

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 672  
3122652

BETWEEN      A LABOUR INSPECTOR  
Applicant

AND            ABHI PATEL ENTERPRISES  
LIMITED  
First Respondent

AND            MEHUL NAVIN PATEL  
Second Respondent

Member of Authority:      Andrew Dallas

Representatives:          Oscar Upperton, counsel for the Applicant  
Liam Johnston, counsel for the Respondents

Investigation Meeting:      31 March 2022 at Auckland

Submissions received      4 April and 6 May 2022 for the Applicant and 27 April  
2022 for the Respondents

Date of Determination:      19 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] A Labour Inspector, Eva Belley lodged proceedings against Abhi Patel Enterprises Limited (Abhi Patel) and Mehul Navin Patel seeking findings of breaches of minimum employment standards, record keeping, arrears of minimum standards' entitlements and penalties against both parties for specific agreed breaches.

[2] Abhi Patel is a Dunedin based telecommunications company incorporated on 5 November 2012 which subcontracted work to Visionstream, the main broadband installation contractor for Chorus Limited. Mehul Navin Patel and his wife Abhi Navin

Patel are equal shareholders of Abhi Patel. Vishwas Patel, Parth Modi and Naveen Kumar (the workers) were employed by Abhi Patel as technicians installing broadband fibre connections.

[3] The Labour Inspector says the workers were not initially paid minimum wages for all the hours they worked and were not provided certain paid holiday and leave entitlements. The Labour Inspector says calculating these entitlements was hampered by Abhi Patel failing to maintain accurate wage, time and leave records in contravention of the Employment Relations Act 2000 (the Act) and the Holidays Act 2003 (H Act).

[4] Further, the Labour Inspector says Abhi Patel made unauthorised deductions from Naveen Kumar's wages and charged him a premium for being employed in contravention of the Wages Protection Act 1983 (WP Act).

[5] Abhi Patel accepted that the following breaches of minimum employment standards had occurred in respect of the workers:

- (i) it did not maintain accurate wage, time and leave records;
- (ii) it did not consistently provide the workers with their holiday and leave entitlements;
- (iii) it failed to pay the workers the applicable minimum wage rate;
- (iv) it failed to pay the workers for unworked public holiday entitlements that fell on normal working days;
- (v) it failed to pay sick leave entitlements owed to Naveen Kumar and Parth Modi;  
and
- (vi) it deducted money from Parth Modi's wages without written consent.

[6] The parties have further agreed that Navin Mehul Patel is a person involved in the above breaches of minimum standards pursuant to s 142W of the Act and is personally liable for such under to s 142Y of the Act.

[7] Abhi Patel has paid the arrears of wages owing to the workers arising out of these breaches.

*Alleged further outstanding arrears*

[8] The Labour Inspector identified the following remaining outstanding arrears owed to one of the workers, Naveen Kumar:

Category	
Unlawful deduction	\$1,208
Premium paid claim	\$10,520
Public holiday pay	\$63.00
Alternative leave day holiday pay	\$75.00
Total	<b>\$11,866</b>

**The Authority's investigation**

[9] During the investigation meeting, I heard evidence from Labour Inspector, Eva Belley and workers, Naveen Kumar and Parth Modi. For the Respondents, I heard evidence from Mehul Navin Patel, Archana Patel and Vipul Jatakiya.

[10] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of the Labour Inspector's employment relationship problem. While I have not referred to all submissions advanced by the parties during the investigation meeting, I record I have fully considered them.

[11] This determination is issued outside of the statutory three-month timeframe provided by the Act. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist. I apologise to the parties for the delay in issuing this determination which arises out of the collateral consequences of the COVID-19 pandemic on the administration of the Authority.

