IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 294
3045275

	BETWEEN	A LABOUR INSPECTOR of the MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
	AND	MIRAC LIMITED First Respondent
	AND	OMER AKBABA Second Respondent
Member of Authority:	Michael Loftus	
Representatives:	Claire English, replaced by Amy Webster, counsel for Applicant Omer Akbaba for the Respondents	
Investigation Meeting:	2, 3, 28 and 29 June 2021 in Nelson	
Submissions Received:	At the investigation with subsequent written exchanges till 28 July and further input up to 13 March 2022	
Determination:	17 May 2024	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matter has a long history with an initial statement of problem lodged in November 2018. By the time the second amended statement of problem was lodged in September 2020 the claims were that the first respondent (Mirac), being the former

employer of three employees, Ibrahim Kocaturk, Mertcam Cakmak and Gurinder Singh had:

a. Failed to pay the minimum wage for all hours worked as required by the Minimum Wage Act 1983;

b. Failed to pay holiday pay correctly to all three employees;

c. Failed to keep both wages and time records and holiday records for Messrs Kocaturk and Cakmak prior to August 2016 as required by s 130 of the Employment Relations Act 2000 and from that date kept inaccurate records for all three employees;

d. Failed to keep holiday and leave records for all employees.

[2] For these breaches the applicant, a Labour Inspector (the Inspector), sought to recover wages and holiday pay said to be owed to the employees. The Inspector also sought penalties.

[3] The Inspector alleges the second respondent, Mr Akbaba, was, as a person holding the position of director of the first respondent, a person involved as defined by s 142W(1)(c) of the Employment Relations Act 2000 (the Act) and that he was knowingly involved in the above breaches. For that penalties were also sought.

[4] Prior to the investigation meeting the parties agreed the following breaches had occurred:

a. Mirac had failed to pay (or in some cases correctly pay) time and a half for working on public holidays (s 50 of the Holidays Act 2003);

b. Mirac had failed to pay (or in some cases correctly pay) alternate holidays (s 60 of the Holidays Act 2003);

c. Mirac had failed to properly maintain time and wage records (at least prior to the events being considered here) and holiday records; and

d. As a result Mirac agreed to pay $2,086.62 to Mr Cakmak and $2,668.80 to Mr Kocaturk.

[5] For these breaches penalties were still sought and the parties agreed that should be determined by the Authority.

[6] The claims, as they remain, are disputed by Mirac.

The Investigation and this Determination

[1] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[7] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Employment relationship problem

[8] I make the comment "the claims as they remain" in paragraph [6] above as the passage of time had seen the number of issues between the parties whittled away through either resolution as outlined above, withdrawal by the Inspector, or in the case of a portion of Mr Kocaturk's claim the fact he had chosen to pursue the issue privately and they were now the subject of separate proceedings.

[9] As Ms English advised at the commencement of the investigation and repeated in her submissions, the remaining issue was a relatively narrow one. It was a claim for unpaid wages as:

> The Labour Inspector, and the three employees who are the subject of this claim, say that the employees were underpaid by approximately 3 hours every day, being the hours between the ending of the lunch service at the employer's restaurant at about 2.00 pm, and the start of the dinner service at about 5.00 pm.

> The parties have referred to this time as the "middle shift".
>
> The employees say that the time-sheets kept by the employer, which show two work periods in each day, and exclude the middle shift, were not an accurate record of time worked, and that they were often asked to sign the blank time sheets before they were later completed by the second respondent.
>
> The employees say that they remained working at the restaurant during the middle shift, and during this time, they carried out work to prepare for the up-coming dinner service, including chopping vegetables, preparing the salad bar, preparing and cooking meat, and re-filling the sauces.[1]

[10] Ms English goes on to say:

> The respondents state that:
>
> The employees were paid by hourly rate.
>
> The employees were aware of the timesheets, and raised no complaints during their employment.
>
> The employees would not work during the middle shift.[2]

[11] That succinctly summarised the key issue with the only remaining holiday claim reliant on the finding with respect to the above issue. As Ms English again put it – if the employees succeed with respect to the "middle shift" then holiday pay will be due on that amount; if they do not then there is nothing.

[12] Finally, and as already said, the question of penalties remains for the breaches already agreed and conceded, as well as those that might result depending on my conclusion with respect to the middle shift issue.

Background

[13] Mirac operates a Turkish restaurant / kebab shop.

[14] Mr Akbaba was one of two directors and two shareholders and acted as an owner/operator. By his own admission he hired the employees; set their terms and conditions; trained the employees and directed their work. He also set their hours and completed the timesheets for forwarding to his accountant for payment.

