

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 596  
3139801

BETWEEN	A LABOUR INSPECTOR Applicant
AND	LAKE DUNSTAN ORCHARDS LIMITED First Respondent
AND	GRAEME MCMILLAN Second Respondent

Member of Authority:	Peter van Keulen
Representatives:	Alistair Miller, counsel for the Applicant Craig Smith, counsel for First and Second Respondent
Investigation Meeting:	On the papers
Submissions and Further Information Received:	2 February 2022, 30 June 2022 and 12 August 2022 from the Applicant 2 February 2022 and 29 July 2022 from the Respondent
Date of Determination:	14 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The claims by the Labour Inspector against Lake Dunstan Orchards Limited (LDO) and Graeme McMillan relate to failures to provide appropriate employment agreements to

employees, failure to pay employees for unworked public holidays and a failure to provide wages and time records.

[2] The claims came after a Labour Inspector conducted an investigation and compiled a report in response to a complaint by an employee of LDO that he had not been paid for public holidays.

[3] The Labour Inspector's investigation and report revealed that LDO had failed to pay some employees for unworked public holidays that were otherwise working days. LDO accepted the Labour Inspector's conclusions on this point and paid the arrears of holiday pay owed. LDO also addressed its employment agreements, modifying them so they complied with the statutory requirements.

[4] What remained after these actions were undertaken by LDO was the question of whether penalties should be imposed against LDO as the employer and Mr McMillan as a person involved in the breaches.

[5] It is the question of penalties being imposed that I investigated. The parties agreed that the claims for penalties could be resolved on the papers; so, I investigated the claims by receiving a joint memorandum setting out agreed facts and then receiving written submissions of the parties' representatives.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

### **Breaches by Lake Dunstan Orchards**

[7] I have been able to make findings in relation to breaches of minimum employment standards by LDO based on the agreed statement of facts.<sup>1</sup>

[8] LDO failed to keep compliant employment agreements for 87 employees. This was because the employment agreements they were using:

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<sup>1</sup> As defined in s 5 of the Employment Relations Act 2000.

- (a) Failed to include mandatory clauses in breach of s 65(2)(a) of the Act and s 52 of the Holidays Act 2003 – that is the employment agreements did not include the legal entity that was the employer, did not have a plain language explanation for the resolution of employment relationship problems, and did not have a provision confirming that time and a half would be paid for working a public holiday.
- (b) Included provisions contrary to law and inconsistent with the Act, amounting to breaches of ss 65(2)(b)(i) and 65(2)(b)(ii) – that is the agreements included an availability provision where there were no guaranteed hours of work and there was no payment for compensation provided for availability.
- (c) Specifically for one employee included clauses in breach of ss 65(2)(b)(i) and 65(2)(b)(i) of the Act – that is the agreement pre-determined that the employee would not be entitled to an alternative days holiday, in breach of s 6 of the Holidays Act and the agreement included a clause prohibiting secondary employment in breach of s 76H(4)(b) of the Act.
- (d) For the 2020/2021 harvest season also failed to specify wages or salary payable to the employee, in breach of s 65(2)(a)(v) of the Act.

[9] LDO did not pay 28 employees for two unworked public holidays that were otherwise working days for those employees, totalling \$7,403.70 and it did not pay 5 employees for one unworked public holiday that was otherwise a working day for those employees, totalling \$586.95.

[10] LDO failed to provide wages and time records forthwith when requested by the Labour Inspector in breach of s 229(2) of the Act.

### **Breaches by Mr McMillan**

[11] Mr McMillan is a person involved in the breaches by LDO as set out in s 142W of the Act. As such Mr McMillan breached the Holidays Act by:

- (a) Failing to provide employment agreements with a provision confirming that time and a half would be paid for working on a public holiday.
- (b) Failing to pay for unworked public holidays.

## **Penalties**

[12] Counsel for LDO and Mr McMillan says:

- (a) There is no public benefit in imposing penalties on LDO and Mr McMillan.
- (b) LDO and Mr McMillan believed they were compliant with their statutory obligations.
- (c) LDO complied with all of the requirements set down by the Labour Inspector.
- (d) No employees have been disadvantaged by anything LDO did or failed to do.
- (e) This case is really about the difficulties an employer faces in trying to establish holiday entitlements, particularly in circumstances such as this where it was believed the employees are casual employees.

