IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 475
3159446

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	SPRINGS JUNCTION CAFÉ AND MOTOR INN LIMITED First Respondent
	AND	JERRY GORDON HOHNECK Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Amy Webster counsel for the Applicant William Fussey counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	19 May and 15 June 2023 from the Applicant 6 June from the Respondent	
Date of Determination:	24 August 2023	

SECOND DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The first determination involving these parties is a consent determination.[1]

[2] The consent determination recorded that Springs Junction Café and Motor Inn Limited (Springs Junction) had breached:

[1] *A Labour Inspector v Springs Junction Café and Motor Inn Limited and Ors* [2022] NZERA 498.

(a) Section 6 of the Minimum Wage Act 1983 (MWA) by failing to pay the complainant (the employee) at least the minimum wage for all hours worked.

(b) Sections 50 and 55 of the Holidays Act 2003 (HA) by failing to pay at least time and a half for six public holidays the employee worked.

(c) Section 56 of the HA by failing to provide the employee with alternative holidays and/or correctly calculate his pay for alternative holidays in relation to eleven public holidays he worked.

(d) Section 63 of the HA by failing to allow the employee to take sick leave on 25 November 2020 when he was sick and failing to pay sick leave entitlements as required.

(e) Section 23 of the HA by failing to calculate the employee's final holiday pay correctly.

(f) Section 81 of the HA by failing to keep adequate holiday and leave records.

(g) Section 130 of the Employment Relations Act 2000 (ERA) by failing to keep adequate wage and time records.

(h) Section 69ZD of the ERA by failing to provide meal breaks on at least 71 occasions from the start of the complainant's employment to 22 March 2022.

[3] The consent determination recorded that Jerry Hohneck was a person involved in the breaches and had knowledge of the essential facts that established the breaches.

[4] The extent of hours claimed by the Labour Inspector Lucia Youn-Powley was not accepted. There was however agreement to pay the full amount of arrears as set out in the consent determination:

> The parties acknowledge that the arrears arose in the difficult context of the Covid-19 pandemic. The First and Second Respondents do not accept the extent of the hours claimed but have agreed to pay the full amount in good faith and accepting the Authority's ability to accept the Complainant's claim as proved in the absence of time and wage records under s 132 of the ERA 2000.[2]

[5] The Authority ordered payment of arrears of $33,165.72 by 7 October 2022. Arrears were paid within the time stipulated.

[2] Above n 1 at [6].

[6] The issues that remain for determination are:

(a) Whether penalties should be imposed against Springs Junction in relation to the identified breaches of employment standards, and if so, how much?

(b) Whether penalties should be imposed against Jerry Hohneck in relation to his involvement in the identified breaches of employment standards, and if so, how much?

(c) Should a portion of any penalties awarded be paid to the employee?

(d) What should happen with costs?

Agreed statement of facts

[7] On 12 December 2022 the parties lodged a statement of facts which outlined facts the parties had been able to agree on and those in dispute for determination of the penalties.

[8] The key matter in dispute from the statement of facts is whether there was an agreement reached in or about 25 March 2020 with the employee and other employees of Springs Junction to reduce hours worked from in or about late March or April 2020 onwards. This was a period impacted by the COVID-19 pandemic. Springs Junction business re-opened from 8 April 2020 as an essential service. The employee was employed until 20 December 2020 when his notice period expired.

[9] Springs Junction and Mr Hohneck say that the agreement reached was that employees' hours of work would be reduced and they would only be paid for the hours they worked and would work no more than 40 hours a week. They say that evidence from other employees would support this. Further that there was constant communication throughout the pandemic and therefore an expectation that concerns on the part of the employee would have been raised earlier. Springs Junction and Mr Hohneck say the agreement was reached on the basis that although redundancy was an option all the employees were migrants with nowhere else to go and the agreement was reached with staff to stick together and support each other.

[10] The Labour Inspector sets out in the agreed statement of facts the employee disputes that there was any agreement to limit his hours and there is no written evidence of an agreement. Further that the actual payments made suggest the wage subsidy was simply passed on with

the narration on payslips changing from "ordinary time" to "Covid -19 Wage S". The Labour Inspector says that if there was an agreement that employees would only be paid for the work they did up to 40 hours then it would have been imperative for the employee to keep recording hours but they were directed to stop recording hours. Further that any agreement was made before contemplation and knowledge of the 8 April 2020 opening as an essential service business. The Labour Inspector say that the employee did not feel he could raise concerns about his hours as he had nowhere else to go but did raise concerns about his final pay not looking right.

