

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 634
3147302

BETWEEN	A LABOUR INSPECTOR Applicant
AND	HANUBH INVESTMENTS PVT LIMITED First Respondent
AND	NARENDRA HIRALAL SONI Second Respondent
AND	ANITABEN NARENDRA SONI Third Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Oscar Upperton, counsel for the Applicant
Michelle Clark, counsel for the Respondents

Investigation Meeting: On the papers

Determination: 18 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment commenced proceedings against the respondents alleging breaches of minimum entitlements and a failure to keep a holiday and leave record in respect of a complainant, Varshaben Chaudhary, for the period of her employment. The parties by consent seek orders that Hanubh Investments Pvt Limited committed the following breaches in respect of the complainant, Varshaben Chaudhary, namely:

- (a) Section 6 of the Minimum Wage Act 1983 (MWA) by failing to pay Varshaben Chaudhary the minimum wage for all hours worked;

- (b) Sections 21, 24 and 25 of the Holidays Act 2003 (HA) by failing to calculate and pay the correct annual holiday pay to the complainant on termination of employment;
- (c) Section 50(1) of the HA by failing to pay the complainant the correct time and a half pay;
- (d) Section 60(2)(b) of the HA by failing to pay the complainant alternative holiday pay on termination of her employment;
- (e) Section 81(2) of the HA by failing to keep a holiday and leave record for the complainant for the period of her employment;
- (f) Section 4B and 130(1) of the Employment Relations Act 2000 (the ERA) by failing to accurately record all the mandatory information for the complainant for the period of her employment.

[2] The parties also seek the following orders, namely:

- (a) An order confirming that Narendra Hiralal Soni and Anitaben Narendra Soni as directors and shareholders of Hanubh Investments Pvt Limited are persons involved in the breach of employment standards outlined above; and
- (b) An order that Hanubh Investments Pvt Limited is liable to pay arrears in respect of the breaches outlined above to a total of \$106,237.46 and that Narendra Hiralal Soni and Anitaben Narendra Soni are liable to pay arrears of \$106,237.46 to the extent Hanubh Investments Pvt Limited is unable to in accordance with s 142Y of the ERA.

[3] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the chief of the Authority has decided exceptional circumstances exist which allow a written determination at a later date.

Consent orders

[4] At the parties' request, the terms agreed between the parties and set out above are now orders of the Authority.

Penalties

[5] The parties have asked the Authority to deal with penalties on the papers. Both parties have filed submissions in respect of penalties. The parties have agreed there are a number of outstanding breaches, and Hanubh Investments Pvt Limited has paid the outstanding arrears owing to the complainant. In *Borsboom (Labour Inspector) v Preet Pvt Limited*, *A Labour Inspector v Daleson Investment Limited* and in other cases, the Court has confirmed the relevant considerations when assessing penalties. I will consider these in turn.

Statutory consideration 1 – the object of the ERA

[6] Section 3 of the Act provides that the objects are to:

- (a) Promote good faith in all aspects of the employment environment and the employment relationship;
- (b) Promote the effective enforcement of employment standards, in particular by Labour Inspectors; and
- (c) To acknowledge and address the inherent inequality of power in employment relationships.

[7] The respondents' wrongdoing left the employee out of pocket, however, that particular aspect has now been remedied.

Statutory consideration 2 – the nature and extent of the breach

[8] There are six types of breaches that have been committed by Hanubh Investments Pvt Limited in respect of the complainant, namely:

- (a) Failure to pay at least the minimum wage for every hour worked;
- (b) Failure to calculate and pay for annual holidays upon termination;
- (c) Failure to pay time and a half for work done on public holidays;
- (d) Failure to pay for alternative holidays;
- (e) Failure to keep compliant holiday and leave records;
- (f) Failure to keep compliant wage and time records.

[9] There is one employee affected by the breaches, with a total of six breaches resulting. I consider that it is appropriate to globalise the breaches set out above as follows, with a focus on the systems issues leading to the breaches. There is:

- (a) A breach caused by the failure to pay the minimum wage for every hour worked;
- (b) A breach caused by failure to calculate and pay for annual holidays upon termination;
- (c) A breach caused by failure to pay time and a half for work done on public holidays and failure to pay for alternative holidays;
- (d) A breach for failure to keep compliant holiday and leave records and failure to keep compliant wage and time records.

Statutory consideration 3 – whether the breach was intentional, inadvertent or negligent.

[10] The respondents purchased the business with the intention of having a manager run it for them. They say it was the complainant who was to have overall responsibility for the running of the store, including recordkeeping functions. However, the respondents cannot shift the responsibility for keeping records or underpaying the complainant, on to the complainant. The respondents needed to take steps to ensure they were complying with minimum standards. It appears they did not do so.

Statutory consideration 4 – the nature and extent of any loss or damage

[11] Whilst the employee lost the use of money she was entitled to at the time it became due, she has since been reimbursed. She did, however, lose the ability to take paid leave at times when she would otherwise have been entitled to do so. Hanubh Investments Pvt Limited did have a period where it had reduced its costs and thus gained a competitive advantage over other employers.

Statutory consideration 5 – steps to mitigate effects of the breach

[12] The arrears have been paid in full.

Statutory consideration 6 – circumstances of the breach and any vulnerability

[13] The complainant had a degree of vulnerability given her reliance on her employer for her visa status. Having said that, the respondents say the complainant was

able to change roles and vary the conditions of her work visa at any time. Nonetheless, the complainant clearly had a degree of vulnerability.

Statutory consideration 7 – previous conduct

[14] The respondents have not previously appeared before the Authority in respect of similar complaints.

