

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 183  
3159481

BETWEEN	A LABOUR INSPECTOR Applicant
AND	RURAL PRACTICE LIMITED First Respondent
AND	REZA ABDUL-JABBAR Second Respondent
AND	SILVIA ABDUL-JABBAR Third Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Rochelle Hill, Amy Webster (29 May-1 June 2023) and Briar Colville (17-19 July, and 1-2 August 2023), counsel for the Applicant Mark Hammond, counsel for the Respondents
Investigation Meeting:	29 May-1 June, 17-19 July and 1-2 August 2023, in Invercargill
Penalties submissions received:	9 October 2023, 28 February, 6, 13 and 25 March 2024
Second Determination:	28 March 2024

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] After an investigation by the Authority a written determination was issued by it on 7 February 2024<sup>1</sup>, to resolve claims the applicant Labour Inspector had brought to recover wages, remuneration, holiday pay and other money, on behalf of three workers.

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<sup>1</sup> *Labour Inspector v Rural Practice Limited* [2024] NZERA 66

[2] As the determination records, the workers came from Indonesia to work on a dairy farm near Invercargill for periods between December 2017 and February 2022.

[3] The farm is a business operated by The Rural Practice Trust (the Trust), of which Rural Practice Ltd (RPL), the first respondent, is the sole trustee.

[4] In an amended statement of problem<sup>2</sup>, the Inspector alleged that RPL was liable as the employer of the workers.

[5] The Inspector's claims extended to the recovery of penalties against RPL for alleged breaches of statutory employment standards, and against Reza Abdul-Jabbar and Silvia Abdul-Jabbar for alleged involvement in RPL's breaches.

[6] Reza and Silvia Abdul-Jabbar were the settlors of the Trust when it was formed and they were also directors and shareholders of RPL.

[7] In its 7 February determination, the Authority upheld the Inspector's claims to recover holiday pay brought on behalf of two of the workers.

[8] The Authority also found that RPL had breached employment standards. Reza and Silvia Abdul-Jabbar were found to be persons involved in breaches of employment standards.

[9] The Authority deferred resolving the Inspector's claims to recover penalties, to allow submissions on the claims to be made by the respondents and by the Inspector in reply.

[10] The Authority also deferred resolving an own-motion enquiry into whether conduct of RPL or Reza Abdul-Jabbar during the Authority's investigation, had obstructed it. Submissions were sought from the parties on that issue.

[11] Submissions were received and this second determination now resolves the Inspector's claims for penalties against the first and second respondents for breaches of employment standards.

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<sup>2</sup> Dated 15 March 2022

[12] As to the Authority's enquiry into obstruction, further information or evidence may need to be sought before the Authority concludes an investigation into that matter, which will be referred to again at the end of this determination.

### **The Inspector's claims**

[13] In her application to have the recovery and penalty claims resolved, the Inspector alleged RPL had breached employment standards of the Employment Relations Act 2000 (the ER Act), the Minimum Wage Act 1983 (the MWA), the Holidays Act 2003 (the HA) and the Wages Protection Act 1983 (the WPA).

[14] The breaches were alleged to have caused the workers to be underpaid statutory and contractual entitlements to wages and remuneration, including holiday pay. Breaches were also alleged to have occurred when RPL unlawfully deducted money from the workers' pay and required them to make premium payments.

### **The claims for wages, remuneration, holiday pay and other money**

[15] In her application, the Inspector had claimed to recover from RPL a total of \$215,892 in unpaid wages, remuneration or other money.

[16] Before the investigation meeting ended, RPL or the Trust, voluntarily paid \$64,387 to the Inspector and agreed to pay interest on that amount.

[17] The voluntary payments comprised amounts for each worker of annual and public holiday pay claimed under the HA, and underpaid contractual remuneration claimed under the WPA. The Authority's determination resolved the claim for the unpaid balance of approximately \$151,000.

[18] Regarding the Inspector's claims to recover annual and public holiday pay for two of the workers, RPL was ordered to pay \$52,056.33 and interest.

[19] In total therefore the Inspector succeeded in recovering \$116,443 and interest, through RPL's voluntary payments and through the Authority's determination of 7 February.

[20] RPL was not ordered to pay wages claimed for two workers under the MWA of \$75,573.69, or to compensate for unconsented deductions from wages under the WPA (other

than underpaid contractual remuneration) or premiums claimed for two workers under the WPA of \$23,560.00.

### **The claims for penalties**

[21] The Inspector's claims for penalties for breaches of employment standards of the ER Act, the MWA, HA and WPA, were for breaches in respect of six employees<sup>3</sup>.

[22] In submissions<sup>4</sup>, penalties were sought for breaches in respect of the Indonesian workers, Agus Sutaji, Falentino Sembiring and Tedi Pribadi.

[23] The applicant identified 27 breaches in her submissions.

[24] In her application the Inspector had initially sought penalties against both Reza Abdul-Jabbar and Silvia Abdul-Jabbar, alleging that they were persons who had been involved in RPL's breaches of employment standards.

[25] In its determination the Authority found and declared that the second and third respondents were persons involved in the breaches of RPL, but by then the Inspector had withdrawn the claim for penalties against Silvia Abdul-Jabbar following her death.

[26] For the reasons it gave, the Authority determined<sup>5</sup> that in relation to the three Indonesian workers, RPL was liable for penalties for breaches of;

- s 6 of the MWA
- s 22 of the HA
- ss 49, 50, 55 of the HA
- ss 56 and 60 of the HA
- s 81 of the HA
- s 130 of the ER Act

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<sup>3</sup> Amended Statement of Problem dated 15 March 2022, paras 1.1 and 1.3

<sup>4</sup> Applicant's Closing Submissions, para 146

<sup>5</sup> Determination dated 7 February 2024, at [375]

- ss 4 and 12A of the WPA

[27] The Authority determined that Reza Abdul-Jabbar was also liable for penalties <sup>6</sup>.

[28] Counsel Ms Hill and Mr Hammond have made written submissions addressed to whether any penalties should be imposed, and if so in what amount, for the breaches of employment standards as determined by the Authority in relation to the Indonesian workers.

