

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 616
3177249

BETWEEN	A LABOUR INSPECTOR Applicant
AND	A W & B L MUDALIAR LIMITED First Respondent
AND	AVINESH MUDALIAR Second Respondent
AND	BIDYA MUDALIAR Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	John Hilario, counsel for the Labour Inspector Simon Greening, counsel for the Respondents
Investigation Meeting:	21, 22, 23 August 2024
Submissions:	23 August 2024 from the Applicant 23 August 2024 from the Respondents
Determination:	15 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, a Labour Inspector, claims that the First Respondent, A W and B L Mudaliar & Co Limited (A W & B L Mudaliar) elicited a premium payment from an employee, owes arrears in respect of annual and public holiday pay to a number of other employees, and seek penalties in respect of a number of breaches of minimum employment standards.

[2] Penalties are also sought against the Second Respondent, Mr Avinesh Mudaliar, and the Third Respondent, Ms Bidya Mudaliar, as persons involved in the breaches of minimum employment standards.

[3] A W & B L Mudaliar denies seeking a premium from any employee, and claims that although it calculated employees annual and public holidays incorrectly, this was an oversight. Further that the employment agreements were checked by Immigration New Zealand for the purpose of complying with visa requirements, and it therefore understood that the employment agreements complied with New Zealand employment law.

[4] Mr and Mrs Mudaliar deny that they are liable for penalties as persons involved in the breaches of employment standards by A W & B L Mudaliar.

The Authority's investigation

[5] The Authority received written and, under oath or affirmation, oral evidence from the Applicant witnesses: Mr Shubham Tayal and Ms Charlotte Grimwood, a Labour Inspector..

[6] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses, Mr and Mrs Mudaliar.

[7] Oral and written submissions were received from Mr Greening for the Applicant and Mr Hilario for the Respondent. These have been fully considered.

[8] 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.

Issues

[9] The issues for determination are whether or not A W & B L Mudaliar:

- i Sought and/or received premium payments from Mr Tayal; or alternatively
 - o Required monies from Mr Tayal amounting to stipulating how his wages should be spent;
- ii Stipulated how Mr Tayal's wages should be spent (for till shortages); or alternatively
 - o Sought and received the payment of a premium in the form of till shortages
- iii Made unlawful deductions from Mr Tayal's wages to recover purported wage overpayments;

- iv Failed to pay annual holiday entitlements on termination to four employees: Jayant Sharma, Diljeet Singh, Shubham Tayal and James Riddell;
- v Failed to include mandatory information in the employment agreements of three employees: Gurpreet Singh, Diljeet Singh and Kahui Tangaroa;
- vi Included a clause contrary to law in the employment agreement of James Riddell;
- vii Failed to keep accurate holiday and leave records in respect of six workers;
- viii The First Respondent should pay penalties for breaches of employment law standards affecting a number of employees; and if so the quantum of any penalties; and
- ix Whether or not the Second and Third Respondents should pay penalties as persons involved in the breaches of minimum employment standards and if so the quantum of any penalties.

Background

[10] The Applicant is a Labour Inspector. A W & B L Mudaliar is a limited liability company which trades as Piopio Superette (the Superette). It was incorporated on 3 May 2002. The Second and Third Respondents are the directors and joint shareholders of the First Respondent. The Third Respondent is the wife of the Second Respondent.

[11] The Superette is located in Piopio, a small town. It sells food and alcohol. The Store is open seven days a week. There is some seasonal variation in the hours of operation.

[12] Mr Mudaliar is primarily responsible for operational matters and rosters for the Store employees whilst Mrs Mudaliar provides the employees with employment agreements and has a good understanding of the payroll. Both Mr and Mrs Mudaliar work in the Superette as required. On occasion other family members assist.

[13] Mr Mudaliar explained that people on visas frequently work in the Superette. As immigrants to New Zealand themselves, they are happy to assist them with their applications for visas and other qualifications. Turnover is reasonably high as Piopio is a small rural town and employees tend to move on to other opportunities in larger locations.

[14] A W & B L Mudaliar entered into individual employment agreements with the following employees:

- (i) Jayant Sharma on 14 November 2015. The employment terminated on 21 October 2016.
- (ii) Gurpreet Singh on 9 January 2016. The employment terminated on 3 February 2017.
- (iii) Diljeet Singh on 9 February 2019. The employment terminated on 6 September 2019.
- (iv) Shubham Tayal on 7 September 2020. The employment terminated on 4 April 2021.
- (v) Kahui Tangaroa on 7 June 2021. The employment terminated on 12 September 2021.
- (vi) James Riddell on 2 August 2021. At the time of the Labour Inspector's investigation the employment was ongoing.

[15] On 6 July 2023 the Labour Inspectorate received a complaint from Mr Tayal who alleged that he had been employed by A W & B L Mudaliar from September 2020 until he had been unjustifiably dismissed in April 2021.

[16] Mr Tayal had seen an advertisement for an Assistant Store Manager on Facebook in mid July 2019. He applied for the position and was invited to visit the Superette where he met Mr Mudaliar. Mr Tayal followed up after the meeting because he had heard nothing further, after which he was invited for a second visit and was interviewed by both Mr and Mrs Mudaliar.

[17] On that occasion he was offered the position of Assistant Store Manager which he accepted, commencing employment at the Superette on 7 September 2020.

(i) Advertising costs

[18] Mr Tayal said at the first meeting Mr Mudaliar told him he would have to pay for the advertising on TradeMe in order that the Superette could prove for immigration purposes that it had tried to recruit a New Zealand employee but had been unable to do so.

[19] Mr Tayal said he had been employed at a Countdown supermarket during which time he had an Open Work Visa, and it had been his intention to apply for an Essential Skills Visa. Mr and Mrs Mudaliar had agreed to support him in his application.

[20] Mr Mudaliar said that Mr Tayal was eligible to work for the Superette because he had an Open Work Visa. His understanding was that Mr Tayal was able to work for the Superette for one year on the Open Work visa.

