

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 360  
3171665

BETWEEN	A LABOUR INSPECTOR Applicant
AND	MAH ENTERPRISES (FIJI) LIMITED First Respondent
AND	MALCOLM HERBERT Second Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Amy Webster, counsel for the Applicant  
Malcolm Herbert for the Respondents

Investigation Meeting: On the papers

Submissions Received: 6 April 2023 from the Applicant

Date of Determination: 6 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The proceedings involve claims brought by the Labour Inspector following an investigation into compliance with minimum employment entitlements by MAH Enterprises Limited (MAH), a limited liability company that carries out the business of construction and its sole director, Malcolm Herbert.

[2] In May 2021 concerns about payment for annual holidays were raised with the Ministry of Business, Innovation and Employment by Ross Brown who alleged that as an employee of MAH he had not received payment for annual holidays that he thought he was entitled to.

[3] The Labour Inspector commenced an investigation but has been unable to properly investigate because MAH and/or Mr Herbert failed to provide information or to adequately explain the absence of employment records.

[4] The Labour Inspector decided to progress the matter based on the failure of MAH to; keep and provide wage and time and holiday and leave records and failing to provide entitlement to annual holidays by virtue of employment agreements that incorrectly provided for pay as you go annual pay for permanent employees.

[5] Accordingly the Labour Inspector seeks penalties for four types of breaches under the following sections:

- (a) Section 130 and s 130(4) of the Employment Relations Act (ER Act) requiring an employer to keep and/or provide wage and time records showing, in the case of each employee, specified information.
- (b) Section 81 of the Holidays Act (HA) requiring an employer to keep a holiday and leave record that contains specified information in respect of each employee. An employer is required to provide a copy of the holiday and leave record to specified persons (including a Labour Inspector) on request.<sup>1</sup>
- (c) Section 16 of the Holidays Act provides that after each completed 12 months of continuous employment, an employee is entitled to not less than four weeks of paid annual holidays.
- (d) Section 65(2)(b)(i) of the ER Act requiring that an individual employment agreement does not contain anything contrary to law.

[6] The Labour Inspector also seeks to have Mr Herbert joined as a person involved in these breaches of employment standards under s 142W(1) of the ER Act.

[7] If Mr Herbert is a person involved in the breaches, the total possible penalties available amount to approximately \$1.2 million, however the Labour Inspector seeks penalties of \$60,000 for MAH and \$30,000 for Mr Herbert.

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<sup>1</sup> Holidays Act 2003, s 82.

[8] The Labour Inspector's position is that the impact of the failure to keep wage and time records and holidays and leave records is serious in this case as it has prevented the Labour Inspector from ensuring that MAH has complied with minimum standards.

### **The Authority's investigation**

[9] The penalties in this matter have been determined on the papers. The information considered comprised of the Labour Inspector's investigation report, affidavits of Ross Brown, Arnel Pamintuan and Priscilla Scholes, Labour Inspector. Written submissions were filed on behalf of the Labour Inspector.

[10] At a case management conference on 6 July 2022, Mr Herbert was given an extension to file a Statement in Reply because he requested time to seek legal advice. There was no further communication from Mr Herbert or MAH until the Labour Inspector sought an extension for filing submissions. At which point Mr Herbert sent an email advising that he was unable to file submissions due to the Napier floods. Mr Herbert had not filed a Statement in Reply or any evidence but he was given a further opportunity to provide information to the Authority for the purpose of this investigation. He did not respond.

[11] No evidence or submissions have been received from MAH or Mr Herbert and I am satisfied that both respondents are aware of the present proceedings and that they have been given a fair and reasonable opportunity to respond. The Authority has the power to proceed if any party fails to attend.<sup>2</sup>

[12] As permitted by s 170E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Issues**

[13] The issues for determination are:

- (a) whether MAH breached the minimum employment standards and requirements set out in the Labour Inspector's report;
- (b) if so, should penalties be imposed against MAH;

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 12.

- (c) is Mr Herbert a person involved in any of the breaches;
- (d) if so, should Mr Herbert be liable for penalties for the breaches; and
- (e) whether a portion of any penalty awarded should be paid to any of the affected employees?