[29] Supplementary submissions have been made to further address the means and ability of the first and second respondents to pay any penalties ordered.

### **Penalties**

[30] There is no issue about the commencement of the penalty claims under the ER Act, the MWA, the HA and the WPA being within 12 months of the cause of action first becoming known to the Labour Inspector, a limitation set by s 135(5) of the ER Act and s 76(5) of the HA.

[31] Comprehensive legal principles apply when the Authority is required to determine the quantum of any penalties it orders. Those principles have been enacted in statute, at s 133A of the ER Act, and they have been explained and expanded upon in leading Employment Court decisions of the last few years, including *Labour Inspector v Preet PVT Ltd*,<sup>7</sup> *Labour Inspector v Prabh Ltd*,<sup>8</sup> and *Labour Inspector v Daleson Investment Ltd* <sup>9</sup>.

[32] In the present case the Authority has also been guided by the Court's judgment in *Labour Inspector v Samra Holdings Ltd t/a Te Puna Liquor Centre and four others* <sup>10</sup>, where penalties for breaches of employment standards by employers and by a person involved, were decided.

[33] The appropriate amount of any penalty is to be determined after considering the circumstances of each proven breach in the light of the legal principles.

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<sup>6</sup> Determination dated 7 February 2024, at [376]

<sup>7</sup> *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143

<sup>8</sup> *Labour Inspector v Prabh Ltd* [2018] NZEmpC110

<sup>9</sup> *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12

<sup>10</sup> *Labour Inspector v Samra Holdings Ltd and four others* [2022] NZEmpC 234

[34] A penalty may be awarded in any amount up to the maximum prescribed by s 135(2) of the ER Act, which for each breach or involvement in a breach, is \$20,000 in the case of a company such as RPL, and \$10,000 in the case of a natural person such as Reza Abdul-Jabbar.

[35] The principles allow that not every proven breach needs to be met with a penalty.

[36] If a penalty is ordered by the Authority, under s 136(2) of the ER Act part of it may be awarded to any person, instead of being paid into the Authority for payment to the Crown which is the more usual course. The Inspector seeks an award for two of the workers of part of any penalties ordered.

[37] The issues to be considered now by the Authority are;

- Should penalties for breach of any employment standard be ordered against the RPL or Reza Abdul-Jabbar?
- If so, in what amount or amounts?
- Should part of any penalties ordered be payable to Agus Sutaji, Falentino Sembiring, Tedi Pribadi, or any other person?
- If so, how should they be apportioned?

### **Penalties – general principles**

[38] The Employment Court in the decisions referred to above including *Preet*<sup>11</sup>, has identified the purposes of penalties. When ordering penalties the Authority should seek to;

- punish those who breach minimum employment standards
- deter companies and individuals from committing employment breaches
- compensate victims of such breaches, and
- eliminate unfair competition.

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<sup>11</sup> [2016] NZEmpC 143, at [49] to [63]

[39] The Court in *Preet* developed a four-step methodology to be followed by the Authority when fixing the amount of penalties, so that consistency and transparency might better be achieved between cases;

Step 1: Identify the nature and number of statutory breaches.

Identify each one separately. Identify the maximum penalty available for each penalizable breach. Consider whether global penalties should apply, whether at all or at some stages of the 4-step approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[40] In providing the Authority with full and exclusive jurisdiction to deal with claims for penalties, the ER Act requires the Authority to have regard to seven relevant matters set out at s 133A of the Act. In *Labour Inspector v Daleson Investment Ltd*<sup>12</sup>, the Court included a further five matters to be considered when assessing the nature and severity of breaches. All twelve matters are;

#### Section 133A matters

1. The object of the Act
2. The nature and extent of the breach
3. Whether the breach was intentional, inadvertent, or negligent
4. The nature and extent of any loss or damage
5. Steps to mitigate effects of the breach
6. Circumstances of the breach, and any vulnerability
7. Previous conduct

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<sup>12</sup> *Labour Inspector v Daleson Investment Ltd*, above at n3, at [19]

### Additional matters

1. Deterrence
2. Culpability
3. Consistency
4. Ability to pay
5. Proportionality of outcome

### **Submissions for the Inspector**

[41] The application of the legal principles has been simplified in a Penalty Analysis appended by counsel Ms Hill<sup>13</sup> to her written submissions made for the Inspector.

[42] For RPL the employer, starting from 27 identified breaches, a reduction to 17 is made at Step 1 after globalisation to take account of the nature of all contended actual breaches.

[43] Then, taking into account aggravating factors, in Step 2 a starting point of 90% of the maxima for those breaches is adopted. For mitigating or ameliorating factors no discount is given.

[44] In Step 3, no discount is given for RPL's means or ability to pay penalties.

[45] Finally, in Step 4, after applying a reduction of 15% to reflect proportionality, \$260,000 becomes the total of penalties claimed against the first respondent company.

[46] For Reza Abdul-Jabbar, as a person found to be involved in breaches, similar calculations based on the \$10,000 maximum penalty per breach have been made. Again, Step 2 starts at 90% and is applied to 17 breaches. After a 15% reduction to reflect proportionality, total penalties of \$130,000 are claimed against the second respondent.

[47] The breaches are described in the applicant's submissions as persistent, systemic and deliberate, as the respondents knew the amounts of wages and remuneration RPL had contracted to pay the workers and therefore must have known, in each pay period, that the workers were not being paid correctly.

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<sup>13</sup> Applicant's Closing Submissions, dated 9 October 2023, Appendix 2 and 3

[48] The Inspector's submissions refer to documents she was provided that had been designed by the respondents to mislead her.

[49] The Authority accepts the submission that loss or damage suffered by the workers was the use of money which they had earned through their skill and labour, having done so in the expectation they would receive it in full each payday when due. Awarding interest will provide some compensation for that harm, and through the imposition of penalties further compensation may be available if s 136(2) of the ER Act is invoked.

