

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 589
3153769

BETWEEN

A LABOUR INSPECTOR
Applicant

A N D

SLD AGRICULTURE LIMITED (IN
LIQUIDATION)
First Respondent

SCOTT DONALDSON
Second Respondent

Member of Authority: Peter van Keulen

Representatives: Petrina Siania, counsel for the Applicant
No appearance for the Respondents

Investigation Meeting: On the papers

Submissions and Further Information Received: 1 September 2023
No submission received from the Respondent

Date of Determination: 11 October 2023

THIRD DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector brought claims against SLD Agriculture Limited (in Liquidation) for failing to pay Riana Grobbelaar, an employee, the minimum wage for all of the hours she worked and failing to pay Petrus Grobbelaar, also an employee, and Mrs

Grobbelaar their correct holiday pay entitlements. Failures to pay minimum wage and holiday pay entitlements are breaches of employment standards.¹

[2] The Labour Inspector also brought claims against Scott Donaldson, the director and shareholder of SLD Agriculture, on the basis that he was a person involved in the breaches of employment standards, pursuant to s 142W of the Employment Relations Act 2000 (the Act).

[3] In the course of my investigation into these claims SLD Agriculture went into liquidation. This meant the Labour Inspector could not proceed against SLD Agriculture but it could proceed with its claims against Mr Donaldson.²

[4] In my second determination in this matter (the Second Determination), I determined that:³

(a) SLD Agriculture had breached employment standards by failing to pay:

- i. Mrs Grobbelaar the minimum hourly wage for the hours she worked for SLD, with the shortfall being \$24,955.29.
- ii. Mr and Mrs Grobbelaar the correct amount of their annual holiday pay with the shortfall being \$1,103.76 for Mr Grobbelaar and \$1,944.18 for Mrs Grobbelaar.

(b) Mr Donaldson was a person involved in the breaches of employment standards by SLD Agriculture and was liable for:

- i. The amounts outstanding to Mr and Mrs Grobbelaar from the breaches of employment standards by SLD Agriculture if SLD Agriculture is unable to pay the amounts owed, pursuant to s 142Y of the Act.

¹ Section 5 of the Employment Relations Act 2000.

² *Lawton v Steel Pencil Holdings Limited (in Liquidation)* [2021] NZEmpC 199.

³ *A Labour Inspector v SLD Agriculture (in Liquidation) and Anor* [2023] 415.

- ii. Penalties, to be quantified at a later date, for three breaches of employment standards by SLD Agriculture, pursuant to s 142X of the Act.

[5] The Labour Inspector now seeks to have the penalties quantified.

The Authority's investigation

[6] The quantification of penalties in this case is appropriately determined on the papers and directions were made for lodging and serving submissions.

[7] Counsel for the Labour Inspector lodged submissions on 1 September 2023. Nothing has been received from SLD Agriculture or Mr Donaldson.

[8] Despite not receiving any submissions from Mr Donaldson I consider it appropriate to proceed without any input from him as I am satisfied he has been made aware of his personal liability (as set out in the Second Determination) and the pending quantification of the penalty amount. The history of service of information relating to this case on Mr Donaldson includes:

- (a) Directions of the Authority, setting out the steps for investigation and determination of liability, were served on 13 April 2023 on Mr Donaldson at 3782 State Highway 7, Ahaura (this address is listed for Mr Donaldson as the Director of SLD).
- (b) The Second Determination was served on the liquidator of SLD Agriculture on 8 August 2023.
- (c) The Second Determination was also served on Mr Donaldson by delivery to 3782 State Highway 7, Ahaura, however this was returned to the Authority on 23 August 2023 with a note stating, "Cannot locate receiver /Recipient has moved".
- (d) On 1 September 2023 the Authority sent a copy of the Labour Inspector's submissions on penalties (dated 1 September 2023), along with a copy of the Second Determination to both the Ahaura address and also to 62 Mill Road,

Ashburton, which is the address listed for Mr Donaldson, as the Director of South Canterbury Milk Limited, which is still a registered company. The 1 September letter clearly set out the direction for Mr Donaldson to lodge and serve submissions on quantum of the penalties within 14 days of 1 September 2023.