[21] Mr Tayal told them that he wanted to apply for an Essential Skills work visa and they agreed to support him in his application. Mr Tayal also told them his immigration advisor had informed him that he needed to show evidence that the job had been advertised on Trade-Me. He would also need to be paid at a higher salary to meet the Essential Skills visa requirements.

[22] Mr Tayal had been issued with a written employment agreement on 25 August 2020. On 21 September 2020 Mr Tayal was provided with a second employment agreement which he signed on 21 September 2020. This agreement specified a higher hourly wage rate of \$25.50.

[23] Mr Mudaliar said prior to Mr Tayal being appointed as Assistant Manager, the Superette had advertised for the position on Trade-Me and on Facebook. It was the Facebook advertisement to which Mr Tayal had responded.

[24] Mrs Mudaliar said that at the time Mr Tayal applied for the advertised position, she and Mr Mudaliar had decided to sell the Superette business and move with the family to Auckland.

[25] She said Mr Tayal had promised that if they assisted him to obtain the Essential Skills Visa, he would stay at the Superette for three years which would assist them in their plans. This was the reason they agreed to help him achieve his desire to obtain an Essential Skills Visa by re-advertising the Assistant Manager position and paying him a higher wage: \$25.50 rather than the originally offered \$18.90 per hour.

[26] When Mr Tayal had raised the subject of his intention to apply for the Essential Skills Visa, he told them he needed to show evidence the position had been advertised. Mrs Mudaliar said she told Mr Tayal the position had been previously advertised on Facebook and she could provide him with that in order that he could use that for his visa application.

[27] However Mr Tayal said that his immigration advisor had told him it would have to be re-advertised and on two platforms in order to satisfy the visa requirement. She said she and Mr Mudaliar agreed to re-advertise provided Mr Tayal paid the cost associated with doing so, and he agreed.

[28] Mr Tayal confirmed during the Investigation Meeting that he told Mr and Mrs Mudaliar that the Facebook advertising was not acceptable and the position would need to be re-advertised as specified to meet the visa requirements and that he agreed to pay for the advertising.

[29] Mr Tayal claimed that he was made to pay back the difference in pay between the higher rate of \$25.50 per hour and \$18.90 per hour each week.

[30] Mr and Mrs Mudaliar denied this was the case and provided manual pay roll records in support.

(ii) *The Manager's certificate*

[31] Mr and Mrs Mudaliar said the advertisement for the Assistant Manager position stated that a Manager's Certificate or a willingness to acquire one was required. During the interview that Mr Tayal told them he did not have the necessary advertised qualifications for the Assistant Manager position because although he had a liquor licence (LCQ), he did not have a Manager's Certificate.

[32] Mr Tayal confirmed he had been told that he needed to have a Manager's Certificate when he applied for the role of Assistant Manager, and since he did not have one, he needed to obtain one. It had been told that he would have to pay the costs for obtaining a Manager's certificate.

[33] Ms Mudaliar said it was explained to Mr Tayal that A W & B L Mudaliar could appoint him for a six week period without a Manager's Certificate but that Waitomo District Council (WDC) would have to be informed and it would only be for the six week period. Mr Tayal had been told he needed to apply for a Manager's Certificate 48 hours after A W & B L Mudaliar had informed WDC.

[34] It was also explained to Mr Tayal that he would have to pay the application fee, but that A W & B L Mudaliar would assist by providing him with additional hours to cover some of the cost. Mr and Mrs Mudaliar said that Mr Tayal had agreed to make the payment.

[35] During the Investigation Meeting Mr Tayal was asked whether or not he had raised his applying for a Manager's certificate when he worked at Countdown supermarket. He said that he had done so, but Countdown had told him that it did not need him to have one since it already had employees who had a Manager's Certificate.

[36] In response to a question about whether payment for the Manager's Certificate had been discussed, Mr Tayal said Countdown had told him he would need to pay for it himself.

[37] Mr Tayal said he paid \$316.25 to Hamilton City Council for a Manager's Certificate which would allow him to sell alcohol.

[38] Mrs Mudaliar said the acquisition of the Manager's certificate was a benefit to Mr Tayal because he could work in any business that sold alcohol.

(ii) Employment agreements

[39] On 25 August 2020 Mr Tayal said he was provided with an employment agreement via email. This showed an hourly pay rate of \$18.90 for 30 hours per week. He signed the employment agreement on 25 August 2020 (the First Employment Agreement).

[40] Approximately one month later he was provided with a second employment agreement by Mrs Mudaliar (the Second Employment Agreement), this stated an hourly rate of \$25.50. The Second Employment Agreement also contained an addition to the deductions clause relating to till shortages which had not been in the First Employment Agreement.

[41] Mr Tayal signed the Second Employment Agreement on 21 September 2020 below the statement:

I, **Shubham Tayal**, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of my right to seek independent advice in relation to this agreement and have been given reasonable time to do so.

(iii) Duties

[42] Mr Tayal's duties were those involved in operating a food retailer, including checking produce, and cleaning shelves. He also opened and closed the Superette when required to do so. He said at times when he was the sole employee in the Superette, he would find it difficult to take his full statutory breaks. He said that Mr Mudaliar would call him often during the day.

[43] Mr Tayal said at the end of a shift it would be the job of the employee working at that time to empty out the till and store the cash, ready for the next shift. If a bag was found to be short of cash and the employee did not have a reason for this, Mr Mudaliar would deduct the shortages from the relevant employees' wages.

[44] Mr Tayal said all record keeping is done manually. Shifts for the week would be written on a calendar in the office which was subsequently replaced by a yearly planner, then the calendar was used towards the end of his employment.

(iv) Payments and deductions

[45] The hours he worked were recorded in a notebook by Mr Mudaliar. Mr Tayal said there would be a calculation based on the hourly rate of \$25.50 which would be adjusted to an hourly rate based on \$18.90. Mr Tayal said he was expected to repay the difference which amount was also recorded in the notebook.

[46] Mr Tayal said he had been paid at the hourly rate of \$25,50 per hour, however he was expected to repay the difference in the hourly rate between \$18.90 and \$25.50 back to the Superette. He said he was to repay weekly otherwise he would not receive the following week's wages.