[50] It is submitted for the Inspector that RPL competed unfairly with other employers in the dairy primary production industry. The Authority agrees that is so, at least to the extent that other employers may choose to employ visa-dependent workers, from South East Asia, the Philippines, Indonesia and other countries, and in that case the employer will be required to pay those workers above the minimum wage to meet the Governments requirements as administered by Immigration New Zealand (INZ).

[51] The Authority agrees with the submission for the Inspector that there are no ameliorating factors in this case. The voluntary payments made, without admission of liability, were not forthcoming until the eve of the investigation meeting and afterwards. The respondents had access to legal advice before the application was made to the Authority by the Inspector. There was also some equivocation before payment for Mr Sembiring was eventually volunteered to the Inspector.

[52] The Authority also accepts the submission for the Inspector that the workers were in the 'vulnerable' class, because they had come from another country and were at some disadvantage arising from language differences and lack of knowledge of local law and employment requirements in New Zealand. The origins of the workers and the imbalance of power inherent in the employment relationship, gave the respondents influence which could improperly have been brought to bear on the workers.

[53] An example of that influence can be seen in the fixed term employment agreement Mr Sutaji received when he began seeking employment in New Zealand. The agreement was signed by him and on behalf of the Trust through its agent Suryo Firmanto, in 2018 in Indonesia. The fixed term was three years or more. Although the agreement with its particular terms was not the one that a work visa was eventually issued for, it purported to expressly forbid Mr Sutaji from cancelling the agreement and warned him that 'sanctions' might be imposed if he did

cancel it within its term. Even if such a provision had been enforceable only in Indonesia, the presentation of it in a formal document provided by an agent of the Trust, brought an element of pressure and increased vulnerability that a local worker resident in New Zealand is unlikely to have been subjected to.

[54] Vulnerability also lay in the situation Mr Sutaji experienced with the loss of his passport. The Authority has made no finding that the respondents withheld the return of the passport, but the fact that Mr Sutaji was in a situation where he entrusted his travel documents to another, Mr Abdul-Jabbar, and also the nature and importance of those documents, shows exposure to pressure, if an unscrupulous employer had wanted to try and force a worker to stay. The evidence showed that Mr Sutaji told Mr Abdul-Jabbar he was dissatisfied and wanted to leave the employment. Attempts were made to persuade him not to. Loss of travel documents put Mr Sutaji under pressure a local non-visa dependent worker would not be under.

[55] The Inspector's submissions refer to factors increasing the respondents' culpability. They include attempts to mislead the Inspector, and providing her with false documents. Also, the quantum of arrears that accrued is referred to. Even although the amount is to be adjusted downwards in the light of the Authority's determination, the \$116,443 recovered by the Inspector is a substantial sum of arrears.

[56] The Inspector confirms that the respondents have had no previous compliance or enforcement interactions with the Inspectorate.

[57] For the Inspector, the submission is made that any consideration of means or ability to pay must of necessity rely on the Authority receiving reliable and up to date information from the respondents. The Authority agrees. It is something of an indulgence sought, when a party otherwise liable for penalties requests to have the amount reduced because of limitations on its ability to pay. A party seeking that indulgence has an obligation to fully and accurately disclose its financial position.

[58] The respondents were given an extended opportunity to provide further and better information about their means and ability to pay, after the information first given was insufficient in the Authority's view.

[59] In considering proportionality of penalties, the Authority is urged to take the gravity of the breaches in this case and need for deterrence, fully into account in imposing meaningful penalties which address and achieve the purposes of those sanctions.

[60] Finally, the Inspector submits that the Authority should order payment of penalties of \$10,000 each to Mr Sutaji and Mr Sembiring, to compensate for harm they suffered and the difficulty caused by RPL not keeping proper records, as that failure impeded the accurate assessment of arrears of wages or remuneration including holiday pay, intended to be facilitated by s 130 of the ER Act and s 81 of the HA.

### **Submissions for RPL and Reza Abdul-Jabbar**

[61] For the first and second respondents, Mr Hammond's submissions refer to the criteria for assessment of penalties under s 133A of the ER Act. The Authority accepts as correct the submission that the imposition of a penalty is not a mandatory requirement. It has a discretion, to be exercised in accordance with principle, as to whether penalties should be imposed and also the level of any penalties.

[62] It is submitted there was no element of unfair competition present as all the workers were paid above the minimum wage. It is accepted that the salaries that were underpaid had been set at their particular level by INZ to meet Government requirements. The Authority considers competition could occur if other employers had employed workers who needed a work permit and had obtained one at the level required by INZ and were paid at that level. An employer paying less, as was the case with RPL, would have an advantage.

[63] The Authority is referred to supportive behaviours shown by the respondents towards the three Indonesian workers, and also to the respondents' participation in a formal intern programme, in the nature of an apprenticeship scheme, set up to promote training and education in dairy farming among participants who travel from Indonesia to stay at the farm while undertaking courses. Other support given, financial and personal, is referred to in this context.

[64] The Authority accepts that the respondents were good to the workers in some aspects of performance of the employment relationships, and generally they did some good works such as participating in the internship scheme. This was as much an opportunity for the respondents to build good connections with Indonesian interests in promoting training and education for

agricultural workers in that country. The good they did can be acknowledged but it does not excuse the respondents' breaches.

[65] It is submitted that rather than being a case of exploitation, any fault on the part of the respondents lay in them having procedures that were inadequate for the requirements of the employment relationships. It was submitted this was particularly so with records keeping.

[66] The Authority observes that agricultural work is one of the most common and oldest forms of employment in New Zealand. Its regulation by statute has been a feature for 100 years or more. The seasonal nature of the dairy industry has long been well known and employment law has been developed around the features of the industry. It is not accepted by the Authority that any of the breaches in this case arose because, in employment matters, the dairy industry is something of a square peg in a round hole.

[67] The Authority is asked to take into account the stated intentions and efforts of RPL or the Trust, to finance payment of the \$52,056 and interest ordered to be paid to the Inspector by the company. It is indicated for the respondents that they are taking steps to pay the money awarded by the Authority in its determination. Although they may have to borrow to do this, they have an obligation to meet in that regard just as they had an obligation to comply with the employment standards. The Authority accepts that there is likely to be financial stress arising. This will normally be the case with many employers who are sanctioned for breaches of employment standards.