[11] The agreed statement of facts set out that the Authority was to decide if it was necessary to convene an investigation meeting or receive written evidence or submissions. This would be in relation to how many additional hours the complainant worked and/or whether there was an ongoing agreement between the parties on or about 25 March 2020 regarding the hours to be worked by and/or the wages to be paid to the complainant.

The Authority investigation process

[12] Following receipt of the agreed statement of facts a case management conference was held with the Authority on 7 February 2023. The Labour Inspector, Ms Webster and Mr Fussey attended.

[13] The Authority did not wish to constrain Springs Junction and Mr Hohneck in matters to be provided by way of mitigation to the breaches although it did record the extent of relevancy of resolution of the disputed issues was somewhat unclear. An exchange of statements of evidence was agreed to and a timetable set.[3]

[14] The Authority received statements of evidence in accordance with the timetable from Mr Hohneck, the manager and supervisor at the material time and from the employee and the Labour Inspector.

[15] The Authority held a further case management conference to discuss how to proceed on 24 April 2023. Ms Webster, the Labour Inspector and Mr Fussey attended. Mr Fussey advised that Springs Junction and Mr Hohneck did not wish the information in the statements of evidence to be tested. It was the existence of a dispute on the part of Springs Junction and Mr Hohneck but payment of the arrears nevertheless that was intended to be advanced by way

[3] Notice of direction from the Authority dated 7 February 2023.

of mitigation. Ms Webster stated that where there is a failure, as there was in this matter, to keep adequate wage and time records the onus under s 132 of the ERA is on Springs Junction and Mr Hohneck to prove the claims are incorrect. Mr Fussey clarified that the statements of evidence were not advanced on a basis to disprove the Labour Inspector's claims.[4] He said that Springs Junction and Mr Hohneck wished to exercise the right to lodge statements of evidence in reply as originally timetabled in the 7 February 2023 notice of direction. There was no objection to this. The Authority also set a timetable for an exchange of submissions on the basis that it would on receipt proceed to determine the application for penalties.

[16] The Authority has in determining this matter read the original statements of evidence, those in reply and the submissions.

Should penalties be imposed against Springs Junction and Mr Hohneck?

[17] The parties accept that this is not a case where the Authority could find that there had been breaches but make no order for penalties. The Authority agrees that it would not be appropriate in this matter not to make orders for penalties.

The legal framework for assessing a penalty.

[18] Ms Webster and Mr Fussey agree that the Authority is required to assess the quantum of any penalties awarded by considering the matters in s 133A of the ERA as below:

(a) The object stated in s 3;

(b) The nature and extent of the breach or involvement in the breach;

(c) Whether the breach was intentional, inadvertent or negligent;

(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;

(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;

[4] Notice of direction from the Authority dated 24 April 2023.

(f) The circumstances in which the breach or involvement in the breach took place, including the vulnerability of the employee;

(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 other enactments to have been engaged in any similar conduct.

[19] The Authority is also guided by the Employment Court's approach in cases which have considered awards of penalties.[5] These considerations which are additional are as below:

(a) deterrents;

(b) degree of culpability;

(c) consistency of penalty awards in similar cases;

(d) ability to pay; and

(e) proportionality of outcome to breach.

[20] Ms Webster noted the statement of Judge Holden in a recent Employment Court judgment that there can be some overlap and care must be taken not to "double count".[6]

Object of the ERA

[21] The objects in s 3 of the ERA promote good faith, the effective enforcement of employment standards and acknowledge and address the inherent inequality of power in the employment relationship. These objects were not met by the migrant employee being asked to stop recording his hours when he had previously been doing so. The failure of Springs Junction and Mr Hohneck to keep adequate and compliant records and to comply with HA requirements hampered the effective enforcement of employment standards. The inherent inequality of power in the relationship was not addressed. Proper records would have removed the subsequent dispute about hours worked.

Nature and extent of the breaches

[22] The following breaches are accepted.