[47] Mr Tayal said his wages were paid into his bank account, apart from the final week when he was paid in cash.

[48] The repayments he made to the Superette were made either from his bank account, from withdrawals from the ATM machine located in the Superette, or by cash payments.

[49] Mr and Mrs Mudaliar said that they had made personal loans to Mr Tayal during the course of his employment. They said they sometimes made loans to all their employees to assist them. Mr Tayal had told them that he had a business in India, a photo studio, and some of the loans were for this purpose. She said on another occasion Mr Tayal had a car accident and his car was written off, so he asked for a further loan.

[50] Mr Mudaliar said A W & B L Mudaliar made the loans to Mr Tayal and he recorded them in the book in which he kept a manual record of the hours worked by each employee. He made a note of the loan amount, and recorded the amount of the repayment made by Mr Tayal, which were made in cash.

[51] Mr Mudaliar said Mr Tayal had approached him about a larger loan, but he advised him that that would not be possible because the Superette could only afford to make loans of small amounts, and said that he should contact his bank.

[52] Mr Tayal denied that he had taken any loans from A W & B L Mudaliar. He agreed that he had borrowed some monies but these were from friends. In addition he had received a bank loan of \$15,000.00 which he had paid in full to his father in India to assist him with setting up his own business.

Dismissal

[53] Mr Tayal said he was dismissed without warning or any process being followed on 2 April 2021. He had attended for work and completed approximately four hours of work when Mrs Mudaliar provided him with a letter of termination.

[54] Mr and Mrs Mudaliar said they had been shocked and upset to discover that Mr Tayal was assisting a competitor store which had recently started operating in Piopio, and decided that they could no longer trust him. They therefore decide to end his employment with the Superette.

[55] On Mr Tayal's final day, Mrs Mudaliar said she had been working in the Superette with her son. She had handed Mr Tayal a termination letter together with a cash payment in respect of his holiday pay entitlement, however he had become very angry and refused to take it.

[56] Mr Tayal subsequently raised a personal grievance. Following the resolution of this, Mr Tayal made a complaint to the Labour Inspectorate.

The Labour Inspector's investigation

[57] Following Mr Tayal's complaint to the Labour Inspectorate on 6 July 2021 Ms Grimwood commenced an investigation on 18 August 2021 into allegations which had been raised in Mr Tayal's complaint, and to determine the Superette's compliance with employment standards.

[58] Ms Grimwood's investigation included:

- a. A phone interview with Mr Tayal on 11 October 2021;
- b. An analysis of employment records on 25 November 2021 from records provided by A W & B L Mudaliar for Mr Sharma, Mr Gurpreet Singh, Mr Diljeet Singh, Mr Tangaroa and Mr Riddell;
- c. Simultaneous interviews conducted with Mr and Mrs Mudaliar on 18 February 2022;
- d. An analysis of supporting evidence provided by Mr Tayal, Mr Mudaliar and Mrs Mudaliar;
- e. Communication with former employees, including Mr Sharma and Mr Gurpreet Singh, to understand the scope of issues raised by Mr Tayal;
- f. A draft Investigation Report issued to A W & B L Mudaliar for comments and response on 5 May 2022;
- g. Consideration of A W & B L Mudaliar's comments and response to the Labour Inspector's draft Investigation Report, received on 26 May 2022; and
- h. A final Investigation Report issued to A W & B L Mudaliar on 1 July 2022.

[59] Mr and Mrs Mudaliar provided employment records for Jayant Sharma, Gurpreet Singh, Diljeet Singh, Shubham Tayal, Kahui Tangaroa and James Riddell. The employment records included employment agreements, handwritten wage payment records, records of handwritten rosters/timesheets and electronic wage records for Mr Tayal. Bank statements were also provided.

[60] Mr and Mrs Mudaliar were interviewed by Ms Grimwood. They told her:

- a. The Superette operates from 7.00 a.m. to 8.00 or 8.30 p.m. during the summer months, 7.00 a.m. to 7.00 p.m. in the winter months. There are no periods of closure.
- b. Shifts are agreed between Mr and Mrs Mudaliar and the employees but these are not set or fixed.
- c. All employees are provided with individual employment agreements before employment commences;
- d. The Superette used websites Facebook and TradeMe to advertise for positions;
- e. Employees are paid by bank transfer unless they request payment in cash;
- f. Employees are paid on a Friday unless there was an issue with the internet, in which case payment might be delayed until the following Monday;
- g. Till shortages were to be repaid by the relevant employee, but there were no deductions from employees' wages other than PAYE or KiwiSaver;
- h. Mr Tayal had a personal loan arrangement with the Superette, these were smaller amounts and he had been advised to obtain a bank loan for a larger amount. Any monies Mr Tayal was withdrawing from the Superette ATM machine or from the till were for his own use;
- i. It was Mr Tayal who had wanted to advertise on TradeMe to meet his own immigration requirements.. The Superette had paid for the advertising and Mr Tayal was asked to reimburse it.

[61] The Superette provided supporting evidence on 24 February 2022.

Ms Grimwood's Conclusions

[62] Ms Grimwood analysed all the evidence available to her and concluded that the Superette sought and received the return of money from Mr Tayal during his employment contrary to the Wages Protection Act 1983 (WPA). From evidence submitted by Mr Tayal, she concluded the return of money was directly correlated to future wage payments and his employment with the Superette.

[63] In relation to the assertions by Mr and Mrs Mudaliar of amounts being advanced as personal loans, she concluded it was unlikely Mr Tayal would have requested a personal loan from the Superette when he had an approved bank loan of \$15,000.00.

[64] Ms Grimwood could not quantify monies deducted or returned to the Superette as till shortages payments. In all the employment agreements she reviewed other than that of Mr Tayal, , there was no general deductions clause for till shortages.

[65] From the employment agreements, Ms Grimwood identified breaches of s 23 of the Holidays Act 2003 (HA) in respect of annual leave. Breaches in respect of s 49 of the HA were also identified.

[66] Breaches of record keeping requirements were also identified in respect to the content of employment agreements, and breaches of holiday and leave holiday and leave records for all sampled employees.

