

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 66
3159481

BETWEEN A LABOUR INSPECTOR
Applicant

AND RURAL PRACTICE
LIMITED
First Respondent

AND REZA ABDUL-JABBAR
Second Respondent

AND SILVIA ABDUL-JABBAR
Third Respondent

Member of Authority: Alastair Dumbleton

Representatives: Rochelle Hill, Amy Webster (29 May-1 June 2023) and
Briar Colville (17-19 July, and 1-2 August 2023),
counsel for the Applicant

Mark Hammond, counsel for the Respondents

Investigation Meeting: 29 May-1 June, 17-19 July, and 1-2 August 2023, at
Invercargill

Submissions received: 9 October, 8 and 23 November 2023

Determination: 7 February 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On the application of a Labour Inspector to recover arrears of wages and remuneration, holiday pay, other money, and penalties for breaches of statutory employment standards, the Authority has investigated the employment of workers by Rural Practice Ltd, the first respondent.

[2] It is accepted by the respondents that Rural Practice Ltd was the entity which employed the workers, although on their written employment agreements the employer's name was shown as The Rural Practice Trust. There is no dispute that Rural Practice Ltd is a trustee of the Rural Practice Trust. The employer will be referred to in this determination as Rural Practice Ltd (RPL).

[3] Three workers came from Indonesia to work for RPL on its Invercargill dairy farm. They were employed there for periods between December 2017 and February 2022.

[4] In December 2020 one of the workers, Agus Sutaji, rang the Contact Centre of the Ministry of Business, Innovation and Employment (MBIE) and complained that he had not been paid the salary recorded in his written employment agreement or given the number of agreed days off each fortnight. He also complained that his employer had taken possession of his passport and identity documents and kept them after he had asked for them back.

[5] Mr Sutaji's complaint was assigned to a Labour Inspector for investigation. The Inspector interviewed Mr Sutaji and others who had been employed on the farm, including other Indonesian workers. She also interviewed the directors and owners of RPL, Reza Abdul-Jabbar and his wife Silvia Abdu-Jabbar, who are named as the second and third respondents to the Inspector's application.

[6] RPL was incorporated in May 2004 and had not been investigated before by a Labour Inspector.

[7] The Inspector completed her final Investigation Report in September 2021 and provided it to the respondents.

The employment agreements

[8] From documentation obtained, the Inspector concluded that Immigration New Zealand (INZ) had granted Mr Sutaji a work permit, allowing him to be employed by RPL as an Assistant Herd Manager for a salary of \$55,000 per annum. His permit was for work to be performed under an individual employment agreement (the IEA for \$55K), a copy of which was received by INZ when the permit was applied for.

[9] From the signatures on the document INZ received, it appeared to have been signed by Mr Sutaji as employee and by R and/or S Abdul-Jabbar on behalf of RPL as employer.

[10] Before the permit was granted, by email Reza Abdul-Jabbar confirmed to INZ that Mr Sutaji had been offered a position by RPL to work on its farm and that his remuneration would be \$55,000 including accommodation.

[11] Mr Sutaji showed the Inspector an IEA he had been given by RPL. It stipulated a salary of \$45,000 (the IEA for \$45K). Records produced by RPL to the Inspector indicated Mr Sutaji had been paid no more than that.

[12] In May 2021, when asked to explain the discrepancy in salary between the two IEA's, RPL advised the Inspector that the IEA for \$45K was the correct one. The employer advised that Mr Sutaji had been paid wages as agreed in that IEA and had not been paid less than the statutory minimum wage at any time.

Wages and time records

[13] When the Inspector investigated Mr Sutaji's hours of work she found RPL was not able to provide time records kept for him. Although his pay was expressed to be 'salary', the IEA for \$55K on which the application for a work permit had been based, stipulated '40 - 45' hours work per week, in the space provided in the document. In the IEA for \$45K that space was left blank.

[14] The Inspector concluded it was likely that Mr Sutaji had been underpaid the \$55K contractual remuneration for every hour or pay period worked by him for RPL. Although there were insufficient records available to provide greater certainty, using other information she obtained, the Inspector concluded the level of underpayment was such as to breach the Minimum Wage Act 1983 (the MWA).

[15] The Inspector also concluded that another Indonesian worker, Falentino Sembiring, who was employed by RPL on a salary of \$55,000, had been paid less than his contractual entitlement in each pay period.

[16] The Inspector received information from other workers raising a possibility that they had not been given written employment agreements when they commenced

employment with RPL. They told the Inspector that only after she began her investigation, were they asked to complete written IEA's.

[17] The Inspector found the lack of time records kept by RPL hampered her ability to calculate claims for arrears of wages over the entire employment of Mr Sutaji.

[18] She found wage and time records had not been kept for Mr Sembiring. She also found there were inconsistencies between payslips RPL had produced and other information the employer provided of time worked by him in each pay period.

[19] The Inspector found that RPL did not have wages and time records for six workers, as had been required to be kept by s 130 and also s 4B of the Employment Relations Act 2000 (the ER Act).

[20] The Inspector found holiday and leave records for the same workers had not been kept as required by s 81 of the Holidays Act 2003 (the HA), particularly in relation to the entitlement under the HA to public holidays observed during each year of employment. Annual holidays and pay for those were also not properly recorded.

[21] RPL claimed it had kept sufficient records and had paid its employees properly for all holidays, including public holidays when work had been performed on the day the holiday was observed.

Deductions from wages

[22] The Inspector also investigated whether deductions had been made by RPL from the pay of any of the workers, and if so whether the Wages Protection Act 1983 (the WPA) had been complied with to permit the deductions.

[23] An invoice of fees for recruitment services charged in Indonesian currency equivalent to NZ\$5,000 or more, was produced by RPL to the Inspector. RPL said the services had been provided by a recruitment agent in Indonesia to Mr Sutaji at his request, when he was seeking employment with RPL.

