IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 355
3234960

BETWEEN	A LABOUR INSPECTOR Applicant
AND	PALACE RESTAURANT COMPANY LIMITED First Respondent
AND	YI TING WANG Second Respondent
AND	CHING JU WANG Third Respondent

Member of Authority:	David G Beck
Representatives:	Claudia Milesi-Humm, counsel for the Applicant Amy Keir and Kendal Cosgrove, counsel for the Respondents
Investigation Meeting:	5, 6, 7, 8 March and 23 April 2024 in Christchurch
Submissions/information received:	22 April 2024 for the Applicant 22 April 2024 for the Respondents
Date of Determination:	17 June 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Li-Jui Liu, lodged proceedings in the Authority against Palace Restaurant Company Limited (PRC), Yi Ting Wang (aka Maxine) and Ching Ju Wang (aka Wawa) seeking findings of breaches of minimum employment standards and record keeping.

The Labour Inspector is seeking arrears of minimum standards' entitlements owed to Hai Rui Chen and Xiang Ru Lin (the two workers) and penalties for the specified breaches.

[2] The alleged breaches are of obligations contained in the Holidays Act 2003 ("HA"), Employment Relations Act 2000 ("The Act"), the Minimum Wage Act 1983 ("MWA") and the Wages Protection Act 1983 ("WPA"). Maxine and Wawa were joined to the proceedings in their alleged capacity as persons involved in breaches as defined in s 142W of the Act.

The Authority's investigation

[3] At the investigation meeting, I heard evidence from Li-Jui Lee, Labour Inspector, and the workers Hai Rui Chen and Xiang Ru Lin. From the company I heard evidence from Yi Ting Wang, Ching Ju Wang, Blasia Su, Rong Jie Huang and Wendy Lu the business's independent accountant. I was also ably assisted by Carol Wong, an interpreter.

[4] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I do not refer in this determination to all the submissions and background material advanced by the representatives, however, I have fully considered them.

Issues

[5] The issues for determination:

(i) Are the outstanding contested breaches established. If so, are Hai Rui Chen and Xiang Ru Lin owed arrears for additional hours worked and not recorded and holiday pay and associated entitlements including for working on public holidays given the respondents' failure of accurate record keeping potentially impacted the workers ability to bring accurate claims for any arrears owed?

(ii) What should be the extent of the liability for penalties for the admitted breaches and other contested breaches (if established)?

(iii) Is Maxine a person involved in the identified breaches, liable for penalties for the admitted and alleged breaches?

What caused the breaches?

[6] PRC is a limited liability company operating an ethnic restaurant in Christchurch employing up to 26 employees. Maxine is the sole director and shareholder and instructed key employees on a day-to-day basis and was latterly responsible for administering, calculating, and paying wages. Maxine and her sister Wawa worked in and were actively involved in running the restaurant.

[7] The business started in 2015 after Maxine, Wawa, and co-worker friends left another restaurant and at the time needed ongoing employment for residency purposes. Maxine was the only one in the group with permanent residency and so purchased an existing restaurant saying this was to ensure the others including Wawa had the ability to extend their then temporary working visas.

[8] Maxine disclosed during the investigation meeting that they left the other restaurant due to, in part, concerns about non-compliant wage payments and conditions of work not being the subject of provided employment agreements, including Wawa ironically indicating she was not paid for working on public holidays and not given days off in lieu for doing so.

[9] Maxine arrived in New Zealand from Taiwan in 2007 and first completed an English language course. Maxine had no previous experience in running a business and her hospitality experience was limited to working in the other restaurant from 2008 to 2015; latterly as the restaurant manager, a role she says was confined to 'front of house' matters with no involvement in the wider business operation.

[10] Maxine says she was initially heavily reliant on a friend (RG) for the administrative side of the PRC business who up until leaving in mid-2018, undertook management and business compliance work including rostering staff and employment engagement / payroll related matters. In addition, Maxine recruited Rong Jie Huang, a chef, to run the kitchen team. After RG left, Maxine assumed all responsibilities of running the business.

The workers' experience of PRC

[11] Xiang Ru Lin, arrived in New Zealand from Taiwan in October 2016 and while on a working holiday visa, commenced a part-time waiter's job with PRC in November 2016. Ms

Lin says while part-time, she was paid for the actual hours she worked and that RG ensured this. However, after she says being encouraged by Wawa, Ms Lin began working full time from December 2016. From this time Ms Lin says her hours were not recorded and she was initially paid $599.98 for six days' work.

[12] Further, Ms Lin says Wawa then offered her an assistant restaurant manager role and at the time introduced her to an immigration lawyer to assist with obtaining a work visa that was issued in May 2017. Ms Lin described this role as akin to a duty manager's job which included greeting and looking after customers, taking orders, serving, and taking payments and then after customers had left, cleaning tables and the restaurant including setting up for the next day. Ms Lin says after RG left in mid-2018, she became responsible for front of house staff rostering, reporting part-time employees' hours of work for payment by Maxine and liaising with suppliers.