[67] On 5 May 2022 Ms Grimwood provided Mr and Mrs Mudaliar with a draft copy of the Investigation Report, with her calculation spreadsheet to demonstrate the calculations that constituted part of her analysis and informed the identified breaches.

[68] On 25 May 2022 Mr and Mrs Mudaliar responded with comments to the draft report but provided no additional evidence or documentation in response to the identified breaches.

[69] Ms Grimwood said she considered the comments from Mr and Mrs Mudaliar but ultimately they did not alter her findings in relation to the identified breaches.

[70] On 1 July 2022 Ms Grimwood provided Mr and Mrs Mudaliar with a final version of the Investigation Report. It included the comments by Mr and Mrs Mudaliar which had been considered before the finalisation of the Investigation Report.

Did A W & B L Mudaliar seek and/or receive premium payments from Mr Tayal or alternatively require monies from Mr Tayal amounting to stipulating how his wages should be spent?

Premium Payments

[71] The Wages Protection Act 1983 (WPA) refers to mode of spending wages and employment premiums at s 12 and s 12A which state:

12 Employer not to stipulate as to mode of spending wages

No employer shall impose any requirement on any worker as to any place or manner in which or any person with whom that worker shall expend wages received by that worker, or dismiss any worker on account of any place or manner in which or any person with whom that worker expends those wages.

12A No premium to be charged for employment

- (1) No employer or person engaged on behalf of the employer shall seek or receive any premium in respect of the employment of any person, whether the premium

is sought or received from the person employed or proposed to be employed or from any other person.

[72] In *Labour Inspector v Tech 5 Recruitment (Tech 5 Recruitment)*, the Employment Court considered the issue of premiums.¹ It concluded that premium:

[53] ... is an elastic word capable of referring to consideration provided for a contract ... while being broad enough to cover a reward and an enhanced payment reflective of higher quality or value.²

[73] The Court further stated that the definition of a premium extended further than those situations:

[54] ...to apply to an employer recouping or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer. ... the feature that stands out in this case is the lack of any benefit to the employee in meeting the trade testing costs, other than getting the job..

[74] In the subsequent case *Holman v CTC Aviation Training (NZ) Ltd* the plaintiff had been required to pay fees relating to a flight instructor training course run by the defendant prior to commencing employment with the company.³ Judge Perkins set out the two requirements necessary for a payment to be a premium in paragraph [20] of the judgment:

[20] Arising from these statements, there are two requirements for a payment to be a premium for employment:

- (a) The payment is a condition for the obtaining of employment. The employment will not be obtained without making the prior payment.
- (b) The payment does not benefit the employee in any way other than obtaining employment.

[75] The Employment Court considered that the facts could be distinguished from those in *Tech 5 Recruitment*. Judge Perkins had held that the payment of a training fee did not meet the *Tech 5 Recruitment* requirement that payment should be a condition for the obtaining of employment.

[76] In the first instance, the condition was the obtaining of the qualification without which the plaintiff could not be employed as a trainer for the defendant under the strict rules imposed by bodies which governed pilot training. Secondly the payment of the fee substantially benefitted the plaintiff who possessed a lifelong valuable qualification once he completed the course successfully. Further, the plaintiff was not bound to accept employment with the

¹ *Labour Inspector v Tech 5 Recruitment Ltd* [2016] NZEmpC 167

² Above n 1 at [53]

³ *Holman v CTC Aviation Training (NZ) Ltd* [2017] NZEmpC 60

defendant upon completing the course and nor was the defendant bound to employ him at that point.⁴

(i) *Was Mr Tayal's payment of advertising costs a premium?*

[77] It is submitted on behalf of the Labour Inspector that the payment of the job advertisement fees by Mr Tayal was a premium because job advertising was a cost that an employer normally bears. This is supported by the Employment Court statement in *Tech 5 Recruitment*:

[54] ...Given the ingenuity with which agreements can be drafted each case will be fact-specific. However, the feature that stands out in this case is the lack of any benefit to the employee in meeting the trade testing costs, other than getting the job. An inference arising strongly from cls 7 and 8 of the addendum is that obtaining the job was conditional on agreeing to pay these costs.⁵

[78] It is submitted for the Respondents that this case can be distinguished from that in *Tech 5 Recruitment* because it does not fulfil the two requirements for a payment to qualify as a premium set out in *Holman v CTC Aviation Training (NZ) Ltd*:

[20] Arising from these statements, there are two requirements for a payment to be a premium for employment:

- (a) The payment is a condition for the obtaining of employment. The employment will not be obtained without making the prior payment.
- (b) The payment does not benefit the employee in any way other than obtaining employment.⁶

[79] In examining the evidence provided by the parties I find that there are significant differences between the circumstances in this case and those in *Tech 5 Recruitment*. Mr and Mrs Mudaliar had incurred and paid the costs of advertising for the Assistant Manager position prior to Mr Tayal's employment.

[80] Mr Tayal was appointed with an Open Visa. He wanted to apply for an Essential Skills Work Visa and Mr and Mrs Mudaliar agreed to support him. It was Mr Tayal's evidence that he told Mr and Mrs Mudaliar the previous advertising was not acceptable for his visa application requirements and the position would need to be readvertised on two platforms.

[81] I find that the job advertising does not meet the two qualifying requirements set out in *Holman*: it was not a condition of Mr Tayal obtaining employment, and the sole benefit was to

⁴ Above n3 at [20]

⁵ *Labour Inspector v Tech 5 Recruitment Ltd* [2016] NZEmpC 167 at [54]

⁶ Above n 3 at [20]

Mr Tayal: the advertising was not an employment-related cost because it was directly attributable to Mr Tayal's immigration application..

(ii) Was Mr Tayal's payment for a Manager's Certificate a premium?

[82] It is submitted by the Labour Inspector that the payment by Mr Tayal of the Manager's Certificate fees amounted to a premium because the acquisition of it was solely a benefit to the First Respondent in that without it no sale of liquor was possible.

[83] It is submitted for the Respondents that payment for a Manager's Certificate did not constitute a premium because it was a requirement for the Assistant Manager position, and because it was a benefit to Mr Tayal.

