

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

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

[2023] NZERA 100
3158561

BETWEEN	LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
AND	FLAVOUR GREENLANE LIMITED First Respondent
AND	FLAVOUR LIMITED Second Respondent
AND	YULIANA YULIANA Third Respondent

Member of Authority: Nicola Craig

Representatives: Matthew Hall, counsel for the applicant
Simon Greening, counsel for the respondents

Submissions and other
information received: 29 November 2022 and 13 January 2023 from the
applicant
20 December 2022 from the respondents

Date of determination: 3 March 2023

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment, Emilie Woodd, commenced proceedings against Flavour Greenlane Limited (FGL), Flavour Limited (FL) and Yuliana Yuliana alleging breaches of minimum entitlements and minimum standards in respect of three workers.

The Authority's process

[2] The parties were able to reach a partial settlement in relation to arrears and breaches of minimum standards. An agreed statement of facts (ASOF) was provided to the Authority. A consent determination was issued incorporating facts agreed between the parties, arrears findings based on those agreed facts and orders requiring payment of arrears.¹

[3] The parties then lodged submissions regarding penalties as penalties must be determined by the Authority rather than agreed upon.

[4] As permitted by s 174E of the Employment Relations Act 2000 this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The issues for determination are:

- (i) Should penalties be imposed on FGL, FL and Ms Yuliana for breaches of the Wages Protection Act 1983 (WPA), the Holidays Act 2003 (HA) and the Employment Relations Act (the Act or ERA)?
- (ii) If so, what penalties should FGL, FL and Ms Yuliana be required to pay?
- (iii) Should any portion of the penalties be awarded to the workers?

Work arrangements and the Labour Inspector's investigation

[6] FGL traded as Flavour Pita in Ellerslie, Auckland. FL traded as Flavour Pitalicious in Vulcan Lane, Auckland Central. The companies are no longer trading. Ms Yuliana is the sole director and 100% shareholder of both companies. She is no longer operating in the food industry and is employed elsewhere.

[7] The Labour Inspectorate received a complaint in December 2020 from a former staff member I identify as worker M that she had not been paid for holiday pay on termination of employment. The Labour Inspector Ms Woodd began investigating.

¹ *Labour Inspector v Flavour Greenlane Limited, Flavour Limited and Yuliana Yuliana* [2022] NZERA 597.

The investigation expanded to consider general compliance with minimum employment standards.

[8] As recorded in the consent determination FGL and FL confirm that at various times between 15 January 2018 and 13 November 2020 they employed worker M. FGL confirms that at various times between August 2017 and October 2019 it employed two others I identify as worker S and worker D.

[9] Worker M was the Operational Manager/Store Manager of FGL's Ellerslie shore from 15 January 2018 to the end of August 2020. She was on an employer sponsored work visa. Worker M's employment agreement with FGL specified that she would be paid \$21.00 an hour for 40 hours a week – Monday to Friday 8am to 4.30pm. In general she worked between 35 and 45 hours a week and was paid for those hours.

[10] In late August 2020 the Ellerslie store ceased operating and worker M began working for FL at the Vulcan Lane store. This continued until 13 November 2020. She was not given a new employment agreement and incorrectly believed the relocation to be a continuation of her employment with FGL when in fact she was now employed by FL.

[11] Whilst worker M was on an Employer Sponsored Work Visa, she was required to pay back to Ms Yuliana the difference between her contractual rate of \$21 an hour (being the information supplied to Immigration New Zealand) and the minimum wage applicable at the time. These payments were made into Ms Yuliana's bank account, labelled 'rent' or 'storage'. Once worker M moved to a partnership visa that arrangement ceased and she was paid the minimum wage rather than the \$21.00 an hour contractual rate.

[12] During her employment with FGL and FL worker M did not take paid annual holidays nor did she received any holiday on termination of her employment. The stores did not open on public holidays and worker M was paid for some but not all of the public holidays which would otherwise have been her working days.

[13] The Labour Inspector's review found that worker S was not paid for correct annual and public holiday entitlements nor worker D for correct annual holiday pay on termination.

[14] None of the three employment agreements contained a description of the work they were to perform.

[15] FGL's wages and time records for worker M were not accurate in respect of the hours she worked and wages paid and did not include her postal address nor specify whether she was on individual or collective employment agreements.

