

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 241
3166384

BETWEEN

A LABOUR INSPECTOR OF THE
MINISTRY of BUSINESS,
INNOVATION and EMPLOYMENT
Applicant

ZAAFRAN MOROCCAN CUISINE
LIMITED
First Respondent

AND

MANGAL SINGH
Second Respondent

Member of Authority: David G Beck

Representatives: Rebecca Hill and Amy Webster, counsel for the Applicant
Bernie Chow, advocate for the Respondent

Investigation Meeting: On the papers

Submissions: 4 November 2022 and 31 March 2023 from the Applicant
18 November 2022 from the Respondent

Date of Determination: 12 May 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector asserts that the first respondent, Zaafran Moroccan Cuisine Limited (Zaafran), has breached obligations contained in the Employment Relations Act 2000 (the Act), the Holidays Act 2003 (HA) and the Minimum Wage Act 1983 (MWA).

[2] The Labour Inspector says that Mangal Singh was involved in Zaafran's breaches pursuant to s 142W of the Act.

[3] The Labour Inspector seeks to recover penalties for identified breaches. Following a mediation, the parties agreed on the issuing of an Authority consent determination dated 29 September 2022 containing an agreed statement of facts and acceptance of agreed breaches.¹

[4] The agreed facts included that:

- (i) Mr Singh had proposed to a worker that in return for assistance with his residency application, the worker would not be paid for all the hours he worked but such hours would be paid if the worker was unsuccessful in his residency application.
- (ii) Mr Singh insisted that the worker document fewer hours than he worked.
- (iii) As a result, timesheets provided to the Labour Inspector were inaccurate.

[5] The parties further accept that Mr. Singh:

- (i) was a person involved in the identified breaches;
- (ii) had knowledge of the essential facts that establish the above contraventions; and
- (iii) is personally liable to pay arrears as scheduled as Zaafran is no longer trading and unable to pay.

[6] The parties have agreed that the only matter outstanding is the quantum of penalties imposed. On this basis of an acceptance of culpability for the breaches the parties agreed that the matter be dealt with by submissions without the need to convene an investigation meeting.

¹ *A Labour Inspector of the Ministry of Business Innovation and Employment v Zaafran Moroccan Cuisine Limited and Mangal Singh* [2022] NZERA 496.

The Authority Process

[7] 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

[8] The Authority must determine the quantum of penalties that Zaafran and Mr Singh should incur for the identified and uncontested breaches by applying relevant legal principles.

What caused the breaches?

[9] Zaafran is a limited liability company that operated a licenced restaurant located in Kaiapoi from December 2015 until March 2021 when the business was sold. In addition, during the period of the Labour Inspector's investigation Mr Singh owned and operated two other restaurants at Rolleston and Rangiora trading as "A Pocket Full of Spices" although he indicated the former one had also been sold. When trading at Kaiapoi, the Labour Inspector observed that the restaurant typically employed three to four workers and that the manager and chef roles were occupied by Indian migrants on temporary work visas, with other part-time roles being filled by school students. Mr Singh also worked as a chef and manager in his businesses.

[10] Mr Singh is one of two directors and shareholders of the company. Mr Singh was heavily involved and worked in the business. He engaged workers, set employment conditions, and administered the payroll system including having the responsibility of maintaining holiday and leave records.

[11] The Labour Inspectorate were contacted in March 2021 by a Zaafran worker alleging he was consistently working 50-60 hours per week and only being paid for 40 hours; was working on public holidays without penal rates or an alternative holiday; had been instructed to record day off as a day he had worked; was paid annual holiday pay on days he was working and other workers were being similarly exploited.

[12] Another worker identified himself during the Labour Inspector's investigation with similar issues of concern as the first worker.

[13] The Labour Inspector commenced an investigation by interviewing various workers and reviewing information provided by Mr Singh. Upon concluding their investigation report on 6 December 2021, the Labour Inspector found Zaafran had failed to:

- pay a worker the minimum wage for all hours worked, pay sick leave when required, calculate and pay holiday pay correctly; and
- keep accurate time and leave records.