[13] Counsel submits that in all of these circumstances it would be a miscarriage of justice to impose penalties against LDO and Mr McMillan.

[14] Clearly the Labour Inspector disagrees with this – having worked with LDO to identify and remedy the breaches of minimum standards the Labour Inspector still believes penalties are appropriate here.

[15] Counsel for the Labour Inspector says the purpose of penalties is to punish those who breach minimum standards, deter other employers from breaching minimum standards, to compensate victims of breaches and to eliminate unfair competition.

[16] From my perspective the question in this case is whether LDO and Mr McMillan should be punished for their breaches, notwithstanding that they have cooperated with the Labour Inspector and complied with the recommendations such that they have remedied their

defaults, because their conduct deserves punishment and because it is important to make an example of them, which will have a deterrent effect.

[17] I conclude that penalties should be imposed. I accept the submissions made about LDO and Mr McMillan's intentions, degree of culpability, limited harm caused and remedial actions to fix any harm but these factors are mitigating factors for assessing the quantum of any penalty. Ultimately this case is about LDO and Mr McMillan getting it wrong in terms of minimum standard obligations and this impacting on a number of employees. These breaches deserve to be punished, although in a limited way and an example set for deterrence purposes.

[18] So, I will impose penalties on both LDO and Mr McMillan and will now turn to quantifying the amount of those penalties.

[19] There are two aspects to consider when quantifying penalties; section 133A of the Act, which sets out relevant considerations and *Borsboom v Preet PVT Limited*, where the Employment Court set out a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards.<sup>2</sup>

[20] In *A Labour Inspector v Matangi Berry Farm Limited* Judge Corkill applied an approach to penalty setting which assessed the factors in section 133A of the Act and then applied those and other considerations using the four-step process in *Preet* to quantify the penalty.<sup>3</sup>

[21] I will follow this approach, so first, I will consider the statutory requirements and then I will use that information to assess quantum based on the four steps in *Preet*.

*The object stated in s 3 of the Act*

[22] The objects of the Act include building productive employment relationships through the promotion of good faith and promoting effective enforcement of employment standards by Labour Inspectors.

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<sup>2</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

<sup>3</sup> *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

[23] What is relevant here is that LDO and Mr McMillan genuinely believed they were complying with minimum standards – arguably there was no breach of the duty of good faith – and they cooperated with the Labour Inspector.

*The nature and extent of the breaches*

[24] The employment agreement breaches impacted on 87 employees and the failure to pay for public holidays impacted 33 employees for a total of \$7,990.65.

[25] Overall, the breaches are in my view at the lower end of the spectrum in terms of nature and extent – particularly the public holiday pay, but I do acknowledge that this may be limited by the extent of the Labour Inspector’s ability to investigate as it appears the breaches were indicative of LDO’s view of employee entitlements and therefore employees may not have been paid for other public holidays that they were entitled to be paid for.

*The nature and extent of any loss or damage suffered*

[26] The impact of the employment agreement breaches is unknown – it is not clear if employees suffered any detriment because of the non-complaint employment agreements. And the impact of the failure to pay public holiday pay was remedied by subsequent payment being made – there would however have been some detriment to employees in not being paid for the public holidays at the time of the day off work.

*Were the breaches intentional, inadvertent or negligent?*

[27] I accept that the breaches by LDO and Mr McMillan were not intentional and largely inadvertent based on their views of what was required to comply with their obligations.

*What steps have been taken in mitigation?*

[28] LDO and Mr McMillan did cooperate with the Labour Inspector and accepted the findings in terms of adjusting their employment agreements and paying holiday pay arrears for the public holidays it had not paid. There was some unacceptable delay from LDO in respect of providing its wages and time records.

*The circumstances of the breach and any vulnerability*

[29] There is some degree of vulnerability of LDO's workforce in terms of some employees being migrant workers and/or transient "backpacker" workers. However, there is no suggestion that LDO or Mr McMillan were seeking to exploit any vulnerability and/or gain some competitive advantage in keeping its labour cost down.

*Previous conduct*

[30] Neither LDO nor Mr McMillan have been involved in breaches of employment standards previously.