[84] As confirmed by Waitomo District Council, Manager's Certificates are initially issued for a one year period, but are easily renewable for a three year period. A Manager's Certificate applies to the person not to a premises. Payment of the fee is a matter between the applicant and his or her employer.

[85] I find that Mr Tayal obtaining a Manager's Certificate was a benefit to A W & B L Mudaliar. However either already possessing one or agreeing to apply for one within a short time period after appointment was a necessary requisite for appointment to the role of Assistant Manager.

[86] I find that obtaining a Manager's Certificate was also a benefit to Mr Tayal, it was a qualification which allowed him to work not only for A W & B L Mudaliar, but in any business that sold alcohol. Although initially awarded for a one year period, WDC confirmed it was easily renewable for a three year period.

[87] In his oral evidence Mr Tayal stated that during his employment at Countdown he had asked if he could apply for the Manager's Certificate which I find supports that he himself saw having the certification as a benefit.

[88] I determine that payment for the obtaining of a Manager's Certificate by Mr Tayal was not an employment premium.

(iii) Were payments of monies from Mr Tayal to A W & B L Mudaliar repayment of the difference between a stated higher wage rate and the actual wage rate and a premium payment?

[89] It is submitted by the Labour Inspector that Mr Tayal's wages were withheld pending his making repayments for the difference between the higher hourly wage rate of \$25.50 and \$18.90 per hour.

[90] Mr Tayal's evidence was that he was required to pay back the difference in the two pay rates weekly. The difference equates to \$6.60 per hour. Mr Tayal worked an average of 30 hours per week which equates to a weekly repayment of \$198.00.

[91] Mr Tayal worked for A W & B L Mudaliar for a period of seven months. If Mr Tayal had been repaying the sum of \$198.00 per week, this would amount to approximately \$5,500.00 over the seven month period.

[92] The amount sought by the Labour Inspector in respect of the payments made by Mr Tayal to A W & B L Mudaliar is \$2,874.11 which includes the amounts paid by Mr Tayal in respect of job advertising costs and the Manager's Certificate. This is a large discrepancy.

[93] When questioned during the Investigation Meeting, Mr Tayal accepted he was paid correctly for the hours he worked. This is also confirmed by the wage records submitted by A W & B L Mudaliar.

[94] Although there is evidence that Mr Tayal paid monies to A W & B L Mudaliar, I find the evidence does not support Mr Tayal's claim that he was made to repay the difference between the higher wage rate of \$25.50 and \$18.90 per week or that it was deducted from his wages.

[95] I determine that there is no premium payment based on the alleged repayment of wages claim.

Did A W & B L Mudaliar unlawfully withhold Mr Tayal's wages until he repaid monies owed to it?

[96] Mr Tayal's evidence is that his wages were withheld from him until he paid monies to the First Respondent.

[97] Mr and Mrs Mudaliar's evidence was that no wages were withheld, however payments to all the employees were sometimes delayed to a Monday rather than a Friday because the timeline to provide the data to the bank had been missed.

[98] Evidence submitted by the Labour Inspector to support its submission that payment was withheld includes an audio recording of a conversation between Mr Tayal and Mrs Mudaliar on Tuesday 12 January 2021

ST: I didn't get paid yet:

BM: Yeah, because you were supposed to be giving the money back. So I think you didn't do that.

ST: Uh, because, yeah I know that, but it doesn't mean like that I'm not providing you the money. Cause I think, uh, I shouldn't ... you know ... I'm just at the shop, so you didn't tell me like, you going to pay or not and I tell him I'm going to pay you tomorrow, but uh, that's regarding the pay, cause I need to pay my bills and stuff. You need to be on time.

BM: Ya

ST: Cause I think you need to pay by Friday? ..

BM: Ya, you also need to give our money back on time. That's what you need to do.

ST: No, I'm ... I'm...

BM: if you don't pay for one week ... then you won't .. if you don't give it .., like one week, uh, then you can't have your pay. It will be hours late before you get your pay, cause we also need money. It's not only you. So it has to be clear, that's the rules.

[99] Mrs Mudaliar's evidence was that the payments referred to in the conversation were for the return by Mr Tayal of loans which she and Mr Mudaliar had made to him while he was employed at A W & B L Mudaliar.

[100] Mr Tayal's evidence was that he had borrowed monies during his employment at A W & B L Mudaliar but this was either in the form of a large loan from the bank which had been sent in full to his father in India, or in the form of smaller loans from friends.

[101] Mr and Mrs Mudaliar's evidence was that smaller loans had been made to Mr Tayal, and these had been recorded by Mr Mudaliar and repaid by Mr Tayal.

[102] In considering whether or not the repayment of a loan constitutes a premium I find that s 12A of the WPA refers to a consideration for employment.

[103] I find the evidence does not support that there were no loans made to Mr Tayal during the course of his employment at A W & B L Mudaliar .

[104] I have taken into account in reaching this conclusion the fact that Mr Tayal did have business interests in India, and he did obtain a significant bank loan which was transferred in its entirety to his father in India. This did not obviate the need for him to borrow monies, and his evidence was that he did obtain loans from friends in New Zealand. That does not preclude his having also borrowed smaller amounts of monies from Mr and Mrs Mudaliar.

[105] I also take into account that the amounts Mr and Mrs Mudaliar claimed Mr Tayal was made during his employment were recorded by Mr Mudaliar on a regular basis, as were any repayments. Whilst these entries were made in writing and were not counter-signed by Mr Tayal, I find they are nonetheless a factor weighing in consideration of whether or not any loans were made by A W & B L Mudaliar.

[106] A premium payment is usually sought in connection with the employment of a person. I find that a loan made to an employee on request does not appear to fall into the provisions of a 12A of the WPA as a premium.

[107] However it does appear to fall within s 12 of the WPA as constituting a stipulation on how Mr Tayal spent his wages because it is clear from the evidence of the telephone conversation between Mrs Mudaliar and Mr Tayal that Mr Tayal was required to repay the loan amount owed before receiving a wages payment.