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[5] *Borsboom (Labour Inspector) v Preet* [2016] NZEmpC 143, *Nicholson v Ford* [2018] ERNZ 393, *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.
[6] *Shah Enterprises Limited v A Labour Inspector* [2022] NZEmpC 177 at [54].

Breach of	**By failing to**	**Breaches**
Section 6 MWA	Pay minimum wage for all hours worked	1
Sections 50 and 55 HA	Provide time and a half payment for every hour worked on six public holidays	6
Sections 56 HA	Provide eleven alternative holidays	11
Section 63 HA	Allow employee to take sick leave and failing to pay sick leave entitlement	1
Section 23 HA	Accurately calculate final holiday pay	1
Section 81 HA	Keep holiday and leave records	1
Section 130 ERA	Keep wages and time records	1
Section 69ZD ERA	Provide meal breaks on at least 71 occasions	0
	Starting total:	22

[23] As Ms Webster observes in her submissions a penalty under s 69ZF of the ERA for a failure to provide meal breaks read with s 135 of the Act must be claimed by the employee rather than the Labour Inspector. That is because the penalty provision in s 69ZF does not expressly permit recovery by a Labour Inspector. Whilst the requirements in s 69ZD for provision of meal breaks are employment standards and breaches are accepted by Springs Junction and Mr Hohneck there is no claim for this breach in the penalty assessment for that reason.

[24] It is appropriate that the two record keeping breaches be combined into one breach. The breaches of ss 50, 55 and 56 of the HA which are sections concerned with payment for public holidays and alternative days can be globalised and treated as one breach.[7] I do not conclude it appropriate to globalise further.

[25] The result is that there are five breaches set out below:

(a) A breach of s 6 of the MWA.

(b) A breach of ss 50, 55 and 56 of the HA to provide for proper payment for working on public holidays and provide payment for alternative holidays.

[7] Above n 5 *Borsboom (Labour Inspector) v Preet* at [157].

(c) A breach of s 63 of the HA in not enabling the employee to take sick leave and failure to pay the sick leave entitlements.

(d) A breach of s 23 of the HA to calculate accurately final holiday pay.

(e) A breach of s 130 of the ERA and s 81 of the HA to keep wage and time records and holiday and leave.

[26] The maximum penalty for Springs Junction in respect of each of the breaches is $20,000.[8] The maximum penalties that could be awarded against Springs Junction is $100,000 for the five breaches.

[27] The maximum penalty for Mr Hohneck is in respect of each of the breaches is $10,000.[9] The maximum penalties that could be awarded against Mr Hohneck is $50,000 for the five breaches.

[28] Mr Fussey submits that the approach taken by the Employment Court in *Shah Enterprise NZ Limited* should be adopted in setting the total maximum penalties to cover both the company and Mr Hohneck.[10] Ms Webster submits that Mr Hohneck is the sole director but there are two other shareholders in the company thereby distinguishing this matter from that in *Shah Enterprise*.[11]

[29] I acknowledge that there are two other shareholders. The close association in *Shah Enterprise* between the company and the director and the responsibility for the decision making and implementation of business practices persuaded the Judge to set the total maximum penalties to cover both the company and the director.[12]

[30] There was also a close association between Mr Hohneck and Springs Junction. Mr Hohneck had responsibility for the decision making and implementation of business practices. I am not satisfied that a different approach to that in *Shah Enterprises* is justified on the basis that there are two other shareholders. The total maximum penalties for both Springs Junction and Mr Hohneck are $100,000.

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[8] Minimum Wage Act s 10; Employment Relations Act s 135(2)(b); Holidays Act, s 75(1) (b).
[9] Minimum Wage Act s 10; Employment Relations Act s 135(2)(a); Holidays Act s 75(1) (a).
[10] Above n 6 at [61].
[11] Above n 6.
[12] Above n 6.

[31] The starting point for penalties, rounded down, is $66,666 for Springs Junction and $33,333 for Mr Hohneck.

[32] The considerations in s 133A are directed toward an assessment of the seriousness of these five breaches. The Authority considers factors that may mean the breaches are more serious and factors that may reduce the seriousness of the breaches.

Whether the breach was intentional, inadvertent or negligent.

Failure to keep records and minimum wage breaches.