Additional consideration 8 – deterrence

[15] The breaches in this case relate to minimum standards. As the Court has noted, there is a need to bring home to the respondents the standards they are required to meet. Since having been put on notice of the issues by the Labour Inspector, the respondents have taken steps to ensure they meet the required standards in the future.

Additional consideration 9 – culpability

[16] This is a relatively small business and Narendra and Anitaben Soni are actively involved in the business and have taken responsibility for it. They assisted the process by cooperating in the preparation of a statement of agreed facts, thus allowing a penalty determination on the papers which effectively reduced costs to both parties.

Additional consideration 10 – consistency

The Court and the Authority have imposed relatively significant penalties in matters involving minimum wage and record keeping breaches, despite these breaches involving relatively small numbers of employees. The Labour Inspector submits that weighing the relevant aggravating and mitigating factors, a reduction is warranted in the present case of 20 percent in recognition of the arrears paid.

Additional consideration 11 – ability to pay

[17] Hanubh Investments Pvt Limited's financial accounts show that the company had been operating at a loss. There was also a bank loan requiring repayment at a rate of some \$1,600 per month. Mr and Mrs Soni have taken out a loan through another company to meet the arrears which have now been paid.

Additional consideration 12 – proportionality of outcome

[18] Penalties should not be reduced so as to create perverse incentives for employers and inadvertently encourage non-payment.¹ The Labour Inspector does not consider that the penalty should be reduced in this case for proportionality. They say the amount of penalty sought is necessarily low as only one employee was affected by the breaches. I disagree with any suggestion that because only one employee was affected, it somehow should result in a higher level of penalty if indeed that is the submission. Proportionality is achieved by calculating the breaches on a per breach, per employee basis. The Authority needs to consider whether or not any penalty would be significantly out of proportion to the gravity of the breaches and whether there is a real risk that it could be of such magnitude as to create a significant risk of non-payment.

[19] It is the Labour Inspector's view that following the consideration steps set out above, Hanubh Investments Pvt Limited should pay a penalty of \$43,200. The Labour Inspector submits that Narendra Hiralal Soni should pay a penalty of \$21,600 and Anitaben Narendra Soni should pay a penalty of \$17,280. This would mean the directors/shareholders would pay a combined penalty of some \$38,880. My view is that the liability for Narendra Hiralal Soni and Anitaben Narendra Soni should be a joint and several liability.

[20] Having considered all the matters, including the guidance provided by the Court in respect of penalties, I order Hanubh Investments Pvt Limited to pay penalties as follows:

- (a) Failure to pay at least the minimum wage, I consider the maximum penalty of \$20,000 should be reduced to \$10,000.
- (b) In respect of the failure to calculate and pay for annual holidays upon termination, I consider the maximum penalty of \$20,000 should be reduced by 50 percent to \$10,000.
- (c) In respect of failure to pay time and a half for work done on public holidays and failure to pay for an alternative holiday, I consider the maximum penalty of \$20,000 should be reduced by 50 percent to \$10,000.

¹ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

- (d) In respect of the failure to keep compliant wage and time and holiday and leave records, I consider the maximum penalty of \$20,000 should be reduced by 50 percent to \$10,000.
- (e) In respect of ameliorating factors, there should be a further discount of 20 percent followed by a 50 percent discount for the respondents' financial circumstances.

[21] Having considered proportionality, the total penalty Hanubh Investments Pvt Limited must pay is the sum of \$16,000.

[22] Narendra Hiralal Soni and Anitaben Narendra Soni jointly and severally are to pay penalties as follows:

- (a) In respect of the failure to pay minimum wage, the maximum penalty of \$10,000 should be reduced by 50 percent to \$5,000.
- (b) In respect of the failure to calculate and pay for annual holidays upon termination, I consider the maximum penalty of \$10,000 should be reduced by 50 percent to \$5,000.
- (c) In respect of failure to pay time and a half for work done on public holidays and failure to pay for an alternative holiday, I consider the maximum penalty of \$10,000 should be reduced by 50 percent to \$5,000.
- (d) In respect of the failure to keep compliant wage and time and holiday and leave records, I consider the maximum penalty of \$10,000 should be reduced by 50 percent to \$5,000.
- (e) In respect of ameliorating factors, there should be a further discount of 20 percent followed by a 50 percent discount for the respondents' financial circumstances.

[23] Taking into account proportionality, the total penalty to be paid by Narendra Hiralal Soni and Anitaben Narendra Soni totals \$8000.

[24] The Labour Inspector has noted the Authority has discretion to award part of any penalty to the complainant. I have considered this but do not think this is an appropriate case for a proportion to be paid to the complainant who has already received significant agreed arrears. Accordingly, I decline to do so.

Summary of orders

[25] Hanubh Investments Pvt Limited is ordered to pay a penalty of \$16,000 to the Crown.

[26] Narendra Hiralal Soni and Anitaben Narendra Soni are jointly and severally ordered to pay a penalty of \$8,000 to the Crown.

Non-publication order

[27] The respondents seek an order prohibiting the publication of their names and any feature which might identify them. They do so on the grounds that Anitaben Narendra Soni has had no involvement of the day-to-day operations of the company and there should be no penalties imposed on the third respondent. Further, she has been suffering from health issues. The difficulty with this is that all respondents accept the breaches as set out in the Labour Inspector's statement of problem.

[28] Further, the Labour Inspector opposes an order for non-publication. The Labour Inspector's view is the correct starting point is the principle of open justice and that the burden of establishing the scope of any non-publication order in this case lies with the respondents. Non-publication is not sought to protect the reputation of others and there is simply insufficient evidence provided for me to grant the order. Accordingly, the application for non-publication orders is denied.

Costs

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

[30] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the Labour Inspector may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondents will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[31] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.²

Geoff O’Sullivan
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1