[16] The holiday and leave records for worker M did not include her current annual holiday entitlement, the dates on which she became entitled to take annual holidays. Records did not include the details of the dates of and payments for any public holiday for all three workers.

[17] Worker M did not receive a written employment regarding her work for FL. That company also failed to keep wages and time or holiday and leave records.

[18] Ms Yuliana was directly involved in the employment arrangements of all three workers. As director and shareholder of FGL and FL she exercised significant influence over the management and administration of the businesses. Ms Yuliana was responsible for making staff rosters and calculating and processing wage payments and calculating annual holiday entitlements.

[19] Ms Yuliana was responsible for arranging wage payments for worker M and worker M's wage repayments to Ms Yuliana.

Arrears are owing

[20] The consent determination sets out findings that:

- (i) FGL and FL jointly and severally owed a total of \$25,088.45 gross to worker M in arrears of premiums, annual holiday pay and public holiday pay, that being in full satisfaction of all arrears of those types in respect of worker M;
- (ii) FGL owed a total of \$1,589.37 gross to worker S in arrears of annual holiday pay and public holiday pay, that being in full satisfaction of all arrears of those types in respect of worker S;

- (iii) FGL owed a total of \$291.70 to worker D in arrears of annual holiday pay, that being in full satisfaction of the arrears of annual holiday pay in respect of worker D; and
- (iv) Ms Yuliana would jointly and severally pay those arrears to the extent FGL and FL do not pay, under 142Y(2)(b) of the Act.

[21] Between May and July 2022 Ms Yuliana made three payments of \$2,000 to worker M for arrears owing to worker M. The remaining arrears owed to worker M are to be paid in monthly instalments by 20 March 2023.

[22] The arrears owed to workers S and D are to be paid by the same date.

Breaches are established

[23] The majority of the breaches which the parties agree, and I accept, occurred relate to FGL:

- (i) Seeking and receiving a premium (by way of wage repayments) from worker M in breach of s 12A of the WPA;
- (ii) Failing to pay annual leave entitlements in accordance with ss 16, 23, 24, 25 and 27 of HA for the three workers;
- (iii) Failing to pay public holiday leave entitlements in accordance with ss 40, 49 and 55 of the Holidays Act regarding workers M and S;
- (iv) Failing to keep and maintain adequate wages and time records in accordance with s 130 of the Act;
- (v) Failing to keep and maintain accurate holiday and leave records in accordance with s 81 of the Holidays Act; and
- (vi) Failing to comply with the mandatory requirements for written employment agreements for the three workers in breach of s 65 of the Act.

[24] FL breached the following provisions regarding worker M:

- (i) Failing to pay annual and public holiday leave entitlements in accordance with ss 23, 27, 40, 49 and 55 of the Holidays Act;
- (ii) Failing to keep and maintain accurate holiday and leave records in accordance with s 81 of the Holidays Act;
- (iii) Failing to keep and maintain accurate wages and time records in accordance with s 130 of the Act; and
- (iv) Failing to provide a written employment agreement to worker M in breach of s 65 of the Act.

[25] The parties agree and I accept on the information before me that Ms Yuliana was a person involved in the breaches by FGL and FL above.

Penalties are appropriate

[26] The breaches affect three employees, who worked for FGL for periods from a few months to a couple of years. There are seven types of breach, including receipt of a premium which I regard as particularly serious. The amounts of money are not small.

[27] The only breaches involving FL concern worker M who worked at the Vulcan Lane store for a few months. The breaches by FL are more modest in scope and quantum but it is not suggested they could be explained as accidental.

[28] Ms Yuliana was a person involved in both businesses and so has a significant number of breaches for which she is liable to a penalty under s 142X of the Act.

[29] I conclude that all three respondents should be subject to a penalty.

Assessment of penalties

[30] In assessing the quantum I have taken into account the factors set out in s 133A of the Act and the judgments in *Borsboom (Labour Inspector) v Preet PVT Limited and Anor*, *Nicholson v Ford* and *Labour Inspector v Daleson Investment Limited*.²

² *Borsboom (Labour Inspector) v Preet PVT Limited and Anor* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

[31] I will discuss those elements step by step, referring to each company and Ms Yuliana where appropriate. The calculations involving each of the parties are set out in the schedule attached to this determination.

