8 – Deterrence

Additional Consideration 9 – Culpability

Additional Consideration 10 – Consistency

Additional Consideration 11 – Ability to Pay

- Consider the means and ability of the person in breach to pay any penalty.

Additional Consideration 12 – Proportionality of Outcome

- Consider the proportionality of the penalty in relation to the harm caused.

¹ *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 (Preet).

² *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110 (*Prabh*).

³ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 (*Daleson*).

⁴ *Preet* above n1 at [137] to [151] and Appendix.

[24] The respondents accept and agree with the applicant's analysis that penalties should be assessed in accordance with the above steps. This determination now sets out this analysis in slightly abridged form.

[25] *Statutory Consideration 1 – the object of the Act*

The relevant objects of the ERA 2000 set out in s3 of the Act are to:

- promote good faith in all aspects of the employment environment and the employment relationship;
- promote the effective enforcement of employment standards, in particular by Labour Inspectors; and
- acknowledge and address the inherent inequality of power in employment relationships.

[26] The Court has found that these objects are particularly relevant in penalty matters involving migrant employees. The applicant notes that three of the affected workers were on temporary work visas to work for the respondents.

[27] It was submitted that the failures to fully pay annual leave, time and a half, alternative days and public holidays undermine employment standards, and give the employer an unfair advantage in the marketplace. I accept this submission in the circumstances of this case given recurring compliance and record keeping failures over a period of years which have reduced business costs for the first respondent in relation to competitors.

[28] *Statutory Consideration 2 – the Nature and Extent of the Breach*

There are six types of breaches which give rise to liability on the part of the respondents:

- A breach of section 21 of the Holidays Act 1983 relating to a failure to properly pay annual leave entitlements;
- A breach of section 50 of the Holidays Act 2003 relating to a failure to pay time and a half; Breaches of section 56 of the Holidays Act 2003 relating to failures to provide alternative holiday entitlements;

- Breaches of section 49 of the Holidays Act 2003 relating to failing to properly pay for unworked public holidays;
- Breaches of section 81 of the Holidays Act 2003 relating to failing to maintain full holiday and leave records;
- Breaches of section 130 of the Employment Relations Act 2000 for failing to maintain full wage and time records.

[29] *Identifying the number of breaches:*

- One breach for failure to properly pay annual leave entitlements;
- One breach for failure to pay time and a half (on the basis of one breach per affected employee);
- Two breaches for failing to provide alternative holiday entitlements to two employees;
- Six breaches (one per affected employee) for failing to pay six employees for unworked public holidays.
- Six breaches for failing to maintain holiday and leave records – one per employee;
- Six breaches for failing to maintain wage and time records – one per employee

[30] *Identifying the maximum penalties available in respect of each identified breach:*

- The maximum penalties available against the first respondent for failure to properly pay annual leave entitlements are \$20,000, and for the second and third respondents are \$10,000. The maximum penalties available against the first respondent for failure to pay time and a half are \$20,000, and for the second and third respondents are \$10,000.

- The maximum penalties available against the first respondent for failing to provide alternative holidays are \$40,000, and for the second and third respondents are \$20,000.
- The maximum penalties available against the first respondent for failing to pay for unworked public holidays are \$120,000, and for the second and third respondents are \$60,000.
- The maximum penalty available against the first respondent for failing to maintain holiday and leave records are \$120,000, and for the second and third respondents are \$60,000.
- The maximum penalty available against the first respondent for failing to maintain wage and time records are \$120,000, and for the second and third respondents are \$60,000.

[31] The next step is considering whether global penalties are appropriate. It was submitted that penalties for failures to pay holiday pay should be approached on a per-employee basis and furthermore should not be globalised across two different pieces of legislation⁵. I find that the failures to pay holiday pay are all breaches of the same statute and that globalisation is appropriate in this case. Accordingly, the 10 penalties in respect of holiday pay can be globalised to 6 penalties.

[32] It was submitted the failures to keep full wage and time and holiday and leave records are distinct from the failures in respect of underpayments. Although they span two pieces of legislation, it is reasonable in the circumstances to globalise holiday and leave and wage and time breaches to one breach per employee. This leads to a total of 12 breaches by each respondent, reduced from an initial total of 22. I find that the globalisation of the record keeping penalties is appropriate in the circumstances of this case where record keeping was substantially undertaken by the second respondent.

[33] *Statutory Consideration 3 – Whether the breach was intentional, inadvertent, or negligent*

⁵ *Preet*, above n 1, at [139]. See also *A Labour Inspector v Bahn Thai Restaurant Limited* [2016] NZERA Christchurch 222 at [21].

