

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 378
3216839

	BETWEEN	RAGHUBIR SINGH Applicant
	AND	ARCHIT VERMANI LIMITED First Respondent
		NEERAJ VERMANI Second Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Alexander Brown, advocate for the Applicant Mamta Dave, counsel for the Respondent	
Investigation Meeting:	21 and 22 May 2024 in Auckland	
Submissions and/or further evidence	29 May and 12 June 2024 from the Applicant 5 June 2024 from the Respondent	
Determination:	25 June 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Raghubir Singh, claims that the Respondent, Archit Vermani Limited trading as Archit Kartik Supermarket (AVL), failed to pay him annual and public holiday leave entitlements, and sick pay entitlements.

[2] Mr Singh also claims that AVL failed to comply with s 130 of the Employment Relations Act 2000 (the ERA) by failing to provide accurate wages and time records when requested to do so.

[3] Mr Singh further claims that Mr Neeraj Vermani is a person involved in the breaches.

[4] AVL denies that it failed to pay Mr Singh annual or public leave benefits, it claims that Mr Singh took annual leave regularly and was paid accordingly. It claims that Mr Singh was never required to work on public holidays, these were paid as they fell due.

[5] AVL denies that Mr Singh was not paid for periods of sick leave and claims he was paid whilst sick and unable to work.

The Authority's investigation

[6] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Mr Singh.

[7] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witness, Mr Vermani.

[8] Oral and written submissions were received from Mr Brown for the Applicant and from Ms Dave for the Respondent.

[9] Further, whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[10] As permitted by s 174E of the ERA 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.

Issues

[11] The issues requiring investigation are whether or not:

- Mr Singh is owed monies in respect of unpaid annual leave entitlement;.
- Mr Singh is owed monies in respect of not being paid for public holidays;
- Mr Singh is owed monies in respect of not being paid statutory sick pay;
- Penalties should be awarded against AVL for breaches of the statutory entitlements, and if so, in what quantum?
- A penalty should be awarded against AVL for failing to provide compliant wages and time records for Mr Singh, and if so, in what quantum?
- Should penalties be awarded against Mr Vermani if he is determined to be a person involved in any of the breaches, and if so, in what quantum?

Background

[12] AVL is a business operating a courier service. Mr Vermani is the sole director and shareholder.

[13] Mr Singh applied for a position with AVL. After a week when he observed what the role of a courier driver involved, and confirmed he believed he could perform the role, Mr Vermani offered him a position.

[14] Mr Singh said he commenced working for AVL as a driver on 1 November 2019 following an interview with Mr Vermani. Mr Singh said he was told by Mr Vermani that he would be working about ten hours a day, five days a week for \$170.00 per day.

[15] Mr Singh said he was provided with a written employment agreement (the Employment Agreement) in March 2020. This was a few months after he commenced employment and after he had requested a written agreement.

[16] Mr Vermani disagreed and said that he provided the Employment Agreement on 4 November 2019. He had told Mr Singh to take it away and returned it signed.

[17] The Employment Agreement was signed by both parties. It was dated 6 November 2019 and signed by Mr Vermani on that date, and 2019 by Mr Singh on 4 November 2019.

[18] Mr Singh said he took leave to travel to India shortly after he commenced employment and returned the Employment Agreement to Mr Vermani on 29 February 2020, but on that date there were no signatures on it. After he returned to New Zealand Mr Vermani had asked him to sign and backdate it.

[19] When asked why the dates on it would be backdated, Mr Singh said that after he returned to New Zealand he asked if he still had employment and Mr Vermani confirmed he did. In addition he wanted to apply for a rental property and needed the Employment Agreement for that purpose.

[20] The Employment Agreement provided to the Authority stated that Mr Singh's hours of work would be 45 hours per week Monday to Friday and the salary was stated as \$20.00 per hour to be paid into Mr Singh's nominated bank account.

[21] The Employment Agreement was signed by Mr Singh below the Employee Declaration which included the statements:

- In signing this agreement, I Raghubir Singh, accept the terms and conditions of my employment as detailed within this offer and declare that:

- I have read, and fully understood the terms and conditions of this agreement , and have received a copy of it.
- I was told about my right to get independent advice on the terms and conditions of this agreement and I have been given time to take that advice.
- I have raised any issues I have about the terms and conditions of this agreement and my employer has responded to these issues.