---

[1] Submission of 11 June 2021 at [2]
[2] Above n 1 at [3]

[15] There were three employees subject to this claim with the evidence showing they performed a wide range of duties related to the restaurant's operation with each working 6 days a week.

[16] They each evidenced that during the busy lunch and dinner services Mr Akbaba would be present serving customers and manning the till but that he might be absent during the middle shift. All three say they remained and worked the middle shift during which time they prepared meat, salads, and sauces so as to be ready for the dinner service.

[17] The employees consistently maintained that they worked during the middle shift, detailing the food preparation work they did and that they would rotate who was in the kitchen and who was out in the shop in case customers came in.

[18] With respect to payment and the relevant employment agreements there are some issues. Mr Singh's agreement stated he would be paid $21 per hour and work a minimum of 30 hours a week. Notwithstanding that he normally received a standard weekly payment of $840 gross which, at $21 an hour, is 40 hours.

[19] Mr Cakmak had two agreements. The first envisaged 40 hours a week at $19 an hour. The second, dated 19 February, provided he would work 8 hours a day Tuesday to Sunday between 10 am and 9pm and be paid a salary of $43,701.32 and that is approximately whet he got - $839.78 a week. His evidence was he worked around 11 hours a day, which the above span is, though there was some variation in his start and finish times. Start would vary and generally be between 9am and 9.30am while finish was between 8.30pm and 9.30pm.

[20] Mr Kocaturk was to work 48 hours a week and be paid $800 net. There was no detail as to how the hours would be worked and he received $970.36 gross though there is no indication as to how that was calculated.

[21] The issue which arises is that the agreements lacked detail and payments were, by and large, regular which as Ms English submitted is inconsistent with Mr Akbaba's assertion the arrangement was hourly and dependant on time sheets.

[22] For Mirac reliance is placed on the timesheets which as a rule show a split shift operation with the middle shift being unworked.

[23] The employees say the timesheets were not accurate, that they signed them blank and they were later completed by Mr Akbaba. Indeed examples of signed blank timesheets were provided Mr Kocaturk to the Labour Inspector. Here though there was some variation with Mr Kocaturk stating he always provided blank and signed timesheets while the other two accepted that while this was the norm for them they occasionally filled in the sheets themselves. Importantly though this is essentially consistent with Mr Akbaba's acceptance that he would usually, though not invariably, provide the timesheets blank and fill these in himself. Here I note that was contrary to what he had told the Inspector early in her investigation. He said this was to protect himself.

Discussion

[24] As already said the key issue is whether or not the employees worked the "middle shift" and on that the parties gave diametrically opposed evidence. In summary, and while each of the employees evidenced some variation in start and finish times the key consistency was that they worked the middle shift.

[25] Mr Akbaba, relying on the timesheets, had a different view and stated that while the odd customer could, and very occasionally would, come in during that time he always remained and it was he who would serve them. That was inconsistent with the employee's evidence he was often absent and it as they who served those customers.

[26] It is here a number of difficulties arise for Mr Akbaba with a significant one being his acceptance the workers were in fact often present during the "middle shift". He explains this by saying that is what they wanted and by remaining they were acting contrary to the rosters with which they should have been familiar through practice (though not because they were actually written and posted) and he could not be blamed if they ignored his frequent instruction they leave. That last point is denied by the employees who say such instruction was never given.

[27] The second problem is his admission Mr Akbaba frequently completed the timesheets.

[28] The third is that the evidence of the employees remained consistent and more so than Mr Akbaba's which was also coloured by other considerations, namely economic. For example and when asked by me about how the employees would know when to work the hours specified in the timesheets he simply said *I divided 48 hours by 6 days* and *There are customer hours, prep[aration] hours, and dead hours. If I paid people during dead hours, I wouldn't make money.* That also fails to take into account the variation in start and finish times, if not the payment amounts, which are recorded.

[29] When that is combined with the fact payment practices were inconsistent with both the employment agreements and what Mr Akbaba said he was doing I find some attraction with the submission he "… had in fact considered how he wanted to run his business, and had reached the conclusion that he did not want to pay for the middle shift, as it was the least profitable time of day, and would impact on his profit margins. He then wrote up the time sheets accordingly, and ensured that the timesheets recorded a fixed number of hours each week, on which payroll was calculated. However, he took no steps to ensure that his employment agreements reflected this practice, or that the employees understood his intent. Indeed, the employees all shared a contrary understanding that the middle shift was time to be used to prepare the food, and tidy the restaurant for the dinner shift, and the doors were kept open to customers during this time. It is indicative that the second respondent explained he relied on the employee's signatures on their time sheets as a type of "protection" against claims for further wages.