[68] Also, it is submitted for the respondents that media publicity given to the Authority's recent determination has resulted in Mr Abdul-Jabbar and his family suffering a form of punishment, through potential loss of reputation and standing in the community. The Authority does not accept that media publicity is to be viewed as *punishment* of any kind comparable to statutory penalties sought by the Inspector. Media reportage serves a different function in the community, always provided it is within the law.

[69] The Authority accepts that the consequences to the second and third respondents and their immediate family must be considered, especially if it appears those consequences may be out of all proportion to the breach.

[70] These were much more than so-called technical breaches, in the Authority's view. It is a serious and damaging breach to knowingly and deliberately deprive a worker in an

employment relationship of statutory and contractual entitlements. Developments in employment laws over the last 20 years or so, amply demonstrates this.

[71] The Authority acknowledges it must look at the outcome of the various claims made by the Inspector and recognise that in some instances, although there was held to be a breach, there was no award of money. That was particularly so with the claim to recover minimum wages for the Indonesian workers.

[72] It is submitted that none of the breaches was intentional but rather they were inadvertent or negligent. That submission must be rejected on the findings of the Authority. Mr Abdul-Jabbar told the Inspector that Mr Sutaji had been employed under an IEA for \$45K, when in fact Mr Abdul-Jabbar had confirmed to INZ that the remuneration was to be \$55K. The Authority can find no negligence or inadvertence in that circumstance. A single instance of conduct may be accepted as negligent or inadvertent, and in this case there was a pattern to the respondents' conduct, spread across at least three workers and which was underscored by the presentation of misleading information to INZ and the Inspector. Negligent or inadvertent conduct is not a credible explanation for the two sets of wage slips created for Mr Sembiring.

[73] It is submitted that neither Reza Abdul-Jabbar or Silvia Abdul-Jabbar set out to deprive the workers of benefits. The Authority considers it would not have been hard to pay them correctly if the respondents had wanted to.

[74] It is accepted by the Authority that penalties should be in reasonable proportion to the amounts of wages and holiday pay RPL has been ordered to pay.

[75] It is not accepted that the conditions of employment should be looked at across the board, or in the round, so that if the workers had a good standard of accommodation for the rental they paid, or they were from time to time given free a beast for eating, or were not required to work as hard as they could have been, that might to some extent offset any underpayment of wages or other entitlements. It is not for the employer unilaterally to decide which of its statutory and contractual obligations it will discharge.

[76] In the respondents' penalties submissions issue is taken with the Authority's findings in its determination. Dissatisfaction with any of those must be raised by challenge.

[77] It is submitted for the respondents that all the relevant factors weigh in favour of no penalty being imposed. The Authority does not agree. It found that the workers were not paid

their contractual and statutory entitlements to wages or remuneration and holiday pay. The breaches extended to three workers over periods of employment of one year and up to three years.

[78] The respondents deny they acted deceptively, but the dual payslips created for Mr Sembiring have remained unexplained and the Authority has concluded they were created with intent to mislead or deceive INZ or the Inspector or both. The Authority found from his evidence that Mr Sutaji did not give written consent for any deduction from his pay for the Suryo Firmanto invoice. The respondents could not have thought he had. Mr Sutaji had not seen the invoice before the Inspector showed it to him, and he denied contracting with Suryo Firmanto at all. The deductions RPL prepared and intended to make, and did make, involved deception.

[79] The respondents have sought an order requiring Mr Sutaji to account by way of set-off for a debt allegedly owed to Mr Firmanto for payment of recruitment fees. Even if there was a transaction giving rise to an employment relationship problem, which is arguable, the Authority is satisfied from the direct evidence it has been given by Mr Sutaji that he did not incur such a debt.

[80] There has been no direct evidence from Mr Firmanto, and this is surprising considering he had the opportunity to address this issue when he provided a statement about the dual receipts for payment of the fee by the Trust. The invoice issue has occupied a great deal of time in the investigation yet Mr Firmanto said not a word directly about it in the 'Explanation Letter' of 24 February 2024 signed with his name. In the circumstances, the issue seems to have been evaded.

[81] The order sought by the respondents in this regard against Mr Sutaji or the Inspector, is declined.

[82] The respondents accept that the Inspector succeeded in proving the claims for holiday pay. It is recognised that a penalty is likely to be imposed for the breaches of the HA but it is submitted penalties should be at the lower level.

[83] The respondents resist penalties being imposed on Reza Abdul-Jabbar personally, as that would amount to a doubling of penalty and ignore good things he did for the workers. The submission overlooks the different bases of liability as between an employer RPL on the one

hand, and a person involved in a breach, Mr Abdul-Jabbar on the other. A director is intended to be held accountable for the conduct of the employer where that is a company, just as the company may be held to be accountable.

[84] It is submitted that imposing a penalty will be an affront to Mr Abdul-Jabbar's moral code. Having a code and living by it may be two different things. The Authority has found that the actions of Mr Abdul-Jabbar involved him in a breach of employment standards by RPL, the company he was the controlling mind of.

[85] It is submitted that no purpose will be achieved in penalising him personally. The Authority refers back to the purposes of penalties in the Court's *Preet*<sup>14</sup> decision. The purposes include deterrence of companies and individuals from committing employment breaches. In the circumstances of this case, deterrence is a strong reason why penalties should be imposed on Mr Abdul-Jabbar as well as RPL.

#### **Applicant's submissions in reply - penalties**

[86] The applicant's submissions in reply on penalties were received on 6 March 2024.

[87] The Authority agrees that competition may be regarded as unfair if an advantage is taken directly or indirectly, through an action which breaches the law and leads to a lessening of operating costs. It is an unduly narrow view of the labour market to say it is not concerned with what happens in employment relationships provided the minimum wage has been paid. Instead of RPL, the workers might well have offered their valuable service to RPL's competitors for their potential advantage, had they known in advance that RPL would breach its employment agreements by underpaying them.