- (e) The correspondence dated 1 September 2023 from the Authority was served on the 62 Mill Road address on 6 September 2023. It has not been returned to the Authority.
- (f) The correspondence dated 1 September 2023 appeared to have been served on the Ahaura address on 8 September 2023 (there is a photo that indicates the parcel was received by a person), however the correspondence was then returned to New Zealand couriers on 12 September 2023 and returned to the Authority on 13 September 2023. It appears that the parcel was returned by someone at the address as it had a handwritten label on it marked RTS.

[9] I am satisfied that the alternative address listed for Mr Donaldson of 62 Mill Road, is an appropriate address for service given that a person at the Ahaura address has indicated that Mr Donaldson no longer resides there. And on this basis Mr Donaldson has been served with all of the information he requires in order to lodge any submissions he might have on the quantum of penalties. It appears he has simply decided not to engage which is consistent with his most recent conduct in respect of this matter.

[10] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Penalties

[11] In my view, there are two key aspects that inform the exercise of quantifying penalties; section 133A of the Act, which sets out relevant considerations and *Borsboom v*

Preet PVT Limited,⁴ where the Employment Court set out a four-step approach to fixing penalties.

[12] As I have done before, I will adopt the approach used by Judge Corkill in *A Labour Inspector v Matangi Berry Farm Limited*⁵; first I will consider the statutory requirements and then I will use that information to assess quantum based on the four steps in *Preet*.

The object stated in s 3 of the Act

[13] The objects of the Act include building productive employment relationships through the promotion of good faith and promoting effective enforcement of employment standards by Labour Inspectors.

The nature and extent of the breaches

[14] Mr Donaldson was a person involved in the following breaches:

- (a) failing to pay Mrs Grobbelaar the minimum hourly wage for the hours she worked for SLD Agriculture, with the shortfall being \$24,955.29.
- (b) failing to Mr and Mrs Grobbelaar the correct amount of their annual holiday pay with the shortfall being \$1,103.76 for Mr Grobbelaar and \$1,944.18 for Mrs Grobbelaar.

The nature and extent of any loss or damage suffered

[15] The loss or damage suffered by the employees in respect of the minimum wage payments and holiday pay requirements is quantified as \$28,003.23.

Were the breaches intentional, inadvertent or negligent?

[16] I conclude that all of the breaches were intentional.

⁴ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

⁵ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

What steps have been taken in mitigation?

[17] SLD Agriculture has not paid the amounts sought by the Labour Inspector and it has now been liquidated and removed from the Companies register.

[18] Mr Donaldson did not cooperate with the Labour Inspector and his only involvement was to dispute whether SLD Agriculture was the employer of Mr and Mrs Grobbelaar.

The circumstances of the breach and any vulnerability

[19] Mr and Mrs Grobbelaar were migrant workers with limited knowledge about their employment rights. They were, in many respects dependant on Mr Donaldson's advice about what to do and how their employment relationship would operate.

Previous conduct

[20] Mr Donaldson, through SLD Agriculture, has previously failed to pay wage arrears and annual holiday pay.⁶

Preet step 1 – Nature and number of breaches

[21] The first step in *Preet* requires me to consider whether any of the breaches should be globalised so that a single breach may reflect two or more of the breaches forming the Labour Inspector's claim. Globalisation is about reducing the number of breaches for penalty purposes so that the actionable breaches are representative of the overall conduct and the starting point for penalties is realistic.⁷

[22] I believe the approach adopted by Judge Corkill to globalisation in *A Labour Inspector v Matangi Berry Farm Limited*,⁸ is appropriate. Judge Corkill globalised failures across 207 employees and 118 employees down to a single breach for each type of default; failure to retain employment agreements, failure to keep holiday and leave records and failure to pay

⁶ *Babe v SLD Agriculture Ltd* [2022] NZERA 78.

⁷ *A Labour Inspector v Parihar* [2019] NZEmpC 145.

⁸ *A Labour Inspector v Matangi Berry Farm Limited*, above n5.

annual holiday pay. This meant globalisation reduced 532 breaches (based on a count per employee affected) down to just three.

[23] In this case it is appropriate to globalise the breaches as one breach per statute, This means there is:

(a) One breach of s 6 of the Minimum Wage Act 1993 for not paying minimum wage for some of the hours worked by two employees.

