

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 108
3153204

BETWEEN	A LABOUR INSPECTOR Applicant
AND	SHIVAJI ENTERPRISES LIMITED First Respondent
AND	RAJANI PANWAR Second Respondent
AND	BEER PANWAR Third Respondent

Member of Authority:	David G Beck
Representatives:	Rochelle Hill, Counsel for the Applicant No appearance for the Respondents
Investigation Meeting:	6 December 2022 at Christchurch
Submissions received:	6 December from the Applicant
Date of Determination:	7 March 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Bridget Zonneveld, makes claims that Shivaji Enterprises Limited (Shivaji Ltd), Rajani Panwar and Beer Panwar have engaged in breaches of minimum employment standards, failed to keep wages and time and holidays and leave records, owe

arrears of wages and holiday pay and should be the subject of specific penalties for such breaches. The actions are brought by the Labour Inspector on behalf of Deepika Deepika who worked at two restaurants run by Shivaji Ltd.

[2] Ms Deepika, at the time a young, newly arriving immigrant on a student visa was employed by Shivaji Ltd in September 2015 at a restaurant located in a Hornby shopping mall. Ms Deepika was not initially provided with an employment agreement. The work was to serve customers, wash dishes, clean the floor and tables and stock the drinks fridge. Ms Deepika initially worked with a chef who was a cousin of Beer Panwar. Ms Deepika later at times worked for Shivaji Ltd in their other restaurant in Wainoni until 27 February 2020.

[3] Rajani Panwar was the sole director and shareholder of Shivaji Ltd. The company was registered on 26 July 2010, is currently not trading and was removed from the New Zealand Companies Register on 16 February 2023.

[4] The Labour Inspector says Ms Deepika was not paid minimum wages for all the hours she worked, insufficiently remunerated whilst working public holidays, not paid for unworked public holidays that fell on otherwise working days, not paid holiday pay upon the ending of the employment relationship and was not paid sick leave at her correct rate.

[5] The Labour Inspector claims penalties for the following statutory breaches relating to Ms Deepika's employment with Shivaji Ltd:

- (i) Section 4 of the Wages Protection Act 1983 (WPA) and section 6 of the Minimum Wage Act 1983 (MWA) - a failure to pay minimum wages for every hour worked.
- (ii) Section 130 Employment Relations Act 2000 (the Act) – a failure to keep a wages and time record.
- (iii) Section 81 Holidays Act 2003 (HA) – a failure to keep a holiday and leave record.
- (iv) A Failure to comply with sections 21, 23, 24, 25, 49, 50, 56, 60, 71 and 81 of the HA and;

(v) That Rajani Panwar and Beer Panwar are persons involved in the above breaches in accord with s 142W of the Act and personally liable for such pursuant to s 142Y of the Act.

Remedies : alleged arrears owing

[6] The Labour Inspector claims the following arrears are owed:

Category	Calculated amounts owed
Minimum wage arrears (unpaid hours worked)	\$116,451.31
Holiday pay owed upon termination of employment	\$13,725.93
Payment for Public holidays falling on otherwise working days	\$2,410.69
Payment of time and a half penal rate for working on public holidays	\$2,561.17
Payment for Alternative holidays for qualifying public holidays	\$4,404.11
Payment for sick leave	\$709.43
Total claimed	\$140,262.64

[7] The Labour Inspector also claimed interest owed on the above amounts and recovery of the Authority filing fee.

[8] The Authority must decide if the above identified arrears flow from the statutory breaches claimed and whether Rajani Panwar and Beer Panwar are persons involved in in the breaches and therefore liable to pay the arrears pursuant to s 142Y of the Act and whether any penalties are applicable and who should be liable for such.

The Authority's investigation

[9] Rajani Panwar and Beer Panwar did not participate in any of the pre-investigation Authority proceedings and did not attend the investigation meeting or provide written statements. The Labour Inspector has information to suggest the Panwars' are currently living outside New Zealand and that Shivaji Ltd has ceased involvement in the two restaurants located in Christchurch.