## **Issues**

[12] The outstanding issues between the parties which require investigation and determination are:

- (i) Is Naveen Kumar owed outstanding arrears of wages by Abhi Patel and/or Mehul Navin Patel for:
  - a. unauthorised deduction from his pay;
  - b. non-payment of alternative holiday;
  - c. non-payment of public holiday pay; and
  - d. for charging an unlawful premium?
- (ii) Is Mehul Navin Patel a person involved Abhi Patels' breaches;
- (iii) If Mehul Navin Patel is a person involved, is he liable for penalties;
- (iv) If Mehul Navin Patel is as a person involved, to what extent is he also liable for the arrears set out in (i) above?; and
- (v) Should either party contribute to the costs of representation of the other party?

## **The Labour Inspector's investigation**

[13] In December 2019, the Labour Inspector commenced an investigation after receiving complaints from former employees about irregularities including not being paid a full eight-hour day; holiday pay owing; and a suggestion that one worker had been charged a premium by Mehul Navin to secure employment.

[14] The Labour Inspector's investigation report concluded, after examining and contrasting global positioning data tracking the workers movements and contrasting with available employer records, that time recording was inaccurate. Payslips provided by Abhi Patel did not show holiday or sick leave entitlements being correctly paid. The executive summary of the report stated that calculations undertaken, based on documentation provided, revealed: "... multiple breaches, including minimum wage,

unlawful deductions, premium and holiday and sick leave breaches that are serious minimum standard breaches”.<sup>1</sup>

[15] The report noted that Mehul Navin Patel offered the workers’ jobs, managed their work and, indeed, regularly worked alongside them onsite. He also manually administered Abhi Patel’s payroll based on direct contact with the workers.

[16] As part of the investigation, the parties made efforts to resolve these matters including attending mediation and utilising Visionstream’s facilitated dispute resolution process.

### **The Labour Inspector’s claim for arrears**

#### *An unlawful deduction from Naveen Kumar’s final pay?*

[17] The Labour Inspector said that an unlawful deduction was made by Abhi Patel to Naveen Kumar’s final pay in the amount of \$2,208. Seemingly during the course of his employment with Abhi Patel, Naveen Kumar borrowed money from Abhi Patel and/or Mehul Navin Patel. There is a dispute about how much money was owed, including for training courses. Naveen Kumar accepted he owed \$1000 to Abhi Patel and/or Mehul Navin. However, Abhi Patel and/or Mehul Navin Patel contend Naveen Kumar borrowed significantly more including, seemingly, \$4000 in cash from Mehul Navin Patel’s son “piggy bank”.

[18] An email from Mehul Navin Patel to Naveen Kumar dated 14 January 2018 records the debts as \$1000 and \$650. However, the apparent loan of \$650 was exhibited on Naveen Kumar bank account as “Abhi PatelEnterpriseWage”. This was ultimately conceded by Mehul Navin Patel during the investigation meeting to be the case but only after concerted efforts to claim it as a loan and recover it as such.

[19] The actual deduction from Naveen Kumar’s final pay of \$2,208 is a curious amount because it neither reflects what Abhi Patel and/or Mehul Navin Patel contended Naveen Kumar borrowed nor what Naveen Kumar accepted he owed. Mehul Navin Patel

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<sup>1</sup> *Labour Inspectorate Investigation Report, Case number LS33337, 16 July 2020.*

would ultimately also agree that deduction of \$1208 (\$2208 deducted less \$1000 accepted as owed) from Naveen Kumar's final pay was unjustified but was adamant he was entitled to deduct \$1000 because Naveen Kumar's employment agreement contained a provision that allowed Abhi Patel to deduct wages if he was "indebted to the employer for any reason". Even if lawful in those terms, the clause also required Abhi Patel to consult with Naveen Kumar and this did not occur.

[20] In assessing the evidence, I have no trouble in finding the deduction of the entire \$2208 was unlawful and Naveen Kumar is entitled to recover this money. This finding also renders Abhi Patel and, to the extent he is a person involved in the breach, Mehul Navin Patel, liable for the imposition penalties.