[13] Ms Lin says all full-time front of house staff including herself, were paid a maximum of eight hours per day for the restaurant opening hours that were 11 am to 2:30 pm and 5pm to 9:30 pm, Tuesday to Sunday (the restaurant did not open on a Monday) despite working outside the opening times. Only part-time staff had their actual working hours recorded and were paid for hours worked.

[14] Ms Lin left PRC on 17 October 2022 after securing an open work visa that allowed her to work elsewhere.

[15] Hai Rui Chen arrived in New Zealand in 2009 from China where he worked as a chef. He initially worked as a chef in Ashburton before being introduced to PRC by Rong Jie Huang (an old school friend). Mr Chen commenced employment as a full-time chef with PRC in September 2015 while he was still the subject of a work visa. Mr Chen says he worked for 48 hours per week Tuesday to Sunday and his hours of work were not recorded.

[16] Mr Chen was summarily dismissed on 14 May 2022 and says it was a result of him pressing previously expressed concerns about payment for working on public holidays. Mr Chen was not paid his final holiday pay and claimed arrears due for public holidays and an additional one hour per week wage arrears. On the latter, Mr Chen says he was at times paid for 47 hours per week when he worked 48 hours.

The Labour Inspector's investigation

[17] From mid-June 2022, the Labour Inspector received complaints from three previous and current employees (including Ms Lin and Mr Chen), submitted on the MBIE migrant exploitation webform. The workers claimed they were not having their working hours properly recorded, believed they were underpaid, one had not been paid final holiday pay upon leaving PRC and they claimed that payments for public holidays were not being appropriately administered for all workers. After separately interviewing Mr Chen and Ms Lin and obtaining background documentation, the Labour Inspector resolved to investigate.

[18] Accompanied by Immigration New Zealand compliance officers, four Labour Inspectors made an unannounced visit to PRC's restaurant on Thursday 24 November 2022. Arriving at 2:30 pm they found customers still seated and eating meals and eleven workers on site.

[19] The Labour Inspector says Maxine was present during the visit, and when asked about wage and time and holidays records and rosters, said they were kept on the computer and that her restaurant manager was responsible for the rosters (by this point in time, the manager was Wawa who was not present during the visit).

[20] When pressed on whether a worker was provided an alternative holiday after working on a public holiday, Maxine appeared unsure what this concept entailed but assured the Labour Inspector that the payroll system they operated, would automatically add a holiday. On being asked if annual leave was being deducted from workers for qualifying public holidays not worked, Maxine said this was not the case but later in the conversation mentioned this had been raised as an issue by a former worker but on checking the payroll system she found nothing wrong with it.

[21] Maxine then confirmed to the Labour Inspector that she was paying departing workers' outstanding holiday pay by weekly instalments due to financial constraints and was unaware of the legality or otherwise of this practice. In relation to Mr Chen, Maxine confirmed his dismissal but said she needed to check the payroll system as to whether Mr Chen had been provided with his outstanding holiday pay.

[22] The Labour Inspectors also interviewed five workers during their visit and got mixed responses on working hours, with the chefs interviewed saying they only worked during opening hours but a front of house staff worker saying start-finish times depended on customer flow with weekend being busy and this required extra hours worked before and after opening times.

[23] An interview with an ex-worker who did not attend the Authority investigation meeting, suggested the usual weekly hours were 48 but overtime worked when the restaurant was busy was not recorded or remunerated. This worker confirmed that annual leave had been deducted for public holidays falling on working days and when he had addressed this with Maxine it was eventually resolved with the repayment of 46 days' pay owed paid in instalments.

[24] The Labour Inspector then had difficulty obtaining full documentation from PRC in response to a notice to produce records. After Maxine and Wawa being interviewed on 7 March 2023 and ongoing concerns about record keeping and other matters being identified, the Labour Inspector, Li-Jui Liu, produced an investigation report of 4 April 2023.

[25] The report identified multiple statutory breaches due to compliant wage, time and holidays and leave records not being kept "for employees for the preceding 6 years". The report posited that Maxine and Wawa were persons involved in the breaches pursuant to s 142W of the Act and signalled that an application was to be made to the Authority seeking penalties and arrears owing to workers.

[26] Following the initial Authority investigation meeting to deal with evidential matters, the respondents on my direction, came to an agreement with the Labour Inspector by way of a 21 March 2024 joint memorandum signed by both counsel that narrowed issues in dispute, admitted several identified breaches and allows the Authority to deal with the question of what penalties should apply and the quantum of such pertaining to the admitted breaches.

[27] Outstanding matters remaining unresolved were related to wage and holiday pay arrears allegedly owed to the two workers and a claim of provision of a non-compliant casual employment agreement.