[88] It is submitted that penalties are warranted against the first and second respondents because of the deliberate nature of the breaches and the vulnerability and loss suffered by the workers. The Authority agrees.

[89] The Authority also agrees that the status of Mr Abdul-Jabbar as an Imam is not a mitigating factor. Because he is in the public-eye the Authority's findings may have greater consequences for him than others, but as in any employment relationship he is to be judged on

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<sup>14</sup> [2016] NZEmpC 143, at [49] to [63]

the basis of his involvement in the lawful performance of those relationships and not on his work as an Imam or holder of any other prominent position or office.

[90] Having his moral code sullied by the imposition of penalties, is a matter for Mr Abdul-Jabbar to wrestle with. If he has not adhered to values he holds, on searching his conscience he may feel he let himself down and harmed others in the course of doing so.

[91] Reference is made to the respondents' participation in the intern programme and acts of generosity and kindness shown towards the Indonesian workers. The Authority does not consider the respondents acted totally without scruple or any care for the workers or their rights, but the good that was done by them makes the breaches harder to explain or understand. These matters are not mitigation of the breaches.

[92] It is submitted that the workers were exploited. The Authority agrees. They were taken advantage of largely because they had recently come from another country, Indonesia, to one they were unfamiliar with. They lacked knowledge and experience of New Zealand, although Mr Pribadi had visited previously as an intern. As well there was a considerable lure or attraction in the economic benefits of being employed in this country. They were vulnerable also through being visa-dependent on their employer.

[93] The Authority agrees that penalties should be assessed according to the nature and purpose of the substantive obligations breached by the respondents. The monetary value of wages, holiday pay and other money involved is relevant too but is not the sole matter for consideration.

[94] The Authority agrees with the Inspector that the payments made voluntarily in the course of the investigation cannot be viewed as reparation. They can reasonably be seen as an acknowledgment by the respondent of their potential liability to have orders made against them, had the Authority been required to make a formal determination. The payments show the respondents now recognise the obligations they earlier failed to meet.

[95] The Authority also agrees that the Authority's disposition of the minimum wage claims should not be viewed as any kind of success the respondents had. The Authority found it likely there were breaches in one or more pay periods over the length of employment, but on the evidence was left unable to quantify the amount underpaid, or the scale of the breach. That result flowed largely from RPL's failure to keep proper records. It would be unjust for the

respondents to achieve any advantage from the employer's failure to comply with the employment standards of s 130 of the ER Act and s 81 of the HA.

[96] While the respondents were not required by law to keep records of money lent to employees and repayment of loans, it is a feature of this case that a respondent who was involved in breaches, Silvia Abdul-Jabbar was a trained accountant and as such she ought to have known better than many, the fundamental importance of having financial records, especially where payments were being made for a mixture of purposes. The workers were disadvantaged and left at risk by the undocumented loans and repayments. Substandard practices adopted by the respondents in this regard were deliberate in the Authority's view.

[97] The applicant's reply submissions refer to other employees who were working and living alongside the Indonesian workers during their employment. It is acknowledged that the evidence about their employment was relevant and was considerable in volume. The Authority has not written much about them, partly because the employment of the Indonesian workers in many respects stood on its own and the Authority has considered it largely in that way. The Authority has concentrated on the workers for whom orders have been sought.

[98] In reply submissions, the Inspector refers to the respondents' continued denial of responsibility. The Authority has made its findings and any dissatisfaction with them may be the subject of a challenge, if the respondents so wish. The Authority agrees that the main point is that the relevant contract documents stipulated the remuneration to be paid and this was not complied with. As has been mentioned several times by the Authority, Mr Abdul-Jabbar confirmed to INZ the \$55K level for remuneration for Mr Sutaji. RPL subsequently agreed to make good the shortfall. Although RPL had knowledge of the agreed remuneration, during the employment RPL deliberately did not comply with its undertaking to pay that remuneration.

[99] The Authority agrees that the payments made voluntarily by RPL did not have the effect of winding back the clock or wiping the slate clean. The underpayments were unlikely to have been corrected without the Inspector's investigation of Mr Sutaji's complaint.

[100] As to arguments that an across-the-board approach should be taken to conditions of employment, the workers may in some respects have had better conditions of work than others elsewhere doing similar farm work, but that can be no excuse for breaching a core term of an employment agreement by not paying wages or remuneration as promised. The conditions of

employment were not bargained for, they were offered in effect on a take it or leave it basis. The respondents cannot complain if they feel they were too generous to the workers.

### **Determination of penalties**

[101] The Authority puts three features of the respondents' conduct at the forefront of its consideration of the culpability of RPL and Mr Abdul-Jabbar. They are;

- (i) The breaches were multiple. They occurred across a range of employment standards and they were continued for relatively long periods during which the workers were employed on IEA's. This is not a case of a single isolated breach affecting only one worker. Nor is it a case of momentary lapse.
- (ii) The breaches occurred within the employment of workers who, through being recent migrants, were more vulnerable than others. Because of who they were, for a number of reasons the workers were disadvantaged or disempowered.
- (iii) The breaches were systematic and intentional. Despite the respondents knowing the effect of their actions, they did not step back or desist from what they were doing.

[102] The presence of those features should count against the application of discretion in their favour, when deciding whether or not to impose penalties on the first and second respondents. The objects of penalties cannot be achieved in this case without reflecting the respondents' accountability by imposing that particular form of sanction.

### **What explanation is there for the breaches**

[103] In determining the Inspector's claim for penalties, it is important for the Authority to try and establish why RPL came to breach several statutory employment standards, and why Reza Abdul-Jabbar was involved in those breaches.

[104] The Authority does not accept that no useful purpose will be served by getting an explanation, whatever one might be. This was the submission made for the respondents in relation to RPL's failure to pay the workers their contractual remuneration <sup>15</sup>, a serious breach in the circumstances.

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<sup>15</sup> Submissions for the Respondents dated 8 November 2023, at para 36

[105] The respondents advanced evidence and submissions intended to discredit the workers and their conduct, yet the respondents argued it would be pointless for them to explain their own conduct.