[24] RPL said it had not charged Mr Sutaji any money but on his behalf had paid his outstanding bill to the recruitment agent. RPL said Mr Sutaji had agreed to repay the invoiced amount by having it deducted from his pay.

[25] When the Inspector enquired of him, Mr Sutaji denied he had hired a recruitment agent in Indonesia or that he owed RPL the amount it said it had paid on his behalf. He also denied signing any agreement to have pay deductions made by RPL for recruitment services.

[26] In her report the Inspector concluded that the deductions were not consented to by Mr Sutaji and were in breach of s 12A of the WPA.

Premiums

[27] The Inspector investigated premiums and whether the payment of those had been demanded or received by RPL from any worker, as the price of their employment, in breach of the WPA. She concluded premiums had been charged and paid on several occasions, when sums of cash were given to Mr Abdul-Jabbar by the Indonesian workers, after they had withdrawn the money from ATM's at his request.

Application to the Authority

[28] After providing her report to RPL and attempting through its solicitors to resolve matters as far as possible, in December 2021 the Inspector applied to have the Authority investigate and determine RPL's liability and the amounts of pay and other money due to the Indonesian workers. She alleged both contractual and statutory pay entitlements, including holiday pay, had not been received by them in full, deductions had been made unlawfully, and premiums had been sought and received unlawfully.

[29] Calculations by the Inspector provided with her application, gave a total amount of over \$215,000 claimed for three workers. For each worker the amount claimed was¹;

Agus Sutaji - \$82,046-14²

¹ Amended Statement of Problem dated 15 March 2022, paras 3.1 to 3.14

² Shown as \$81,611.09 in Doc 93A, p 1225 of Common Bundle of Evidence, and in Applicant's Closing Submissions, para 153

Falentino Sembiring - \$121,988-49³

Tedi Pribadi - \$11,858-35

TOTAL: \$215,892-98

[30] Payment of interest was sought from RPL on these amounts.

[31] The Inspector has claimed total penalties of \$260,000⁴ against the company, for failing to comply with employment standards under the ER Act, MWA, WPA and HA.

Second and third respondents

[32] As well as RPL, the Labour Inspector brought her application against the second and third respondents, Reza Abdul-Jabbar and Silvia Abdul-Jabbar, who at material times were directors and shareholders of RPL. The liability alleged of them was based on a claim they were persons involved in RPL's alleged breaches of employment standards.

[33] Reza Abdul-Jabbar described himself to the Authority as an Indonesian New Zealander. Both he and his wife Silvia Abdul-Jabbar had professional qualifications as well as practical experience relevant to their farming business. Reza had New Zealand university degrees in Agricultural Science. He had progressed to farm management and ownership after working for others in New Zealand on their farms. Silvia was a qualified accountant and looked after most of the paperwork and bookkeeping required by the business. She also assisted in day-to-day operations such as calf-rearing and staff management.

[34] During the employment of the workers, Reza and Silvia were living with their young children in their home on RPL's dairy farm, where workers also lived in separate houses owned by RPL.

³ Shown as \$118,730.33 (as amended) in Doc 94A, p 1235 of Common Bundle of Evidence, and in Applicant's Closing Submissions, para 153

⁴ Applicant's Closing Submissions, Appendix Two

[35] Tragically, after the investigation of the Authority began, Silvia became terminally ill. She died on 22 September 2022.

[36] RPL and Reza applied to have the proceedings discontinued against Silvia and, on compassionate grounds, the Inspector withdrew the claim for penalties brought against her personally, arising from alleged involvement in RPL's breaches.

[37] She or her legal personal representative have remained joined as a respondent party to the Authority's investigation.

[38] In some circumstances a person involved in a breach may have liability extended to them if an employer defaults in paying wages or other money due from employment and which has been ordered by the Authority to be paid. Under s 142Y of the ER Act, arrears of wages or other money may be recovered from a person involved, if the employer is unable to pay.

[39] If found to be persons involved in a breach, Reza, or the estate of Silvia, or both, may become liable for arrears, depending on any liability the Authority determines RPL has and whether RPL is unable to pay any amount ordered against it.

[40] Against Reza Abdul-Jabbar for being a person involved in breaches by RPL, total penalties claimed are \$130,000⁵.

Investigation meeting

[41] Because of the scope of the employment relationship problem in this case, the scale of conflict in the evidence of witnesses, and the nature and critical importance of several areas of fact disputed by the parties, the necessary examination and cross examination of witnesses led to the meeting taking far longer than the time first allocated for the hearing.

[42] Over nine meeting days, evidence was taken from 12 witnesses who were affirmed and examined by the Authority and by counsel Ms Webster, Ms Hill and Mr Hammond. Oral evidence was supported by some 1600 pages of documents produced

⁵ Applicant's Closing Submissions, Appendix Three

by the parties. Electronic visual and audio communications by cell phone between some of the workers were produced to the Authority.

[43] An episode from the TV programme Country Calendar was viewed. It went to air in August 2019 and showed RPL's dairy farming operations. It showed Reza and Silvia Abdul-Jabbar and some of RPL's employees at work. It also showed Reza leading prayers as the Imam of the Invercargill mosque for the local Muslim community, in his role as a priest or minister. He likened an Imam to a Bishop.

[44] Ms Hill and Mr Hammond provided comprehensive written closing submissions addressing the employment relationship problem and how the Authority should resolve it, taking full and proper account of all relevant matters of fact and law.

[45] This determination is given in accordance with s 174E of the ER Act and does not record all the evidence or information considered by the Authority, or submissions received.

Credibility

[46] Believability of witnesses is a key issue in this case where there has been accusation and counter accusation of dishonesty and collusion, made of each other by the respondents and the workers. There are strong conflicts of evidence, requiring the Authority to look carefully at the general conduct of the respondents and the workers, before making findings and determining the Inspector's claims. The evidence included the report of a handwriting expert who examined signatures on IEA's and other documents obtained by the Inspector.