[33] Springs Junction and Mr Hohneck say they did not consider they were breaching minimum standards and therefore the breaches cannot be intentional. Mr Fussey submits that the breaches were either inadvertent arising from a failure to fully appreciate the legislative requirements or human error from the stress and anxiety of the COVID-19 lockdown and its impact on the business. Mr Fussey refers to the original untested statement of evidence of the manager about the wage subsidy covering the few hours worked and a reliance on trust. Further he says that there is a context to the decision to tell employee to stop recording hours that is more complex than that presented on behalf of the Labour Inspector.

[34] In respect for the minimum wage breaches Mr Fussey submits there was no intention not to pay at least minimum wage. He says that the wage subsidy payments to employees considerably exceeded the hours of work performed at the time. In respect of the payment of a significant amount of arrears to the employee in the consent determination Mr Fussey submits the hours of work are disputed and that the employee claimed hours spent in the premises when he was not working.

[35] The employee had prior to the COVID-19 March 2020 lockdown been required to record his hours of work so the instruction to not continue to do so was a change to the usual practice.

[36] The agreed statement of facts provides that the employee was not paid for any work in the week 23 to 29 March 2020. He was then paid an amount equivalent to the government wage subsidy in the sum of $585.80 (gross) per week for 15 weeks from the week ending 5 April 2020 up to and including the week ending 12 July 2020. That is 31 hours at minimum wage The agreed statement of facts records that this was despite the employee being ready,

able, and willing to work his agreed hours, being 7am to 7pm Monday to Sunday and working over this period for more than 31 hours per week.

[37] After the business picked up from mid-July 2020 to the end of employment there was agreement that the employee was paid varying amounts which did not equate to the hours he had worked and no contemporaneous records were provided to explain the calculation of these amounts.

[38] Even if it was believed that the wage subsidy would be higher than the number of hours worked and therefore there was no requirement to record hours that belief could only have been held for a very limited period considering the above. Springs Junction and Mr Hohneck say that there was an agreement the employee would work no more than 40 hours a week which agreement by its nature would require a record of hours to enable proper payment. This position did as Ms Webster observed appear to shift in the untested statements to an agreement to work as and when required.

[39] An earlier Authority determination involved Springs Junction.[13] The company after that determination changed its name from Alpine Motor Inn & Café (2008) Limited to Springs Junction. The matter is not the same as this matter because there was an argument which ultimately was not accepted that an employee was a volunteer. Springs Junction received penalties in that determination for failing to keep records and pay minimum wage. Mr Hohneck was a director at that time. That determination would have highlighted the importance of these minimum employment standards.

[40] Claims about an exaggeration of hours on the basis not all were spent by the employee working have not been tested although that opportunity to do so was available. The Labour Inspector's assessment of arrears and hours worked must therefore stand.

[41] I do not find that a conclusion is available that the breaches for failing to keep records and pay minimum wages were inadvertent or because of human error. The decision to not record hours of work was an intentional and sustained departure from an existing practice well beyond a period where it was reasonable on any sensible analysis not to record hours of work. I conclude the breaches in that regard were intentional. Underpayments of minimum wages flowed from a failure to properly record and then pay for hours worked.

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[13] *A Labour Inspector v Alpine Motor Inn & Café* [2016] NZERA Christchurch 130.

Public holidays, holiday pay and sick pay

[42] Mr Fussey refers to accounting advice being faulty about the payment of alternative days based on 8-hour days rather than 12-hour days. He submits that this is not an example of deliberately underpaying staff and the final pay miscalculations are simply explained by poor record keeping not a deliberate decision not to pay the employee.

[43] Mr Fussey says the Labour Inspector characterising a recording of a conversation between the employee and Mr Hohneck with respect to sick leave as offsetting wages owing to him over the COVID-19 period is not accurate. He says that the "better interpretation" is that Mr Hohneck is saying that the employee was paid more than the hours he worked during that time but would commit to paying owed sick leave.