[10] I am satisfied that the respondents have knowledge of these proceedings as the Labour Inspector detailed contact with them during her investigation and produced an affidavit of service (delivered to an address in Margate, Queensland) to Beer Panwar providing him on 26 July 2022: the Labour Inspector's application to the Authority with annexures; a directions notice and notice of the Authority investigation meeting date and venue.

[11] At the investigation meeting, I heard evidence from Bridget Zonneveld, Labour Inspector, Vijay Rawat, an ex-employee of Shivaji Ltd and Deepika Deepika the worker subject of the alleged breaches. All provided written statements. I was ably assisted by an interpreter.

[12] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions on matters to resolve the identified issues and make orders but I do not record all evidence and submissions received.

Issues

[13] The issues for determining are:

- (i) Did Shivaji Ltd maintain sufficient wage, time and holiday and leave records?
- (ii) Did Shivaji Ltd pay Ms Deepika at least the minimum wage for all hours she worked in accord with the MWA and WPA?
- (iii) Did Shivaji Ltd correctly pay for holiday entitlements (including Public Holidays) to Ms Deepika during her period of employment and when the employment ended?

- (iv) Are Beer Panwar and Rajani Panwar each a person involved in the identified breaches and can one or both be liable to pay identified arrears?
- (v) The Authority has then to determine the quantum of penalties, if any, that the respondents may incur by applying relevant legal principles.
- (vi) How costs are to be dealt with.

The Labour Inspector's investigation.

[14] In October 2020 the Labour Inspector, Ms Zonneveld, says she met with Ms Deepika to discuss her complaint and provided a useful overall summary of the situation, that Ms Deepika had:

- Worked for the first respondent between September 2015 and November 2015 and was only paid for 14 hours per week when in reality, she was working many more.
- After returning from a trip to India she worked for the first respondent in February, March and April 2016 and was only paid for 14 hours when she worked more hours than that.
- Started work for the first respondent again in October 2016 and worked until February 2020 and that in this period of time she had to work seven days per week from approximately 9 am or 9:30 am until 9 pm for a total of 75-77 hours each week but was only paid for 30 hours each week.
- Was required by the second and or third respondent to pay money to their bank account to pay various personal bills of theirs.¹

[15] Ms Deepika's evidence was, while employed, she lived with the Panwars at their family home (paying rent), and she provided: her own record of hours she says she worked; copies of personal bank statements; two employment agreements she was subsequently provided; and screenshots of her working.

[16] Ms Zonneveld detailed attempts to engage, over a two month period, with the Panwars on producing relevant employment records, including working with their licenced immigration advisor and Shivaji Ltd.'s accountant. The upshot was, no coherent or accurate wage time or holiday records were provided. Ms Zonneveld received a spreadsheet from Shivaji's

¹ Brigit Ann Frances Zonneveld, Labour Inspector, sworn brief of evidence, at para [5].

accountant and confirmation from the accountant that no records had been provided to him and the spreadsheet merely detailed net amounts paid to Ms Deepika (as shown in her bank statements). The Labour Inspector says she concluded that the material provided by Ms Deepika was “more likely to be an accurate representation of the hours she actually worked” and formed the basis of the calculations of arrears (para 6 above). Timesheets were provided purporting to be in Ms Deepika’s handwriting but they only covered a limited period (27 September 2019 – 23 February 2020) and did not match Ms Deepika’s handwriting.

[17] On 11 March 2021, Ms Zonneveld says she interviewed Beer and Rajani Panwar with their immigration advisor present. In the interview Ms Zonneveld says the Panwars confirmed no record of hours worked or leave taken was kept.