**Have there been breaches?**

[14] It was submitted on behalf of the Labour Inspector that the respondents have been involved in the following breaches:

<b>Number of breaches</b>	<b>Act</b>	<b>By failing to</b>
14	Sections 4B and 130 of the Employment Relations Act 2000	Keep accurate wage and time records
14	Section 81 of the Holidays Act 2003	Keep holiday and leave records
1	Section 65(2)(b)(i) of the Employment Relations Act 2000	Provide an IEA that complies with the law.
13	Section 16 of the Holidays Act 2003	Provide annual leave entitlement

[15] On behalf of MAH in response to the Labour Inspector's request, Mr Herbert provided a list of employees on 21 September 2021. On 15 November 2021 he provided employment records for one employee and on 22 November 2021 couriered partial employment records for three other employees. He also provided a USB that was unable to be opened due to a virus. He was advised what further information was missing and given an opportunity to provide it. No further records were provided.

[16] While Mr Herbert provided some information to the Labour Inspector during the investigation, he failed to provide all the information requested and also required of MAH under the statutory notices issued by the Labour Inspector. Despite repeated attempts to engage with Mr Herbert to obtain the material required to complete her investigation, Mr Herbert either

did not respond, sought extended deadlines that he also did not meet and then when he provided information it was not complete.

[17] The Labour Inspector completed her report and sent it to Mr Herbert on 14 March 2022. As well as concluding that MAH had failed to keep wage and time and holiday and leave records, the Labour Inspector also concluded the list of employees Mr Herbert provided was not accurate because it contained one current employee and seven past employees and did not include the complainant; 13 employees did not receive annual leave entitlements; and MAH was using an individual employment agreement that did not comply with the law.

[18] In particular, one employee had a fixed term individual employment agreement that did not state in writing the way in which the employment would end or the reasons for ending employment as required by the ER Act.<sup>3</sup> It is a breach of the ER Act to use an employment agreement that does not comply with the law.

[19] From the payslips provided the Labour Inspector was able to identify 13 employees who did not receive their annual holiday entitlements because their pay incorrectly included payment for annual leave when they were permanent employees.

[20] Mr Herbert also failed to provide information to enable the Labour Inspector to verify his claim that his computer was stolen in a burglary or to explain how the Napier floods had impacted on his obligation to keep the required employment records and to provide them when required to do so under a statutory notice requiring the supply of employment records.

#### *The Labour Inspector's additional findings*

[21] The Labour Inspector also noted from the information she had been provided that:

- (a) the wage and time records did not contain sufficient detail to demonstrate the employer had complied with the minimum entitlement provisions;
- (b) the payslips provided by Mr Herbert did not identify the following:
  - the kind of work an employee was usually employed to carry out;
  - whether the employee was employed under an IEA or a CEA;

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<sup>3</sup> Employment Relations Act 2000 s 66(4)(a) and (b) and s 65(2)(b)(i).

- the number of hours worked each day in a pay period and the pay for those hours as required by s 130(1B) of the ER Act;
- public holidays worked and holiday pay was recorded as inclusive and contained no holiday balance or sick leave balance.

(c) there were a number of payslips missing.

[22] Based on the Labour Inspector's findings I am satisfied the breaches for which the penalties are claimed have occurred. Noting Mr Herbert's reference to the Napier floods and a burglary, but no further information I consider it is appropriate to find the breaches in relation to providing records to be that of failing to provide the records rather than failing to keep the records.

### **Should penalties be imposed?**

[23] In deciding whether to impose penalties and in what amount I need to consider the principles and approach set out by the Employment Court in *Borsboom v Preet PVT Limited*, *A Labour Inspector v Prabh Limited*, and *A Labour Inspector v Daleson Investment Limited*.<sup>4</sup>

[24] Section 133A of the ER Act requires that regard is given to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct.

[25] The purpose of penalties is punitive. They are not imposed to remedy a loss but to punish the person who has breached a statutory duty and to condemn that behaviour.

[26] One of the objects of the Act is to promote the effective enforcement of employment standards. There is a duty to keep compliant wage and time and holiday and leave records and to provide these on request. An employee is also entitled to receive their minimum holiday and leave entitlements. Individual employment agreements must not contain anything contrary to law.

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<sup>4</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143; *A Labour Inspector v Daleson Investment Limited* [2018] NZEmpC 110; *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

[27] The failure to fulfil these requirements represents a failure to comply with employment standards and in this case has hampered the Labour Inspector's ability to investigate alleged breaches of other minimum standard entitlements.

[28] Each of the Acts allows for penalties to be imposed with the maximum penalty for a single breach by a company of \$20,000 and \$10,000 for individuals.<sup>5</sup> With a total of 42 breaches, there is a potential and total liability for penalties amounting to \$960,000 for MAH and \$420,000 for Mr Herbert as a consequence.