[106] The Authority disagrees. An explanation may serve to provide mitigation, or be a matter of aggravation, and therefore in principle an explanation may influence the quantum of any penalty ordered. Also, in bringing closure to the employment relationship problems, the affected parties, the workers in this case and the Inspector who brought claims on their behalf, might reasonably expect to be left with some idea of what motivated the respondents to act as they did.

[107] With or without the respondents' input, the Authority must form its own conclusions as to why the breaches occurred. The Inspector assisted in this regard by offering her reasoned views.

[108] There may be a number of underlying reasons for the failure of an employer such as RPL to comply with statutory and contractual employment law obligations, or for persons such as Reza Abdul-Jabbar and Silvia Abdul-Jabbar, becoming involved in a failure of that kind.

[109] Lack of dairy farming skill or knowledge or experience, may be an explanation. So too might be financial pressure or concern, personal problems including health issues of different kinds, ignorance of the law, or just plain neglect or inadvertence.

[110] The Authority concludes that none of those reasons provides an explanation. The Authority concludes that the explanation is an attitude held by Mr Abdul-Jabbar of disrespect for employment and immigration statutory rules and regulations - 'officialdom and bureaucracy' - and also an attitude of indifference to the sanctity of contract.

[111] In short, as a director and owner of the employer RPL, when it suited him, Mr Abdul-Jabbar knowingly disregarded the law governing employment. He took advantage of Mr Sutaji, Mr Sembiring and Mr Pribadi because they were not from New Zealand and were from Indonesia, where he too was from.

[112] The respondents acted as if they knew best what was right for workers from Indonesia, not INZ or the Labour Inspector or Parliament which made the law.

[113] The Authority accepts from the evidence there were occasions where the respondents showed benevolence, kindness, empathy and other virtues in their relations with the three workers, but at the same time they knowingly deprived them of statutory and contractual entitlements and wilfully deceived them. Not paying the workers each pay period the amount RPL had agreed to pay in a written employment agreement, was in the circumstances a deliberate act. It was also an act calculated as against Mr Sutaji not being fully aware that he was required to be employed at the higher level of salary agreed to by RPL and Mr Abdul-Jabbar.

[114] It is necessary to mention the late Silvia Abdul-Jabbar, as she has been found to be a person involved in some of the breaches, although penalties have not been sought from her or her estate. It is enough to reiterate the Authority's finding that she had knowledge of the central facts and was complicit with her husband in many of the breaches. Theirs was a very close union, at both a business and personal level. Both were originally from the same country as the workers. The Authority concludes from the evidence that she shared some of her husband's beliefs, attitudes and ambitions that may explain the breaches. The Authority has found nothing to suggest she tried to dissuade her husband or warn him about the need to comply with employment obligations.

[115] The idea of providing INZ and the Inspector with different payslips for Mr Sembiring may not have been hers to begin with, but it is likely she was the person who put that plan into action by creating and supplying the misleading information. The payslips had been carefully designed, so that a simple cross-check of banking or IRD records would not readily have shown that information within the payslips had been 'engineered' to mislead INZ.

[116] Silvia Abdul-Jabbar was a trained accountant and looked after the bookwork for RPL or the Trust. She must have known what her actions amounted to on behalf of RPL. Her actions ultimately benefited herself and her husband as RPL's owners and directors. Her actions showed no respect for the role of INZ or the Inspector, or the dairy farming community generally with whom her business, RPL, was in competition. She disregarded the law and the reasons for the rules and regulations governing employment and immigration.

[117] Plainly there was a direct financial advantage taken from underpaying the Indonesian workers their entitlements to wages, remuneration and holiday pay, and from receiving premiums from them and taking money out of their pay without consent, where that occurred.

[118] A power advantage also motivated Mr Abdul-Jabbar. The Authority considers that he and RPL exploited an existing strong imbalance of power inherent in the employment relationship RPL had with the Indonesian workers. The respondents had control of the opportunity the workers were given to come from the different world of Indonesia to New Zealand, to work on RPL's dairy farm and enjoy economic and societal advantages. The respondents had some control over the workers in their everyday lives, including their accommodation, working conditions and integration into the local community.

[119] In the case of at least one of the workers, Mr Abdul-Jabbar was his religious advisor or mentor as well as effectively being his employer. As leadership positions, Imam and Bishop its equivalent, are fundamentally positions of power in religion, the influence of which usually will extend into an adherent's daily life including employment.

[120] Because of their INZ permit obligations and their limited immediate circle of family and friends, the workers could not have simply given notice and gone to look for another job down the road if they were unhappy with their conditions. RPL knew that the workers' ties to it were greater than the commitments they had given under their employment agreements. The respondents also had connections such as Suryo Firmanto in the country of Indonesia they were likely to be nurturing and developing, and they were familiar with the culture and administration of that country.

[121] The respondents had the power of the knowledge they possessed or had access to, of employment law, and immigration and taxation requirements, which the workers lacked, at least when they began work. The respondents could anticipate that the workers would trust them to use that knowledge properly for their benefit.

### **Should penalties be imposed for all breaches?**

[122] The Authority found it likely there was a breach or breaches of the MWA during the employment of the workers, but it made no orders for payment of minimum wage arrears which were claimed to be \$75,573 in total.

[123] In the circumstances the Authority does not impose a penalty for that particular breach, as it is not clear how often or in what particular pay period, any breach or breaches occurred with any worker during the employment of Mr Sutaji for about one year and Mr Sembiring for

about three years. The Authority considered that in the circumstances s 132 of the ER Act could not be applied so broadly that the Inspector's claims could be accepted across the entire period of a worker's employment.

[124] The MWA breaches were not at the heart of the employer's failures in this case, although financially the impact to the workers may have been significant.

[125] The central failures in this case lay in not paying the contractual remuneration agreed to with the workers under their IEA's and in not keeping a wages and time record and a holiday and leave record, in breach of the ER Act and the HA. There were significant failures in not providing entitlements and allowing payments under the HA for both annual and public holidays. There were also failures under the WPA in relation to unlawful deductions from wages and premiums.