Partial payment of amounts claimed

[47] As the investigation meeting progressed, RPL withdrew its opposition to some of the claims the Inspector had brought to the Authority. RPL confirmed its intention to pay arrears of contractual wages and holiday pay in a total of \$64,387.56⁶, plus interest from specified dates. In closing submissions of 23 November 2023, counsel Mr Hammond advised the payments had been made.

⁶ Submissions for the Respondents dated 8 November 2023, para 25

[48] The amounts paid were under heads of claim for Mr Sutaji, Mr Sembiring and Mr Pribadi, that had been set out in the Amended Statement of Problem dated 15 March 2022. They were for arrears of annual and public holiday pay (approximately \$16,000 in total) and for unlawful deductions from wages (approximately \$49,000 in total).

[49] The payments made by RPL reduced the Inspector's claim to recover wages, holiday pay and other money, from \$215,892⁷ to \$151,190.

[50] For each worker the total claimed is;

Agus Sutaji	-	\$44,960.07 ⁸
Falentino Sembiring	-	\$106,229.95
Tedi Pribadi	-	Nil

TOTAL: \$151,190.02

The Inspector's actions to recover wages or remuneration, holiday pay, unlawful deductions, and other money, and penalties

[51] There is no dispute that the workers who came from Indonesia, Agus Sutaji, Falentino Sembiring and Tedi Pribadi, each entered into a relationship of employment under an employment agreement, or that their employer was the first respondent RPL.

[52] Accordingly, s 130 of the ER Act required RPL, as an employer, at all times to keep in writing a wages and time record containing the information detailed in s 130(1). In addition, s 4B of the ER Act required RPL to keep that record in sufficient detail to demonstrate that it had complied with minimum entitlement provisions contained in the MWA, HA and WPA.

[53] Failure to comply with s 130 is a breach of an employment standard for which a penalty may be imposed by the Authority. A breach has been alleged and a penalty is claimed by the Inspector, who is empowered to bring that action.

⁷ Amended Statement of Problem, paras 3.1 to 3.18

⁸ There is a difference of \$315.40 between the amount of claim at para 3.2 of Amended Statement of Problem - \$14,345.17, and the amount paid by Respondent - \$14,029.77

[54] For any work the workers performed, they were required to be paid by RPL at least the minimum wage fixed for adult workers. If they were not paid that, the Labour Inspector is empowered to bring an action under s 11 of the MWA to recover the shortfall. Her claim includes an action to recover minimum wages.

[55] The employees were also required to be paid wages or remuneration at the rate agreed to by RPL under the employment agreement, regardless of whether that agreement was oral or written.

[56] If they were not paid agreed wages or remuneration, the workers may bring an action under s 131 of the ER Act to recover the shortfall.

[57] A failure to pay contractual wages or remuneration to workers in the period they fall due, amounts to a deduction⁹. Any deduction from wages or remuneration made by an employer without written consent by a worker (including consent in a general deductions clause in the employment agreement) may be recovered by the worker, or by a Labour Inspector on behalf of a worker, under s 11 of the WPA.

[58] The Inspector's claim includes an action to recover underpayments of contractual wages or remuneration.

[59] The workers employed by RPL had the public holiday and annual holiday entitlements of the HA provided to all workers. Under s 77 of the HA, a Labour Inspector is empowered to take action to recover unpaid holiday pay. The claim includes an action to recover holiday pay.

[60] The workers employed by RPL had their wages protected by the WPA. As an employer, RPL was not permitted to seek or receive from the workers or any other person, any premium in respect of their employment. Under s 12A of the WPA, a Labour Inspector may bring proceedings on behalf of a worker for the recovery of the amount of any premium paid.

[61] The Inspector's claim includes an action to recover the amount of premiums alleged to have been paid to RPL by the Indonesian workers.

⁹ *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [200] NZCA 580, at [78]

[62] The alleged failures to comply with the MWA, HA and WPA, are breaches of employment standards under those Acts, for which penalties may be imposed by the Authority on the application of a Labour Inspector. The Inspector's claim includes an application for penalties.

No double counting, and no averaging

[63] The Authority is satisfied that the methodology applied by the Inspector to her claims for recovery of arrears of contractual remuneration, has not led to double counting because of the payment made during the investigation meeting of some of the arrears claimed.

[64] The Inspector confirmed in her Investigation Report that she had avoided 'double-dipping' when assessing and quantifying wage arrears ¹⁰.

[65] The minimum wage was not necessarily satisfied by the payment of arrears at the contractual rate of \$55,000 per annum in the case of Mr Sutaji, if in any pay period or fortnight his hours of work reached a point where his wages fell below the applicable minimum wage.

[66] Even at the higher rate of remuneration as claimed (and now paid), there remains potentially a claim to recover minimum statutory wages. The Inspector has used the hours of work expressed in the IEA for \$55K, to calculate that the remuneration for those hours if worked, would fall below the minimum wage applicable during the employment of Mr Sutaji ¹¹.

[67] The claim to recover minimum wages depends on the Authority's finding as to how long the workers worked in any period, beyond the hours stipulated in their employment agreements.

[68] The issue of hours and days of work is central to the arrears claims in this case. A significant part of the lengthy investigation meeting was taken up with evidence about that.

¹⁰ Witness Statement of Nicola Marie Rowe, May 2023, para 67

¹¹ Applicant's Submissions in Reply, para 29

[69] The Court of Appeal has held that in paying the minimum wage, averaging is not permissible¹². The minimum wage may be paid hourly, daily, weekly or fortnightly, but each period of payment must stand alone and averaging across a month or a year, will not satisfy the employment standard of the MWA. The Inspector's claim applies that principle.