The respondents have accepted responsibility for the breaches and the parties have agreed that the respondents have not been shown to have set out to take advantage of vulnerable employees. Nevertheless, the respondents deliberately undertook all of the various actions or inactions which as a matter of fact fell short of minimum standards.

[34] While it was submitted that the breaches may not have been malicious, they were intentional in the sense that the respondents were well aware of the matters which comprised the breaches. The respondents had also been made aware of similar matters in two previous interactions with the Labour Inspectorate which had led to two previous Improvement Notices. This is not a case where there was a lack of knowledge by the respondents about what was occurring in their business and the respondents also accept that they should have been aware of minimum requirements. I find that the breaches were intentional.

[35] *Assessment of the Severity of Breaches*

The Labour Inspector submits, and the respondents accept, that the correct starting point is 50%. This is because the failures resulted in an obvious financial advantage to the respondent, who received labour without having to fully and properly pay for that labour. This also reflects the variation in the amounts of arrears across each breach and the multiple different breaches globalised into one penalty per employee.

[36] It was submitted that failures to maintain records should be assessed at 50%. I note that the applicant asserts that the breaches potentially hindered the Labour Inspector in calculating arrears as records of hours worked each day only dated back 6 months. There were also no records for any employees to show their sick leave, annual leave or alternative holiday entitlements. However I acknowledge the respondents' request to note that some manual additional wage, time and leave records in hardcopy held in the representatives offices were not accessible under the relevant Covid-19 lockdown level. On this basis the I make no adverse finding that the work of the Labour Inspector was hindered by having records that only dated back 6 months. I find that the agreed weight of 50% given to this factor by the parties in calculating penalties is appropriate.

[37] *Statutory Consideration 4 – the nature and extent of any loss or damage*

The employees have lost the use of the money they were entitled to at the time it became due⁶. The employer has reduced its costs and gained an unfair advantage over its competitors⁷. The record-keeping breaches have hindered the Labour Inspector's investigation and mean it is unclear whether all arrears have been correctly identified.

[38] *Statutory Consideration 5 – Steps to mitigate effects of the breach*

The respondents were co-operative with the investigation and showed a willingness to accept the breaches from the outset and have repaid all monies owed. However the Court has held that payment of monies owing is not evidence of contrition, and amounts to no more than the late performance of a duty⁸. The respondents have had an attitude of remorse and willingness to resolve matters from the time of filing their Statement in Reply onwards, although the filing of this document was somewhat belated and the respondents had been unwilling to engage with the issues prior to that. I find that although it is gratifying that the respondents have now adopted a constructive approach to redressing these breaches, previous repeated non-compliance and the disadvantage to their employees mean that a reduction in penalty is not warranted.

[39] *Statutory Consideration 6 – Circumstances of the breach, and any vulnerability*

The first respondent was in business for a number of years, had multiple interactions with the Labour Inspectorate and it was its responsibility to know and apply the relevant laws. Three of the affected workers were visa dependent and it is concerning that the respondents were underpaying vulnerable workers and not maintaining proper records for them. The amounts of the arrears owed were relatively modest. The recordkeeping breaches were more longstanding and systemic breaches. The liability of the second and third respondents derives from their close involvement in the first respondent's business. I find that the repeated and on-going breaches involving vulnerable workers is a matter of concern.

[40] *Statutory Consideration 7 – Previous Conduct*

The respondents had previous interactions with the Inspectorate as set out above.

[41] *Additional Consideration 8 – Deterrence*

⁶ *Daleson* above n 3 at [31].

⁷ At [31].

⁸ At [33]-[35].

The breaches in this case are of minimum standards. It was submitted that as such there is a need to “bring home” to the respondents the standards they were required to meet, and that they are not to be met merely when it is financially convenient for the employer or when the employer is put under pressure by the Labour Inspector⁹. I concur that the on-going and repeated occurrence of the breaches means that penalties awarded must reinforce the non-negotiable nature of minimum entitlements.

[42] *Additional Consideration 9– Culpability*

Factors already traversed which increase the respondents’ culpability include:

- The number of affected workers;
- That the workers lost the use of the money they were entitled to at the time it became due;
- The previous Improvement Notices and ongoing breaches despite them

I find that the respondents were aware of the need to meet minimum standards and failed to comply over a significant period of time. The cost of these breaches was carried by low paid workers deprived of their basic entitlements. Accordingly I find a high degree of culpability.

[43] *Additional Consideration 10 – Consistency*

The Court and the Authority have imposed relatively significant penalties in matters involving holiday pay breaches and relatively small numbers of employees. In *Preet* and *Prabh*, penalties of \$100,000 were imposed.