[30] Fourth was the fact there is corroborating evidence with, for example, the fact the Inspector's investigation appears to have been triggered by the landlord of one of the employees complaining to Immigration New Zealand that she was concerned about her tenant given the stress he was showing and expressing as a result of the long (12 hour) days he was being forced to work. Here also I note that notwithstanding the fact it was the Inspector who approached the employees and not the other way round their evidence has not only remained consistent, it has done so for over three years

[31] Having weighed and considered the evidence it leads to a conclusion the middle shift was worked as the employees consistently claimed. That also means holiday pay is payable on the amounts now owing as a result of the failure to pay the minimum wage and that shall be calculated at an additional 8%.

[32] The Inspector's calculations were not challenged beyond the assertion they were meaningless as nothing was due but therein lies a problem. The amounts cited in the submission correlate to those contained in the Inspectors brief which was prepared prior to the second amended statement of problem and the subsequent narrowing of the residual claims. They are also inconsistent with the calculations presented in documents DD, EE and FF of the statement of problems attachments.

[33] My assessment, having reviewed the evidence, is the sum best used is that cited in the Inspector's evidence as wage arrears owing. Given the lack of clarity leave is reserved for a return to the Authority should the Inspector disagree, though should that leave be exercised the issue is limited to quantum with respect to unpaid minimum wages. Holiday pay should not be an issue as the approach followed simply means it is added to the wage arrears at 8% and the holiday pay due on that.

[34] My reading of the evidence is that the following amounts are due:

a. Gurinder Singh: $4,227.11 being $3,913.99[3] plus holiday pay of $313.12;

b. Mertcam Cakmak: $15,791.77 being $14,622.01[4] plus holiday pay of $1,169.76;

c. Ibrahim Kocaturk: $7,688.37 being $7,118.86[5] plus holiday pay of $569.51.

[35] Payment will be made to the Inspector who will deal with tax and distribution etc.

[36] Interest is also sought on these amounts. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Mirac has, by failing to make payments properly due, continued to have use of money rightfully belonging to those the Inspector represents. This is, I conclude, a circumstance in which interest should be payable but a question remains as to how much given variations as to when the amounts

[3] Inspector's statement at [58]
[4] Inspector's statement at [64]
[5] Inspector's statement at [72]

became due and the time taken to both progress and determine this application, with the two roughly balancing each other.

[37] Given the complications I adopt an approach beneficial to the respondents and that is to say interest will only start to accrue when the Inspector refined the claim and the second statement of problem was lodged. That was 11 September 2020. Applying the governments civil debt interest calculator the amount due as at the date of determination is $3,179.19. That is payable and has the potential to increase with each day that passed until payment. I will not address that at this time but put the respondents on notice this debt may increase should they be tardy with respect to payment. I also leave it the Inspector to distribute this amount as appropriate.

[38] That Mr Akbaba was a person involved cannot be disputed. He was a director and by his own admission actively engaged in the day to day running of the business and it was he who was primarily responsible for the preparation of the timesheets at the heart of these proceedings.

[39] The final issue to be addressed is penalties which the Inspector seeks against both Mirac and Mr Akbaba as a person involved.

[40] There are multiple breaches, both as a result of my conclusions and for those acknowledged in the earlier settlement. In my view this multiplicity of breaches warrants some form of penalty given there is no doubt breaches have occurred and the whole purpose of the current regime is to discourage such events.

[41] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,[6] *A Labour Inspector v Prabh*[7] and *A Labour Inspector v Daleson Investment*.[8]

[42] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss

---

[6] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[7] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[8] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[43] The Court has found the Act's objects, which include the effective enforcement of employment standards, are particularly relevant in penalty matters involving migrant employees as it does here. Failure to provide minimum standards directly disadvantages employees, and arise in circumstances which the Court has described as *involving a distinct power imbalance* and here the evidence is the employees were acutely aware of that imbalance.[9]

[44] The agreed total ten but there is some duplication and I consider consolidation appropriate. There were breaches of both ss 50 and 60 of the Holidays Act affecting two employees each (4 in total) along with breaches of both the requirement to keep wages and time records and holidays records each affecting all three employees (6 in total). As said I consider consolidation appropriate and do so to the extent I consider there to have been four breaches each affecting more than one employee (especially as proportionality is a consideration and the amounts involved here were not significant.

[45] Since then, this determination has concluded the Minimum Wage Act has been breached and while this affected all three employees I again consider consolidation appropriate. Similarly, I have found additional breaches regarding the maintenance of wages and time records but the respondents are already liable for penalties in that regard. My approach to consolidation means no more will be added.