[18] Ms Zonneveld says she also interviewed Vijay Rawat. Mr Rawat who gave evidence at the investigation meeting, confirmed whilst working alongside Ms Deepika at Hornby (as a chef between May 2017 and September 2019), that she commenced her working day whilst he was at work at 10 or 10:30 am and worked till approximately 9 pm and was afforded initially a half day per week off work. Mr Rawat says for a later period (June – December 2017) when another chef was employed, Ms Deepika was able to have one full day off every week. Mr Rawat indicated he could not recall a system in place to record hours worked and he also experienced some pay issues including not being paid extra whilst working public holidays. Mr Rawat says he chose to leave and work elsewhere rather than confront Beer Panwar who he described as running all aspects of the business.

[19] Ms Zonneveld completed an investigation report on 4 October 2021, after earlier sharing drafts with the Panwars’ immigration advisor. Ms Zonneveld ascertained from Immigration New Zealand that the Panwars left New Zealand for Brisbane, Australia, on 16 August 2021. The Panwars’ immigration advisor advised he had lost contact with his clients and communicated an understanding that the Panwars had moved permanently to Australia.

[20] Ms Zonneveld’s investigation report concluded multiple breaches of the HA, the Act and WPA had occurred.

Issue one - Did Shivaji Ltd maintain sufficient wage, time and holiday and leave records?

[21] Section 130 of the Act has detailed provisions on the content and record keeping requirements an employer must fulfil. All Shivaji Ltd provided to the Labour Inspector was a latterly prepared spreadsheet containing information relating to net amounts paid to Ms Deepika. No holidays and leave records were provided

[22] In terms of the latter, s 81(2) of the HA has specific requirements for a holiday and leave record. They includes that an employer must record the date the employment commenced, the cumulative days of leave taken, the amount of payment made for each period of leave and the number of hours worked on any public holidays and date when alternative holidays fell due. Ms Deepika was not provided with any pay slips setting out her wages and holiday balances and says she worked on public holidays without any level of additional compensation or lieu days.

[23] The duty to maintain records is an employer one (s 130(1) of the Act and s 81 of the HA). It is not an employee responsibility. An employer cannot fulfil these obligations by assuming the employee is keeping records. Where an employee holds a position of responsibility for maintaining records as part of their role, an employer should have systems in place to ensure that task is carried out in accordance with the legislation.

[24] There was no evidence before the Authority that Shivaji Ltd had any such system in place. Evidence showed Beer Panwar controlled the hours of work by imposing obligations on Ms Deepika without recording her actual hours worked. Likewise, Beer Panwar controlled when Mr Deepika took leave and did so in a wholly discretionary manner.

Finding

[25] I find that Shivaji Ltd failed to keep proper, accurate records under the Act and HA and that Beer Panwar was an active party to this breach as he directly controlled the allocation of working hours and statutory leave including public holiday entitlement matters.

Issue two – did Shivaji Ltd pay Ms Deepika at least the minimum wage for all hours she worked in accord with the MWA and WPA?

[26] The Labour Inspector's submission indicated that Ms Deepika was not always paid at least the minimum wage for every hour worked as she was consistently paid for fewer hours. Specifically, the underpayments were detailed as Ms Deepika working between:

- October 2015 and November 2015 for 7 hours a day, Thursday to Sunday – being 28 hours a week but only being paid for 15 hours.
- February 2016 and April 2016, Thursday to Sunday – being 28 hours per week but only being paid for 4 of the 8 weeks and for those weeks she was paid only being paid for 15 hours.
- October 2016 and 29 January 2017, sporadic hours worked and not being paid at all until 29 December 2016.
- 30 January 2017 and 11 June 2017, working 80.5 hours a week – being paid approximately 17 to 23 hours per week.
- 12 June 2017 and 12 November 2017, working 11.5 hours per day over 6 days a week totalling 69 hours – being paid for approximately 18-35 hours per week.
- 13 November 2017 and 30 December 2018, working an estimated 73.8 hours per week – being paid for 33-35 hours per week.
- 1 January 2019 and 26 February 2020, working 60-80 hours per week and not being paid in full including weeks when not paid at all.