Statutory consideration 1 – object of the Act

[32] The objects of the Employment Relations Act include:

- (i) Recognising the implied mutual obligations of trust and confidence in the employment relationship and requiring good faith behaviour;
- (ii) Acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and
- (iii) Promoting the effective enforcement of employment standards, in particular by Labour Inspectors.³

[33] Worker M being on an employer sponsored work visa tipped the balance of power particularly heavily in FGL's favour. This is demonstrated by the imposition on her of a requirement to pay some of her wages to Ms Yuliana. Failure to operate in good faith resulted in workers not receiving their proper entitlements and worker M being unaware of who her employer was, due to FL's failure to provide her an employment agreement. Failure to keep the requisite records does not assist in ensuring employment standards are readily enforced.

[34] FGL, FL and Ms Yuliana acknowledge that their behaviour fell short of minimum standards of behaviour expected of all employers.

Statutory consideration 2 – nature and extent of the breaches

Nature and number of breaches

[35] The breaches outlined, as outlined above, were ongoing, especially for workers M and S.

[36] Consolidation of like breaches results in the failure to pay annual holiday pay amounting to one breach per employee and the two records breaches being regarded as one. Under other circumstances I would not have consolidated the failure (by FL) to

³ The Act, s 3.

provide an employment agreement with the wages and holiday records breaches but in this case I do as worker M had a written agreement with a related company.

[37] On the basis of the information available I also consider it appropriate to globalise between the employees.

Maximum penalty available

[38] The maximum penalty for the companies FGL and FL is \$20,000 each with Ms Yuliana as an individual being liable to a maximum \$10,000 penalty per breach.

[39] As set out in the schedule, having consolidated and globalised, the penalties at the end of step one of the calculations come to:

- (i) \$80,000 against FGL, in respect of four breaches of employment standards;
- (ii) \$60,000 against FL in respect of three breaches of employment standards; and
- (iii) \$40,000 against Ms Yuliana, in respect of four breaches of employment standards.

Statutory consideration 3 – intentional, inadvertent or negligent breaches

[40] The application of a premium requirement on worker M only during the period she was on an employer sponsored visa and also not to the other workers, indicates this breach was intentional.

[41] FL's failure to provide an employment agreement could be seen as negligent when one had been supplied when worker M was with FGL.

[42] The companies and Ms Yuliana accept that they were negligent. Other than regards the intentional premium matter, negligence is established.

Statutory consideration 4 – nature and extent of any loss or damage

[43] Worker M was owed a little over \$25,000, worker S a little over \$1,500 and worker D almost \$300. The total arrears were almost \$27,000. Worker M's loss was reasonably significant. The workers were denied the benefit of their money for an extended period.

Statutory consideration 5 – steps taken to mitigate effects

[44] The Labour Inspector acknowledges that Ms Yuliana has co-operated with her investigation. She and her companies acknowledge their failure by accepting liability.

[45] Ms Yuliana reached agreement with worker M to pay back arrears prior to the parties attending mediation. She has made substantial efforts to regularly repay what is owing, so by late 2022 worker M had received almost half of all that was owing to her. This should be recognised although care is needed not to attach undue weight to belated payment of money which was due some time ago. Submissions for the companies and Ms Yuliana rely on the Employment Court's reduction in the *Preet* case of 50% for having taken similar steps to those here.⁴

Statutory consideration 6 – circumstances of the breaches and any vulnerability

[46] FGL and FL had been incorporated and trading before the commencement of workers M, S and D's employment. The companies should already have known and be applying the relevant minimum employment standards laws. I accept the Labour Inspector's point that the unequal application of standards across the different periods of worker M's employment and between the three employees, suggests some knowledge of the appropriate standards. The imposition of the premium was certainly intentional. The Labour Inspector's submissions describe this action, occurring as it did only whilst worker M was on a sponsored visa, to be a manipulation of the immigration system.

[47] Worker M was particularly vulnerable being on an employer sponsored visa.

Statutory consideration 7 – previous conduct

[48] There is no evidence of FGL, FL or Ms Yuliana have not come to the attention of the Labour Inspectorate prior to this investigation.

⁴ Above at n 2, at [179] – [180].

Additional consideration 1 – deterrence

[49] A message needs to be sent to the companies, to Ms Yuliana and to others that such non-compliance is not to be tolerated.

Additional consideration 2 – culpability

[50] The severity of the breaches is considered to establish a provisional starting point for the penalties. Adjustments for any aggravating and ameliorating factors can then be made. These are set out in the attached schedules.