[14] By an Authority Consent Determination of 29 September 2022, the parties recorded how arrears created by Zaafran and Mr Singh's breaches would be resolved.

What level of penalties are appropriate in the circumstance of the breaches?

[15] The approach I intend to adopt is consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited*² and I am also guided by Judge Corkill's decision in *Labour Inspector v Matangi Berry Farm Limited*³. *Preet* identified a four-step framework to fixing penalties where multiple breaches of minimum standards are evident:

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 penalties 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.⁴

[16] To ensure consistency I use an approach adopted in a recent Authority determination (*Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita*

² *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

³ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 40.

⁴ At [151].

Enterprises Ltd) that first considered the statutory framework and then assessed the quantum of remedies based on the four steps identified above.⁵

The object of the Act

[17] Section 3(a) of the Act sets out relevant ‘aspirational’ matters I must consider. These include 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

[18] Zaafran’s admitted breaches and extent of such, are:

- a. Thirteen breaches of s 4B and s 130 of the Act (eleven cases of missing or incomplete wage and time records and two of insisting two workers complete inaccurate timesheets.
- b. A breach of s 6 MWA for failing to pay a worker for all the hours worked, resulting in an underpayment of \$14,873.18.
- c. Thirteen breaches of s 81 HA for failing to keep accurate holiday and leave records for thirteen workers.
- d. One breach of s 63 HA for failing to pay a worker paid sick leave on one occasion, resulting in an underpayment of \$110.50.
- e. Four breaches of s 49 HA by failing to appropriately pay a worker for four unworked days that fell on otherwise working days, resulting in an underpayment of \$323.62.
- f. Thirteen breaches of s 50 and s 55 HA for failing to pay a worker time and a half on thirteen occasions he worked on a public holiday, resulting in an underpayment of \$920.41.

⁵ *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

- g. Seven breaches of s 56 HA for failing to provide a worker with seven alternative holidays while he worked on public holidays, resulting in an underpayment of \$1,171.47.
- h. A breach of s 16 HA for failing to provide a worker with at least four weeks paid annual holidays.
- i. A breach of s 21 HA by failing to accurately calculate annual holiday pay, resulting in an underpayment to a worker of \$144.06.
- j. A breach of ss 23, 24 and 25 HA by failing to accurately calculate a final holiday pay for a worker, resulting in an underpayment of \$3,405.92.
- k. A breach of s 4 WPA by failing to pay a worker without deduction for hours worked but not paid and no pay for eleven alternative holidays, resulting in an unlawful deduction from a worker's pay in the amount of \$3,223.30.

The nature and extent of any loss or damages suffered

[19] The true loss or damage incurred by the workers involved relating to breaches was unable to be quantified due to Mr Singh's record keeping practices. One worker's quantified loss however amounted to an accumulated total of \$24,172.46. This sum would have made a significant difference to the experience of a migrant worker in an unfamiliar country. The latter sum does not include the value to the worker concerned of getting additional paid days off for working on public holidays and he lost an opportunity to take four weeks paid leave for rest and recreation.

[20] In addition, the Labour Inspector highlighted a profitability advantage Zaafran would accrue over other competing businesses. I also note when Mr Singh was interviewed by the Labour Inspector on 26 May 2021, he indicated that whilst pitching his business for sale, he disclosed to the prospective purchaser (and new owner) the hours workers undertook to demonstrate the healthy profit margin after labour costs were considered – given he accepted the working hours were understated this was a misrepresentation.

Were the breaches intentional, inadvertent, or negligent?

[21] Given the breaches were admitted and that Mr Singh did not give evidence I can only draw inferences from his reported conduct as outlined in disclosed correspondence including the Labour Inspector's report and interview notes. I conclude from such that Mr Singh, an experienced business operator, failed to have due regard to easily understood and well-known obligations (including that a worker be paid for all hours worked) and the breaches were impliedly intentional. This view is reinforced by the fact that Mr Singh insisted on falsifications of timesheets to conceal the true picture of at least two workers' earnings and used a threat to ensure compliance with this direction.