Finding

[27] From the evidence made available I accept the Labour Inspector's analysis and submissions. Due to the respondents' failure to participate in the investigation they have lost an opportunity to displace the presumption in s 132(2) of the Act ² that provides unless contrary

² Section 132 Employment Relations Act 2000 – Failure to keep or produce records.

evidence is produced by an employer, the Authority can treat the workers claims as established (provided there is some evidential basis to the claim/s). A lack of appropriate record keeping is the reason for this finding.

[28] I accept the Labour Inspector's calculations and the evidence of Ms Deepika's notes of hours worked. Such was partly confirmed by Mr Rawat as he worked alongside Ms Deepika for a significant period of her employment.

[29] I find in the absence of any relevant documentation, that Ms Deepika was not paid for all the hours she worked, and this is a breach of s 4 WPA and s 6 MWA.

Issue three - did Shivaji Ltd correctly grant/pay holiday entitlements (including Public Holidays) to Ms Deepika during her period of employment and when the employment ended?

[30] The Labour Inspector's submission and findings of their investigation identified potential HA unpaid entitlements that Ms Deepika:

- Worked 29 public holidays and was not paid time and a half and was not granted any alternative days of paid leave.
- Was not paid for 13 unworked public holidays falling on days that were her otherwise working days.
- Was not paid for 6 special leave days when she was sick.
- Was not paid for annual holidays taken and not paid for accumulated holiday pay owed at the ending of the employment relationship.

Finding

[31] I find, essentially on the same basis as the unpaid wage claims, that the above claims are made out by the Labour Inspector as the respondents have not displaced a presumption in s 84 (4) HA governing a parallel situation where the employer has failed to maintain a holidays and leave record.

[32] I find the arrears set out above (at para 6) are owed to Ms Deepika and, the Authority having regard to the ambit of s142 of the Act, gives leave for recovery under s 142Y(2) to potentially hold Beer Panwar and Rajani Panwar jointly and severally liable for the arrears identified should I find either or both were sufficiently involved in the breaches (discussed below).

Issue four - are Beer Panwar and Rajani Panwar each a person involved in the identified breaches and can one or both be held liable to pay identified arrears?

[33] The Labour Inspector submits that Beer Panwar and Rajani Panwar (the Panwars) are both persons involved in the identified breaches pursuant to s 142W of the Act and seeks that they each be held liable under s 142Y to pay the arrears claimed should Shivaji Ltd given that it has ceased trading, be unable to pay such.

[34] Further, the Labour Inspector is seeking penalties for the identified breaches be awarded against Shivaji Ltd and, pursuant to s 142X of the Act, against the Panwars. The Labour inspector asserted Beer Panwar was responsible for the day to day running of the business and exercised a significant influence over management of working hours and administration of wages. When interviewed by Ms Zonneveld, Beer Panwar disclosed he was the chef and looked after the business in his wife's name. The evidence of Rajani Panwar's involvement was more limited apart from an implied role as a director. Ms Zonneveld's evidence was that the business operated over two locations but both restaurants were small scale family affairs with the Panwars working in the business. Ms Deepika and Mr Rawat described Beer Panwar as the "go to" person, who would at times, arrange rostered hours and direct tasks. However, as Ms Deepika lived and ate with the Panwars, it is inconceivable Rajani Panwar was not aware of at least, Ms Deepika's lengthy working hours.

[35] To ascertain whether the Panwars were involved in a breach of minimum standards I must first be satisfied that they each, as the Court of Appeal in *Labour Inspector v Southern Taxis Ltd* suggests as a prerequisite for liability, had "knowledge of the essential facts that

establish the contravention by the employer”³ before I can find they were knowingly involved in the breaches. Further the Court of Appeal commented that:

It was common ground before us that a person is knowingly concerned in a breach if they have actual knowledge of all the essential facts giving rise to the breach, or are wilfully blind in relation to those facts. That is plainly correct, in light of the authorities on accessory liability in New Zealand, Australia and England.⁴

[36] Section 142W of the Act is applicable:

142W Involvement in breaches

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
 - (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
 - (a) a person occupying the position of a director of a company if the entity is a company;
 - (b) a partner if the entity is a partnership;
 - (c) a general partner if the entity is a limited partnership;
 - (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership;
 - (e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.
- (4) This section does not apply to proceedings for offences.