[22] Mr Singh in signing the Employment Agreement accepted the terms and conditions as defined in it. I find that to include a start date of employment as 6 November 2019.

Public Holiday leave

[23] Mr Singh said that when the first public holiday arose, Mr Vermani told him he would not be required to work that day, but he would be required to work on the following Saturday to compensate for the time lost. He was also informed that if two statutory public holidays arose in the same week, he would be required to work two weekend days in the following weekend periods.

[24] After approximately eight months of employment Mr Singh said he wanted to apply for a visa for his parents to visit New Zealand and also to apply for a credit card. He required proof of income and asked Mr Vermani to provide him with payslips.

[25] Mr Singh said he received his first payslip on 27 April 2021. He noticed that the pay appeared to be correct, however \$33.00 had been deducted in respect of KiwiSaver. This was incorrect because he was not a resident.

[26] Having raised this issue with Mr Vermani he was surprised to see it still noted as a deduction on the second payslip provided. Moreover he was provided with two payslips for the same pay period. When he questioned Mr Vermani about it, Mr Vermani said there was a software problem with the payroll App AVL was using, and it would be fixed.

[27] Mr Vermani said that once Mr Singh advised him of the KiwiSaver deductions, he informed IRD of the error.

[28] Mr Singh said he had also noticed that there was no sick leave accrual on the payslips. When he spoke to Mr Vermani about this, Mr Vermani said it was due to the payroll programme errors.

[29] Mr Vermani said that he had tried rectifying the error and AVL changed its payroll provider.

[30] Mr Singh said the payroll issues continued throughout 2021. However there were no issues in his employment apart from the incorrect payslips and the incorrect recording on them of leave entitlements so he took no action to address the issue at that time.

Resignation and annual leave entitlement issue

[31] In May 2022 Mr Singh obtained residency and gave notice on 17 May 2022, this was not actioned and he continued to work for AVL. On 9 October 2022 Mr Singh again resigned providing the contractual two weeks' notice period.

[32] Mr Singh said he received his final pay on 23 October 2022 however there was no payment in respect of outstanding annual leave entitlement. He text messaged Mr Vermani during October and November 2022 asking for the annual leave entitlement payment.

[33] On 21 November 2022 AVL sent him a final payslip and Mr Vermani asked him to verify it in order that he could make payment. Mr Singh messaged him and advised it was incorrect, asking for information about his hours of work, outstanding leave entitlement and pay rate.

[34] On 2 December 2022 Mr Vermani made a final payment of one week's wages. Mr Singh said he contacted Mr Vermani and asked for his annual leave entitlement to be paid. Mr Vermani responded that it would be paid.

[35] Mr Singh was subsequently paid one week's salary, but this was much less than the amount he considered he was owed, and there was no payment in respect of accrued annual leave entitlement.

[36] Mr Singh contacted the Ministry of Business, Innovation, and Employment following which the matter was investigated by a Labour Inspector. Following an inspection of the documents provided by AVL, the Labour Inspector informed Mr Singh that it appeared the annual leave entitlement had been paid, and that the matter was closed.

[37] The documents provided to the Labour Inspector included payslips. Mr Singh said he noticed that these were completely different to the payslips which had been provided to him during his employment. On analysis, these also incorrectly recorded the hours worked and leave entitlement accruals.

[38] Mr Singh engaged an advocate and a Statement of Problem was lodged with the Authority on 6 March 2023.

The Law

[39] Employers are required to keep and maintain wages and time records in accordance with s 130 of the ERA. These must be kept in specific detail for each individual employee and provided upon request by an employee or any person authorised to represent the employee.

[40] There is a similar provision in respect of the requirement for an employer to keep and maintain a holidays and leave record pursuant to s 81 of the Holidays Act 2003 (the HA).

[41] AVL does not deny that it failed to keep and maintain wages and time, or holidays and leave records for Mr Singh.

[42] A consequence of failing to keep or produce the records is set out in s132(2) of the Act which states:

Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proven all claims by the employee in respect of:

- (a) The wages actually paid to the employee
- (b) The hours, days, and time worked by the employee.

[43] The onus is therefore with AVL to provide evidence that what Mr Singh claims is incorrect.

[44] Both parties were asked, prior to the date of the investigation meeting, to provide supporting evidence. As set out in the Authority's Directions Minute dated 17 July 2023, their supporting evidence was to be lodged and served during October and early November 2023.