Claim for workers' contractual remuneration

[70] In considering the various heads of the Inspector's claim, it is convenient to start with the action to recover agreed or contractual remuneration, brought under s 11 of the WPA.

[71] The workers and RPL had no agreement that the rate of pay was to be the minimum wage only. It seems unlikely that INZ policy would allow a work visa to be granted on that basis to a migrant.

[72] The Inspector's action is based on wages or remuneration above the minimum wage, at the rate RPL and each worker agreed to.

[73] The agreed rate was required by s 65 of the ER Act to be included by the parties in a written employment agreement.

[74] Under this particular head the recovery action does not require determination as to quantum, because RPL has paid the precise amounts of contractual remuneration claimed by the Inspector as owing to Mr Sutaji, Mr Sembiring and Mr Pribadi under their IEA's.

[75] RPL's payment of the arrears claimed does not remove the need to determine the liability of the employer to pay, because penalties have been claimed for breaches of the WPA, and from Reza Abdul-Jabbar for his alleged involvement in those breaches. A determination is also sought that Silvia Abdul-Jabbar was a person involved in the breaches, although the sanction of penalties is no longer sought.

¹² *Idea Services Ltd v Dickson* [2011] NZCA 14, at [37]

[76] RPL has not accepted that it breached any employment standards as alleged by the Inspector, nor has Reza Abdul-Jabbar accepted that he was a person involved in any breaches.

Remuneration of Agus Sutaji

[77] When Mr Sutaji's application for a work visa was first made, an IEA he and Reza Abdul-Jabbar had signed was sent to INZ. The salary contained in that IEA was \$45,000/year, which included accommodation of \$10,000/year to be deducted (the IEA for \$45K).

[78] After INZ declined a permit, a fresh application was made. It was considered by INZ's Manila Branch which, in December 2018, requested confirmation from RPL of the job offer made to Mr Sutaji, and the remuneration and other details of the position.

[79] An email reply was sent to an INZ officer by Mr Abdul-Jabbar on 21 December 2018. In it he confirmed, 'Remuneration: \$55,000 including accommodation'. This was done a week after 13 December, the date of the signature placed on the IEA with Reza Abdul-Jabbar's name.

[80] The Inspector obtained from INZ an IEA in the names of Mr Sutaji and RPL, in which a salary of \$55,000, including accommodation, was written as the remuneration (the IEA for \$55K). It appeared to be signed by Mr Sutaji and Mr Abdul-Jabbar. It also appeared to be in the form of the application originally made but with '\$45,000' crossed out and replaced by '\$55,000', and with the changes initialled. The signatures of Mr Sutaji and Mr Abdul-Jabbar dated October 2018, had further signatures in those names dated 13 December 2018 alongside them.

[81] In February 2021 when the Inspector began investigating Mr Sutaji's complaint, in response to her enquiries RPL provided a copy of an IEA for Mr Sutaji which stated the salary was \$45,000 including accommodation. This was the IEA for \$45K.

[82] Despite being asked why there were two different IEA's for Mr Sutaji with two different remuneration levels, RPL offered no explanation but maintained that the IEA

for \$45K was the contract the employer had entered into. RPL claimed that in any event the salary paid to Mr Sutaji had not been less than the minimum wage.

[83] During her investigation the Inspector wrote to RPL and asked:

2. The employment agreement and work visa application states the salary will be $55,000/12 = \$4,583.33$ per month for Agus SUTAJI. In April 2019 the gross is \$2,971.05 ($\$2,971.05 \times 12 = 35,652.60$). Please explain why you have not paid the contractual/visa conditions agreed amount of \$4,583.33 per month?

RPL replied:

2. Because we have based the salary on the above contract and made sure that he never got paid less than the minimum wage.

[84] The reference to 'the above contract' was expressly to the IEA for \$45K¹³.

[85] RPL did not directly answer the Inspector's question why the agreed amount of \$55,000 had not been paid.

[86] In closing submissions the respondents accepted that \$55,000 was the applicable salary¹⁴. The respondents also accepted that RPL paid Mr Sutaji under the IEA for \$45K, not under the IEA for \$55K the Inspector obtained from INZ.

[87] As to the reason for this significant discrepancy in payment, the respondents submitted that nothing turned on seeking and finding an explanation, because RPL had come to accept \$55,000 as correct and had paid arrears (over \$22,000) to make up the shortfall from paying only \$45,000 or less while Mr Sutaji was employed.

[88] The Authority considers the issue cannot be disposed of so lightly.

[89] During her investigation the Inspector had advised RPL she considered it was delaying in giving a response to requests made by her for information and was hindering

¹³ Common Bundle of Evidence, Doc 18, p 322

¹⁴ Respondents' Closing Submissions, para 33.

her investigation. The Inspector warned RPL that the complaints made to her were potentially serious. She pressed for a full response from RPL, including an explanation as to why there were two versions of the employment agreement with different salary amounts.

[90] On 4 March 2021, advice was given to the Inspector by email from Strettons, a firm of chartered accountants retained by RPL. That advice attached or copied an email from Reza Abdul-Jabbar. It referred to the employment agreement of Agus Sutaji, as follows:

2.0 Regarding Agus's contract. The contract is for \$45,000 including accommodation per annum. There should be no other contract unless he modified them.

[91] The Authority finds that when Mr Abdul-Jabbar wrote this to his accountant, he knew there was another contract, because he had confirmed remuneration of \$55,000 to INZ by email in December 2018. When he was asked for that confirmation by INZ, he had not questioned the IEA for \$55K, or suggested then in his email to INZ that Mr Sutaji had 'modified' the contract.

[92] The suggestion in the email of 4 March 2021, is the closest RPL got to providing the Inspector with an explanation of any sort as to why two versions of the IEA existed, each with different remuneration. After that Mr Abdul-Jabbar seemed to back away from suggesting Mr Sutaji had tampered with the contract in any way.