³ *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at [59]

⁴ At [42].

Assessment

[37] Under s 142Y of the Act the Authority may determine that either or both Panwars, was a person involved in the breaches identified to the extent that he/she is personally liable to pay Ms Deepika any amounts that Shivaji Ltd is unable to pay.

[38] In assessing the facts and documentation and taking account of the Panwars respective roles and involvement in administration and oversight of the business and applying the appropriate statutory⁵ and legal tests⁶ it is apparent that Beer Panwar was more involved in the breaches.

[39] The Authority finds Beer Panwar was knowingly involved in the underpayment of Ms Deepika's wages for extra hours worked as he set up the employment, administered wages and frequently visited the workplace, sometimes worked alongside Ms Deepika and at times set work rosters. As such, Beer Panwar was aware of the essential facts, initiated the breaches and ignored his record keeping obligations. Beer Panwar was clearly a person involved in the breaches and when they were brought to his attention by the Labour Inspector, he failed to resolve the underpayments identified. An aggravating factor was the evidence that the Panwars exploited a young, vulnerable immigrant worker on an ongoing basis.

Finding

[40] The Authority finds that Beer Panwar is personally liable for the breaches of minimum standards and unpaid wages and unpaid holiday pay in the amounts claimed to the extent that Shivaji Ltd is unable to meet these arrears as it has ceased trading.

Issue 5 - what level of penalties are appropriate in the circumstance of the breaches?

[41] Having identified how the breaches were caused I now turn to consideration of penalties. The Authority has jurisdiction to hear and determine an application by a Labour Inspector for recovery of penalties under the Act, the HA, WPA and MWA⁷ The standard of proof for the

⁵ Section 142W(1) Employment relations Act 2000.

⁶ *Labour Inspector v Southern Taxis* [2021] NZCA 705, (2021) 18 NZELR at [42].

⁷ Employment Relations Act 2000, s 161(m)(ii) and s 161(m)(iv).

imposition of a penalty in this jurisdiction is on the balance of probabilities.⁸ The maximum penalty for an individual, found liable for a penalty is \$10,000 per breach and for a company \$20,000 per breach.⁹

The Law

[42] The following section of the Act provides guidance about the matters the Authority needs to have regard to when imposing penalties

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
- (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.

⁸ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁹ Section 135(2)(a) Employment Relations Act 2000 and s 75(1)(b) Holidays Act 2003.

[43] Consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited*

¹⁰ I will adopt a four-step framework to fixing penalties, that is:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalty starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances. ¹¹

[44] I also utilise an approach used in an Authority determination (*Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd*) that first considered the statutory framework and then assessed the quantum of remedies based on the four steps identified above. ¹²

The object of the Act

[45] Section 3(a) of the Act sets out relevant ‘aspirational’ matters including the need to “build productive employment relationships through the promotion of good faith in all aspects of the employment environment”, acknowledging and addressing the inherent inequality of power in employment relationships” and promoting effective enforcement of “employment standards” by Labour Inspectors.

The nature and extent of the breaches

[46] The Labour Inspector’s report identified a total of 113 accumulated breaches that I have found established as follows.

- (i) A breach of s 4b and s 130 of the Act by failing to keep compliant

¹⁰ *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

¹¹ At [151].

¹² *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

wage and time records;

- (ii) A breach of s 81 HA for failing to keep accurate holiday and leave records for the worker;
- (iii) A breach of s 6 MW Act for failing to pay the applicable minimum rate to the worker;
- (iv) Breaches of s 49, 50, 55, 56, 57, 60, 71 and 72 of the HA by failing to pay correct leave and public holiday entitlements to the worker;
- (v) Breaches of s 16, 21, 23 and 25 H Act for failing to pay final holiday pays to the worker;
- (vi) A breach of s 12A(2) WPA.