[28] The Labour Inspector confirmed that no claims would be pursued against Wawa after the Authority had indicated the evidence given of Wawa's involvement in the breaches did not

appear compelling as she says she had no access to or control of the business bank account and had no ownership stake in the business. Wawa's evidence to her involvement was she occasionally worked in the business in support of her sister Maxine and advanced personal loans to support the business but had no access to the business bank account and lacked administrative skills and experience.

[29] Despite their investigation report concluding Maxine "has complete control of the company," I accept that the initial Labour Inspector decision to pursue Wawa under s 142W, was reasonably based upon Wawa's answers to questions posed at her initial interview on 7 March 2022 and summarised in the subsequent investigation report. These responses included Wawa saying she latterly managed staff rosters, operated the payroll system, and compiled wage and time records and had a significant role in and knowledge of how the business was operating and "material knowledge of the breaches." [1] Also, in a 26 April 2023 emailed response to the investigation report, Maxine although claiming she made all decisions in the business, impliedly conceded Wawa was managing the staff and did not challenge the Labour Inspector's summation of the interview with Wawa.

[30] I was however satisfied during the investigation that Wawa may have initially overstated her involvement in the business to the Labour Inspector and that her assuming the restaurant manager role was late in the contested period when some record keeping issues had been addressed solely by Maxine. I find Wawa's involvement was confined to basic restaurant 'front of house' operational matters rather than any financial control or part in decision-making.

The admitted breaches

[31] In the joint memorandum, PRC and Maxine accept that they breached:

(i) Section 130 of the Act by failing to keep compliant wage and time records for the two workers throughout their periods of employment and that this led to hours worked not being accurately documented.

(ii) Section 81 of the HA by failing to keep compliant and accurate holiday and leave records for all workers employed, which over time meant there was:

[1] *Labour Inspectorate Report*, Ministry of Business, Innovation and Employment, 4 April 2023 at page 18.

- Inaccurate records of workers' cumulative entitlements to annual leave.
- No record being kept of what workers were paid when taking leave or record of what amounts related to holiday pay.
- No record being kept of hours worked on public holidays and latterly (post 2019), a failure to correctly record hours worked on public holidays.

(iii) Section 49 of the HA being a failure to pay unworked public holidays that were otherwise working days for the two workers.

(iv) Sections 56 and 60 of the HA being a failure to pay alternative days for public holidays worked and to pay those owing in final pays.

(v) Section 63 of the HA being a failure to pay the two workers sick leave in specified instances.

(vi) Section 27 of the HA being a failure to accurately calculate and pay the two workers holiday pay in their final pays.

[32] Further, Maxine, PRC's sole director and shareholder, accepted that she was "a person involved in a breach" as defined in s 142W of the Act and in this capacity accepts her involvement and potential liability for all the above identified breaches and the contested breaches.

Outstanding alleged arrears and breaches

[33] The Labour Inspector's counsel in their opening synopsis provided on 4 March 2024 identified arrears claims they say are owed to the two workers to cover minimum wages not paid for all hours worked, outstanding final holiday pays, public holidays, and alternative holiday arrears, being:

(i) For Ms Lin: $23,876.62 (gross).

(ii) For Mr Chen: $17,744.60 (gross).

[34] In the synopsis and evidence given, the Labour Inspector's counsel asserted that:

> The Labour Inspector took a conservative approach to calculating the arrears owed to Ms Lin and Mr Chen. For pre-2019, the inspector used the daily time records [PRC] provided for Ms Lin and Mr Chen. Post 2019 it was a difficult task, as [PRC] did not have any daily time records.

[35] In the statement of problem submitted and in evidence given at the investigation meeting, the Labour Inspector explained in some detail how the above arrears figures, that also include arrears of holiday pay, were arrived upon.

[36] A further alleged breach being pursued by the Labour Inspector was an assertion that employment agreements being provided by PRC contained wording on casual workers access to leave entitlements contrary to s 65(b) of the Act.

Issue 1 : Assessment of contested breaches

Xiang Ru Lin

[37] Ms Lin's alleged total arrears were broken down as:

(i) Minimum wage arrears for hours not recorded: $13,713.22.

(ii) Worked public holidays: $1,813.10.

(iii) Unworked public holidays falling on otherwise working days: $1,128.93.

(iv) Non provision of alternative days for working public holidays: $2,889.25.

(v) Final holiday pay arrears: $3,452.12.

(vi) Paid sick leave arrears: $880.00.

[38] Maxine, while conceding that Ms Lin's actual hours were not recorded, says this was because Ms Lin worked the same rostered hours each week and although she was paid by the hour, Maxine considered this guarantee of hours essentially made Ms Lin a salaried worker and thus PRC was exempt from an obligation to record additional hours worked in accord with s 130(1C) of the Act.