[108] Unless Mr Tayal was able to borrow monies from his friends to make the repayment, then I conclude it is more likely than not that the payment must have been made from his wages earned at the Superette.

[109] I determine that the requirement that Mr Tayal pay monies to A W & B L Mudaliar before his wages were paid was the employer stipulating the mode of his spending his wages in breach of s 12 of the WPA.

Did A W & B L Mudaliar stipulate how Mr Tayal's wages or other employees' wages should be spent (for till shortages) or alternatively seek and received the payment of a premium in the form of till shortages?

[110] Clause 16.5. of the Second Employment Agreement stated that A W & B L Mudaliar was entitled to deduct monies from Mr Tayal's wages in respect of till shortages.

[111] Mt Tayal's evidence was that he had not read the Second Employment Agreement, just signed it. He had however signed the Second Employment Agreement below the declaration that stated he had read it and fully accepted the conditions of employment set out in it. I find A W & B L Mudaliar was entitled to rely on this signed declaration as indicating Mr Tayal was aware or should have been aware of the deductions clause.

[112] It is submitted that in *Labour Inspector v Mittal & Son Limited & Ors* a deduction from employees' wages in respect of drivers driving away from a garage without having paid for the petrol obtained was held to be illegal and unenforceable and to be treated as premiums.⁷

[113] I observe that was a position put forward by the Labour Inspector in that case, and it was submitted for the First and Second Respondents that it had not been appreciated by them that the drive off deductions could be viewed as a penalty payment.. The issue being accepted

⁷ *Labour Inspector v Mittal & Son Limited & Ors* [2019] NZERA 497

by the Respondents, it was not necessary for the Authority to determine whether or not it fell squarely within the definition of a premium.

[114] In this case, the evidence from Mr Mudaliar in relation to the till shortages was that a discussion was held with the employee and the amount of any till shortage agreed before it was repaid. The amounts involved were small, and Mr Tayal confirmed were not deducted from his weekly wages but repaid by way of cash or by a debit card payment.

[115] A premium made to obtain employment is illegal pursuant to s 12A of the WPA. determined. There is no evidence that agreeing to pay till shortages was a condition of obtaining employment and therefore the payments in respect of till shortages do not come within the first limb of the definition in *Holman*, .⁸

[116] There was no benefit to Mr Tayal or the other employees from making payments in respect of the till shortages.⁹ However there is no evidence to support the view that the employees continued employment was dependent on their repaying any till shortages which moreover appeared to be small amounts and the deduction made were only after discussion and agreement.

[117] I find this weighs against the till shortages being considered to be a premium.

[118] However I do find that the payment for till shortages constituted a stipulation as to how the employees spent their wages in breach of s 12 of the WPA.

[119] I determine that the requirement that the employees pay monies to A W & B L Mudaliar in respect of till shortages was the employer stipulating the mode of their spending his wages.

Did A W & B L Mudaliar fail to pay annual leave entitlements on termination to four employees: Jayant Sharma, Diljeet Singh, Shubham Tayal and James Riddell?

[120] Ms Grimwood identified breaches of s 23 of the HA for the calculation and payment of 8 percent final holiday pay owed upon termination of employment to three employees whose employment came to an end before completing 12 months of continuous employment. The affected employees were Jayant Shama in the sum of \$56.81 gross; Diljeet Singh in the sum of \$1,459.20 gross; and Shubham Tayal in the sum of \$1,699.46 gross.

[121] In the case of Jayant Sharma, there had been a payment to him in respect of holiday pay on termination, which Ms Grimwood believed had arisen due to underpayments to holiday and leave entitlements due to be paid during employment, for example for public holidays not

⁸ Above n 3 at [20] (a)

⁹ Above n 3 at [20](b)

worked that fell on an otherwise working day. The effect of this was to increase gross earnings throughout Mr Sharma's employment and therefore the final calculation.

[122] Ms Grimwood said that she was told that the 8 percent holiday pay had not been paid to Diljeet Singh because he abandoned employment. Mr and Mrs Mudaliar told her that they had relied on a clause in the employment agreement which stated that holiday pay was forfeited if notice was not provided.

[123] As regards Shubham Tayal the final holiday entitlement had not been paid.

[124] Mrs Mudaliar's evidence was that the payment had been offered in cash, on Mr Tayal's final day, but he had refused to take it.

[125] Mr Hilario has confirmed that arrears in respect of annual holiday pay have been made since the investigation meeting to Mr Tayal and Mr Singh, although there is no confirmation that payment for arrears of annual holiday pay has been made to Mr Sharma. Mr Greening submits that all the named employees have received their holiday pay.

[126] It is submitted by Mr Hilario that although some arrears have now been paid, a penalty in respect of the default behaviour is merited.

[127] The evidence supports a finding that annual leave entitlement was not paid as required on termination to the named employees.

[128] I determine that some annual leave payments were paid later than the date they should have paid in accordance with the statutory requirement.

Did A W & B L Mudaliar fail to pay public leave entitlements to five employees: Jayant Sharma, Gurpreet Singh, Diljeet Singh, Shubham Tayal and James Riddell?

[129] Ms Grimwood upon analysis of the employment records said they showed that several public holidays during the employment of Jayant Sharma, Gurpreet Singh, Diljeet Singh and Shubham Tayal fell on what would be considered to be an otherwise working day for these employees because of their work patterns.

[130] The amounts calculated as owing to the employees in respect of the public holidays were:

Jayant Sharma: \$392.80 gross

Gurpreet Singh: \$514.95 gross

Diljeet Singh: \$478.67 gross

Shubham Tayal: \$1009.87 gross

[131] Ms Grimwood's conclusion was that rosters had been purposefully organised to avoid payment of public holidays to employees on days which would be considered an otherwise working day.

[132] Mr and Mrs Mudaliar denied that the rosters had been manipulated to avoid paying the employees in respect of public holidays. Their evidence was that as a small business and to accommodate the employees' wish for flexibility, it had been difficult to ascertain what would constitute an 'otherwise working day'.

[133] Mr and Mrs Mudaliar said that the named employees were paid for the days which were 'otherwise working days' and therefore the Superette had complied with the HA requirements.