[93] RPL now considers an explanation has become unnecessary, because it has accepted the \$55,000 salary as correct and paid arrears and interest on that higher amount.

[94] The belated payment has removed the need for a determination of the arrears claim in the amount paid, but the claim for penalties is not extinguished, as it is based on the respondents' actions and involvement before the arrears were paid. Culpability in that regard must still be determined.

The comparative employment agreements

[95] Mr Hammond, in closing submissions for the respondents, noted that the issue of seemingly multiple employment agreements for Mr Sutaji and other RPL employees had occupied significant time¹⁵, and that the Inspector's evidence and submissions had covered the issue extensively. The Authority agrees and considers that its determination needs to address the issue directly.

[96] There is no dispute that Mr Sutaji and RPL signed the IEA for \$45K. The date of 31 October 2018 is under Mr Sutaji's signature, and 4 October 2018 is under Mr Abdul-Jabbar's. That IEA was presented to INZ in support of a work visa for Mr Sutaji.

[97] The visa was declined, most likely because the salary level did not meet the requirements of INZ.

[98] The Inspector obtained from INZ another IEA subsequently received by INZ, containing a salary of \$55,000 per annum including accommodation.

[99] Mr Abdul-Jabbar denied that he had signed the IEA for \$55K. He inferred that someone else had copied his signature onto that agreement. Three possibilities of who that might have been are Mr Sutaji, Malcolm Pacific Immigration, or INZ.

[100] It is unlikely that Mr Sutaji copied the signature, or 'modified' the IEA as Mr Abdul-Jabbar suggested to his accountant. Mr Sutaji denied doing so. This is unlikely because to begin with Mr Sutaji signed an IEA for \$45,000 which was submitted to INZ. He hoped to be granted a work visa, travel to New Zealand and commence employment at a salary considerably more than he could earn in Indonesia. It is unlikely he changed his mind about accepting that salary level and unilaterally altered a document, all in the hope RPL would not become aware of the upward adjustment to salary but would unwittingly confirm the increased amount to INZ, which in turn would grant him the visa.

[101] It is also unlikely that a licensed immigration agent such as those the firm Malcolm Pacific employs, would have copied Mr Abdul-Jabbar's signature. For doing that an agent is likely to lose their license and risk prosecution.

¹⁵ Respondents' Closing Submissions, para 26.

[102] It is equally unlikely that INZ copied a person's signature onto the IEA. The usual purpose of a signature is to represent that a document has been read and marked by the person whose signature is placed on the document. It is unlikely that officers of INZ would falsely represent that another person had signed or marked a document. There would also be nothing to be achieved by doing that, since INZ had obtained confirmation of the job offer, the \$55,000 salary and other details, from the email Mr Abdul-Jabbar sent to the Manila Branch on 21 December 2018.

[103] Gordon Sharfe, Chief Document Examiner for the New Zealand Police and a handwriting and signatures expert, gave evidence to the Authority. His report did not extend to the signatures on the IEA for \$55K, as he had not been asked to examine those.

[104] The Authority concludes it is more likely than not, that the signature or mark on the IEA for \$55K was put there by Mr Abdul-Jabbar. His denial was an attempt to support a misleading claim he made to the Inspector when she began her investigation, that Mr Sutaji had been employed under the IEA for \$45K.

[105] By failing to pay Mr Sutaji under the IEA for \$55K in each pay period, RPL unlawfully deducted wages from him in breach of the employment standard of s 4 of the WPA. Although the arrears claimed have now been paid, claims for penalties remain to be determined.

[106] In the light of the information given on behalf of RPL by Reza Abdul-Jabbar to the Inspector about the IEA's for \$45K and \$55K, his and RPL's credibility must be questioned.

Deductions from Mr Sutaji's wages for the fees of Mr Firmanto

[107] This matter also received close attention during the investigation meeting. It raised serious questions about the relationships between the respondents and the workers, particularly as to the honesty and good faith shown towards each other. It is convenient to consider it fully at this point.

[108] RPL advised the Inspector that Mr Sutaji had authorised deductions from his pay to reimburse RPL an amount it had paid on his behalf to Suryo Firmanto, an Indonesian resident.

[109] RPL produced a document that purported to be from Mr Firmanto to Mr Sutaji, invoicing a fee charged for services rendered to recruit Mr Sutaji into employment with RPL¹⁶. The Inspector was also given by RPL a document that purported to show the written consent of Mr Sutaji to having the invoiced amount deducted from his pay.

[110] When questioned, Mr Sutaji told the Inspector that he had not engaged Mr Firmanto to be his recruitment agent in return for payment of a fee and he had not received any invoice from him. He said he had not seen the recruitment fee invoice before it was shown to him by the Inspector. He also said he did not think he had signed the document purporting to be his written consent to a deduction of the amount of the fee from his wages. Mr Sutaji's evidence to the Authority was to the same effect as the statement he gave the Inspector.

[111] Mr Sutaji told the Inspector he knew Mr Firmanto. When he was in Indonesia he had contacted Mr Firmanto after hearing he had previously worked in New Zealand on dairy farms, including RPL's farm with Mr Abdul-Jabbar. Through Mr Firmanto, telephone contact was arranged between Mr Abdul-Jabbar in New Zealand and Mr Sutaji in Indonesia, to discuss employment with RPL.

[112] After contacting Mr Firmanto and while still in Indonesia, Mr Sutaji received from Mr Firmanto an employment agreement dated 21 September 2018. It was for fixed term employment until 1 June 2022 with Rural Practice Trust of Invercargill. RPL is a trustee of that trust.

[113] Mr Firmanto is described in the contract as acting as the agent of the employer. Mr Sutaji is described as acting on his own behalf.

[114] If Mr Firmanto was the agent of the employer and providing a draft employment agreement was part of the recruitment process, he would have had no reason to invoice his services to the employee and not the employer.