[45] Accordingly the parties have both had ample time to provide evidence in support of their claims. Conversely they have had sufficient time to consider the evidence filed by the other party prior to the investigation and have made requests for further evidence if required before the investigation took place.

[46] Some of the difficulties with determining this matter arises from the lack of any of the statutory records which AVL was expected to keep. Mr Vermani provided scan documentation from his client NZ Post, but these do not meet the requirements of s 130 of the Act in a number of respects: for example, Mr Singh is not named in the scan reports, but is identified by an APL number. This does not assist the Authority because Mr Singh's evidence was that he used more than one APL number.

[47] Moreover as stated in s 132(3) of the ERA: "A defendant may not use as evidence any wages and time records that would be inadmissible under section 232(3)."

[48] In addition, payments were made to Mr Singh into a number of bank accounts belonging not only to him (three were identified during the investigation meeting) but also on occasion into bank accounts belonging to third parties.

[49] There were also cash payments for which there is no reliable record and are therefore unverifiable because there is no documentary trail to identify the amount or the purpose of the payment.

[50] Mr Vermani said AVL made payments in various ways in response to directions provided by Mr Singh via an email or request, and claimed payments were made into about eight different bank accounts for Mr Singh.

[51] AVL bank statements show the cash withdrawals from its bank accounts as itemised to be for Mr Vermani's personal expenses, to pay for van repairs purchase parts, and for other costs, but not for employees' salaries.

[52] Whilst such varied methods of payment do not necessarily infer any degree of wrongdoing on the part of either party, they make it difficult to calculate what was paid in respect of annual leave and sick leave.

[53] Payslips have been provided. One set of payslips was provided to Mr Singh upon his request from 27 April 2021. The second set was provided after the Labour Inspector became involved in early 2022.

[54] During the Authority's investigation the payslips were discussed in detail, assisted by the detailed analysis Mr Singh had provided in his witness statement.

[55] Both sets of payslips have clearly identifiable, and a multiplicity of, inaccuracies; for example one payslip shows Mr Singh as working 117 hours over a two week period from 3 August to 16 August 2020 but also as taking 48 hours (almost one week) of annual leave.

[56] Following analysis, I do not consider the Authority may rely upon these payslips as providing an accurate record of what has been paid to Mr Singh.

Is Mr Singh owed monies in respect of unpaid annual leave entitlement?

[57] Mr Singh said that during his employment he took approximately seven or eight days of annual leave. This included time taken for a trip to Fiji in 2022, and one or possibly two other days.

[58] Mr Vermani said that Mr Singh went to India during January and February 2020, providing text messages as confirmation which show that Mr Singh was travelling between 7 January 2020 and 14 February 2020.

[59] Mr Singh said he took unpaid leave to travel to India. He kept in touch with Mr Vermani during that period, and checked when he returned to New Zealand that AVL had employment for him.

[60] The bank records provided by both parties show salary payments being made to Mr Singh on 6 January 2020 and the next salary payment being made on 3 March 2020.

[61] I find that this confirms Mr Singh's evidence that he took unpaid leave to travel to India during that period.

[62] Mr Vermani claims that AVL made cash payment advances of annual leave entitlement to Mr Singh to assist him with paying for the trip to India. AVL also made other such payments as requested by Mr Singh during his employment. Mr Singh disputes there were any cash advances.

[63] The HA deals with payment of annual leave. In respect of requests that a portion of annual holidays be paid out, the employee must request this in writing, and the employer must advise the employee in writing that he or she agrees to the request.¹ There is no written evidence that the request was made by Mr Singh or agreed to by Mr Vermani, and therefore s 28(2) of the HA applies. This states:

If an employer has incorrectly paid out a portion of the employee's annual holidays where the employee did not make a request for the payment, the employee's entitlement to take the portion of annual holidays concerned remains in force as if the payment has not been made.

[64] Taking the date in the Employment Agreement for the start of the employment as 6 November 2019, and the employment ending on 23 October 2022, I calculate Mr Singh's annual leave entitlement for the period of his employment as 69 days.

[65] Mr Singh confirms that he took approximately 7 or 8 days as annual leave during his employment. Following questioning during the investigation meeting, I take 8 days as the appropriate amount of leave taken.

[66] Mr Singh was paid the equivalent of one week of annual leave on or about 18 November 2022.

¹ The Holidays Act 2003 s 28A(2)(a) and s 28A(3)(b)

[67] I find this reduces the amount of annual leave owing to Mr Singh to 56 days in total.

[68] I order AVL to pay Mr Singh the amount of \$10,080.00 gross (calculated as 56 days x \$180 per day) pursuant to s 24 of the HA.

Is Mr Singh owed monies in respect of not being paid for public holidays?

[69] Mr Singh said that although he did not work on public holidays, Mr Vermani told him he had to work on one day over the weekend period following the statutory holiday. Mr Singh said he was not paid for these days.

[70] Mr Vermani said he did pay Mr Singh for working on weekend days, but said sometimes only an hour was worked, and Mr Singh was carrying out private work the rest of the time worked. This is denied by Mr Singh.

[71] Mr Vermani also said that payments were made to Mr Singh in cash for the weekend working. Bank accounts provided by AVL do confirm that large cash withdrawals were made, but it is not possible to verify the reason for these.

[72] Mr Singh confirmed that on occasion he was paid in cash, and sometimes into alternative bank accounts. He claimed these payments were not for the weekend working but for items including petrol or vehicle repairs. There are some text messages which confirm payments are made in cash and sometimes appear to be in respect of petrol or vehicle item:

- A text from Mr Singh dated 13 October 2020 stating: “10 days. 2 Sunday. Petrol \$22
- A text from Mr Singh dated 17 May 20022: “pls don’t transfer money to Simran accouy(sic) bring cash I will pick up tomorrow
- A text from Mr Vermani dated 22 November 2022 suggesting that he makes a payment in cash.

[73] Such is the nature of cash payments that it is difficult to identify the exact amounts that have exchanged hands, and for what purpose. Equally payslips, even if they were an accurate record (which is not the case here) are not useful in determining payments in cash.

[74] On the basis that there is some dispute about what was paid, and there were cash payments with the amounts and the purpose not verifiable, I cannot reach a determination on whether or not Mr Singh is owed monies in respect of the weekend working and in what quantum. Accordingly I shall address this matter when dealing with the issue of penalties.

[75] Mr Singh said that he worked on the following public holidays during 2022:

- a) 2 January (day after New Year's Day)
- b) 31 January (Auckland Anniversary Day)
- c) 7 February (Waitangi Day) and
- d) 6 June 2022 (Queen's birthday)

[76] While Mr Singh was paid for working the day, he was not paid time and a half, nor was he provided with a day in lieu.

[77] I find that Mr Singh is owed monies for a half day in respect of the four public holidays worked, plus an additional four days in respect of the day in lieu.

[78] I order AVL to pay Mr Singh the amount of \$1,080.00 gross (calculated as 6 days in total x \$180 per day) in respect of public holidays worked pursuant to s 50 and s 56 of the HA.

Is Mr Singh owed monies in respect of not being paid statutory sick pay?

[79] Mr Singh claims that he did take sick leave during his period of employment. This was paid but he claims either he was made to work weekends to compensate, or days were deducted from his annual leave balance.

[80] Mr Vermani said that Mr Singh was paid when he was absent from the workplace on annual leave and not made to work extra time without pay or use annual leave to compensate for the day taken.

[81] The payslips provided do not assist because they are inaccurate. For example Mr Singh was absent due to sickness for three days, 25 to 27 May 2022 (a medical certificate was provided and verifies the date) but this is not recorded until the payslip for the pay period ending 19 June 2022.

[82] There is also some evidence that Mr Vermani may have been using annual leave in respect of sickness leave, for example in his written witness statement Mr Vermani has stated: "he only provided the text message for 10 June 2021 and said he was sick, and I paid him annual leave".

[83] As noted above, it is difficult to identify what, if anything, is owed to Mr Singh in respect of any weekend working because of either payments being made in cash, or payments

being sometimes made into bank accounts belonging to other people of which there are no complete bank statements to verify amounts paid.

[84] However sick leave cannot be treated as annual leave and the only deductions from the sick leave balance are therefore in respect of the 8 days Mr Singh had confirmed he had taken as annual leave.

Interest

[85] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act.

[86] The purpose of interest is to reimburse someone for the loss of use of monies to which there is established entitlement as is the case with Mr Singh.

[87] I consider it appropriate therefore to award Mr Singh interest on the amounts owed to him.

[88] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

Should a penalty be awarded against AVL for failing to provide compliant wages and time records for Mr Singh?