### **In what amounts should penalties be imposed?**

[126] Penalties under the ER Act, WPA and HA are to be assessed for quantum by applying the four-step test in *Preet* and looking at the additional considerations in *Daleson*;

### **Step 1 – Breaches, maximum penalties, and globalisation**

[127] The number of potential breaches as a starting point in this exercise, will depend on how closely the Authority focusses on the transgressions constituting any breach. The Inspector identified 27 breaches. Focussing more softly, the Authority sees 19 breaches in total, made up of;

- **6** records keeping breaches – 3 of s 130 of the ER Act and 3 of s 81 of the HA,
- **3** unlawful deductions breaches - of s 4 of the WPA – the failure to pay contractual remuneration when due to the three Indonesian workers,
- **8** breaches - of ss 49, 50, 55, 56 and 60 of the HA – for 2 types of holiday pay, annual and public, and 2 types of failure, not allowing leave or not paying it at termination of employment, for two employees, and

- 2 breaches of s 12A of the WPA – requiring payment of premiums from 2 employees.

[128] A refocus brings those 19 to 11 breaches. That reduction comes from taking the records keeping breaches as 2 not 6 – recognising the two different types of record - and the HA breaches as 4, not 8 - there were two workers and two types of holiday pay involved, annual and public holiday pay.

[129] A starting point for measuring severity at 90% for all types of breach, is considered too high by the Authority. That level should be reserved for the most egregious breaches, and although in this case the breaches were serious, the Authority considers they did not reach that uppermost level.

[130] A starting point of 85% is taken instead and is applied to all types of breach.

[131] After these changes are made, total potential penalties are \$187,000 in relation to RPL's breaches.

## **Step 2 – Starting point and aggravating and mitigating factors**

[132] The Authority agrees with the applicant there are no mitigating factors but a reduction of 10% is applied to recognise RPL's stretched financial position. The potential total is then reduced to \$168,300.

## **Step 3 – Ability to pay**

[133] Leave was given by the Authority on 7 March for further submissions to be made by the parties. They were to address the means and ability to pay of the first and second respondents as persons in breach or involved in breach, a factor to be considered at Step 3 of the 4 steps of *Preet*.

[134] Earlier submissions for the respondents had referred to this factor in relation to the *Trust*, whereas in the Authority's determination of 7 February liability was placed upon the first respondent, RPL, Rural Practice *Limited*. As noted in the determination, the respondents had not disputed that RPL was the entity which had employed the workers. It was not disputed that RPL was a trustee of the Trust.

[135] There appears to be no issue extant between the parties that RPL was the employer or stands legally in the shoes of the employer.

[136] The Authority sought clarification of the employer's legal structure and the financial position of RPL the company and of its director and shareholder, the second respondent Reza Abdul-Jabbar.

[137] The respondent filed submissions on 13 March. Those of the applicant were not received until 25 March, after the date given by the Authority in its directions. No explanation for the delay was given and leave was not sought to file them late. Counsel were aware that the Authority had wanted to complete this determination on penalties by Easter.

[138] The Authority is an investigative body and should not ignore relevant information even when provided late. It read the applicant's submissions and attachments. They did not cause the Authority to materially change conclusions already reached by it from evidence and submissions received before 20 March. The applicant's submissions largely aligned with the Authority's views reached independently of those submissions.

[139] The information provided for the respondents includes advice from Mr Abdul-Jabbar about his means, Strettons a firm of chartered accountants retained by the respondents, a member of Mr Hammond's law firm TomkinsWake, and a lending institution, Rabobank.

[140] The Authority considers that the information it has been given about means or ability to pay, is incomplete. The Authority accepts that RPL or the Trust has substantial debt to service, but it has not been given sufficient information about the nature of the assets of RPL and its interrelated entities, the Trust and other property-owning companies Mr Abdul-Jabbar is a shareholder of. It has been given no information about the value or potential value of those assets. It may be inferred that the assets are likely to be at least enough to have provided security for borrowing by RPL or the Trust. Unfortunately the Authority has not been given a full picture of the financial position of the respondents. It is contended that RPL has no assets.

[141] This is contradicted by advice given in public valuation records. Strettons advised that RPL the corporate trustee of the Trust, has no assets or income, but Council rateable value information shows RPL to be the registered owner of property having a value of \$5,660,000.

[142] Even if RPL has no assets, it has a right to be fully and completely indemnified by the Trust under the Deed <sup>16</sup> unless the trustee had been dishonest. RPL can enforce the indemnity which may be considered an asset.

[143] Strettons advice is that the Trust has substantial debt of over \$8.5 million, although how much over is not stated. Nor is there any more precise information given about the Trust's farm assets other than that they are 'substantial'. No attempt has been made by the accountancy firm to give an anticipated or estimated value.

[144] The public valuation records show that Mr Abdul-Jabbar has an interest in a number of properties, as a company director owning them or as a shareholder in the company owning them.

[145] Mr Abdul-Jabbar has given a formal declaration of his personal financial position, for the purposes of the Authority's investigation. He has declared that he owns nothing in his name. Presumably he is not the legal owner of the motorcycle he rides. He says he is not in a financial position to personally pay significant sums.

[146] The public records show him to be a shareholder in companies owning property of some \$2 million in Queenstown and the Southland region.

[147] He has not disclosed the property he settled on the Trust when it was formed. It appears that as well as monthly drawings he receives from the Trust's account, other personal expenses of his are financed by the Trust.

[148] The respondents have attempted to fall back on the separate legal components of the Trust structure, when it seems clear that Mr Abdul-Jabbar is largely the controller and decision maker within the overall enterprise he created with Silvia Abdul-Jabbar. He is a common agent in the parts of the organisation and the day-to-day manager of it, acting as if he personally was the employer. For the Trust to argue that RPL had been dishonest or had acted in breach of trust, to avoid the right of indemnity, might cause the trust structure to be viewed as a sham.