[21] On the matter of Mehul Navin Patel culpability, consistent with the legal position articulated by the Court of Appeal in *Southern Taxis Limited v A Labour Inspector*<sup>2</sup>, I find, on the evidence available to the Authority, that Mehul Navin Patel had the requisite level of knowledge of all the primary facts relevant to the company's breaches.<sup>3</sup>

*Unpaid public holiday and alternative leave day pay to Naveen Kumar?*

[22] Abhi Patel and Mehul Navin Patel accepted they did not maintain accurate holiday and leave records. The Labour Inspector found that Naveen Kumar had worked seven hours on 20 March 2017 (being Otago Anniversary Day) entitling him to be paid time-and-a-half but he was only paid ordinary time and was, therefore, owed wages totalling \$63.00. He was not given alternative holiday for working on a public holiday (or paid out for it on termination of his employment) and was therefore owed \$75.00 for that day.

[23] Mehul Navin Patel said that Abhi Patel did not require its workers to work on public holidays and this was accepted by, at least, one other worker, who did not make claims against the company. Naveen Kumar gave evidence about GPS records showing him attending addresses for two Visionstream customers on 20 March 2017 and said Mehul Navin Patel directed him to undertake the work. Mehul Navin Patel denied giving any such direction.

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<sup>2</sup> [2021] NZCA 705

<sup>3</sup> At [57]

[24] In assessing the holiday pay arrears, I place reliance, in the absence of accurate records, on Naveen Kumar's evidence and the GPS records. I find it is more likely than not, that Naveen Kumar worked on 20 March 2017 and was directed to do so by Mehul Navin Patel. Consequently, the Labour Inspector claim for holiday pays arrears on behalf of Naveen Kumar is made out. I further find on the balance of probabilities that Mehul Navin Patel had the requisite level of knowledge of all the essential facts relevant to the company's breaches arising out of Naveen Kumar working on Otago Anniversary Day and is therefore a person involved in that breach.

*A premium paid by Naveen Kumar?*

[25] Naveen Kumar says that in exchange for supporting his residency application, Mehul Navin Patel insisted he pay him back regular cash sums from his wages. So, despite Naveen Kumar's wage progressively increasing over time to \$25.00 an hour, his actual rate paid was approximately \$20.00 an hour. Naveen Kumar says Mehul Navin Patel instructed him to pay him on an irregular basis in cash and to disguise these payments by getting cashback when buying groceries rather than utilising automatic teller machines (ATMs); which could potentially alert the Labour Inspectorate and/or Immigration New Zealand to suspicious transactions.

[26] Mehul Navin Patel denies requiring Naveen Kumar paying a premium and accused him of fabricating evidence that supported such claims: "WhatsApp" messages containing hand-written calculations and spreadsheets detailing money owed. Mehul Navin Patel claimed that Naveen Kumar had access to his mobile phone while they work together, and Naveen Kumar had composed messages to himself and then had deleted them from Mehul Navin Patel's phone.

[27] Section 12A(1) of the WP Act states: "[n]o employer or person engaged on behalf of the employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person". While the payment of a premium normally relates to pre-employment, it can extend to situations, as here, where the employer later

tries to recoup recruitment-related costs from a worker, or the worker is compelled to make payments to maintain ongoing employment.

[28] I find the explanation given by Mehul Navin Patel for the text messages implausible and conclude that it is more likely than not that Mehul Navin Patel obtained cash payments from Naveen Kumar and that these payments were capable of being a premium with the scope of s 12A(1) of the WP Act.

[29] To the extent Mehul Navin Patel sought to enforce this premium as a director of Abhi Patel, I also consider Mehul Navin Patel had the requisite knowledge of all the primary facts relevant to the company's breach and he is therefore a person involved in the breach and liable for a penalty (to be analysed below) and for repayment of the premium \$10,520 to Naveen Kumar to the extent Abhi Patel is unable to do so.