[46] That means five breaches in total with each potentially attracting a penalty of $20,000.

[47] The breaches concerning ss 50 and 60 of the Holidays Act warrant a minimal penalty especially given proportionality is one of the considerations and here the respondents conceded and attempted to correct the issues in mediation and albeit after some delay. I consider a penalty of $2000 for each appropriate. I take a similar approach

---

[9] *A Labour Inspector v Daleson Investment Limited,* above n 3, at para [27].

to the issue of maintenance of holiday records for a similar reason and consider a further penalty of $2,000 appropriate.

[48] Turning now to the more serious breaches – failure to pay the minimum wage (which then affected the amount due for holidays) and the failure to maintain proper wages and time records. Again, I globalise these to one of each covering all affected employees.

[49] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[10], or failed to take reasonable steps to fulfil their legal obligations.[11] Here, and this is an aggravating factor, there can be no doubt the acts were intentional with my conclusion meaning there was deliberate attempt to reduce the wages and then cover it up with falsified records.

[50] With respect to the breaches severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 70 to 80%.[12] That said recent decisions suggest this is excessive and impractical, with the respondent liquidating. A more realistic award which might see the ex-employees paid what they are due is now expected.

[51] The loss is monetary and its extent is reflected in the order made regarding arrears. As a result the employees lost the use of the money they were entitled to at the time it became due.[13]

[52] Given the line of defence I must conclude there has been no attempt to remedy or mitigate the breaches concerning minimum wages and comment has already been made about the fact the employees were, originally, migrant workers. They are inherently

---

[10] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich,* Auckland TT 4088383
[11] *El-Agez v Comprede Limited*, TT 4121553, at para 18
[12] See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.
[13] *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [31]

vulnerable, particularly because they were unfamiliar with New Zealand laws and regulations.[14]

[53] Finally, there is no evidence of similar previous conduct by Mirac.

[54] Having weighed these factors I conclude that while some of the above points, such as the failure to remedy acknowledged breaches and the attempts to cover the that by falsifying the records, would suggest an increase there are balancing factors favouring a reduction such as the likelihood payment might actually be made and proportionality.

[55] Having weighed these factors I conclude Mirac should be required to pay a penalty of $8,000 in respect to the failure to pay the minimum wage and $4,000 for the failure to maintain proper wages and time records.

[56] The total, payable to the Ministry of Business, Innovation and Employment, in penalties is therefore $18,000.

[57] There is then the argument the second respondent should also be liable. That he should, given his status and culpability in having prepared the wages and time records goes without question, but then there is then the issue of to what extent.

[58] The penalty to which an individual is liable is half that of a company so it follows that by applying the same rational as that applied to Mirac the amount due is $9,000. That, I consider appropriate.

---

[14] The Court has noted, in *A Labour Inspector v Prabh Limited* at para [10}

Conclusion and Orders

[59] For the above reasons I find each and every one of the breaches alleged by the Inspector did occur and as a result make the following orders:

a. The first respondent, Mirac Limited, is to pay to the Labour Inspector the sum of $27,707.25 (twenty seven thousand, seven hundred and seven dollars and twenty five cents) gross being the amount owing as a result of its failure to pay minimum wages and annual holiday pay thereon. Payment is to be made within 28 days of this determination and the Labour Inspector will attend to the distribution of the arrears to those it represented, including deduction and payment of tax, as appropriate.

b. In the event Mirac Limited is unable to pay the above amount or part there-of liability shall pass to Omer Akbaba to pay any deficiency as a person involved pursuant to ss 142W(2) and (3)(a) of the Employment Relations Act 2000.

c. The first respondent, Mirac Limited, is to pay to the Labour Inspector a further $3,179.19 (seven thousand, three hundred and seventy eight dollars and seventy one cents) being interest due on the above amounts as at the date of determination. That amount may yet increase depending on the response to this determination. Payment is again to be made within 28 days of this determination and the Labour Inspector will attend to the distribution of this money to those it represented as appropriate.

d. That the first respondent, Mirac Limited, pay to the Inspector penalties totalling $18,000 (eighteen thousand dollars) with payment to be made within 28 days of this determination.

e. That the second respondent, Omer Akbaba is to pay to the Inspector penalties totalling $9,000 (nine thousand dollars) with payment to be made within 28 days of this determination.

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed the Inspector may, as the successful party, lodge a memorandum on costs

within 28 days of the date of issue of this determination. From that date the respondents will have 14 days to lodge any reply memorandum. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors require an upward or downward adjustment of that tariff.[15]

Michael Loftus
Member of the Employment Relations Authority

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