¹⁶ Common Bundle of Evidence, Doc 24, p 383

[115] No evidence or statement from Mr Firmanto, who lives outside of New Zealand, was provided to or obtained by the Authority for its investigation.

[116] The invoice for 'Recruitment Fee' shown to the Inspector is dated 10 November 2018. It is unsigned but purports to be an invoice to Mr Sutaji and has on it an account number for payment to BRI, an Indonesian bank.

[117] The document is an unusual invoice for a number of reasons. Although it is for a relatively large sum, \$5,000 or more in New Zealand currency - RPL's own estimate was \$5,400¹⁷ - there is no description or breakdown of the work carried out or services provided, for which that high level of fee was charged.

[118] The fixed employment contract Mr Firmanto sent to Mr Sutaji had been written in Indonesian. As at the date of the invoice for services, 10 November 2018, Mr Sutaji remained living in Indonesia. He did not arrive in New Zealand to start work for RPL until about four months later, in March 2019.

[119] The document is also unusual because it is entirely in English although Mr Sutaji and Mr Firmanto are Indonesian. In giving his evidence to the Authority, Mr Sutaji required an interpreter. There seems no good reason why Indonesian, the first language of all parties involved, was not used. The fee is purportedly incurred in Indonesia and is required to be paid in the local Rupiah currency. The invoice at the top has the name of Malang, a city in Java, and an address there for Mr Firmanto, suggesting the invoice was produced and sent from Java.

[120] The document states the invoiced amount has already been paid. In that regard it is as much a receipt as an invoice, although it is not unusual for an invoice to record that it has been paid. That may occur when payment is made at the same time as services are provided and an invoice for them is rendered. That is not the situation here, because RPL says it stepped in and paid an invoice that Mr Sutaji had not paid.

[121] That suggests there is likely to be an earlier invoice to Mr Sutaji. If payment of it had not been made, it would not state that it had been paid. It would not reference RPL at all. The document produced to the Inspector, although it is numbered '01',

¹⁷ Common Bundle of Evidence, Doc 22 / p 379

suggests an earlier invoice was issued by Mr Firmanto to Mr Sutaji, at some time before 10 November 2018. If there was such an earlier invoice, it would have been sent to Mr Sutaji, most likely to his email address.

[122] The invoice dated 10 November 2018 that RPL produced to the Inspector, is the only invoice the parties have provided to the Authority.

[123] Mr Sutaji has denied receiving any invoice from Mr Firmanto at any time. He has denied transacting with Mr Firmanto or providing any basis for an invoice to be rendered not him.

[124] In English, the invoice states;

Agus Sutaji is responsible for this invoice

[125] In the way invoicing is commonly utilised, an invoice which had been expressly directed 'To: Agus Sutaji', did not need in addition to declare that Mr Sutaji was 'responsible' for payment of it.

[126] To the Authority, the spin of the invoice seems to be that a debt Mr Sutaji owed to Mr Firmanto had been discharged by RPL - of its own initiative - and had consequently become a debt Mr Sutaji owed to RPL. In substance it was not an invoice at all, as any services rendered by Mr Firmanto had been paid for and, as Mr Firmanto may be taken to have acknowledged in the invoice, his interest in the debt had been met.

[127] In circumstances where English was chosen as the language of the invoice, and from its underlying purpose, the invoice gives a sense that it was written to be read by someone who might not understand written Indonesian, as well as by Mr Sutaji.

[128] The Inspector was given the invoice to read by Mr Abdul-Jabbar. He suggested in evidence it had been emailed to him from Indonesia but did not produce proof of that and was unable to say when he first saw the invoice. The evidence is that Mr Sutaji had an email address which Mr Firmanto had used when sending him the fixed term employment agreement. Mr Sutaji's evidence is that he did not receive the invoice

directly from Mr Firmanto or indirectly from Mr Abdul-Jabbar, but first saw it when the Inspector showed it to him.

Payment of the invoice

[129] During the investigation meeting RPL did not volunteer any documentary proof of its claim that the invoiced amount of 50 million Rupiah had been paid by it to Mr Firmanto.

[130] The sum of over \$5,000 is a large one for any employer to pay on behalf of an employee. It is a large sum for any business to pay for any reason. It might be expected that if it was paid, whether as a loan or a gift to an employee, it would go through the books of RPL and be able to be seen in a bank statement of RPL, or the Trust entity that RPL served.

[131] The Inspector was given a copy of a handwritten memorandum of Silvia Abdul-Jabbar, which simply referred to \$5,400 as ‘a debt that Agus has incurred’¹⁸. There are no signatures on the memorandum.

[132] Another debt referred to as incurred by Agus is ‘Malcolm Pacific’ for \$3,450. Mr Sutaji did acknowledge that he engaged the firm Malcolm Pacific Immigration as his agent when seeking a visa from INZ. He acknowledged the debt and that he had consented to it being paid back from his wages. There is no dispute that he did pay that debt.

[133] Mr Sutaji doubted he had consented in writing, on 27 May 2019, to wages deductions for ‘recruitment cost from Indonesia’, written on page 1 of the memorandum in English. The handwritten memorandum makes no reference to either ‘Suryo Firmanto’ or ‘Malcolm Pacific’, or to any monetary amount of cost to be deducted from wages. If the invoice in the name of Suryo Firmanto had been paid by RPL in November 2018, the exact amount of ‘recruitment cost from Indonesia’ would have been known to RPL in May 2019. The only monetary amounts referred to for deduction are \$98 for power, \$150 for clothing, and \$1,552 as an ‘advance’ from RPL.

¹⁸ Above, p 379

Mr Sutaji doubted the 'advance' item had been written on page 2 of the memorandum at the time he signed his consent for the power and clothing deductions.