### **The Labour Inspector's claims for penalties**

[30] The Authority has jurisdiction to hear and determine an application by a Labour Inspector for recovery of penalties under the Act, the H Act, WP Act and MW Act.<sup>4</sup> The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.<sup>5</sup> The maximum penalty for Abhi Patel, as a company, is \$20,000 per breach of employment standards and for individuals, including Mehul Navin Patel as a person involved in the breaches is \$10,000 per breach.

[31] Section 133A of the Act provides guidance about the matters the Authority needs to have regard to when imposing a penalty under the Act:

#### **133A Matters Authority and court to have regard to in determining amount of penalty**

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and

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<sup>4</sup> Employment Relations Act, s 161(m)(ii) and s 161(m)(iv).

<sup>5</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[32] Given its succinct elegance, and obvious need to simplify the law wherever possible, s 133A of Act could equally apply, by analogy, to consideration of penalties under other Acts, for example the H Act and MW Act, for which jurisdiction to do so is derived under the Act. However, there are other legal principles said to currently apply in respect of penalties not covered by the Act, and these principles will be applied in the absence of submissions from the Labour Inspector to the contrary.

#### *Seriousness of the breaches*

[33] Consistent with these established legal principles, the Labour Inspector identified various “aggravating” and “mitigating” factors which were relevant to the assessment of penalties.

#### *The nature and extent of the breaches*

[34] The established breaches involving Abhi Patel and Mehul Navin Patel, as a person involved, for which penalties are sought are as follows:

- (i) three breaches of s 4b and s 130 of the Act by failing to keep compliant wage and time records for the workers;
- (ii) three breaches of s 81 H Act for failing to keep accurate holiday and leave records for the workers;
- (iii) three breaches of s 6 MW Act for failing to pay the applicable minimum rate to the workers;
- (iv) three breaches of s 49, 55, 71 and 72 of the H Act by failing to pay correct leave entitlements to the workers;

- (v) three breaches of s 16, 21, 23 and 25 H Act for failing to pay final holiday pays to the workers;
- (vi) one breach of s 4 WP Act by the making of an unlawful deduction from one of the worker's pay; and
- (vii) one breach of s 12 WP Act by Mehul Navin Patel for receiving a premium from one worker.

[35] At this stage the total penalties sought against Abhi Patel are \$320,000 (16 breaches x \$20,000) and Mehul Navin Patel, \$160,000 (16 breaches x \$10,000).

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

[36] The loss or damage incurred by the three workers involved relating to wage arrears and breaches of the H Act was initially cumulatively stated as being around \$22,000. While this may seem on its face a relatively modest sum when divided across three workers, these workers were paid very close to minimum wages and being deprived of the use of this money in those circumstances had very serious consequences.

*Were the breaches intentional, inadvertent, or negligent?*

[37] While Mehul Navin Patel eventually accepted his involvement in the breaches, I conclude that both he and the company failed to have proper regard to their legal obligations to employees of Abhi Patel and their conduct was both self-serving and intentional.

*What steps have been taken in mitigation?*

[38] While most of the minimum standards breaches were acknowledged and most of the arrears paid to the workers by the time this matter came to be determined, several breaches were contested for a significant period of time and this displays elements of obstructiveness on the part of Abhi Patel and Mehul Navin Patel. The sums involved were comparatively relatively small but would have been of great value to low paid workers, who were entitled to be properly paid in a timely fashion.

*The circumstances of the breaches and any vulnerability factors*

[39] I heard evidence from two workers who were both in a difficult work situation reliant on Mehul Navin Patel's support for the continuation of their work visas. As migrant workers there would be some trepidation, if not reluctance, on their part to seek to enforce their employment rights in the face of losing their job and, potentially, also their residency. Consequently, I find the workers were objectively vulnerable. There is little doubt Mehul Navin Patel was under a great deal of pressure to keep his business operating in a highly competitive environment and in doing so, recruit, train and retain appropriately skilled workers. However, that is no excuse for breaching minimum employment standards. Most small businesses face the same pressures; yet manage to comply with their legal obligations.