The nature and extent of any loss or damages suffered

[47] The loss or damage incurred by the worker involved relating to wage arrears (underpayment for hours worked) and breaches of the HA was initially quantified cumulatively as \$140,262.64. This is a significant sum of money that a worker effectively paid less than the minimum wage for hours worked, was deprived of the use of.

Were the breaches intentional, inadvertent, or negligent?

[48] I conclude that Beer Panwar failed to have due regard to well-known legal obligations and his conduct was objectively self-serving and, thus the breaches intentional.

What steps have been taken in mitigation?

[49] I was presented with no evidence that the breaches were rectified. It would appear that once the extent of the concerns was brought to the Panwars' attention they simply left New Zealand and ignored the Labour Inspector's investigation findings.

The circumstances of the breaches and any vulnerability factors

[50] The worker involved was in a very difficult situation, reliant on the Panwars for accommodation and meals and emotional support. It is easy to draw an inference that as a migrant worker with English not her first language, that Ms Deepika would likely be unaware of her employment rights and reluctant to pursue such where income and residency were

potentially at stake and cultural factors may have been in play. I find the worker was objectively vulnerable.

Previous conduct

[51] This was not placed at issue.

***Preet* step one – nature and number of breaches**

[52] *Preet* allows me to consider if any of the breaches can be ‘globalised’ for the purpose of quantifying penalties so that one breach may reflect two or more.¹³ In applying a globalised approach in *Preet* the Court noted:

Still under Step 1, once the nature and number of breaches have been identified, the Court or the Authority should give consideration to whether global penalties may be appropriate in the particular case. If, for example, there are multiple and very similar breaches such as the repeated non-payment or below-minimum payment of wages to an employee, it may be an appropriate case for the imposition of a global penalty for these. This may include cases where the breaches are part of a consistent pattern of breach of a particular statutory requirement. The Authority or the Court should be careful to ensure that the globalisation of a penalty does not diminish the significance of a repeated and/or long-running series of breaches. Ultimately, this global penalty assessment will be subject to cross-checking and confirmation or potential reconsideration when the Authority or the Court applies what we call the proportionality test under Step 4.¹⁴

[53] The effect of the above is where multiple breaches occur in respect of multiple employees, globalising can allow the application of one penalty for such. Here as in *Preet*, some of the breaches relate to one activity (record keeping). This approach was affirmed by the Court in *A Labour Inspector v Parihar* where Judge Perkins allowed that a failure to keep wage and time records and holiday and leave records although required under two separate statutes, relates to the general breach of failure to keep adequate records, and should be treated as one breach per impacted employee.¹⁵

¹³ At [100].

¹⁴ At [141].

¹⁵ *A Labour Inspector v Parihar* [2019] NZEmpC 43.

[54] In *A Labour Inspector v Matangi Berry Farm Limited*¹⁶ faced with multiple employees and identical breaches, Judge Corkhill focused on the nature of the breach rather than the frequency per employee. This allowed a finding of a single breach for each type of default. Taking this approach and focussing broadly on the nature of the breaches, rather than the frequency or each specific statutory transgression, allows me to reduce six breaches to one - for the record keeping transgressions of both s 130 of the Act and s 81 HA.

[55] However, the other breaches of minimum standards relating to remuneration including the HA breaches, are not related and need to be treated separately: so, three breaches of s 6 MWA can be reduced to one, three breaches of s 23 HA can be reduced to one and so can three breaches of 72 HA. The remaining issues of a breach of s 4 WPA and s 12 WPA were single breaches.

[56] Taking a pragmatic global approach reduces the various breaches to six and provides a sensible starting point to define potential maximum penalties before I apply further analysis of other factors using guidance from *Preet*. So, at this stage, the potential maximum penalties I can impose on Shivaji Limited and Beer Panwar using a globalised approach, are respectively \$20,000 and \$10,000 per breach¹⁷ which for the six accumulated breaches identified above amounts to \$180,000.