(b) One breach of s 27 of the Holidays Act for not paying annual leave for two employees which was payable at the end of employment.

[24] Based on this globalisation the starting point for assessing quantum of penalties to be imposed against Mr Donaldson is \$20,000.00.

Preet step 2 – Severity of breaches

[25] In addition to weighing up my consideration of the statutory considerations I must also consider the additional factors referred to in *Preet* of deterrence and culpability.

[26] Considering the aim of the Act, assessing the nature and extent of the breaches and losses suffered, reflecting on the fact that Mr Donaldson acted intentionally and that his culpability is high, considering previous conduct and then adding in the need for deterrence, I conclude that the breaches are significant and consider 90% of maximum is an appropriate starting point.

[27] Mr Donaldson has not taken any steps in mitigation so there is no reduction for this.

[28] After considering the severity of the breaches and the lack of mitigation my penalty assessment stands at 90% of the maximum amount being \$18,000.00.

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

[29] There is no evidence from Mr Donaldson about his ability to pay any penalties, so my assessment remains at 90%.

Preet step 4 – Proportionality

[30] This step is about ensuring that the final amount of any penalty is proportional to the breaches and in line with other penalty amounts.

[31] In this regard I turn to consider an assessment of various determinations of the Authority that I have done before in which I analysed Authority determinations where the starting point has been multiple breaches before globalisation.⁹ The amounts awarded in recent Employment Court cases, are also relevant.¹⁰

[32] The end result of the comparisons, particularly to those that involve similar scope and severity of breaches, and my reflection on proportionality is that I am satisfied that a further reduction to \$16,000.00 is appropriate.

Payment to Mr and Mrs Grobbelaar

[33] The Labour Inspector has submitted that some of the penalty imposed by me should be paid to Mr and Mrs Grobbelaar. I agree with this submission; it is entirely appropriate in the circumstances. I order that \$10,000.00 of the penalty be paid to Mr and Mrs Grobbelaar so that they receive \$5,000.00 each.

⁹ *Cooper v Sweet Greens Limited* [2023] NZERA 537; *A Labour Inspector v Elev 8 Global Limited* [2023] 417; *A Labour Inspector v Woop Limited* [2023] NZERA 126; *A Labour Inspector v Elements Therapeutic Massage Limited* [2022] NZERA 415; *A Labour Inspector v House of Island Style Limited* [2022] NZERA 181; *A Labour Inspector v Preeminent Enterprise Limited* [2021] NZERA 501; *A Labour Inspector v Samual* [2021] NZERA 479; *A Labour Inspector v Raj Kiwi Limited* [2020] NZERA 493; *A Labour Inspector v H4M Corporation Limited* [2020] NZERA 406; *A Labour Inspector v Sail City Venture Limited* [2020] NZERA 268; *A Labour Inspector v Hawkes Bay Seafoods Limited* [2020] NZERA 133; *A Labour Inspector v Chait & Bish Hospitality Limited* [2020] NZERA 105; *A Labour Inspector v Indian Heaven Limited* [2019] NZERA 597; *A Labour Inspector v New Zealand Mountain Hunting Limited* [2019] NZERA 568; *A Labour Inspector v Mittal & Sons Limited* [2019] NZERA 406; *A Labour Inspector v Shalini Limited* [2019] NZERA 334; *A Labour Inspector v Dhanoa Transport Ltd* [2018] NZERA Wellington 32; *A Labour Inspector v Double Seven Services Limited* [2018] NZERA Christchurch 195; and *A Labour Inspector v Alps Travel Company Ltd* [2018] NZERA Christchurch 22.

¹⁰ *A Labour Inspector v Parihar*, above n9; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12; and *A Labour Inspector v Matangi Berry Farm Limited*, above n8.

Orders

[34] Mr Donaldson must pay \$16,000.00 to the Labour Inspectorate as penalties for the breaches of the Minimum Wage Act 1983 and the Holidays Act 2003. Once this is received the Labour Inspector can transfer:

- (a) \$5,000.00 to each of Riana Grobbelaar and Petrus Grobbelaar; and
- (b) \$6,000.00 to a Crown Bank account.

Costs

[35] Costs are reserved. If the Labour Inspector seeks an order for costs, it may lodge and serve a memorandum on costs within 14 days of the date of this determination. Mr Donaldson will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority