

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 655  
3165664

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              TOP SHELF SCAFFOLD  
LIMITED  
First Respondent

AND                              JAMES BATES  
Second Respondent

Member of Authority:      Robin Arthur

Representatives:            Rebecca Denmead, counsel for the Applicant  
James Bates for the First Respondent and in person as  
the Second Respondent

Investigation Meeting:      10 August 2023

Determination:                6 November 2023

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**DETERMINATION OF THE AUTHORITY**

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- A. Myles Mandeville was an employee of Top Shelf Scaffold Limited (TSSL), not an independent contractor.**
- B. TSSL must pay the following amounts to the Labour Inspector for the benefit of Mr Mandeville:**
- (i) \$3,586.04 as annual holiday pay;**
  - (ii) \$1,707.09 as pay for public holidays and alternative days;  
and**
  - (iii) interest on those amounts for the period from 29 March 2021 to the date of payment, calculated using the civil debt interest calculator.**

- C. TSSL must pay penalties totalling \$15,000 in the Authority for four breaches of the Employment Relations Act 2000, the Holidays Act 2003 and the Wages Protection Act 1983.**
- D. James Bates was a person involved in breaches of employment standards and the Labour Inspector has leave to recover from Mr Bates any arrears owed to Mr Mandeville if TSSL is unable to pay those arrears.**
- E. Mr Bates must pay penalties of \$7,500 into the Authority for four breaches of employment standards.**
- F. TSSL and Mr Bates must also pay the Inspector \$4,500 as costs and \$71.55 in reimbursement of the Authority lodgement fee. They are jointly and severable liable for these costs and expenses.**
- G. All sums ordered for payment must be paid within 28 days of the date of this determination.**

### **Employment relationship problem**

[1] Labour Inspector Natasha Cenevska sought orders against Top Shelf Scaffold Limited (TSSL) and its director James Bates in relation to a complaint by Myles Mandeville. The Inspector said TSSL breached employment standards by treating Mr Mandeville as an independent contractor rather than an employee and not meeting its statutory obligations to him as an employee to give him a written employment agreement, to keep complete time and leave records and to pay for annual leave, public holidays and alternative holidays.

[2] The Inspector sought penalties against TSSL and Mr Bates for breaches of those obligations and, if the company could not pay any arrears found to be due to Mr Mandeville, an order that Mr Bates must pay those arrears himself.

[3] TSSL and Mr Bates opposed all findings and orders sought by the Inspector. They said the working relationship with Mr Mandeville was mutually agreed and understood as being on the basis that he was an independent contractor to the company, not its employee.

## **The issues**

[4] The issues for determination were:

- (i) Did Myles Mandeville work as an employee or independent contractor for TSSL?
- (ii) If he was an employee, did TSSL breach statutory obligations to provide a written employment agreement and to keep complete records for time, wages, holidays and leave?
- (iii) Did TSSL breach obligations to pay annual leave, public holiday leave and pay and alternative holiday leave and pay?
- (iv) If so, should orders be made for payment (with interest) of arrears of annual holiday pay, public holiday pay and alternative holiday pay?
- (v) Did TSSL fail to obtain written consent for deductions made from Mr Mandeville's wages?
- (vi) Was TSSL liable to penalties for any, some or all of the alleged breaches of the Employment Relations Act 2000 (the ER Act), the Holidays Act 2003 (the HA) and the Wages Protection Act 1983 (the WPA)?
- (vii) If liable to penalties, what penalty should be imposed on TSSL?
- (viii) Was James Bates a person involved in breaches of employment standards and, if so, can the Inspector recover from Mr Bates any amount of arrears that TSSL is found liable to pay Mr Mandeville if the company cannot?
- (ix) Was Mr Bates also liable to penalties for any, some or all of the alleged breaches of the ER Act, the HA and the WPA?
- (x) Should either party contribute to the costs of representation of the other party.

## **The Authority's investigation**

[5] Written witness statements from the Inspector, Mr Mandeville, Mr Mandeville's mother Jemma Mandeville, Chase Gibson, Mr Bates and Monty Petrecivich were lodged for the Authority's investigation. Mr Petricevich worked for TSSL from June 2020 until its business closed down around April 2022. He said he had worked on the agreed basis of being an independent contractor.

[6] Chase Gibson had worked for TSSL from October 2019 to March 2021. He had also complained to the Inspector about being treated as an independent contractor and not getting paid for annual leave and public holidays. In the statement of problem

lodged in March 2023 the Inspector sought findings that Chase Gibson was also an employee of TSSL and orders should be made requiring arrears for leave and holiday entitlements to be paid to him. On the day before the investigation meeting, however, the Inspector, through counsel, advised the Authority that Chase Gibson no longer wished to give evidence in support of the claim she had made on his behalf. She sought to leave to withdraw the aspects of her application relating to him.

[7] At the outset of the investigation meeting the Inspector said Chase Gibson told her a few dates beforehand that he was “not comfortable” about coming to the investigation meeting. She said he told her this was because word of the dispute had spread among family members and friends and he felt under pressure to withdraw his complaint.

[8] The context to that comment concerned the family links between several people who worked for TSSL. When Mr Bates left another scaffolding company in 2019 to set up his own business through TSSL, he was joined by Dwayne Gibson, a former colleague from his former workplace. Dwayne Gibson is Chase Gibson’s brother. He had asked Mr Bates to also offer his brother work with TSSL.

[9] Chase Gibson’s partner is Ms Mandeville. It was through this connection that her son, Mr Mandeville, was offered work in March 2020.

[10] Monty Petricevich’s partner is a cousin of Dwayne Gibson. Mr Petricevich, the Gibson brothers and Mr Bates also knew one another from their high school days.

[11] The Inspector said she told Chase Gibson her claim for arrears to be paid to him might not be able to go ahead if he did not attend the investigation meeting.

[12] I asked the Inspector what she had done to inquire in the nature of the pressure Chase Gibson said he had experienced. She said she had explained the importance of attending but, because of what she described as the nature of the business involving friends and family, had done nothing more.

[13] It is a matter of concern when a witness, previously co-operative and involved in preparation for an investigation, belatedly withdraws and alleges this is due to “pressure” not to give evidence. If accompanied by threats, dissuading a person from giving evidence in a civil matter, as Authority proceedings are, is potentially an

offence.<sup>1</sup> Many proceedings about employment matters involve family and friends who work closely together and who may have strong views, one way or the other, about whether a friend or family member should give evidence. Such evidence may be of considerable importance to the administration of justice and, if part of proceedings about an application by a Labour Inspector, the maintenance of employment standards as a general social good.

[14] In that context some further inquiry may be necessary about the facts of any alleged pressure. In turn some consideration may be needed of whether attendance and evidence should be compelled by witness summons. The personal preference of an individual about whether they give evidence, where they are a witness in a matter pursued by the regulator rather than being a party to civil proceedings in their own right, does not necessarily outweigh the public policy reasons for ensuring relevant evidence is heard.

[15] Ms Mandeville, who as already noted is Chase Gibson's partner, did give her own evidence at the investigation meeting. She would not provide any more details about what she also alleged were threats he had received about giving evidence. However she also said he had not attended because he had not been able to arrange the time off work that day, which is a reason of a different nature.

[16] Against that background I reluctantly agreed to the Inspector's request to withdraw the aspects of her claim relating to Chase Gibson. A witness statement lodged on his behalf could not be tested by questioning so has also been put aside from consideration in this investigation. Notes of the Inspector's interviews of him, while conducting the inquiries which then formed the basis of her Investigation Report, remained part of the evidence and context in which the claims in relation to Mr Mandeville have been considered.

[17] During the investigation meeting the Inspector, Mr Bates, Mr Mandeville, Ms Mandeville and Mr Petricevich each answered questions about their evidence under affirmation. Counsel for the Inspector gave oral closing submissions, speaking to a written synopsis. Mr Bates opted not to make any closing submissions.

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<sup>1</sup> Crimes Act 1961, s 117.

[18] As permitted by s 174E of the ER 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.

### **The working arrangement**

[19] In 2019 Mr Bates left a demanding job with the scaffolding company where he had worked for some time. He intended setting himself up with work that involved less pressure. Initially his plan was to find enough work for just himself and Dwayne Gibson by providing scaffolding services to other scaffolding or construction companies. However, as a result of what Mr Bates called requests for favours, he agreed to others joining TSSL's crew. One of those was Chase Gibson who, in turn, later asked about a job for Mr Mandeville.

[20] Mr Mandeville was aged 16 years at the time and completing a transition to work programme at school. Mr Bates arranged a trial session and then offered Mr Mandeville ongoing work as a labourer helping TSSL's scaffolders.

[21] Mr Bates said he offered Mr Mandeville work on the same basis as others already working for TSSL. He said he and Mr Mandeville had agreed on a "contractor rate" of \$20 an hour. As with the scaffolders, who were paid a higher hourly rate, Mr Bates said the work was offered and accepted on the basis Mr Mandeville and the others would "look after" their own tax and ACC levy obligations. Mr Bates said he told Mr Mandeville that he helped the others with their taxes and could do the same for him, to which Mr Mandeville agreed.

[22] There was no written agreement about any arrangements made between them.

[23] Mr Bates kept an electronic record of hours worked and, using Xero software, generated pay records which included deduction of withholding tax. Mr Bates' wife did the company's administrative work, including arranging the direct crediting of weekly pay to Mr Mandeville's bank account.

[24] Later, at the request of Ms Mandeville, Mr Mandeville was given pay slips. Those slips, prepared using a form available in the software, showed the tax code as WT but elsewhere on the form labelled the tax deduction as PAYE.

[25] Records Mr Bates kept showed Mr Mandeville had a regular Monday to Friday pattern of work through the 56-week period he had worked for TSSL from each March 2020 to late March 2021. Those records showed his hours of work were mostly from 7am to 3pm, with absences on some days for sickness and attending a course. Mr Bates arranged a constant flow of work at various work sites under contracts with larger scaffolding businesses and construction companies. Mr Mandeville relied on Mr Bates and other workers for transport to and from those various work sites. He was provided with high visibility work gear, including some with a TSSL logo, to wear while at work on those sites. Mr Bates also purchased a basic scaffolder's tool kit for Mr Mandeville, deducting \$50 from his pay each week until the \$400 purchase price was paid in full.

### **Determining the real nature of the relationship**

[26] From her inquiries, including interviews of Mr Mandeville and Mr Bates, the Inspector concluded the working relationship should properly be described as employment. TSSL and Mr Bates insisted this was wrong because they said it was agreed from the outset that Mr Mandeville was contracting independently to provide services to the company.

[27] Section 6 of the ER Act requires the Authority to determine this contested issue by consider the real nature of the relationship:

#### **6 Meaning of employee**

- (1) In this Act, unless the context otherwise requires, *employee*—
  - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
  - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
  - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[28] The fact-specific inquiry into “all relevant matters” in each case includes looking at any written and oral terms agreed between the parties (for indications of their common intention concerning the status of their relationship); whether how the relationship operated in practice showed any changes or additions to those terms and

conditions; what control of the work or its integration into the business may show about the nature of the relationship (described as the control and integration test); and whether the contracted person was effectively working on their own account (described as the fundamental or economic reality test).<sup>2</sup>

[29] There was no evidence that a mutual intention about the nature of the working relationship was clearly established at its outset. Even if Mr Bates preferred and had clearly referred to independent contracting, it was unlikely Mr Mandeville knew or understood what that might mean. He had, on his evidence, not been employed in any part-time work while still at high school, so had no prior experience of what to expect in making arrangements to work for someone else, whether as an employee or on any other basis. Mr Bates told him what the hourly rate was and Mr Mandeville thought he had a job. He lacked any understanding of what the difference between employment and contracting might be.

[30] Once he began working he had not questioned the deduction from his pay of withholding tax, the type appropriate for a contractor, because he did not know any better or different. Similarly, he did not know or understand that he would be expected to pay his own ACC levies if he was an independent contractor. He only learnt of that expectation when a levy invoice arrived from ACC some months later.

[31] But, even if Mr Mandeville had agreed to a form of words that referred to independent contracting (with its own tax and ACC obligations), the ‘real nature’ of the arrangements for the work he did and how it was carried out were consistent with employment, not independent contracting. This overrode whatever words might have been said by Mr Bates about the arrangements.

[32] As a 16-year-old labourer in a scaffolding crew, Mr Mandeville had no control over the type, timing, location or order of work he did. He had no ability to profit from doing the job more efficiently or inventively. Equally, he carried no risk of loss for doing the job poorly. He turned up for work when he was told to, apart from some sick days, and did what he was told to by Mr Bates or whichever experienced scaffolder was in charge on the site during the day.

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<sup>2</sup> *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34 at [32].

[33] He had to perform the work he was being paid for and could not substitute his personal service by getting someone else to turn up and do it for him. Neither could he, realistically, canvas other clients for his labouring services in a scaffolding crew. The reality was he was working exclusively for TSSL.

[34] This was part of his integration into the work of TSSL's business. This was also apparent from the requirement that he and others wear the TSSL-branded hi-vis gear provided. In part this met necessary safety requirements for anyone on a building site but also marked him as part of TSSL's workforce, not someone working on his own account.

[35] There were no genuine indicators that Mr Mandeville was working on his own account, that is as an independent business. He did not invoice for his services. He accepted the tax arrangements because he relied on Mr Bates doing the right thing for him, not because he understood the deductions were of the nature appropriate for an independent contractor rather than being coded and deducted at the PAYE rate suitable for an employee. He did nothing to arrange tax deductions to which a genuine independent contractor might be entitled for expenses in running their own business, such as transport or equipment costs.

[36] An objective analysis of the nature of all those arrangements must conclude the reality of the relationship was one of employment. There were some additional subjective factors which supported this conclusion, but were not necessary for it.

[37] Firstly, TSSL applied for wage subsidies for Mr Mandeville and three other people working for the company during the 2020 Covid emergency lockdown. Mr Bates said this application was done hurriedly and he had asked the workers whether they wanted him to do so. They had agreed they did. However, the forms TSSL had to complete included declarations that the people named in the application were employees and legally employed by the company. The subsidy was available for self-employed people but Mr Mandeville, and others in the TSSL scaffolding crew, would have had to apply on their own account rather than it being done by the company if they were truly independent contractors.

[38] In his oral evidence Mr Bates said that application was made in "a state of panic" given the circumstances and uncertainty of that particular time. While understandable,

it was, nevertheless, an indicator that he and the workers understood their arrangement to really be one of employment.

[39] Secondly, the totality of the evidence suggested Mr Bates had really been seeking to have an arrangement more consistent with one of casual employment, with workers paid an hourly rate and no expectation of work every day if there were days when no scaffolding work was needed by TSSL's customers. This was apparent from some references in TSSL's statement in reply, lodged by an employment advocate acting for the company at the outset of these proceedings. It referred to jobs being "offered to all workers with no expectation of acceptance" and "all work offered was in a fluid, casual manner done ... by verbal agreement".

[40] Thirdly, this was not a case where evidence about industry practice provided much insight or guidance about the real nature of the work. As Mr Bates and Mr Petricevich confirmed in their oral evidence, arrangements for both employment and independent contracting are found throughout the scaffolding industry. They, themselves, are both now working as employees of other scaffolding companies.

### **Breach of obligations on written employment agreements and keeping records**

[41] Because Mr Bates wrongly believed Mr Mandeville was an independent contractor, TSSL failed to observe its statutory obligation to provide him with a written employment agreement. This breached s 65 of the ER Act and made TSSL liable to a penalty.

[42] This belief also meant TSSL had not generated and kept all the information needed to meet all the statutory requirements for records of time, wages, holiday and leave related to Mr Mandeville and his work.<sup>3</sup>

[43] As noted in the Inspector's Investigation Report, TSSL's records lacked the mandatory information about his age, as an employee under 20 years old; whether he was employed on an individual or collective agreement; the date on which he last became entitled to annual holidays; payments for public holidays worked; dates on which he became entitled to annual holidays and the dates and payments made for public and alternative days not worked but for which he was entitled to holiday pay. As breaches of ER Act s 130 and HA s 81, those shortfalls in record keeping made

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<sup>3</sup> Employment Relations Act 2000, s 130 and Holidays Act 2003, s 81.

TSSL liable to penalties.<sup>4</sup> Subject to a finding of being a person involved in the breach, Mr Bates was also liable to penalties for those breaches.<sup>5</sup>

### **Breach of obligations on paying annual leave and other holidays**

[44] Although Mr Bates did not keep all the mandatory information, he did record the days and hours worked, which was information TSSL needed for its own invoicing of clients for the work done by Mr Mandeville and others. TSSL also had the pay records and pay slips generated using its Xero software.

[45] From those records the Inspector was able to calculate the annual leave, public holidays and alternative holidays for which Mr Mandeville should have been paid. Her analysis established TSSL has breached its obligations under the HA to:

- provide four weeks' paid annual holidays after 12 months' continuous employment – s 16;
- pay annual holiday pay when the employment ended – s 24 and s 25;
- pay time-and-a-half for work on a public holiday – s 50; and
- pay for alternative holiday entitlements not used – s 60.

[46] Those breaches also made TSSL and, subject to a finding as a person involved, Mr Bates liable for further penalties.

### **Arrears due for annual leave and other holidays**

[47] Careful analysis by the Inspector of the application of the relevant statutory provisions established the following arrears were due to Mr Mandeville.

[48] He was entitled to a payment of \$3,586.04 for annual holidays, for a full and a part year. He was also entitled to a further payment of \$1,707.09 for public holidays and alternative days.

[49] He was due to be paid those amounts by no later than 29 March 2021. Accordingly, exercising the Authority's power to order interest in any matter involving the recovery of any money, TSSL must also pay Mr Mandeville interest on the total of

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<sup>4</sup> Employment Relations Act 2000, s 130(4) and Holidays Act 2003, s 75

<sup>5</sup> Employment Relations Act 2000, s 142W and s 142X and Holidays Act 2003, s 75.

\$5,293.13 from that date until those amounts are paid in full.<sup>6</sup> Interest is to be calculated using the civil interest debt calculator.<sup>7</sup>

### **Breach of obligation for written consent for deductions**

[50] Mr Bates did not get Mr Mandeville's written consent for the deductions made from his wages to repay the cost of the tool kit bought for his use. This omission was a breach of s 5 of the WPA which requires written consent.

[51] This breach made TSSL and, subject to a finding as a person involved, Mr Bates liable to a further penalty.

### **Penalties due for multiple statutory breaches**

[52] TSSL's liability for penalties for breaches of its statutory obligations to an employee had to be considered under the requirements of s 133A of the ER Act and s 76A of the HA. Application of the relevant criteria are guided by the principles and process developed in case law.<sup>8</sup>

[53] TSSL was liable for penalties for breaches of ER Act s 65 and s 130; HA ss 16, 24, 25, 27, 49, 50, 55, 56, 60 and 81; and WPA s 5. The Inspector appropriately proposed these multiple statutory breaches be globalised (that is grouped together) as four breaches for the purpose of assessing penalties:

- One breach of failing to provide a written employment agreement and to keep records of time, wages, holiday and leave.
- One breach of failing to provide annual holiday entitlements and pay.
- One breach of failing to pay public holiday entitlements.
- One breach of failing to get written consent for deductions made from pay.

[54] The maximum available penalty against a company for each of these breaches, as globalised, is \$20,000. This meant the assessment started from a potential maximum of \$80,000 for the four breaches.

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<sup>6</sup> Employment Relations Act 2000, Schedule 2, clause 11.

<sup>7</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

<sup>8</sup> *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151]; *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]

[55] For reasons which follow, the penalties TSSL is ordered to pay for these four breaches total \$15,000. This amount has been reached from considering the Inspector's submissions on the relevant criteria and the evidence.

[56] *Objects of the ER Act:* A penalty is necessary to give effect to the ER Act's objects of addressing the inherent inequality of power in employment relationships and of promoting effective enforcement of employment standards. In this case a 16-year school leaver new to the workforce was denied minimum entitlements due to a lack of knowledge and power in entering that employment relationship.

[57] *Nature and extent of the breaches and involvement in them:* The failures to observe minimum employment standards endured through the entire employment relationship because of Mr Bates' mistaken belief, and through him TSSL, about the nature of the working relationship. This mistaken belief that Mr Mandeville could be treated as a contractor did not negate or reduce the need for a penalty for failure to observe his rights as an employee.

[58] *Intentional breach:* Mr Bates was aware of the difference between an employee and a contractor and chose to treat Mr Mandeville as if he were a contractor or, at least, a casual employee. In that sense TSSL actions were intentional.

[59] *Loss or gain resulting for either party:* Mr Mandeville lost the use of \$5,293 in holiday pay, losing the benefit of having paid time off during his employment or getting the money after it ended. TSSL had the benefit of keeping money it would otherwise have spent on holiday pay.

[60] *No mitigation steps:* TSSL had done nothing to mitigate Mr Mandeville's loss prior to the Authority investigation. It had, however, co-operated with the Inspector's inquiry by providing helpful information. The Inspector was provided with records of payments made, timesheets and payslips which enabled her to better calculate leave and pay entitlements, to assess what was due in public holiday pay and to confirm there had been no breach of the minimum wage entitlements.

[61] *Circumstances of the breach, including vulnerability of the employee:* Mr Mandeville, at the age of 16 and starting his first job, was a vulnerable employee. He was being given an opportunity, when Mr Bates was called upon by a friend as a favour, to get work but was nevertheless reliant on his employer to do things the right way.

[62] *Previous conduct:* TSSL has no previous adverse history with the Labour Inspectorate.

[63] *Deterrence, both particular and general:* As submitted by the Inspector a penalty was necessary to deter TSSL and employers in this industry generally from failure to comply with statutory obligations to provide written employment agreements, to provide and pay all holiday entitlements, to keep proper pay and holiday records and to get written consent for deductions from wages. TSSL gained at least a notional competitive advantage, either in pricing or profit, by avoiding the costs of providing holiday pay. A penalty was needed to demonstrate non-compliance of that kind would not be tolerated.

[64] *Culpability:* TSSL was culpable for those breaches. However the level of non-compliance was, considered against the full range of circumstances and severity of other cases, at the lower end of the scale. There was some naivety about the arrangements made in the context of providing a job as a 'favour' rather than a deliberate and calculated attempt to deceive and short-change Mr Mandeville. Mr Bates' co-operation with the Inspector's inquiry also warranted some reduction in the level of penalty appropriately imposed on TSSL.

[65] Taking into account all the factors already discussed, the penalty could be set at 25 per cent of the maximum as an intermediate step in the assessment, that is to a total of \$20,000 (being \$5,000 for each breach).

[66] *Consistency of penalty awards in similar cases:* As acknowledged in the Inspector's submissions, each case turns on its facts. Penalties in similar cases, with similar breaches, can range higher where more workers are involved, the losses are larger and the employer has behaved in a calculated or callous way. In the circumstances of this case, concerning a single worker and with an important but relatively low amount to be recovered, a penalty in the range of \$15,000 to \$20,000 appeared appropriate.

[67] *Ability to pay:* TSSL is no longer operating a scaffolding business. The Companies Office registrar, at the request of the Inspector, had stopped the process for removal of the company from the register. There was no verified information about what resources TSSL might still be able to call upon to pay any penalties awarded. Mr Bates was now employed elsewhere and described himself as living week to week. This

was not a reason, in itself, to increase or decrease the level of penalty TSSL might be ordered to pay.

[68] *Proportionality of outcome to breach:* As a final cross check, it was necessary to consider whether penalties totalling \$20,000 should be imposed for the failures identified in this case to comply with statutory standards.

[69] The penalties in this case are, ultimately, being imposed for failures in respect of one worker, who was deprived of just over \$5,000. Allowing for the effect of the loss of the less tangible but nevertheless valuable benefits of having a written employment agreement, proper pay and holiday records and paid holiday time off, a proportionate penalty for the each of those breaches in respect of just Mr Mandeville's employment was \$4,000. For the failure to get written consent for making deductions from wages to pay off a tool kit, valued at \$400 and which Mr Mandeville still has, a penalty of \$3,000 was more proportionate.