[134] Page 1 of the handwritten 27 May 2019 memorandum signed by Mr Abdul-Jabbar, seems to have been written in quite vague terms, especially when RPL had agreed with Mr Sutaji 'to compile all invoices incurred on my behalf'. According to the document and the date of it, the invoice of Suryo Firmanto would have been available for several months for compilation by May 2019.

[135] Mr Abdul-Jabbar in giving evidence was confident he could provide the Authority with proof of payment of the invoiced amount to Mr Firmanto. After directing him to provide whatever proof he had, the Authority on 24 August 2023 received a photograph of a receipt. Mr Abdul-Jabbar said that on behalf of RPL or the Rural Practice Trust, his mother in Indonesia had paid to Mr Firmanto the invoiced amount and their signatures were those that could be seen on the receipt.

[136] The signatures and writings are on a standard form of a receipt which has words in Indonesian printed on it. They describe the form as being one for use where there has been payment or repayment of arrears of money.

[137] The receipt has on it a stamp for stamp-duty purposes, for 6,000 Rupiah (about 60 cents in New Zealand currency). The signatures are written partly across both the receipt form and the stamp.

[138] The date of the photographed receipt Mr Abdul-Jabbar provided, 15 October 2019, is curious, as it is about 10 months after the date of Mr Firmanto's invoice, 10 November 2018, which stated the invoiced amount had by then been paid. It is unexplained by the respondents what prompted the issue of a receipt long after the payment it records had been made.

[139] The Authority requested production of the original of the receipt shown in the photograph. A document was received from the respondents on 14 December 2023. At first sight it appeared to be the one in the photograph but, on closer inspection by the Authority, differences in the documents could be seen.

[140] Some of the differences are in the way the signatures are formed on the documents, and also in the alignment of the stamp and signatures on each document in relation to the printed words and borders of the form.

[141] The most striking difference is in the stamp-duty stamp, across which is a code in small but readable letters and numerals. The codes are printed as below across the stamp on each receipt;

Original receipt – **0C661AFF178544932**

Photographed receipt – **A66T5AEF982159667**

[142] Both documents were produced by or on behalf of the respondents, at the request of the Authority, as proof that RPL had paid or repaid Suryo Firmanto a recruitment fee of 50 million Rupiah. Although both have the date 15 October 2019 handwritten on them, one is not a photograph of the other.

[143] The purported original appears to have been purposefully made to look like the one in the photograph. As the Authority had requested production of the ‘original’ of the photographed receipt, the document received in December can be taken to have been presented to the Authority for it to be received as the original of the receipt shown in the photograph.

[144] Mr Firmanto’s signature and initials were notarised on the fixed term employment agreement he provided to the Rural Practice Trust and Mr Sutaji ¹⁹ in September 2018. The Authority does not have evidence that the signature on the photographed receipt and the purported original is that of Mr Firmanto or is not. There has been no evidence from him at all. The receipt documents had not been produced by the respondents when the handwriting and signature expert, Gordon Scharfe, was retained by the Inspector to give an opinion.

[145] After receiving the purported original receipt from the respondents, the Authority advised counsel for the parties that the documents appeared to be different. Counsel were offered an opportunity to view the document the Authority received on 14 December.

¹⁹ Common Bundle of Evidence, Doc 55, pp 944 to 946

[146] As directed at the end of this determination, the parties are to have an opportunity to provide further information or submissions in relation to the documents produced by the respondents to the Authority, on 24 August 2023 and 14 December 2023.

[147] At this point the Authority has found that RPL breached s 4 of the WPA by underpaying Mr Sutaji his contractual remuneration. After the Authority has received any submissions as to penalties the parties wish to make, it will be giving a further determination to resolve the claim for penalties. Depending on any further information or submissions received about the Suryo Firmanto invoice and the documents produced in August and December as proof of its payment by RPL, the Authority's next determination may make further findings about that issue.

[148] This determination gives notice to the respondents that the Authority may, after receiving submissions from the parties, also determine whether the conduct of any of the first or second respondents in producing those documents, amounted to an obstruction of the Authority and, if so, whether a penalty should be imposed under s 134A of the ER Act against them.

Remuneration of Falentino Sembiring

[149] In 2021 when the Inspector began investigating Mr Sutaji's complaint, RPL provided her with a written IEA, representing it to be Mr Sembiring's current IEA. It had been signed by RPL in September 2017 and by Mr Sembiring in October 2017. It contained a salary of \$55,000 per annum including \$10,000 for accommodation.

[150] The Inspector found that INZ had been provided with a more recent IEA signed in July 2020. It contained a salary of \$62,500 per annum and a commencement date of 20 August 2020 (the IEA for \$62.5K).

[151] RPL did not pay the agreed salary from 20 August 2020 for work Mr Sembiring performed.

[152] Mr Abdul-Jabbar claimed he had acted on advice that the commencement date for the salary of \$62,500 was the date INZ gave approval for the new or varied visa Mr

Sembiring had applied for. He said he believed that until approval had been received, the new IEA did not take effect.

[153] There was no express term of that IEA making the commencement date conditional on INZ approval or permission being given.

[154] The Authority considers it is unlikely Mr Abdul-Jabbar was given that advice by INZ which was not a party to the IEA, whose terms and conditions were for RPL and Mr Sembiring to agree upon. INZ's role was to vet those terms and conditions as presented, to see whether they met Government requirements for the grant of a new or varied work visa.

[155] The Authority agrees with the Inspector's conclusion, that while Mr Sembiring worked for RPL, he was entitled to be paid at \$62,500 per annum from 20 August 2020.

[156] RPL breached the employment standard of s 4 of the WPA by not paying the agreed salary.

[157] Although the arrears claimed at the higher salary rate have now been paid, claims for penalties remain for determination.

Copies of payslips for Mr Sembiring provided to the Labour Inspector and INZ

[158] In relation to Mr Sembiring, there is a particular matter that casts considerable doubt over the credibility of the respondents and their good faith conduct investigated by the Inspector.