[44] In one recent case, failure to maintain wage and time and holiday and leave records for a total of 19 employees, despite no arrears being specifically identified, led to a penalty of \$55,000 for the company and \$27,500 for the person involved¹⁰. Record-keeping breaches in respect of multiple employees are significant breaches in and of themselves which have led to stern sanctions by the Authority. The present case involves both multiple record-keeping breaches and arrears and this must be reflected in the penalty.

[45] Total arrears in the present case are \$1,496.46. While there is often a correlation between arrears and penalties, the penalty should reflect the totality of the breaches and

⁹ At [39].

¹⁰ *A Labour Inspector v New Zealand Mountain Hunting Ltd & Anor* [2019] NZERA Christchurch 568.

not just the monetary amounts involved. For example in *Babylon Communications*¹¹ penalties totalling \$72,600 were imposed where total arrears were only \$790. \$32,200 of the penalties related directly to the underpayment of minimum wage while \$40,400 related to inadequate records for 9 employees. Similarly in *BBS Horticulture Limited*¹² penalties of \$57,120 were imposed where the total arrears were only \$1,818.02. In that case, 5 employees were owed arrears while record keeping breaches affected 16 employees. In *Jocelyn and L*¹³ as in the present case there were two persons involved who were husband and wife. The total amount of arrears owed in that case were \$1,860.60 and each breach affected no more than 3 employees. Penalties of \$20,000 were imposed on the company and \$10,000 and \$8,000 respectively on the persons involved.

[46] Weighing the relevant aggravating and mitigating factors outlined above including the co-operative approach ultimately taken by the respondents, and taking into account consistency with other cases, it was submitted that a reduction is warranted in the present case of 25%. I find a reduction of 25% to be an appropriate reduction in this case, though I concur with the submission that this is a generous discount. I accept that it reflects the respondents' acceptance of the breaches and preparedness to redress the effects of their non-compliance.

[47] *Additional Consideration 11 – Ability to Pay*

The respondents have expressed a readiness to respect any penalties as determined by the Authority and to make every reasonable effort to pay any penalties in full, and in a timely manner. The second and third respondent have also drawn the Authority's attention to the difficult trading situation in Auckland in 2020 and 2021 because of covid lockdowns. However, the Court in *Daleson* held that liability to pay a penalty is different from subsequent enforcement, and that the financial circumstances of a defaulting party is not a factor that Parliament considers pivotal to the penalty-setting exercise.¹⁴ There are no specific submissions before the Authority as to ability to pay, so this factor has not contributed to the overall assessment.

[48] *Additional Consideration 12 – Proportionality of Outcome*

¹¹ *A Labour Inspector v Babylon Communications Ltd* [2019] NZERA Christchurch 310.

¹² *A Labour Inspector v BBS Horticulture Limited* [2017] NZERA Auckland 172.

¹³ *A Labour Inspector v Jocelyn and L Limited & Ors* [2021] NZERA Christchurch 44.

¹⁴ *Daleson* above n 3 at [45].

Although penalties should not be reduced so as to create perverse incentives for employers, and inadvertently encourage non-payment¹⁵, the application of the proportionality test in this matter will lead to a reduction in penalties properly and fairly payable. This is largely necessary because of the large number of discrete breaches committed by the respondents.

[49] A penalty in the range of \$40,000 for the first respondent is consistent with other cases when taking into account the amounts and different types of arrears and the record-keeping breaches, and the previous interactions with the Labour Inspector. The available penalties for the second and third respondents is half that of the first respondent. I find the level of penalty to be proportionate to the gravity of the breaches.

[50] I order that the first respondent pay \$40,000.00 and that the second and third respondents each pay \$20,000.00 to the MBIE Trust account. Payment is to be made within 28 days of the date of this determination.

Costs

[51] The agreed summary of facts submitted to the Authority on 15 April 2021 states that “The respondents are liable to pay costs as set out at paragraph 3.16 of the SOP”. The SOP requests reimbursement to the applicant for legal costs and expenses of \$71.56 being the fee paid to bring this application to the Authority.

[52] The current tariff for a one-day investigation meeting in the Authority is \$4,500. I consider it appropriate to make a costs award analogous to a half day investigation meeting of \$2,250.00. Accordingly, **I order that the Labour Inspector is paid \$2,250.00 towards legal costs and is reimbursed for the Authority’s filing fee in the sum of \$71.56.**

Pam Nuttall
Member of the Employment Relations Authority

¹⁵ At [47].