[44] Public holidays have been recorded in the agreed statement of facts as having been paid correctly until March 2020 so there was awareness and knowledge about how to treat these.[14]

[45] After March 2020 the employee worked on a further six public holidays for which he was paid as if he had not worked for three of these and the remaining three were not referred to on his payslip.[15]

[46] Although Mr Fussey refers to accountancy errors being the reason for the final pay breaches the agreed statement of facts provides that there was no evidence provided to corroborate this and as a result the Labour Inspector did not agree to this fact.[16] I do not place weight on the responsibility for the holiday breaches being other than with Springs Junction and Mr Hohneck.

[47] I have treated the recording with some caution as the Authority has not heard evidence about it. I could not however be satisfied that it assisted Springs Junction and Mr Hohneck in the manner Mr Fussey advances in his submissions about the sick leave and pay.

[48] I conclude these breaches were also intentional.

[49] Intention is an aggravating feature.

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[14] 5.1 of the agreed statement of facts.
[15] 5.2 – 5.4 of the agreement statement of facts.
[16] 6.2 of the agreed statement of facts.

The nature and extent of any loss of damage

[50] The failure to keep records impacted on the ability to properly quantify the loss suffered by the employee. The total arrears paid for all breaches was a little over $33,000. The employee was deprived of money he was owed for a significant period.

[51] Springs Junction had a corresponding benefit in reduced operating costs because it was not paying the employee for all hours worked.

[52] Mr Fussey takes issues with the submission from Ms Webster that the breaches provided Springs Junction with an advantage over competitors complying with minimum standards. He submits that there are no competitors and that the business has been closed since November 2022.

[53] The agreed statement of facts provides that the employee tracked the opening and closing times of other local businesses and reported on vehicle movements during the period that breaches were occurring.[17] It is likely that was done because there were some other businesses selling food and drink. Viewed in the round though competition is less of a consideration given the remote location.

Mitigation and remorse

[54] There were concessions by Springs Junction and Mr Hohneck during the Labour Inspector's investigation and payment of arrears notwithstanding a view that the amount was too high.

[55] Mr Fussey submits that there is evidence of remorse or contrition and there are certainly words to the effect in the untested statement of evidence of Mr Hohneck. He accepts that he made mistakes. There are other aspects of the statement that may not appear to support remorse and contrition although I have not treated these as to nullify the remorse articulated.

[56] Some credit should be given for the concessions during the Labour Inspector investigation on 24 May 2021 about public holidays and alternative holidays that these were miscalculated, and the payments were made. There was also some concession about sick leave and its payment. Agreement to pay the arrears which occurred in September 2022 took

[17] 3.18 of the agreed statement of facts.

considerably longer. It was about 10 months after the Labour Inspector completed the investigation and 9 months after the statement of problem was lodged on 21 December 2021. Payment was made in October 2022.

[57] Some credit needs to be given for payment of the disputed arrears beyond simply neutralisation of an otherwise aggravating factor. Agreement to, and then payment, negated the need for an Authority investigation meeting to resolve the disputed issue of arrears owing. Attendance at that would have been inconvenient and stressful for the employee, taken the Labour Inspector away from other important work and resulted in further delay for the employee receiving payment whilst the matter was investigated and determined by the Authority.

[58] There was mitigation and, although not to the fullest extent, remorse.

Circumstances of the breaches and the vulnerability of the employee

[59] The breaches occurred or flowed from the time of the COVID -19 lockdown in late March 2020. That was a particularly difficult time for all businesses, and this was a small hospitality business in a remote location. Mr Fussey submits that making the employees redundant would have been the most financially sensible decision but, instead, Mr Hohneck chose a new arrangement to enable the employee to keep his accommodation with a reduced income. Mr Hohneck's leadership award from the Fire Emergency New Zealand for contribution and dedication to the service and communities is referred to as an example of his "generosity of spirit." Other employees' views about being treated kindly and appropriately and equally in the untested statements of evidence are referred to. Mr Fussey does not accept that the actions of Springs Junction and Mr Hohneck could be properly categorised as exploitation of a migrant to the advantage of the business.

[60] The decision to keep the business open did enable the employee to retain accommodation and receive food. It is only a moderate mitigating factor when I weigh that there was an advantage to the business when it did not keep the compliant records it had been keeping before lockdown. This was particularly so after the business could operate as an essential service and beyond that.[18] The employee worked a considerable number of hours

[18] The standard of food was disputed in the untested statements of evidence. Mr Hohneck saying that it was food of the "best quality" and the employee said that it was mostly the food they could not sell "old sandwiches, paninis and pies."

without being paid and the absence of records made it more difficult to establish what was owed.