[22] In submissions Mr Singh sought to relitigate previously conceded facts and to shift blame to other sources including a worker he failed to appropriately remunerate. This did not lead me to any conclusion Mr Singh was contrite.

What steps have been taken in mitigation?

[23] The Labour Inspector is satisfied on submission that the 'compliance' matters have now been rectified and arrears were paid to the worker concerned but not all in a timely manner. An improvement notice was issued by the Labour Inspector on 14 January 2022 and compliance with this followed shortly afterwards. However, while identified holiday pay discrepancies for several workers were accepted in mid-May 2021, it was not until September 2022 that all remuneration issues were resolved. Mr Singh says he has met the debts owed personally because his co-director is impecunious. I am prepared to discount based on mitigation steps.

The circumstances of the breach and any vulnerability factors

[24] Very little was advanced about the specific vulnerabilities of the workers other than noting that some were engaged on open work visas. Zaafran's advocate suggested that the workers had the option of leaving and seeking work elsewhere. I reject this assertion as the likely cultural perception of the workers was Mr Singh was able to influence their residency applications.

[25] I find there is sufficient to draw an inference that as migrant workers they would likely be unaware of their rights and reluctant to pursue such in a small workplace where their

income and perceived residency ambitions were potentially at stake. I find the workers were vulnerable.

[26] I also consider the broad contextual factor that significant and prominent publicity has accompanied similar breaches involving small businesses. It is unlikely that Mr Singh, who has been in the business for over seventeen years, would have been unaware of such developments.

[27] The respondents' counsel suggested Mr Singh did not speak English as his first language but I was not provided with evidence that he sought interpretation services whilst being interviewed by the Labour Inspector in mid-2021. He was always accompanied by experienced counsel at meetings and from the notes no issues of comprehension problems were identified although I do acknowledge Mr Singh did say his English was not good and he said at times, a nephew assisted him.

[28] I observe that compliance resources in other languages are available on Employment New Zealand's website.

Previous conduct

[29] Zaafran and Mr Singh have not previously appeared before the Authority or the Employment Court.

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

[30] The approach to quantification in *Preet* allows me to consider whether any of the breaches can be 'globalised' for the purpose of quantifying a penalty so that one breach may reflect two or more or where multiple breaches occur in respect of multiple employees, globalising can allow the application of one penalty for such. ⁶

[31] Here, as in *Preet*, the breaches are substantially related to each other and relate to the same number of employees. 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

⁶ At [100].

breach of failure to keep adequate records, and should be treated as one breach per impacted employee.⁷

[32] In *A Labour Inspector v Matangi Berry Farm Limited*⁸ the Court, when faced with multiple employees and identical breaches (532), focused on the nature of the breach rather than the frequency per employee reducing such to a single breach for each type of default. I see no reason why the approach confirmed in *Matangi* cannot be utilised for cases involving fewer employees. 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 24 record keeping breaches to one, for the transgressions of both ss 4B and 130 of the Act and s 81 HA. However, a further two breaches of ss 4B and 130 of the Act need to be separated out as they involved a more serious transgression of requiring the two workers to complete inaccurate timesheets. This totals three breaches.

[33] The other breaches are not related and need to be treated separately as follows :

- s 63 HA failing to provide a worker a paid sick leave day on one occasion is one breach;
- s 49 HA failing to pay one worker for four unworked public holidays that fell on working days, is one breach;
- ss 50 and 55 HA failing to pay time and half to one worker for working on a public holiday on 13 occasions I will treat as one breach;
- s 56 HA failing to provide one worker seven alternative holidays after he worked on public holidays, is one breach;
- s 16 HA failing to provide at least four weeks annual leave to one worker and paying annual leave on two occasions when that worker was working is one breach;
- s 21 HA failing to accurately calculate holiday pay and under ss 23, 24 and 25 HA failing to accurately calculate final holiday pay for one worker is one breach.

⁷ *A Labour Inspector v Parihar* [2019] NZEmpC 43.

⁸ *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43

[34] This leaves two unrelated serious breaches of s 4 WPA that involved one worker not being paid for all hours worked and a failure to pay 11 alternative holidays (resulting in unauthorised pay deductions). Given the seriousness of these breaches I decline to take a globalised approach and treat them as two breaches.