[40] As this point several concurrent breaches set out in para [34](i), (ii) and (iii) above can be globalised in single penalties but those relating to separate breaches of the H Act and the breach of the WP Act, in respect of the premium, must be considered and treated separately.

[41] This global approach reduces the aggregate number of separate penalties and provides a basis to sensibly re-define the potential maximum penalties before further applying established legal principles. So, at this stage, the potential maximum penalties available against Abhi Patel is \$200,000 and Mehul Navin Patel is \$100,000

[42] Having regard to the various aggravating features, including the delay in resolving some payments owed and the seriousness of requiring the payment of a premium, I believe deterrence where vulnerable workers are involved is a key consideration. I conclude that the breaches are reasonably significant, and I believe 75% of the maximum available penalty is appropriate at this point. So, at his point the penalties stand at \$150,000 for Abhi Patel and \$75,000 for Mehul Navin Patel.

[43] The main mitigating factors I have identified are the payment of most of the arrears owed to the workers and the acceptance by Mehul Navin Patel that he was a person involved in the breaches of minimum employment standards. In the circumstances, I

consider a further discount of 20% is warranted and penalties now stand at: \$120,000 Abhi Patel and \$60,000 for Mehul Navin Patel.

[44] In terms of ability to pay penalties ordered, I was provided with some evidence by Mehul Navin Patel including a personal bank account balance and an indication of a mortgaged property.

[45] In these circumstances, while no compelling evidence of financial hardship was provided to the Authority, I am prepared to discount the potential maximum penalties by a further 20% to \$96,000 Abhi Patel and \$48,000 to Mehul Navin Patel.

### **Result**

[46] Standing back now to consider consistency with other comparable situations where the Authority has imposed penalties on other small businesses for breach minimum employment standards (and on persons involved in those breaches), I believe these penalties are largely in proportion given the extent and severity of the breaches and within the context of there being three workers involved. However, having regard to the totality of the case brought by the Labour Inspector and the submissions of the parties, a further adjustment would seem justified. So then, at this final step, Abhi must pay penalties of \$78,000 and Mehul Navin Patel must pay penalties of \$38,000.

[47] The Labour Inspector does not oppose a portion of the penalties being paid to the affected workers. In the circumstances of this matter, I have decided that a proportion of these penalties should be payable to the workers. Each worker is to receive \$6000 of the penalty paid by Mehul Navin Patel.

[48] Abhi Patel Enterprises Limited must pay the following amounts to the Labour Inspector within 28 days of this determination:

- (i) penalties in the amount of \$78,000 for subsequent payment to a Crown Bank Account;
- (ii) \$10,520 as an unlawfully obtained premium from Naveen Kumar for subsequent payment to Naveen Kumar; and

- (iii) \$1,208 as an unlawful deduction from Naveen Kumar for subsequent payment to Naveen Kumar;
- (iv) \$63.00 as unpaid public holiday pay to Naveen Kumar for subsequent payment to Naveen Kumar; and
- (vi) \$75.00 as unpaid alternative leave day holiday pay to Naveen Kumar for subsequent payment to Naveen Kumar.

[49] Mehul Navin Patel must pay the following amounts to the Labour Inspector within 28 days of this determination:

- (i) penalties in the amount of \$38,000 for subsequent payment in the amount of \$6000 each to Vishwas Patel, Parth Modi and Naveen Kumar with the balance of \$20,000 payable into a Crown Bank Account; and
- (ii) as a person involved in Abhi Patel Enterprises Limited breaches of minimum employment standards, to the extent Abhi Patel Enterprises Limited is unable to pay the amounts set out in paragraph [48] (ii), (iii) (iv) and (v) above, those amounts together with corresponding orders made in respect of payment to the Labour Inspector.

### **Costs**

[50] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to make an agreement on costs. If no agreement is achieved, the Labour Inspector has fourteen days from the date of this determination to provide any submissions on costs. Abhi Patel Enterprises Limited and Mehul Navin Patel will have fourteen days to provide a response.

Andrew Dallas  
Chief of the Employment Relations Authority