[61] The employee was also vulnerable and that is an aggravating feature. He had an open work visa but with the COVID-19 lockdown he had nowhere else to go. I accept Ms Webster's submission that he was more likely as a migrant employee to accept poor working conditions and minimum standards breaches than those with the security of residency. This is reflected in the absence of complaint for a period despite the employee working more hours than he was paid for.

[62] The factors under this consideration are quite evenly balanced. I do however consider the impact of COVID-19 and decisions made at that time warrant a moderate reduction in penalties in addition to that already given for payment of the disputed arrears. The agreed statement of fact supports such a conclusion would be fair.

Previous conduct

[63] As set out above whilst the facts were different Springs Junction was found to have breached the MWA, the HA and the ERA. There was a failure to keep records and pay minimum wages for all hours worked. The employee was also a migrant worker. Penalties were imposed of $7,500 for breaching the MWA and $5000 for the record keeping breaches. The need for compliance with these requirements was therefore highlighted. Whilst Mr Hohneck was a director at that time the focus must be on the entity the penalty is awarded against.

Culpability

[64] Beyond the factors noted above there are no other factors to bring into an assessment of the culpability of Springs Junction and Mr Hohneck.

Conclusion on the seriousness of the breaches

[65] I have weighed the features that make the breaches more serious such as intention, vulnerability of the employee, the fact the employee was deprived of payment for a significant period and the benefit to Springs Junction and Mr Hohneck in having him work for hours for which he was not paid. There is also an earlier finding by the Authority that Springs Junction had breached minimum standards and the serving of that to highlight the importance of the

standards. I have weighed that Springs Junction and Mr Hohneck made some concessions during the Labour Inspector's investigation and after a longer period paid a not inconsiderable amount for arrears maintaining dispute as to their accuracy. Further there is some remorse and acceptance of the harm that was caused by the breaches to the employee. I have weighed that the breaches commenced during the difficult period of COVID-19 with responding concerns and uncertainty about the viability of the business.

[66] A starting point for the breaches of the MWA Act is 70 per cent. The starting point for the failure to keep compliant record breaches of 60 per cent because of the earlier conduct by Springs Junction, the knowledge about the importance of record keeping and because Mr Hohneck is not an inexperienced director. The starting point for the other breaches is 50 per cent weighing the factors that increase and mitigate seriousness.

[67] I now apply these percentages with minor rounding to the starting point and the figures are as set out below for each breach.

(a) $9,333 for Springs Junction and $4,666 for Mr Hohneck for breaches of the MWA.

(b) $8000 for Springs Junction and $4,000 for Mr Hohneck for failing to have adequate holiday and leave and wage and time records under the HA and the ERA.

(c) $6666 for Springs Junction and $3,333 for Mr Hohneck for HA public holiday beaches.

(d) $6666 for Springs Junction and $3,333 for Mr Hohneck for failing to allow the employee to take sick leave when sick and failing to pay sick leave entitlements under the HA.

(e) $6666 for Springs Junction and $3,333 for Mr Hohneck for failing to calculate the employee's final holiday pay correctly under the HA.

[68] The provisional penalty figures at this stage are $37,331 for Springs and $18,665 for Mr Hohneck.

Deterrents

[69] Mr Fussey submits that there is no specific deterrence required as Springs Junction has no existing employees, is not trading and does not intend to do so in the future.

[70] Whilst the use of penalties to deter Springs Junction is not a factor in the circumstances some general deterrence is necessary for employers who may be non-complaint with employment minimum standards.

Ability to pay

[71] The Authority has a letter from the company accountant about the financial position of both Springs Junction and Mr Hohneck dated 7 March 2023. It states that no formal balance sheet of the company has been prepared. What is set out is an estimation based on information it had and enquiries with Mr Hohneck. Springs Junction has assets of about $61,000 and liabilities of about $950,000.

[72] Mr Hohneck's financial position that is set out appears to be self-reported. It is stated that he does not have any significant funds in back accounts and relies on a pension for living. He does have a current shareholders account with a value of about $97,000. Further that he has no tangible assets apart from some vehicles in a field which could be owned by someone else and he has a number of personal guarantees over business debts.