[70] Standing back from those adjustments, penalties for the four breaches would total \$15,000. It is an amount sufficient to deter employers from acting in the way TSSL did. The adjustments are not reductions which risk inadvertently encouraging non-payment of leave entitlements or failures to keep proper records and provided written employment agreements. The meaning and consequences are clear. An employer who does not comply with employment standards risks penalties significantly larger than the money or other benefits 'saved' by not providing workers with their statutory entitlements.

[71] Within 28 days of the date of this determination TSSL must pay into the Authority \$15,000 for four breaches of employment standards.<sup>9</sup> On recovery of the penalties, the Authority must then transfer that amount to a Crown Bank Account.

**Mr Bates is a person involved in breaches of employment standards**

[72] As director and sole shareholder of TSSL, and in charge of running its scaffolding business before it stopped operating, Mr Bates was directly responsible for each of the four established breaches of Mr Mandeville's statutory entitlements. The failure to keep proper pay and holiday records and to provide and pay annual leave and public holiday entitlements are all breaches of "employment standards" as defined in s

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<sup>9</sup> Employment Relations Act 2000, s 136.

5 of the ER Act. The breach of s 65, by not provided a written employment agreement, is not included in the scope of those standards.

[73] Under s 142Y of the ER Act a person involved in breaches of employment standards may be held liable to pay money owed to a worker if the employer defaults in payment of that money.

[74] The Inspector applied for a finding that Mr Bates was “a person involved” in breaches of employment standards and for leave to recover from Mr Bates any money owed to Mr Mandeville if TSSL defaulted in paying those amounts.

[75] As Mr Bates has been found to be a person involved in breach of employment standards, leave is granted under s 142 of the ER Act for the Inspector to recover from Mr Bates any arrears of wage or other money owed by TSSL to Mr Mandeville in the event that TSSL defaults on paying those arrears.

### **Penalties against Mr Bates**

[76] As a person involved in breaches of employment standards, Mr Bates was also personally liable to a penalty where the ER Act, the HA and the WPA provide for a penalty for those breaches.<sup>10</sup>

[77] The maximum penalty for each breach by an individual is \$10,000. In this case the potential penalties for the four breaches totalled \$40,000.

[78] Each of the criteria considered in respect of the penalties imposed on TSSL apply in equal measure to Mr Bates as the relevant conduct was his own, conducted on behalf of TSSL. While Mr Mandeville was employed with good intentions, the failure to observe employment standards made it appropriate to award penalties for that conduct.

[79] Assessing the relative seriousness of the breaches in this case, an adjustment to one quarter of the maximum liability was appropriate, that is a total of \$10,000. This comprises a \$3,000 penalty for each of the breaches of failing to keep records, of failing to pay annual leave entitlements and of failing to pay public holiday entitlements and \$1,000 for the unauthorised deduction from wages.

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<sup>10</sup> Employment Relations Act 2000, ss 135, 142X and 130; HA ss 16, 24, 25, 27, 50, 55, 56, 60 and 74; and Wages Protection Act 1983, ss 5 and 13.

[80] In respect of the criteria regarding ability to pay, Mr Bates confirmed he was employed so had some income. However, as a matter of consistency of awards in similar cases and of proportionality of the outcome, a further reduction of the penalty for the first three breaches was warranted, that is from \$3,000 to \$2,500. No further reduction was required for the deductions breach.

[81] Mr Bates is, therefore, liable to pay a total of \$7,500 as penalties for the four breaches. He must pay this amount into the Authority within 28 days of the date of this determination. On recovery of the penalties, the Authority must then transfer that amount to a Crown Bank Account.

### **Costs**

[82] The Inspector was entitled to an award of costs as the successful party. In closing submissions the Inspector sought costs at the level of the Authority's usual daily tariff of \$4,500 for a one-day investigation meeting, along with reimbursement of expense of the \$71.55 fee paid to lodge her application in the Authority.<sup>11</sup> This was the appropriate amount to order as costs and expense for which TSSL and Mr Bates are jointly and severally liable. It must be paid within 28 days of the date of this determination.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>11</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).