[51] The quantum owed to worker M and the occurrence of the breaches, particularly the premium imposition, during her visa dependent period are aggravating factors.

[52] For FGL and Ms Yuliana, the Labour Inspector seeks a 70% provisional starting point regarding the premium, with 50% for the other breaches. A 50% starting point for all FL's breaches is sought. FGL and Ms Yuliana see these as appropriate starting points for them but for FL 20% is said to be the correct point.

[53] I have set out the various reductions I consider appropriate in the schedules.

Additional consideration 3 – consistency

[54] The Labour Inspector referred to *A Labour Inspector v RBM Communication Limited, Viral Vala and Dharam Vala* as a case with some similarities – three employees, co-operation with the Inspectorate and similar breaches, save a Minimum Wage Act 1983 breach. Acknowledged are some differences in the type as well as the number of breaches – 28 there compared to 10 here before consolidation. The company employer was penalised \$54,000 in that case and the directors \$27,000 and \$9,000.

[55] Ms Yuliana and the companies rely on several determinations of the Authority, involving a small number of employees with mostly similar or lesser arrears than here.⁵ They conclude that the pattern is of penalties in the range of \$12,000 to \$20,000 for a company and \$4,000 to \$13,000 for an individual.

⁵ *Labour Inspector v Dhanoa Transport Limited* [2018] NZERA Wellington 32, *Labour Inspector v La Wheat Limited* [2019] NZERA 50, *Labour Inspector v Basra & Khella Limited* [2020] NZERA 534, *Labour Inspector v Janson Trading Limited* [2021] NZERA 5, *Labour Inspector v Jocelyn and L Limited* [2021] NZERA 44, *Labour Inspector v Elements Therapeutic Massages Limited* [2022] NZERA 415.

[56] When comparing to other cases I note that there are no minimum wage breaches here. Worker M had to pay Ms Yuliana a premium but only to the extent of effectively dropping her salary to the minimum wage, distinguishing this from cases where the employee had to survive on a very small amount of money well below the minimum wage. However, the premium breach makes it more serious than other cases solely involving negligent breaches.

[57] I accept that the cases referred to for the companies and Ms Yuliana reflect a relevant range of outcomes with which consistency should be sought, although the premium and three workers involved take this case to the higher end of the range.

Additional consideration 4 – ability to pay

[58] FGL and FL are no longer trading and advise they have no cashflow. No other information about their financial position is available. Ms Yuliana is currently employed in a position but no information was provided about her salary or wider financial position.

[59] In the absence of specific evidence regarding the financial picture of the companies and Ms Yuliana I make no deduction for inability to pay.

Additional consideration 5 – proportionality of outcome

[60] The Labour Inspector recognises that the close relationship between the companies and Ms Yuliana and proportionality may lead to some reduction.

[61] I have taken into account that globalisation was allowed at the start but the final penalties need some reflection of the involvement of three workers. By contrast FL's provisional total needs an adjustment downwards to ensure proportionality. I have also considered the proportionality between the two companies and Ms Yuliana with some adjustment made.

A portion of the penalties should go to worker M

[62] The Labour Inspector seeks an order that a portion of the penalties are paid to worker M pursuant to s 136(2) of the Act. Worker M contributed significantly to the Labour Inspector's investigation and when viewed in totality, the severity of the breaches affecting her warrant an apportionment of the penalties to her.

[63] No apportionment is sought regarding the other employees. The Inspector recognises they were affected but the breaches regarding them are less serious and arrears much lower than those owing to worker M. No other apportionment is ordered.

Orders

[64] Within 28 days of the date of this determination:

- (i) Flavour Greenlane Limited shall pay to the Labour Inspector for transfer to a Crown bank account a penalty of \$20,000 and the Crown shall transfer \$5,000 of that sum to worker M;
- (ii) Flavour Limited shall pay to the Labour Inspector for transfer to a Crown bank account a penalty of \$6,000 and the Crown shall transfer \$1,500 of that sum to worker M; and
- (iii) Yuliana Yuliana shall pay to the Labour Inspector for transfer to a Crown bank account a penalty of \$9,000 and the Crown shall transfer \$2,250 of that sum to worker M.

Costs

[65] Costs are reserved and the parties encouraged to resolve them between themselves.