[89] Mr Vermani accepts that AVL did not keep the records as set out in the ERA.

[90] Mr Vermani has been an employer in New Zealand for a significant period of time. Employers in New Zealand are expected and considered to know the minimum legal requirements in respect of their employees, and to adhere to them. Ignorance of the law is no defence.²

[91] Resources offering advice on the statutory obligations and providing assistance are also widely available to employers.³

Should penalties be awarded against AVL in respect of the breaches of minimum standard entitlements?

[92] I have found that AVL has breached the following in respect of Mr Singh:

² *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [29]

³ *Preet* at [87]

- a) Section 24 of the HA in respect of the failure to pay annual leave entitlements.
- b) Section 75 of the HA in respect of the failure to pay public holiday entitlement; and
- c) Breach of s 130 of the ERA in respect of the failure to keep time and wage records.

[93] Penalties for breaches render a company liable to penalties up to a maximum amount of \$20,000.00 per penalty.

[94] In deciding whether to impose a penalty and if I decide to, deciding how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in a number of judgments.⁴

[95] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[96] One of the objects of the ERA is to promote the effective enforcement of employment standards. There is a duty to maintain wage and time and holidays and leave records and provide these on request, and an employee is entitled to be properly recompensed throughout the period of their employment. This AVL has failed to do in respect of Mr Singh.

[97] Failure to fulfil these requirements represents a failure to adhere to employment standards, and prejudiced Mr Singh's ability to calculate the wages and other monies owed to him following the termination of his employment with AVL.

Identify the nature and number of statutory breaches

[98] There are three statutory breaches identified, two of the HA and one of the ERA, each merit a penalty to a maximum amount of \$20,000.00. This is a potential total penalty of \$60,000.00.

[99] I consider that the breaches of the HA should be considered as a global penalty of one breach respectively. This reduces the overall liability to two breaches and potential total penalty of \$40,000.00.

Step Two- assess the severity of the breaches

[100] The aggravating factors include the fact that Mr Singh was a migrant worker who was entitled to be treated with respect in the New Zealand workforce. He was entitled to be paid

⁴ For example, *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

properly during the period of his employment and to have access to the wage and time records for ensuring he could calculate payments due to him after his employment was ended.

[101] An ameliorating factor on the part of AVL include the fact that it did provide a written employment agreement to Mr Singh and fully participated in the Authority's investigation. I also take into account the fact that AVL relied upon payroll providers that failed to perform as required.

[102] I consider that the penalty amount should be reduced to 70 per cent of the total amount due in respect of the breaches.

The Respondent's financial circumstances

[103] No financial information on its operation has been provided by AVL or financial information on behalf of Mr Vermani personally.

The nature and extent of any loss or damage

[104] No payments have since been made by AVL or Mr Vermani to remedy the loss suffered by Mr Singh.

Circumstances of the breach

[105] As observed by the Full Court in *Preet* it is a matter of common knowledge within the community generally that minimum holiday entitlements and other statutory minima are applicable to all employment.⁵

[106] It was also noted by the Court in that case that there are freely available resources to employers to ensure they understand their responsibilities in adhering to minimum standards.

[107] The circumstances of the breaches of the HA and the ERA highlights the vulnerability of employees.

Previous Conduct

[108] There is no evidence before the Authority regarding previous conduct in respect of minimum standards breaches by AVL.

⁵*Preet* above n 4 at [87]

Deterrence

[109] I consider that there is a need to enforce to employers the employment standards they are required to meet and that minimum entitlements are non-negotiable.

[110] I find that AVL did not adhere to those standards in the case of Mr Singh.

Proportionality

[111] The parties acknowledge that in accordance with *Preet*, penalties imposed should be in proportion to the amounts of money unlawfully withheld from Mr Singh as a result of AVL's breaches and, in accordance with s 133A of the Act, the circumstances in which the breach took place.

[112] There were two areas of non-compliance with the HA, being the incorrect payment of annual leave entitlement and of public leave entitlements. In respect of the breach of s24 of the HA total amount of monies owed to Mr Singh was \$10,080.00; and in respect of the breach of s 50 and 56 of the HA \$1,080.00 was the amount owed to Mr Singh.

[113] I consider that a proportional penalty reflecting the amount for monies unlawfully withheld and the failure to keep and be able to provide upon request the wages and time records and the holiday records to be represented by the sum of \$12,000.00.