[134] In regard to Mr Riddell, their evidence was that he did not work any public holidays and had been paid correctly.

[135] Mr Hilario confirmed that arrears in respect of public holiday pay have been paid to Mr Tayal and Mr Riddell, however arrears remained outstanding to Mr Singh, Mr Sharma and Gurpreet Singh.

[136] I find credible Mr and Mrs Mudaliar's evidence that they tried to accommodate employee preferences on working days and therefore there was no intention to evade paying public holiday entitlements. However, as outlined in the Labour Inspector's report, this is in fact what occurred.

[137] I determine that public leave entitlements were not paid correctly, or were paid late, to the named employees.

Did A W & B L Mudaliar fail to keep accurate and holiday and leave records in respect of all six workers?

[138] It is accepted by Mr and Mrs Mudaliar that they did not comply with s 81(2) of the HA in that they failed to accurately record all holiday and leave details for all six of its employees.

Did A W & B L Mudaliar fail to include mandatory information in the employment agreements of named employees?

[139] Ms Grimwood identified a number of areas in which mandatory information in the employment agreements of four employees had not been recorded. These were:

Gurpreet Singh – no restructuring provisions in breach of s 65 and s 69OJ of the Act

Diljeet Singh - no restructuring provisions in breach of s 65 and s 69OJ of the Act

Kahui Tangaroa - no provisions regarding the description of the work to be performed, place of work, plain language explanations for bringing a personal grievance, restructuring, and time and a half pay provisions, in breach of s 65 and s 69OJ of the Act and s 52 of the HA.

James Riddell – no provisions regarding the description of the work to be performed, place of work, plain language explanations for bringing personal grievance, and restructuring in breach of s 65 and s 69OJ of the Act.

[140] In addition the individual employment agreement of James Riddell contained a clause providing that holiday pay of 8 percent would be paid out on a six monthly interval which would be in breach of s 16 and s 28A of the HA if implemented.

[141] Mrs Mudaliar said Mr Diljeet Singh provided an employment agreement drafted by his lawyer, she did not draft it. As regards the employment agreements for Mr Tangaroa and Mr Riddell, these were casual employment agreements which had been built using the assistance of the employment contract builder website. The holiday clause was added into Mr Riddell's employment agreement at his request.

[142] I determine that whilst it may not have been by deliberate intention, mandatory information was omitted from the employment agreements of the named employees.

Should any penalties be imposed on the Respondents, and if so, in what quantum?

[143] It is submitted for the Labour Inspector that, whilst acknowledging that penalties are a discretionary remedy, they are appropriate in this case.

[144] It is submitted for the Respondents that it would be manifestly unfair for the Authority to order penalties given the breaches of employment standards were minor and inadvertent in nature. The breaches were mainly tied to incorrect record keeping and calculations rather than to an intention to pay employees incorrectly.

[145] It is submitted for the Respondents in light of the minor and inadvertent nature of the breaches that an Improvement Notice could have been issued.

[146] Pursuant to s 161(m)(ii) and s 16 (m)(iv) of the Act, the Authority has jurisdiction to determine an application by a Labour Inspector for recovery of penalties under the Act, the HA, and the WPA. As the Employment Court observed in *Xu v McIntosh*, the standard of proof applying in the Authority is on the balance of probabilities.¹⁰

[147] In approaching this issue of penalties I adopt the process of the four-step framework set out in *Borsboom v Preet PVT Limited*.¹¹ :

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

The Object of the Act

[148] Section 3 of the Act notes that its object is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment”, This is achieved by “acknowledging and addressing the inherent inequality of power in employment relationships” and promoting “the effective enforcement of employment standards” by Labour Inspectors.

[149] The breaches in this case under the HA and the WPA were breaches of employment standards. The employees were migrants and there was an inequality of power between them and the Respondents. Some of the employees were not paid annual and/or public holiday leave entitlement on termination.

[150] There were defects in the employment agreements in that mandatory information was not included.

¹⁰ *Xu v McIntosh* [2004] 1 ERNZ 448 at [29]

¹¹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 43

Nature and Number of the breaches

[151] The Labour Inspector submits there are seven general types of breaches identified:

- i. Premium payments in breach of s 12A of the WPA (the premium breaches);
- ii. Unlawful deductions from wages in breach of s 6 of the WPA;
- iii. Stipulation as to mode of expending wages (for till shortages) in breach of s 12 of the WPA (the stipulation breach)
- iv. Record keeping breaches under s 81(2) of the HA (the record keeping breaches);
- v. Individual employment agreement documentation breaches under s 65 and a 69 OJ of the Act (the IEA documentation breaches);
- vi. Breaches of s 23 and s 29 of the HA relating to payment of annual holiday pay (the annual holiday pay breaches); and
- vii. Breaches of ss 49, 50 and 56 of the HA relating to public holiday pay on termination (the public holiday pay breaches).

[152] I did not find that there were any premium payments made during the course of Mr Tayal's employment, nor did I find that a claim by Mr Tayal that he had been required to make wage repayments in respect of a difference in pay rates to be substantiated.

[153] I accept that there were unlawful deductions from wages, in addition to the failures in record-keeping and breaches of the Act, the HA and the WPA.

[154] Accordingly I find that there were 21 individual breaches. This is a total penalty against the First Respondent, A W & B L Mudaliar of \$420,000.00, calculated as 21 breaches at \$20,000.00 per breach

Where the breaches intentional, inadvertent or negligent?

[155] The Labour Inspector submits that the Respondents who had been in the grocery business for 22 years should have had awareness of the relevant matters under the HA and the Act and have been aware of the requirement to keep accurate and complete records, and the need to ensure all mandatory information was included in employment agreements.mn

[156] The Labour Inspector submits that the Respondents acted intentionally by failing to fulfil their legal obligations.

[157] It is submitted for the Respondents that the breaches of employment standards were minor and inadvertent in nature.

[158] Having considered the evidence, I do not find that the breaches were intentional in the sense of having been taken in order to deprive employees of monies to which they were legally entitled, although that had been the effect in some cases.