*Preet step 1 – Nature and number of breaches*

[31] The first step in *Preet* requires me to consider whether any of the breaches should be globalised. 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.<sup>4</sup>

[32] In *Preet* the Employment Court contemplated that globalisation could apply where there were multiple breaches of statutory provisions in respect of multiple employees, reducing the number of breaches down to one single penalty.<sup>5</sup> The Labour Inspector accepts this approach and has submitted that the breaches per employee should be globalised to one representative breach.

[33] I believe the approach adopted by Judge Corkill in *A Labour Inspector v Matangi Berry Farm Limited*, is appropriate.<sup>6</sup> In this case Judge Corkill globalised failures across 207 employees and 118 employees down to a single breach for each type of default; failure to retain employment agreements, failure to keep holiday and leave records and failure to pay annual holiday pay. This meant globalisation reduced 532 breaches (based on a count per employee affected) down to just three.

[34] In this case it is appropriate to globalise the breaches for LDO as follows:

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<sup>4</sup> *A Labour Inspector v Parihar* [2019] NZEmpC 145.

<sup>5</sup> *Borsboom v Preet PVT Limited*, above n7 at [100].

<sup>6</sup> *A Labour Inspector v Matangi Berry Farm Limited*, above n3.

- (a) One breach of the Act for failure to have compliant employment agreements, which includes the failure to have correct provisions in relation to public holiday payment under the Holidays Act.
- (b) One breach of the Holidays Act relating to not paying employees correctly for unworked public holidays that were otherwise working days.
- (c) One failure to provide wages and time records in a timely way to the Labour Inspector.

[35] In this case it is appropriate to globalise the breaches for Mr McMillan in the same way so the breaches are:

- (a) One breach of the Act regarding compliant employment agreements.
- (b) One breach of the Holidays Act relating to not paying employees correctly for unworked public holidays that were otherwise working days.

[36] Based on this globalisation the starting point for assessing quantum of penalties to be imposed against LDO is \$60,000.00, and for Mr McMillan the starting point is \$20,000.00.

*Preet step 2 – Severity of breaches*

[37] Considering the aim of the Act, assessing the nature and extent of the breaches and losses suffered, reflecting on the inadvertent nature of the breaches and that any culpability is minimal, a significant reduction from the starting point is appropriate.

[38] In addition, LDO and Mr McMillan's cooperation and compliance is a significant factor.

[39] To be weighed against these factors is the need to penalise – these are still breaches of minimum standards - and the need to deter others from breaching in the same way.

[40] So, after considering the severity of the breaches and cooperation and mitigation my penalty assessment stands at 25% of the maximum amount being \$15,000.00 for LDO and \$5,000.00 for Mr McMillan

*Preet step 3 – Means and ability of the respondent to pay*

[41] There is no reduction for this aspect.

*Preet step 4 – Proportionality*

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

[43] In this regard I turn to consider an assessment of various determinations of the Authority that have similar breaches in terms of the type of breach or the number of breaches that have been globalised.<sup>7</sup> The end result of the comparisons and my reflection on proportionality is that I am satisfied that further reductions to \$7,200.00 for LDO and \$1,800.00 for Mr McMillan are appropriate.

**Orders**

[44] LDO must pay a penalty of \$7,200.00 for breaches of minimum standards.

[45] Mr McMillan must pay a penalty of \$1,800.00 for being a person involved in breaches of employment standards.

[46] These penalties must be paid to the Authority within 28 days of the date of this determination. On recovery each penalty is to be transferred to the Crown Account.

[47] If LDO or Mr McMillan do not comply with this order, the Labour Inspector or the Chief Executive of the Ministry of Business, Innovation and Employment may recover the penalty in the District Court as a debt due to the Crown.

**Costs**

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed,

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<sup>7</sup> *Morgan v Star Cutz Barbershop Limited* [2022] NZERA 519; *Marlon Batista Dos Santos v Southland Food Services Limited* [2022] NZERA 363; *McLeod v Everiss* [2022] NZERA 256; *Annand v Affordable UK Caravans and Parts Limited* [2021] NZERA 537; *Labour Inspector v K Contracting Limited* [2021] NZERA 421; and *Labour Inspector v Greywacke Farms Limited* [2021] NZERA 87.

the Labour Inspector may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum LDO and Mr McMillan will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[49] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>8</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>8</sup> For further information about the factors considered in assessing costs, see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).