[114] I order AVL to pay a penalty of \$12,000.00 to the Authority. On recovery of that amount the Authority must then transfer that amount into a Crown Bank Account.

Should a penalty be awarded against Mr Vermani for his part in the breaches, and if so, in what quantum?

[115] Section 142W of the Act addresses whether or not a person is involved in a breach:

142W Involvement in breaches

(1) In this Act, a person is involved in a breach if the breach is a breach of employment standards and the person—

- (a) has aided, abetted, counselled, or procured the breach; or
- (b) has induced, whether by threats or promises or otherwise, the breach; or
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
- (d) has conspired with others to effect the breach.

(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may

be treated as a person involved in the breach only if that person is an officer of the entity.

(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:

(a) a person occupying the position of a director of a company if the entity is a company:

(b) a partner if the entity is a partnership:

(c) a general partner if the entity is a limited partnership:

(d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:

(e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

[116] Pursuant to s 142W of the ERA, if a company breaches employment standards as AVL has done, a person who is an officer of the company may be treated as a person involved in the breaches. Pursuant to s 142W(3)(a) of the ERA a person occupying the position of a director of the company is to be treated as an officer of the company.

[117] Mr Vermani was the sole director and shareholder of AVL during Mr Singh's employment and the person responsible for the operation of AVL. As such he was directly responsible for all the breaches which occurred and of which he was notified.

[118] However as set out in s 142X of the ERA, only a Labour Inspector may bring an application for a penalty pursuant to s 142W.

[119] Mr Vermani can however be made liable for default in payment or wages or other money due to Mr Singh as a person involved in the breaches of employment standards pursuant to s 142Y of the Act.

[120] I find that Mr Vermani, as the sole director and shareholder of AVL, was knowingly concerned in the breaches of minimum employment standards and in the failures to pay Mr Singh his entitlements correctly.

[121] As such, he may be held liable to fulfil the remedies ordered to be paid to Mr Singh pursuant to s 142Y(2)(b) of the ERA: "to the extent that the employer's employer is unable to pay the arrears in wages or other money" and with the prior leave of the Authority.

[122] I determine that AVL and Mr Vermani are both jointly and severally responsible for seeing this order is met in full. I determine that in the event that AVL is unable to, or fails to,

pay Mr Singh the sums awarded to him in respect of the breaches of minimum employment standards including the interest, Mr Vermani is liable to pay the ordered payments.

Should any part of the penalties be paid to Mr Singh?

[123] The purpose of penalties is not punitive and Mr Singh has been awarded the unpaid leave entitlements. However the failure to pay Mr Singh correctly and on time for annual leave and public holiday leave entitlements caused stress to him and has involved him in a significant amount of time analysing the pay slips provided by AVL in detail, and in presenting his case before the Authority.

Remedies

[124] I have found that AVL has breached the following in respect of Mr Singh:

- d) Section 24 of the HA in respect of the failure to correctly pay annual leave entitlements;
- e) Section 75 of the HA in respect of the failure to correctly pay public holiday entitlement; and
- f) Breach of s 130 of the ERA in respect of the failure to keep time and wage records.

Filing Fee

[125] I order AVL to pay Mr Singh the filing fee of \$71.56.

Orders

[126] I have made the following orders:

- **I order AVL to pay Mr Singh the sum of \$10,080.00 gross (calculated as 56 days x 180 per day) in respect of annual leave entitlement pursuant to s 24 of HA.**
- **AVL is ordered to pay Mr Singh the sum of \$1,080.00 in respect of unpaid public leave entitlements pursuant to s 50 and s 56 of the HA.**
- **AVL is ordered to calculate and pay interest to Mr Singh within 28 days of the date of this determination on the sums for which payment has been ordered until they are paid in full.**
- **To the extent that AVL is unable to make the payments, Mr Vermani is ordered to make the payment.**

- **I order AVL to pay the full penalty amount of \$12,000.00 to the Authority which will transfer payment to a Crown bank account.**
- **I order that 40 percent of the penalty to be paid by AVL, amounting to the sum of \$4,800.00, is to be transferred from the Crown to Ms Singh.**
- **AVL is ordered to pay Mr Singh the filing fee of \$71.55.**
- **All orders for payment are to be paid within 28 days of the date of this determination.**

Costs

[127] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[128] If they are not able to do so and an Authority determination on costs is needed Mr Singh may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum AVL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[129] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[130] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Eleanor Robinson
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].