Mitigation Steps

[159] Payments in respect of arrears have been made to most employees, however there are some still outstanding, and those that have been paid, were paid after they were due to be paid.

Circumstances of the breach and any vulnerability factors

[160] The employees were all migrant workers which increases their vulnerability.

[161] Mr and Mrs Mudaliar's evidence was that they recognized the status of their employees and tried to accommodate their situation working in a small rural environment away from family and friends in regard to leave requirements. Their evidence was that this accommodation impacted the legal requirements in regard to public holiday leave.

[162] It is also not disputed by Mr Tayal that Mr Mudaliar discussed the roster with the employees and made accommodations on it for their personal preferences.

[163] I therefore do not find the evidence, other than the noted breaches, support there having been exploitation of the migrant status of the employees.

Previous Conduct

[164] The Respondents have no previous adverse history with the Labour Inspector and have not previously been before the Authority.

Preet Step 1: the nature and number of the breaches

[165] The approach to quantification in *Preet* allows for a consideration of whether any of the breaches can be globalised. When applied, this has the effect of allowing for the application for one penalty for each.

[166] Focusing on the nature of the breaches rather than on the frequency I group the failures to comply with requirements of the HA in regard to the failure to keep accurate holiday and leave records, failure to pay annual leave entitlement on termination and to pay public leave entitlement ; failure to comply with the requirement to include mandatory information in

employment agreements; and failure to comply with the requirements of the WPA by the making of unlawful deductions and stipulation as to the mode of expensing wage.

[167] On a pragmatic basis this reduces the breaches down to three representative ones. As follows:

Two breaches of the WPA: s 6 and s 12,

Two breaches of the Act (ss 65 and 69OJ)

Six breaches of the HA (ss 81,53, 23, 29 49,50 and 56)

[168] This reduces the penalty liability to \$200,000.00.

Preet Step 2 - severity of the breaches

[169] There is a public interest factor in that the penalty regime is intended to have a deterrent effect and deter other employers from acting in a similar matter.

[170] In this case the employees were migrant workers. However I have not found an exploitative element and the employers were cooperative with the Labour Inspector's investigation. The fact that A W & B L Mudaliar maintained a manual rather than an automated system did not mean that they used it to wilfully deprive the employees of their statutory rights. I also note that payments of some arrears have now been paid.

[171] In these circumstances I consider a further reduction of 50 percent of the total penalty amount is warranted, to \$100,000.00.

Preet Step 3- Ability to Pay

[172] There is no evidence before the Authority that A W & B L Mudaliar is unable to meet any penalty payment.

[173] Accordingly no adjustment to the penalty amount is made at this stage.

Preet Step 4 - Proportionality

[174] At this stage I am required to stand back and consider proportionality with other comparable situation in which penalties have been imposed by the Authority and the Employment Court.. This is to ensure that the final figure I determine is proportionate to the extent and severity of the breaches, and also taking into account the context and number of employees affected by the breaches.

[175] I have taken into account that the most serious alleged breaches affected Mr Tayal, being the premium payment claims. These I have not determined as being established.

[176] I did find that there were breaches of s 12 of the WPA and other breaches I have determined as being established affect all the employees, but I have not found them to be necessarily exploitative. I have taken into the account that this is a small business operating in a small rural town and that Mr and Mrs Mudaliar appear to have tried to accommodate the needs of their employees with the needs of the business.

[177] There was full cooperation with the Labour Inspector's investigation and there has been payment of most of the arrears.

[178] In all the circumstances, I find it just that A W & B L Mudaliar pay a penalty of \$10,000.00.

Should Mr and Mrs Mudaliar pay penalties as persons involved in the breaches of minimum employment standards?

[179] Mr and Mrs Mudaliar are joint directors and shareholders of A W & B L Mudaliar. They operated the business between them, Mr Mudaliar preparing the rosters and dealing with the Superette operations, Mrs Mudaliar administering the accounts and employee contractual administration.

[180] I take the same *Preet* approach as adopted and the same factors noted above for reducing the total penalty of \$210,000.00 per person, calculated as 21 breaches at \$10,000.00 per breach.

[181] These include the globalisation factor, the severity of the factors, and ability to pay. This reduces the penalty amount to \$105.00 per person.

[182] The last stage is proportional. In all the circumstances I find it just that Mr and Mrs Mudaliar pay a penalty of \$3,000 each.

Orders

(1) Penalties

[183] Within 28 days of the date of this determination being issued A W & B L Mudaliar must pay to the Crown a penalty in the sum of \$10,000.00.

[184] On the same terms as above: Mr and Mrs Mudaliar must each pay a penalty to the Crown in the sum of \$3,000.00.

(2) Arrears

[185] Within 28 days A W & B L Mudaliar must pay the following amounts of arrears of holiday pay to the Labour Inspector for the use of the employees named below (unless A W & B L Mudaliar can satisfy the Labour Inspector that the arrears have been paid):

- i) Jayant Sharma in the amount of \$56.81 gross in respect of annual holiday pay
- ii) Diljeet Singh in the amount of \$478.67 gross for unworked public holidays
- iii) Jayant Sharma in the amount of \$392.80 gross for unworked public holidays
- iv) Gurpreet Singh in the amount of \$514.95 gross for unworked public Holidays

(3) Interest

[186] The Labour Inspector seeks interest on the unpaid monies in respect of the holiday pay and unworked public holiday arrears. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act.

[187] I consider it appropriate therefore to award interest on the amounts owed to the named employees.

[188] 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.

Recommendation

[189] As was submitted by the Respondents, this is a case in which an Improvement Notice might have been issued, however I accept that since premium payment claims were involved, it was appropriate that it came before the Authority.

[190] Pursuant to s 123(ca) of the Employment Relations Act 2000 I recommend that Mr and Mrs Mudaliar work with a Labour Inspector to ensure that their work practices and all their manually maintained records accurately conform to the statutorily required standards

Costs

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

[192] If they are not able to do so and an Authority determination on costs is needed the Applicant 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 the Respondent 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.

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

[194] 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.¹²

Eleanor Robinson
Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].