[39] Evidence of a signed individual employment agreement established that Ms Lin was employed initially from 1 November 2016 on a part-time basis as a waitress and paid for each hour worked but from signing a second employment agreement on 3 September 2017, her job changed to a designated "Assistant Restaurant Manager" and the hours of work clause indicated:

> 6.1 The Employee's work hours will be based on the rostered shifts from Monday to Sunday. This will require you to work evenings, weekends, and public holidays.
>
> 6.2 The normal hours of work are 40 per week, however the employee may be required to work in excess of these hours from time to time to fulfil the requirements of the position.

[40] The agreement then (at 6.3) detailed a variation of hours provision that essentially allowed PRC to unilaterally vary Ms Lin's hours of work provided she was consulted and the hours were not reduced "below 8 hours" and "that any increase in hours of work is reasonable". The succeeding clause of the agreement indicated Ms Lin "shall be paid according to an hourly rate which shall be $16 per hour (the minimum wage rate at this point was $15.75 per hour) on a weekly pay cycle.

[41] I observe that objectively, it is difficult to see how the above provision and the operation of the employment engagement could support a view that Ms Lin was a salaried worker.

[42] On the evidence provided of hours worked, in the absence of records, I prefer Ms Lin's evidence that it is more likely than not, that she regularly worked additional hours to meet the needs of the restaurant's operation and customers and that this included being present before and after opening and closing times to attend to setting up and cleaning tasks.

[43] I accept that in the normal course of a restaurant business there were busy and less busy times in terms of customer flow when Ms Lin was allowed to finish early but as none of these times were accurately documented, it is impossible to determine the extent of the times Ms Lin left work early but was still paid. To turn the matter on its head, had Ms Lin in her position of responsibility turned up for work and left work strictly according to the opening and closing times, her expected or allocated tasks could not be completed.

[44] Since no accurate wage and time and holidays records were provided, s 132(2) of the Act and s 83(4) of the HA apply, so that the evidence given by Ms Lin may be accepted as

sufficient if not displaced by evidence to the contrary. [2] The Authority is permitted to exercise discretion where, as is here, PRC failed to keep or produce wage and time and accurate holidays and leave records and this failure prejudiced a worker's ability to bring an accurate claim for arrears owed. The Labour Inspector urged me to, in the circumstances, apply this section to shift the burden to PRC showing the claims are incorrect. The central failure of PRC was to simply not have in place a system to record all hours worked by Ms Lin.

[45] The Authority is satisfied on the balance of probabilities that the Labour Inspector has discharged the onus of proving all of Ms Lin's claims as quantified. I accept the Labour Inspector's 'conservative' claims that Ms Lin continually worked outside the restaurant's opening and closing hours and the quantification of all other claims connected to admitted breaches.

[46] I find PRC should pay Ms Lin total arrears of wages and holiday pay entitlements in the sum of $23,876.62.

Hai Rui Chen

[47] Mr Chen's alleged total arrears were broken down as:

(i) Minimum wage arrears for hours worked and not recorded: $1,238.10.

(ii) Worked public holidays: $429.78.

(iii) Unworked public holidays falling on otherwise working days: $1,893.94.

(iv) Non provision of alternative days for working public holidays: $2,408.00.

(v) Final holiday pay arrears: $9,494.78.

(vi) Paid sick leave arrears: $2,280.00.

[48] Maxine conceded that the reason PRC had not paid Mr Chen his final holiday pay when he was dismissed was tied to Mr Chen challenging her just prior to his dismissal and a perception that he was disloyal, not appreciative of the past support he had previously been

[2] *Shah Enterprise NZ Limited and Sapan Jagdishbhai Shah v A Labour Inspector of Ministry of Business, Innovation and Employment* [2022] NZEmpC 177, EMPC 1/2021 at [26].

afforded and the breakdown of another personal relationship. Despite this, it was apparent from the evidence that Mr Chen had a legitimate reason for asking Maxine to address holiday pay anomalies.

[49] However, the notion that Mr Chen had worked 49 hours per week and only been paid 48 hours per week was contested. Mr Chen's own evidence was not compelling on this point as he also reduced his hours of work at times and PRC witnesses contended that he left early on several occasions. I conclude Mr Chen's minimum wage arears claim is not established but all other holidays and sick leave pay claims are established.

[50] I find PRC should pay Mr Chen $16,506.50 in total arrears of entitlements connected to admitted breaches.

Non-compliant employment agreement provisions

[51] The Labour Inspector asserts employment agreements produced in 2018 and provided by PRC to two workers, contain a clause that is at best, ambiguous on the access of casual workers to leave entitlements and not compliant with s 65(b) of the Act that specifies an employment agreement must not contain a provision contrary to law. PRC's counsel suggested the drafted provision was legally compliant as it needed to be read in its entirety and stated leave is available to casual workers but access only arises in specific circumstances.