[35] The global approach I have applied above, now reduces the various breaches to eleven and provides a starting point to define potential maximum penalties before I apply further analysis of other factors. So, at this stage, the potential maximum penalties I can impose on Zaafran using a globalised approach, are \$20,000 per breach which for the eleven accumulated breaches identified above amounts to \$220,000 and for Mr Singh at \$10,000 per breach, is a maximum of \$110,000.⁹

Preet Step 2 – severity of breaches

[36] On top of statutory considerations (the aims of the Act) I am obliged to examine the extent of Zaafran and Mr Singh’s culpability and take the public interest factor of using the penalty regime as a legitimate deterrent into account.

[37] Considering the above, and the aggravating feature that the breaches were easily resolvable had the company taken heed of the Labour Inspector’s improvement notice and investigation report, I find deterrence where vulnerable individuals are involved is a key consideration. Taking the later considerations into account I conclude that the breaches are reasonably significant and I deem 70% of the maximum accumulated penalty to be a ‘starting point’ (\$154,000 for Zaafran and \$77,000 for Mr Singh). .

[38] In mitigation, the breaches have been rectified and entitlements paid.

[39] In the circumstances, I consider a further 10% reduction of the maximum penalty is warranted which reduces it to \$138,600 for Zaafran and \$69,300 for Mr Singh.

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

[40] Zaafran has ceased trading and the Kaiapoi business has been sold. An audited financial statement provided for the year ending 2021 shows negligible profitability, low net assets (\$4,238) and a bank account balance as of 17 November 2022 of \$3,220.68.

⁹ Section 135(2) Employment relations Act 2000 and section 75(1)(b) Holidays Act 2003.

[41] I was also provided with sufficient information in submissions to assess that Mr Singh has significant personal debts and is working as a chef to meet all his obligations.

[42] In these circumstances, I am satisfied Zaafran and Mr Singh have a limited ability to meet significant penalty payments and as a result will exercise the Authority's discretion under s 135(4A) of the Act to order payments of determined penalties by instalments.

***Preet* step 4 - Proportionality**

[43] 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. Four Authority cases I have contrasted involve breaches of a similar nature involving small businesses¹⁰ and I also sought guidance from a case involving a bottle store that has a useful analysis of past authorities and amounts awarded.¹¹ The cases show penalties imposed on the companies involved, range from \$12,000 to \$ 21,000 depending on various contextual factors.

[44] Considering the totality of factors including Mr Singh's financial situation and applying proportionality to my analysis, does lead to further significant reductions. I find it just in all the circumstances, that Zaafran should pay a penalty of \$10,000 and Mr Singh a penalty of \$5,000.

Conclusion on penalties

[45] Within 28 days of the date of this determination Zaafran Moroccan Cuisine Limited must pay to the Labour Inspector for transfer to a Crown bank account accumulated penalties in the sum of \$10,000

[46] On the same terms as above, Mangal Singh as a person involved in the breaches must pay a penalty in the sum of \$5,000 and to the extent Zaafran Moroccan Cuisine Limited is unable to pay the amount set out in paragraph [45], Mangal Singh must also pay that penalty amount of \$10,000 to the Crown .

¹⁰ *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.

¹¹ *A Labour Inspector v Basra & Khella Limited* [2020] NZERA 534 at [211].

[47] Pursuant to section 135(4A) Employment relations Act 2000 the penalties identified are to be paid by instalments of ten equal monthly instalments of \$1,500 by the 28th day of each month commencing from 28 June 2023.

[48] I order that the total sum of the above penalties (\$15,000), pursuant to s 136(2) of the Employment Relations Act 2000 once received, be subsequently paid by the Crown to Mandeep Verma and Sanjiv Kumar Meena in equal amounts.

Costs

[49] Costs are reserved. The parties are invited to resolve the matter. 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 and Zaafran Moroccan Cuisine Limited and Mangal Singh has a further 14 days in which to file and serve a memorandum in reply.

[50] The parties can 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.¹²

David G Beck
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1