[29] The Labour Inspector submits that globalisation to reach a realistic starting point would be reasonable in this case and suggests the breaches relating to multiple employees could be combined into one breach each, reducing the total number of breaches from 42 to 4. I agree with the Labour Inspector's approach to globalise the record keeping breaches to one breach for each Act. This would amount to \$80,000 for MAH and \$40,000 for Mr Herbert.

[30] The aggravating factors include the fact that MAH has employed migrant workers who were entitled to be treated with respect in the New Zealand workforce. They are particularly vulnerable because of their migrant status. Work visas are sponsored by the employer and tied to the employer and it is evident from material in the Labour Inspector's report that accommodation for migrant workers was also tied to MAH.

[31] The impact of the record keeping breaches on the Labour Inspector's ability to do her job meant she was unable to assess whether the minimum wage had been paid for each hour worked, to check whether the correct public holiday or alternative holiday entitlements were provided or to calculate any annual holiday arrears, and to check whether any deductions made were lawful. She submits that the vulnerability of the largely migrant workforce warrants the imposition of penalties.

[32] While it is mandatory for the Authority to have regard to all objects of the Act when considering penalties, I agree with the Labour Inspector that the Court has found that these objects are particularly relevant in penalty matters involving migrant employees. The failure to keep compliant records puts the employees at a disadvantage and arises in circumstances in which the Court has described as "*involving a distinct power imbalance*".<sup>6</sup>

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<sup>5</sup> Employment Relations Act 2000, s135(2).

<sup>6</sup> *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 at [27].

[33] I also agree that promoting good faith and effectively enforcing employment standards and acknowledging and addressing the inherent equality of power in employment relationships are particularly relevant in penalty matters, especially those involving migrant employees. I was reminded that the effective enforcement of employment standards is particularly important in this case because of the inability to investigate due to failure to provide the records meant that the full extent of any breaches was unable to be investigated and therefore quantified. This impacts directly on employees and in this case includes migrant employees.

[34] Although the Authority is reliant on submissions from the Labour Inspector only, I conclude that the breaches represent an ongoing systemic failure as opposed to a one-off or isolated example of conduct in both MAH and Mr Herbert's approach to basic minimum employment standards that employees can expect in New Zealand.

[35] For these reasons I agree with the Labour Inspector that the seriousness of the record keeping breaches is at the more serious end of the scale and therefore I set a starting point for these breaches at 80 percent of the maximum.

[36] This brings the working totals to \$64,000 and \$32,000 respectively before considering ameliorating factors, ability to pay and proportionality.

[37] Mr Herbert has been involved in cases before the Employment Relations Authority on at least three occasions.<sup>7</sup> While these cases do not represent previous breaches of minimum standards entitlements, they do show that Mr Herbert is not an inexperienced business person or employer. He is and has been the director of several companies currently or formerly appearing on the public Companies Register. I accept the submission that because of that he either is familiar with, or at least ought to have been familiar with, the requirements of minimum standards employment legislation.

[38] There are no submissions from MAH or Mr Herbert, although I note MAH is still trading and registered on the Companies Office Register. On that basis the Authority has no information to take into account regarding any reduction that may be appropriate based on the respondents' ability to pay.

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<sup>7</sup> *Cachemaille v Herbert Construction Company* [2011] NZERA Wellington 190; [2012] NZERA Wellington 17; *Woolley v The Cosmetic Clinic Napier Limited* [2021] NZERA 230; *Krug v HG Hotels Limited* [2023] NZERA 105.

[39] The Labour Inspector points out that while there is often a correlation between arrears and penalties, in this case the penalty should reflect the totality of the breaches and not just the monetary amounts involved. I was referred to the case of *Babylon Communications* where penalties totalling \$72,600 were imposed where total arrears were only \$790.<sup>8</sup> Of those penalties, \$32,200 related directly to the underpayment of minimum wage, while \$40,000 related to inadequate records for nine employees.

[40] In another case, *New Zealand Mountain Hunting*, a failure to maintain records for a total of 19 employees despite no arrears being identified led to a penalty of \$55,000 for the company and \$25,500 for the person involved, despite the Authority acknowledging it was more likely than not that the respondents had not set out with the intention to deliberately defeat minimum standards.<sup>9</sup>

[41] In this case while there is no obvious intention to point to that shows the respondents have deliberately attempted to defeat statutory minimum standards, there was sufficient information in the Labour Inspector's investigation report for me to be satisfied it was likely further minimum standard breaches would have been identified. This means that the record keeping breaches are serious because they have prevented the Labour Inspector from being able to investigate such matters and irrespective of the quantum of arrears that may or may not resulted from an investigation, the fact that the records were not provided means the breaches are serious.