***Preet* Step 2 – severity of breaches**

[57] On top of statutory considerations, I am obliged to examine the respondents' culpability and consider the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[58] Considering the above aggravating features I believe deterrence where a vulnerable individual is involved is a key consideration. I conclude that the breaches are reasonably significant, and I deem 80% of the maximum accumulated penalty to be a 'starting point' (\$144,000).

¹⁶ *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43

¹⁷ Section 135(2)(a) Employment Relations Act 2000 and s 75(1)(b) Holidays Act 2003.

[59] There were no mitigating factors.

Preet step 3 – means and ability of the respondents to pay

[60] I was provided no evidence about the respondents' financial situation apart from what can be implied from a small business that was impacted by Covid generated lockdowns and the constrained trading this caused.

[61] In these circumstances, whilst no compelling hardship reasons have been identified I am prepared to reduce the penalties by a further 20% to \$115,200.

Preet step 4 - Proportionality

[62] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such where here three workers were involved. Four Authority cases I have contrasted involve breaches of a similar nature involving small businesses with three or fewer employees¹⁸ and I also sought guidance from a recent case involving a bottle store that has a useful analysis of past authorities and amounts awarded.¹⁹ The cases show penalties imposed range from \$12,000 to \$21,000 depending on various contextual factors.

[63] Considering the totality of factors, I have explored and that applying proportionality to my analysis should lead to a further reduction I consider below what would be proportionate in applying penalties against Shivaji Ltd and Beer Panwar.

¹⁸ *Labour Inspector v Sharma and Sons (2009) Ltd and Sharma and Sons Ltd* [2016] NZERA Auckland 128; *Labour Inspector v IXL Petroleum and Gas Ltd* [2017] NZERA Auckland 128, *Labour Inspector v Dhanoa* [2018] NZERA Wellington 32 and *A Labour Inspector v Janson Trading Limited t/a SBA Thames and Jaswant Singh* [2021] NZERA 5.

¹⁹ *A Labour Inspector v Basra & Khella Limited* [2020] NZERA 534 at [211].

Shivaji Ltd and Beer Panwar liabilities

[64] I have found Beer Panwar was significantly involved in the breaches identified and benefitted from such and he falls within the scope of s 142W(1)(c) of the Act and is liable under s 142Y of the Act.²⁰

[65] As above I have applied the factors identified in *Preet* and applying proportionality and consistency I consider it appropriate that a potential penalty of \$115,200 be reduced to \$50,000 for both parties to be apportioned as follows. The Labour Inspector does not oppose a portion of the penalties being paid to the worker and in the circumstances, I have decided that half of the penalties owed should be paid to Ms Deepika.

Conclusion on penalties and arrears

[66] Within 28 days of the date of this determination the following amounts must be paid:

- (i) Shivaji Enterprises Limited is to pay penalties in the amount of \$40,000.00.
- (ii) Shivaji Enterprises Limited is to pay Deepika Deepika \$140,262.64 for cumulative arrears of wages and holiday pay.
- (iii) Beer Panwar is to pay penalties in the amount of \$10,000.00.
- (iv) As a person involved in Shivaji Enterprises breaches of minimum standards, to the extent Shivaji Enterprises Limited is unable to pay the amounts set out in (ii) above, Beer Panwar must pay the identified arrears amount (\$140,262.64) to the Labour Inspector within 28 days of this determination being issued.
- (v) The penalties and arrears identified above, shall be paid into a Crown bank account and the Crown shall transfer half of the amount of the penalties to Deepika Deepika and the full amount of arrears identified to Deepika Deepika.

²⁰ Section 142W(1)(c) Employment Relations Act 2000 that specifies a person is involved in a breach where that person “has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach”.

Costs

[67] Costs are reserved. The parties are invited to resolve the matter between themselves. If they are unable to do so, the Labour Inspector has 14 days from the date of this determination in which to file and serve a memorandum on costs. The Respondents have a further 14 days in which to file and serve a memorandum in reply.

[68] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors, require an adjustment upwards or downwards.

David G Beck
Member of the Employment Relations Authority