[52] I find that the cited clause is compliant with s 65 of the Act but should be worded in a more plain English or enabling manner, making it clearer in what circumstances a casual worker can access leave entitlements.

Contextual factors

[53] As a broad contextual issue, evidence established that PRC operated in an unusual manner with there being blurred boundaries between the owner and selected workers. First, many foundation workers were immigrants seeking to transit from work visas to permanent residency and PRC's subsequently engaged workers shared similar circumstances.

[54] Both Maxine and Wawa say they assisted workers with visa issues and provided affordable and sometimes cost-free accommodation in their homes, travel to work and they at

times closed the restaurant to accommodate workers' overseas travel plans and frequently socialised together. Personal insurance was also paid for selected key workers.

[55] Both the workers seeking arrears had become close friends and lived with both Maxine and Wawa. Maxine gave evidence that she viewed her workers as 'family' and part of the reason for her setting up in business was to assist immigrants from Taiwan and China.

[56] In addition, PRC say they operated as a significantly benevolent employer by providing free mid-day and evening meals and one instance was cited where several workers were taken to Rarotonga for a holiday with accommodation and air fares paid by PRC. The benevolence displayed led PRC's accountant to disclose her client advice to the Authority that such expenditure was unusual and impacting on profitability, as in her opinion staffing overheads were not being professionally managed and she had accordingly given such counsel to Maxine. In addition, the accountant says she referred Maxine to legal advisors to deal with employment legislation compliance issues.

[57] I also observe that while on the face of it, the model of employment PRC operated appears overall benevolent, some benefits were selectively provided.

Issue 2: What level of penalties are appropriate in the circumstance of all the breaches?

[58] The Authority has jurisdiction to determine an application by a Labour Inspector for recovery of penalties under the Act, the HA, the WPA and the MWA.[3] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.[4] The maximum penalty for an individual found liable for a penalty is $10,000.00 per breach as is here, where Maxine has accepted she was a person involved in the identified breaches, and for a company, $20,000.00 per breach. [5]

[3] Employment Relations Act 2000, s 161(m)(ii) and s 161(m)(iv).
[4] *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].
[5] Section 135(2)(a) Employment Relations Act 2000 and s 75(1)(b) Holidays Act 2003.

[59] The approach I adopt is consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited* [6] and I am also guided the Employment Court decision: *A Labour Inspector v Matangi Berry Farm Limited* [7].

[60] *Preet* identified a four-step framework to fixing penalties where multiple breaches of minimum standards are evident:

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped 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. [8]

[61] To ensure consistency I use an approach adopted in an Authority determination (*Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd*) that first considered the statutory framework (s 133A of the Act) and then assessed the quantum of remedies based on the four steps identified above. [9]

The object of the Act

[62] Section 3(a) of the Act sets out relevant 'aspirational' matters I must consider. These include the need to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment", acknowledging and addressing the inherent inequality of power in employment relationships" and promoting effective enforcement of "employment standards" by Labour Inspectors.

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[6] *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.
[7] *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 40.
[8] At [151].
[9] *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

The nature and extent of the breaches

[63] The conceded and other established breaches pertain to two identified workers but due to poor record keeping practices, it is highly likely that others were involved and have not come forward.

[64] Viewing the nature, duration and extent of the breaches, I estimate that the sums involved are reasonably significant and I have regard of the foregone value to the workers concerned of not getting additional paid days off for working on public holidays and that as low paid employees the value of unpaid wages or part thereof, can cause significant material hardship. I also consider that in a hospitality service business that is labour intensive, the reduction of the cost of overheads by illegitimate means gives the perpetrator an unfair competitive advantage over businesses that comply with minimum legal obligations. These were not inconsequential breaches.

Were the breaches intentional, inadvertent, or negligent?

[65] Given the conceded breaches and Maxine and other witnesses' evidence, I can assess the intentionality or otherwise of the breaches identified. I am also able to draw inferences from disclosed correspondence and submissions, including the Labour Inspector's report and interview notes.

[66] I was asked by counsel for PRC and Maxine to consider that this was a business ran by an inexperienced and naïve, in a business sense, individual who does not use English as a first language, relies on others to navigate language and compliance matters and operates in a culturally different fashion. Counsel also highlighted the Labour Inspector's lack of assistance and alleged they had failed to holistically engage with PRC in addressing compliance issues.

[67] PRC's accountant also gave evidence that implied the business was run in a chaotic fashion and inefficiently (and at times, only marginally profitably), when contrasted with other restaurant operations known to the accountant. A particular observation was the lack of proper control over staffing overheads, entertainment expenses and business debt.