[42] Penalties should be set at a level which both punishes a party for its breaches and deters it from future non-compliance of minimum standards. The Authority must take into account whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk that it could be of such magnitude as to create a significant risk of non-payment.<sup>10</sup>

*Should a portion of any penalties be payable to the employees affected?*

[43] The Court in *Prabh* considered that notwithstanding the payment of arrears compensated the employees for loss of money entitlements, it is also appropriate that the employees receive further compensation for the mental or emotional consequences suffered.<sup>11</sup>

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<sup>8</sup> *A Labour Inspector v Babylon Communications Limited* [2019] NZERA 310.

<sup>9</sup> *A Labour Inspector and New Zealand Mountain Hunting Limited & Anor* [2019] NZERA 568.

<sup>10</sup> Above n4 at [147].

<sup>11</sup> Above n4.

The Court ordered each worker was to receive \$10,000 from the penalties ordered with the balance to the Crown.<sup>12</sup>

[44] In this case the Labour Inspector has been unable to calculate whether any arrears are owing to the employees due to the failure to provide records and to engage with the Labour Inspector. The employees have also suffered due to the sporadic payment of wages throughout their employment, which arguably breached the Wages Protection Act, although no such claim has been pleaded on this occasion. The Labour Inspector submits, and I do not disagree, that it would be entirely appropriate for a portion of any penalties awarded to be paid to the employees pursuant to s 136(2) of the ER Act.

[45] In terms of apportioning any penalties, the Labour Inspector requests the Authority make an order that a portion of penalties be paid to the affected employees. It is suggested that rather than apportioning a fixed amount per employee, a global amount be awarded with a direction to the Labour Inspector to divide that amount between the 14 employees proportionately based on how many full months they worked for MAH (being any month in which the employee worked 15 days or more).

[46] In the event that the Labour Inspector is unable to contact any affected employee within six months of the Authority's decision, any remaining penalty is to be apportioned to those employees the Labour Inspector was able to contact. I agree with that approach.

### **Is Mr Herbert a person involved in the breaches?**

[47] The Court of Appeal in *A Labour Inspector v Southern Taxis and Ors* settled the legal test regarding persons involved in relation to s 142W(1) of the ER Act:<sup>13</sup>

The level of knowledge required to establish liability for a person “involved in a breach” of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer.

[48] I accept the Labour Inspector's submissions that Mr Herbert had knowledge of the essential facts. This is with reference to the fact that Mr Herbert has signed the employment agreements that are available on the Labour Inspector's investigation file, that Mr Herbert is listed as the Work Site Manager on the employment agreements, and he was the person the

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<sup>12</sup> *Prabh* above n4 at [79] to [81].

<sup>13</sup> *A Labour Inspector v Southern Taxis and Ors* [2021] NZCA 705 at [59].

employees interviewed by the Labour Inspector reported to. He was and is the sole director of MAH and therefore he is responsible for record keeping and payroll and as a result directly involved in the breaches. Furthermore, Mr Herbert has signed variations to employment agreements involving applications for extensions to visas and other such arrangements.

[49] I am satisfied there is sufficient information to show Mr Herbert is a person involved in the breaches.

### **Conclusion**

[50] Taking into account consistency with other cases of proportionality and then standing back and rounding the quantum, the total penalties would amount to \$64,000 against MAH and \$32,000 against Mr Herbert. It is clear that these penalty sums are within the range of penalty orders made by the Authority and the Court. I am satisfied these sums are proportional to the nature of the breaches in this case and reflect the gravity by which the law should regard the failures by MAH and Mr Herbert to comply with its obligations to keep and provide wage and time and holiday and leave records and pay annual holidays in accordance with the Holidays Act, and to provide employment agreements that comply with the law. Further reduction is not warranted.

### **Orders**

[51] The following orders are made:

- (a) MAH Enterprises (Fiji) Limited is to pay a penalty of \$64,000 to the Crown Account.
- (b) Mr Herbert is to pay a penalty of \$32,000 to the Crown Account.

[52] The Labour Inspector is to apportion and remit 50 per-cent of the total penalties (\$48,000) between the employees of MAH in accordance with the proposal set out above at [45] and [46].

### **Costs**

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, the Labour Inspector may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum

the respondents would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[54] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>14</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>14</sup> [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)