[66] The Labour Inspector has been successful in pursuing this matter. If the parties are unable to agree on costs, she shall have 14 days from the date of this determination in which to file and serve a memorandum on the matter. FGL, FL and Ms Yuliana shall have a further 14 days in which to file and serve a memorandum in reply. The parties could expect the Authority's assessment to consider the notional daily tariff, recognising that this matter did not require an in-person investigation meeting.⁶

Nicola Craig

Member of the Employment Relations Authority

⁶ Employment Relations Authority, Practice Note 2, Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi.

SCHEDULE

Flavour Greenlane Limited		
Step 1: Nature and number of breaches – potential maximum following consolidation and globalisation		
Sought and received a premium, s 12 WPA	1 x \$20,000	\$20,000
Failure to pay annual holiday pay, ss 16, 23, 24, 25, 27 HA	1 x \$20,000	\$20,000
Failure to pay public holiday entitlements, ss 49, 55 HA	1 x \$20,000	\$20,000
Failure to keep accurate records, ss 130 ERA, s 81 HA	1 x \$20,000	\$20,000
	Subtotal	\$80,000
Step 2(a): Aggravating factors		
Sought and received a premium	Less 30%	\$14,000
Failure to pay annual holiday pay	Less 50%	\$10,000
Failure to pay public holiday entitlements	Less 50%	\$10,000
Failure to keep accurate records	Less 50%	\$10,000
	Subtotal	\$44,000
Step 2(b): Ameliorating factors		
Sought and received a premium	Less 50%	\$7,000
Failure to pay annual holiday pay	Less 50%	\$5,000
Failure to pay public holiday entitlements	Less 50%	\$5,000
Failure to keep accurate records	Less 50%	\$5,000
	Subtotal	\$22,000
Step 3: Ability to pay		
	No deduction	
	Subtotal	\$22,000
Step 4: Proportionality		
	TOTAL	\$20,000

Flavour Limited		
Step 1: Nature and number of breaches – potential maximum following consolidation and globalisation		
Failure to pay annual holiday pay, ss 23 and 27 HA	1 x \$20,000	\$20,000
Failure to pay public holiday entitlements, ss 49 and 55 HA	1 x \$20,000	\$20,000
Failure to keep accurate records, ss 65 and 30 ERA, s 81 HA	1 x \$20,000	\$20,000
	Subtotal	\$60,000
Step 2(a): Aggravating factors		
Failure to pay annual holiday pay	Less 50%	\$10,000
Failure to pay public holiday entitlements	Less 50%	\$10,000
Failure to keep accurate records	Less 50%	\$10,000
	Subtotal	\$30,000
Step 2(b): Ameliorating factors		
Failure to pay annual holiday pay	Less 50%	\$5,000
Failure to pay public holiday entitlements	Less 50%	\$5,000
Failure to keep accurate records	Less 50%	\$5,000
	Subtotal	\$15,000
Step 3: Ability to pay		
	No deduction	
	Subtotal	\$15,000
Step 4: Proportionality		
	TOTAL	\$6,000

Yuliana Yuliana		
Step 1: Nature and number of breaches – potential maximum following consolidation and globalisation		
Sought and received a premium, s 12 WPA	1 x \$10,000	\$10,000
Failure to pay annual holiday pay, ss 16, 23, 24, 25, 27 HA	1 x \$10,000	\$10,000
Failure to pay public holiday entitlements, ss 49, 55 HA	1 x \$10,000	\$10,000
Failure to keep accurate records, ss 65 and 130 ERA, s 81 HA	1 x \$10,000	\$10,000
	Subtotal	\$40,000
Step 2(a): Aggravating factors		
Sought and received a premium	Less 30%	\$7,000
Failure to pay annual holiday pay	Less 50%	\$5,000
Failure to pay public holiday entitlements	Less 50%	\$5,000
Failure to keep accurate records	Less 50%	\$5,000
	Subtotal	\$22,000
Step 2(b): Ameliorating factors		
Sought and received a premium	Less 50%	\$3,500
Failure to pay annual holiday pay	Less 50%	\$2,500
Failure to pay public holiday entitlements	Less 50%	\$2,500
Failure to keep accurate records	Less 50%	\$2,500
	Subtotal	\$11,000
Step 3: Ability to pay		
	No deduction	
	Subtotal	\$11,000
Step 4: Proportionality		
	TOTAL	\$9,000