[68] In contrast, the Labour Inspector asserted that Maxine's evidence of her lack of understanding of the HA and obligations arising arose because of an over reliance initially on

a worker to oversee such matters and then her supposed confusion over hourly pay and a salary, but this had to be placed in context of Maxine's apparent unwillingness to inquire into such during the eight years she was engaged in running PRC. The latter was exemplified by Maxine saying in evidence she did not read or impliedly understand the employment agreements provided for PRC workers, even after 2022 when she sought specialist employment law advice and had new employment agreements drawn up.

[69] I incidentally note that the worker recipients of such employment agreements would likely be in a worse comprehensibility situation as no other language text was provided and their capacity to understand and accept terms of engagement and know their minimum rights is also at issue – objectively, Maxine must have known this but took no steps to correct the evident imbalance.

[70] I conclude that Maxine's breaches resulted from both wilful blindness and a failure to take due care to apprise herself of employer responsibilities. I assess this was a deliberate reluctance to address minimum standards matters brought to her attention in a timely fashion. There was also some evidence that Maxine had said to Ms Lin that only "Kiwi businesses" complied with HA provisions concerning alternate days. Maxine could not recall this conversation but I had no reason to doubt it was more than likely to have been portrayed in this way, as it appeared consistent with contextual matters and Maxine's own experience of working in the past in a non-compliant business with a similar profile.

[71] In addition, while I do consider the Labour Inspector's approach was direct here and not preceded by encouragement via improvement notices or other educative steps, Maxine's engagement with the Labour Inspector's report was minimal. Maxine said she did not read the report or get a translation of it but sought an employment advocate's assistance in providing a limited response to the report (that contested little of the content) and only obtained legal advice at an advanced stage of the Authority's investigation with initial responses contesting all breaches. No issue of lack of comprehension of the report was raised at the time with the Labour Inspector.

[72] A further factor in my finding that the breaches were intentional, was Maxine's attitude to not addressing Mr Chen's unresolved holiday pay issue that avowedly involved personal animus.

What steps have been taken in mitigation?

[73] While it is pleasing to see is that because of this investigation, Maxine has sought an experienced counsel's expertise to address ongoing compliance issues after some initially piecemeal efforts of rectification, Maxine did not provide any compelling evidence to demonstrate that she had paid all wage or holidays arears due or tried to contact other former workers to rectify such.

[74] Also, of significance is no evidence was provided to show the not contested breaches relating to Ms Lin and Mr Chen have so far been fully rectified.

The circumstances of the breaches and any vulnerability factors

[75] Counsel for PRC and Maxine rightly accepted that the workers involved were vulnerable, had language difficulties and placed significant trust in their employer especially when accommodation was initially part of the employment package and they were seeking long term residency. The Labour Inspector pointed to the same factors and emphasised the trust issue being heightened by the 'family' type relationship Maxine created but also viewed her claimed benevolence to justify breaches, to be an aggravating factor in the sense that Maxine failed to appreciate the import of her omissions.

[76] Counsel suggested that I balance vulnerability factors up by considering Maxine was in a similarly vulnerable situation due to the difficulties she faced in establishing a business to support her sister and friends' ongoing residency issues and the lack of financial benefit obtained in the business.

[77] While s 133A(f) of the Act refers only to the vulnerability of "the employee" being a factor, it is not an exhaustive list. However, I must contrast these factors with the obvious vulnerability and power imbalance in an employment context between the parties. I find that the vulnerability of the workers to be more at issue in my penalties consideration.

Previous conduct

[78] While these breaches were sustained over a prolonged period, PRC and Maxine have not previously been before the Authority. I now turn to determining the quantification of available penalties.

***Preet* step one – PRC: the nature and number of breaches**

[79] The approach to quantification in *Preet* allows me to consider whether any of the breaches can be 'globalised' for the purpose of quantifying a penalty so that one breach may reflect two or more. [10] The effect of adopting this approach, is that where multiple breaches occur globalising can allow the application of one penalty for such.

[80] Here however unlike *Preet,* the breaches do not relate to one statute but I shall consider the possibility of 'grouping' breaches that are related to each other and relate to the same number of employees. This approach was affirmed by the Employment Court in *A Labour Inspector v Parihar* where Judge Perkins allowed that a failure to keep wage and time records and holiday and leave records, although required under two separate statutes, relates to the general breach of failure to keep adequate records, and could be treated as one breach per impacted employee. [11]

[81] In *A Labour Inspector v Matangi Berry Farm Limited* [12] Judge Corkill when faced with multiple workers involved and identical breaches (532), focused on the nature of the breach rather than the frequency per worker, reducing such to a single breach for each type of default. While the reasoning applying was to avoid 'artificiality" of discounting as Judge Perkins reasoned in *Parihar* "if the maximum penalty is related to each breach, an enormous total is reached," [13] I see no reason why the approach used in *Matangi* cannot be used for matters involving fewer workers.