[73] The Labour Inspector ran asset checks, and these were provided to the Authority and Mr Fussey. They show that Mr Hohneck is part-owner of five properties in the Queenstown–Lakes area including a property with a value of up to 1.95 million. Further he is currently the director of nine companies and a shareholder of six of these companies.

[74] The Employment Court has not suggested liability for a penalty in the event of financial incapacity should be reduced to nil and reductions have been comparatively modest.[19] Further the Court has recognised that the liability to pay a penalty is different from subsequent enforcement and instalment payments can address issues of financial capability.[20] A discount

[19] Above n 5 *A* L*abour Inspector v Daleson* at [44].
[20] Above n 19 at [45] and [46].

in an Employment Court judgment where the company had very limited ability to pay was limited to 20 per cent.[21]

[75] The Authority is left with some concerns about the degree to which it can rely on the financial information and whether Mr Hohneck made full disclosure of his financial situation to the accountant considering information from subsequent asset checks.

[76] I conclude only a modest reduction of 20 per cent is warranted for Springs Junction and no reduction for Mr Hohneck.

[77] Applying that reduction, the provisional penalties for Springs Junction are $29,864 and for Mr Hohneck the provisional penalty remains at $18,665.

Consistency in similar cases and proportionality to breaches

[78] Consistency is important. Both counsel agreed that the most similar case is the recent judgment in *Shah Enterprise*.[22] Ms Webster referred the Authority to several others where more significant penalties had been awarded for minimum wage and holiday pay breaches with a small number of employees. Each case will have its own factual considerations and differences. It is sensible to have regard to these cases but to focus on what is agreed to be the most similar case.

[79] In *Shah Enterprise* the Court assessed penalties for three breaches of minimum standards for one employee. $19,200 in penalties were awarded against the company and the director was ordered to pay $9,600 for the breaches.[23] There hadn't been in that case full payment of arrears, and it was necessary to go through an Authority and then Court process to determine what was owed. It also needs to be weighed there had not been the previous conduct that there was in this matter by the employer and there are two additional breaches of minimum standards in this matter. Unlike Mr Shah, Mr Hohneck is not an inexperienced small business owner. An adjustment does need to be made at this point for consistency and proportionality to reflect that Mr Hohneck was not found previously by the Authority to be in breach. I have then weighed the factors both aggravating and ameliorating with awards of penalties in other cases and with the penalty awards in *Shah Enterprise*.

[21] *A Labour Inspector v Prabh Ltd* [2018] NZEmpC 110 at [70].
[22] Above n 6.
[23] Above n 6 at [86].

[80] I conclude an appropriate, consistent, and proportional penalty in all the circumstances is $24,000 for Springs Junction and $12,000 for Mr Hohneck.

Conclusion on penalties

[81] Springs Junction Café and Motor Inn Limited is ordered to pay $24,000 for penalties for breaches of the Minimum Wage Act 1983, the Holidays Act 2003, and the Employment Relations Act 2000.

[82] Jerry Gordon Hohneck as a person involved in the breaches of Springs Junction is ordered to pay $12,000 for penalties.

[83] Both parties agree it is appropriate that the employee receive a portion of the penalties as he suffered from the breaches in a manner not entirely compensated for by payment of arrears. I agree. An appropriate portion of the penalty to be paid to the employee is 30%.

Payment of the penalty

Springs Junction

[84] Springs Junction Café and Motor Inn Limited is ordered to pay the sum of $16,800 to the Crown within 28 days of the date of this determination.

[85] Springs Junction Café and Motor Inn Limited is ordered to pay the sum of $7,200 to the Labour Inspector for the credit of the complainant employee within 28 days of the date of this determination in the manner.

Jerry Hohneck

[86] Jerry Gordon Hohneck is ordered to pay the sum of $8,400 to the Crown within 28 days of the date of this determination.

[87] Jerry Gordon Hohneck is ordered to pay the sum of $3,600 to the Labour Inspector for the credit of the complainant employee within 28 days of the date of this determination.

Costs

[88] 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, Ms

Webster may lodge, and serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Fussey will 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.

[89] 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.[24]

Helen Doyle
Member of the Employment Relations Authority

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