[149] It was the respondents' obligation to give full disclosure if they wanted to have their liability for penalties considered for a reduction. The Authority is satisfied they have not done

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<sup>16</sup> Deed of Trust dated 13 May 2004, clause 21.2

so and therefore it has no proper basis for granting relief from potential penalties which are assessable in principle under the Act and following the Court's guidance.

#### **Step 4 – Proportionality of outcome**

[150] To achieve consistency with other cases, the final total penalties for RPL will be further reduced to \$145,000.

[151] The workings of the Authority to reach the final amount of penalties, are set out in **Appendix One** of this determination.

[152] A similar calculation using the same factors for the penalties Mr Abdul-Jabbar is liable for, yields penalties of \$84,150. The workings are set out in **Appendix Two**. In reaching that amount the Authority recognises that Mr Abdul-Jabbar was not the sole person involved in the breaches, as Silvia Abdul-Jabbar also played a part.

[153] The penalties will be reduced to \$70,000 in recognition of Mr Abdul-Jabbar's family responsibilities.

[154] Accordingly, RPL is ordered to pay penalties of \$145,000 in total and Mr Abdul-Jabbar is ordered to pay \$70,000 in total.

#### **Payment of penalties to workers**

[155] Under s 136(2) of the ER Act, Mr Sutaji and Mr Sembiring are to each receive \$10,000 of the penalties ordered. RPL and Mr Abdul-Jabbar will each pay \$5,000 to each worker.

#### **Time for payment**

[156] RPL and Mr Abdul-Jabbar should be allowed a reasonable period of time in which to pay the penalties ordered. It is best that the parties try to reach agreement as to how much time that should be, but if they cannot agree an order from the Authority may be sought in that regard.

[157] The Authority considers it is desirable that the Rural Practice business is not discontinued because of penalties, as it does provide employment and its ongoing operation will probably be the best way it can raise the amounts needed to pay the penalties. Mr Abdul-

Jabbar is also responsible for the care and welfare of a young family. He may best be able to provide for them if he continues to be able to work in an occupation he is clearly skilled at.

### **Interest on agreed payments**

[158] Mr Hammond in his memorandum of 16 June 2023 advised of the payments RPL or the Trust had agreed to make to the Inspector, in a total of some \$48,000. The agreement included the payment of interest. Ms Hill has advised that the agreed interest has not been received and seeks an order in that regard.

[159] Whether there has been payment is something that should be able to be readily confirmed between counsel. Although the Authority has not heard from Mr Hammond about this question of interest, it will make an order for payment of interest within 14 days, contingent on confirmation that payment has not been made. In the event the payment has been made and the applicant is satisfied of that, the order will lapse immediately.

### **The Authority's investigation of obstruction**

[160] The Authority member presently presiding considers that further investigation should be carried out before this side issue can be resolved. As there will be a change in the Authority and another member will become responsible for completing outstanding work on this file, that member will decide what has to be done and how.

### **Costs**

[161] Costs are reserved for further directions.

[162] Counsel are well aware that the Authority frequently determines costs by applying its current daily rate to the time taken to hold the investigation meeting. An adjustment up or down is then made where circumstances warrant that.

[163] Although there were nine actual days of meetings, the length of some of those justify 10 days as the overall time taken.

[164] Directions for resolving the question of costs will be given following the pending change in Authority.

Alastair Dumbleton  
Member of the Employment Relations Authority

APPENDIX ONE – Rural Practice Limited – PENALTY ANALYSIS

Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to maintain records	6 x \$20,000	\$240,000
Failure to minimum wage	-	-
Unlawful deductions (s 11 WPA)	3 x \$20,000	\$60,000
Unlawfully charging premium (s 12A WPA)	2 x \$20,000	\$40,000
Failure to pay holiday pay (all types)	8 x \$20,000	\$160,000
(19 breaches)	<i>Subtotal</i>	<i>\$380,000</i>
<i>After Globalisation</i> (11 breaches)	<i>Subtotal</i>	<i>\$220,000</i>
Step 2 – Aggravating Factors as a proportion of maxima in Step 1		
Failure to maintain records	85%	\$34,000
Failure to pay minimum wage	-	-
Unlawful deductions (s 11 WPA)	85%	\$51,000
Unlawfully charging premium (s 12A WPA)	85%	\$34,000
Failure to pay holiday pay (all types)	85%	\$68,000
	<i>Subtotal</i>	<i>\$187,000</i>
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)		
No discount	<i>Subtotal</i>	<i>\$187,000</i>
Step 3 – Defendant’s Financial Circumstances		
No discount	<i>Subtotal</i>	<i>\$187,000</i>
Step 4 – Proportionality		
Reduced to reflect proportionality	TOTAL	<i>\$145,000</i>

APPENDIX TWO – Reza Abdul-Jabbar– PENALTY ANALYSIS

Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to maintain records	6 x \$10,000	\$60,000
Failure to minimum wage	-	-
Unlawful deductions (s 11 WPA)	3 x \$10,000	\$30,000
Unlawfully charging premium (s 12A WPA)	2 x \$10,000	\$20,000
Failure to pay holiday pay (all types)	8 x \$10,000	\$80,000
(19 breaches)	<i>Subtotal</i>	<i>\$190,000</i>
<i>After Globalisation</i> (11 breaches)	<i>Subtotal</i>	<i>\$110,000</i>
Step 2 – Aggravating Factors as a proportion of maxima in Step 1		
Failure to maintain records	85%	\$17,000
Failure to pay minimum wage	-	-
Unlawful deductions (s 11 WPA)	85%	\$25,500
Unlawfully charging premium (s 12A WPA)	85%	\$17,000
Failure to pay holiday pay (all types)	85%	\$34,000
	<i>Subtotal</i>	<i>\$93,500</i>
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)		
No discount	<i>Subtotal</i>	<i>\$93,500</i>
Step 3 – Defendant’s Financial Circumstances		
No discount	<i>Subtotal</i>	<i>\$93,500</i>
Step 4 – Proportionality		
Reduce to reflect proportionality	TOTAL	<i>\$70,000</i>