Deterrence

[82] An overall factor is whether imposed penalties have a deterrent impact so that breaches are not repeated by the transgressor and to signal to others that the objects of the Act and adherence to minimum standards will be vigorously upheld.

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[10] At [100].
[11] *A Labour Inspector v Parihar* [2019] NZEmpC 43.
[12] *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43
[13] At [39].

[83] Counsel suggests the breaches here involve a small business and given Maxine has been "thoroughly educated on employment law obligations" and "intended to do the right thing" then specific deterrence is not at issue.

[84] I disagree with counsel's latter submission as the circumstances do not display a clear intention by Maxine to do the right thing and deterrence, even for small businesses, is a factor to be considered useful as marginal advantage over similar small competing enterprises through non-compliance with minimum standards is still at issue.

Globalising breaches

[85] Taking the approach in *Matangi* and *Parihar* focussing broadly on the nature of the breaches rather than the frequency or each specific statutory transgression, allows me to first group breaches of ss 4B and 130 of the Act and s 81 of the HA as a failure to keep adequate wage time and holidays records of workers minimum entitlements involving two identified workers (but evidently extending to all workers employed). Adopting a pragmatic approach this allows me to reduce these breaches down to four representative ones.

[86] However, the other breaches are not related and need to be treated separately: so failures to pay workers for unworked public holidays falling on otherwise working days pursuant to s 49 of the HA I will treat as one breach; failures to pay workers alternative days for public holidays worked and to pay this owing in final pays pursuant to ss 56 and 60 of the HA, I will treat as two breaches; failures to pay workers sick leave at specified times pursuant to s 63 HA, I will treat as one breach and failing to correctly calculate and pay final holiday pay in final pays pursuant to s 27(2) of the HA I will treat as one additional breach.

[87] This leaves the unrelated breach of s 6 of the MWA being a failure to pay minimum wages to workers for each hour worked involving two workers. I will, consistent with my other findings, treat this as one breach.

[88] The global approach I have applied above, reduces the various breaches to ten and this provides a sensible starting point to define potential maximum penalties before I apply further analysis of other factors using guidance from *Preet.*

[89] At this stage, the potential maximum penalties I can impose on PRC using a globalised approach is $20,000.00 per breach[14] which for the ten accumulated breaches amounts to $200,000.00.

***Preet* Step 2 – severity of breaches**

[90] On top of statutory considerations (the aims of the Act) discussed above, I am, I reiterate, obliged following *Preet,* to examine the extent of PRC's culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[91] Considering that the various breaches involved vulnerable immigrant workers in a weak bargaining situation with an employer blurring the lines between home and work, and that the breaches were easily resolvable had PRC put in place a compliant payroll system, plus the significant amount of money the workers were deprived of over time, I believe deterrence is a key consideration.

[92] Taking the later considerations into account but balancing them against the fact that this matter has some unique features that do not appear to disclose a exploitative situation, I conclude that 50% of the maximum accumulated penalty of $200,000 be a 'starting point' ($100,000).

[93] In mitigation, PRC has apparently rectified the breaches albeit in a faltering manner and committed to putting in place a payroll system and getting ongoing legal advice to ensure future compliance, including with compliant employment agreements.

[94] However, the extent of the respondents' remorse was not always evident in giving evidence but I do give them credit for latterly coming to an agreement on conceded breaches.

[95] In the circumstances, I consider a further 10% discounting of the maximum penalty is warranted which reduces it to $90,000 at this stage.

[14] Section 135(2)(b) Employment Relations Act 2000, Section 75(1)(b) Holidays Act 2003, Section 10 Minimum Wage Act 1983, and Section 13 Wages Protections Act 1983.

***Preet* step 3 – Assessing PRC's means and ability to pay**

[96] I was provided with information in evidence from PRC's accountant and submissions from counsel, which suggested PRC was currently marginally profitable and had operated at a loss in the previous trading year. Commenting on PRC's ability to pay a "large" penalty, their accountant noted that it would prove problematic to fund this through cash reserves, profit or turnover and that payment by instalments of a low-level penalty was possible.

[97] The Labour Inspector's submissions accepted the evidence showed PRC was in a precarious financial position but suggested this fact should not be given disproportionate weight. They cited the Employment Court decision of *A Labour Inspector v Daleson Investment Limited* to support the premise that mere financial incapacity, without more was not a pivotal factor and unlikely to lead to a total reduction of penalties and, that the underlying purpose of the statutory scheme should not be skewed totally by an issue of temporary financial incapacity that may change in a business over time. [15]

[98] In these circumstances, I consider it appropriate that a 20% reduction be made reducing the maximum at this stage to $72,000.

***Preet* step 4 - Proportionality**

[99] This step requires me to stand back and consider consistency with other comparable situations where the Authority and Employment Court has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such and number of the workers involved.

[100] Taking account of the totality of factors I have explored and applying proportionality to my analysis, including whether the size of the business and its unusual manner of operation should lead to a further reduction, I find it just in the circumstances that PRC should pay a penalty of $12,000.00.

[15] *A Labour Inspector v Daleson Investment Limited* [2019] ERNZ 1 at [45] - [46].

Issue 3: What, if any penalties should be imposed on Yi Ting Wang (Maxine) for admitted involvement in the breaches?

[101] Maxine, a sole director and shareholder of PRC, has conceded that she participated in all the breaches identified and I find that such resulted from her abject and continuing failure to take sufficient steps to put in place compliant systems in her business. I find these admissions sufficient to bring Maxine within the scope of s 142W(1)(c) of the Act. [16]

[102] The starting point for individual penalties is found in s 75(1)(a) of the HA and s 135 of the Act that specifies a maximum of $10,000.00 for each identified breach of the provisions detailed in the Labour Inspector's claims. For consistency I adopt the four step *Preet* approach that inevitably has a significant degree of the same conclusions.

***Preet* step 1 – nature and number of breaches**

[103] Using the same globalised approach to multiple breaches as I have used for PRC, it reduces the breaches for Maxine's involvement or neglect that caused the breaches to ten with an accumulated maximum penalty of $100,000.00 as a starting point.

***Preet* step 2 – severity of breaches**

[104] As with my findings regarding PRC I have considered the same level of severity should be imputed to Maxine and I adopt a broadly similar approach to penalty discounting (50% of the maximum) that leaves it at $50,000.00.

***Preet* step 3 – means and ability to pay**

[105] Counsel also suggested that Maxine, although accepting she was a person involved in the breaches, was in no better a financial position to meet any penalty imposed than the business and an affidavit disclosed her personal finances and assets in New Zealand as being very modest with her being totally reliant on PRC for income. An affidavit filed by Maxine attested to her difficult and complex financial position that was frankly difficult to assess given the amounts of evidently unsecured loans and debt involved and an overseas asset of uncertain value. I was convinced from viewing Maxine's disclosed bank statements that she has significant and

[16] Section 142W(1)(c) Employment Relations Act 2000 that specifies a person is involved in a breach where that person "has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach".

unavoidable regular outgoings including a significant mortgage on her own home and potential ongoing debt. In these circumstances, with the Labour Inspector's acknowledgement that the sole business Maxine owns is struggling, I take affordability to be a significant factor and would reduce the proposed penalty by 25% to $38,500.00.

***Preet* step 4 - proportionality**

[106] In applying proportionality and consistency into account I round down Maxine's final penalty to $4,000.00.

Apportionment

[107] The Labour Inspector asked that my discretion to apportion part of the penalties awarded should be exercised in favour of the two named workers on the basis that continuing distress has been caused by the ongoing failure of PRC and Maxine to address issues and that actual arrears claims were difficult to calculate due to significant record keeping deficiencies. I have the discretion to do this under s 136(2) of the Act and determine that half the total penalties awarded against both PRC and Maxine should be paid in equal shares to the two workers cited in this matter.

Orders

Penalties

[108] Within 28 days of the date of this determination being issued Palace Restaurant Company Limited must pay to the Crown a penalty in the sum of $12,000.00.

[109] On the same terms as above: Yi Ting Wang must pay a penalty to the Crown in the sum of $4,000.00.

[110] The Crown once receiving the amounts specified above shall transfer a proportion of the penalties paid to:

i) Xiang Ru Lin in the amount of $4,000.00; and

ii) Hai Rui Chen in the amount of $4,000.00.

Arrears

[111] Within 28 days Palace Restaurant Company Limited must pay the following amounts of arrears of wages and holiday pay combined to the Labour Inspector for the use of the two workers concerned, being:

i) Xiang Ru Lin in the amount of $23,876.62

ii) Hai Rui Chen in the amount of $16,506.50

[112] If the Palace Restaurant Company Limited and Yi Ting Wang do not comply with the above orders of the Authority, the Labour Inspector or the Chief Executive of the Ministry of Business Innovation and Employment may recover the amounts awarded in the District Court as a debt owed to the Crown.

Recommendations

[113] Pursuant to s 123(ca) of the Employment Relations Act 2000 I recommend that:

i) Palace Restaurant Company Limited, when providing employment agreements, for consideration, must ensure that those agreements are translated into the workers first language; and:

ii) Employment agreements for casual workers contain leave clauses explaining access to statutory leave entitlements in clear unambiguous language.

Costs

[114] Costs are reserved.

[115] The parties are invited to resolve the matter of costs. If they are unable to do so, the party that considers they are entitled to consideration of a cost contribution has 28 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Upon request by either party, an extension of time to explore settlement of costs may be granted.

[116] The parties can expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors require an adjustment upwards or downwards. [17]

David G Beck
Member of the Employment Relations Authority

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