[159] Mr Sembiring's evidence is that he was not given payslips by RPL during his employment.

[160] The Inspector requested copies of payslips from RPL and was given information produced in the typical form of payslips.

[161] The Inspector also asked INZ for payslips sent to it by RPL in support of Mr Sembiring's application for the new or varied work visa.

[162] When she examined the payslips she found that for the same pay periods, those provided to her by RPL were different from those RPL had provided to INZ.

[163] An example of the difference can be seen in the payslips for the one month pay period ending 26 March 2020.

[164] RPL gave the Inspector a payslip saying that Mr Sembiring had, in that period, worked 77.64 hours and been paid an hourly rate of \$18.2058. That was above the minimum wage, which was \$17.70 in March 2020. The payslip RPL gave INZ said Mr Sembiring had worked 104.44 hours and had been paid a rate of \$21.9000 per hour.

[165] The difference in the payslip hourly rates is 20%, the higher rate equating to a salary of more than \$45,000 for a 40 hour week.

[166] The amounts of holiday pay shown were also not the same; 115.36 hours in the payslip given to the Inspector but only 56.00 hours in the payslip given to INZ.

[167] The total gross, tax and net payments recorded in the two sets of payslips were almost the same, with differences of only 8 cents, 5 cents and 3 cents respectively. For example, the net payment in one was given as \$2,874.99 and in the other it was \$2,874.96.

[168] From their appearance, the different payslips in each period seem to have been produced with the objective of trying to make the gross, tax and net payments as close as possible to the same, while the hours and hourly pay rates they were calculated from were quite different.

[169] Mr Sembiring's bank statements and his IRD account provided an available means of checking the payment of net wages and tax against the payslip information, which is something the respondents are likely to have known.

[170] There were also arithmetic discrepancies in calculating the product of hours and hourly rate. For example, $115.36 \text{ hours} \times \$18.2058 = \$2,100.22$ but was recorded in a payslip as \$2,100.28. A difference of 6 cents is hard to understand in a modern computerised payroll programme such as RPL appeared to use. Even by long multiplication and applying decimal rounding, there should be no difference, or only 1 cent at the most.

[171] Of greater concern to the Authority is the plain fact that payslips for Mr Sembiring in the same work period, are different. Payslips generally contain a computation made from a single finite measurement of time that has been worked, by applying a single rate of pay for that work (although the rate may be increased by a known factor such as 1.5 for overtime or work on public holidays). For in the pay packet the same person working over the same period of time, the fundamental components of time worked and rate of pay, have been presented differently to INZ and to a Labour Inspector.

[172] Mr Abdul-Jabbar in attempting to explain this difference to the Authority pointed to the payslips for the month ended 26 April 2020. The payslip given to the Inspector recorded 25 hours of pay for 5 public holidays paid at time and a half. This would make the total hours worked $147.43 + 25 = 172.43$. The pay rates are \$19.0000 and \$28.5000 per hour, the latter being $\$19 \times 1\frac{1}{2}$ to compensate under the HA for work performed on a public holiday.

[173] The payslip given to INZ for the same period records a total of 160.44 ordinary hours and a pay rate of \$21.9000 per hour. No public holidays are recorded or computed.

[174] This explains where the arithmetic difference lies between the two payslips, but not why there is that difference, or how the Inspector or INZ was chosen to receive one version of the payslip and not the other.

[175] The Authority agrees with the submission made for the Inspector that there is no rational or credible explanation for the differences in the two sets of payslips created for Mr Sembiring²⁰. While arithmetically a multiplicand and a multiplier can each be changed but still provide the same product for gross or net wages (eg., 12 can be the product of 12×1 , or 6×2 , or 4×3) it has not been shown to the Authority how the substance of a payslip received by INZ can legitimately be reformatted or repurposed into the substance of the payslip for the same period the Inspector received.

[176] Despite having several opportunities to explain the differences, RPL has not done so.

²⁰ Applicant's Closing Submissions, para 80.

[177] The Authority concludes it is likely that the payslips provided by RPL to INZ were created and designed to facilitate the granting of a new or varied work visa for Mr Sembiring, and that the hourly rate of pay was deliberately inflated to achieve the requirements of INZ.

[178] The Inspector concluded the payslips had been ‘reverse engineered’ by working backwards from figures for net, tax and gross and producing a particular hourly rate or number of hours worked. This may also explain the minor but unusual arithmetic discrepancies between payslips for the same period.

[179] In the absence of any explanation for the difference in the payslips, the Authority views them as an indication that RPL through its directors and owners set out to mislead or deceive INZ or the Inspector, or both.

[180] Although it is clear some of the information contained in the payslips has been invented, there is no reliable way of telling the extent to which that has occurred or whether some of the source information might be true. As no one has confessed to inventing information contained in the payslips, no methodology behind a scheme or plan has been offered to show whether any components of the payslips are correct.

[181] The Authority accepts Mr Sembiring’s evidence that he did not receive any payslips. He was unable to raise any issues about them with his employer.

[182] When records are required to be kept under the ER Act or HA, implicitly they are required to be *true* records. The Authority agrees with the submission for the Inspector that the payslips on their own cannot be used safely to determine the hours actually worked by Mr Sembiring or the pay or holidays he actually received ²¹ or accrued.

[183] The creation of separate sets of payslips, and presentation of them to statutory officers, must raise the strongest doubts about the intentions of the respondents towards RPL’s employees, INZ and the Inspector, and about the credibility of the second respondent Mr Abdul-Jabbar, who acted on behalf of RPL in tandem with his co-director and shareholder, Silvia Abdul-Jabbar.

²¹ Applicant’s Closing Submissions, para 81.

The video recordings and translation of communications between Mr Sutaji and Mr Sembiring

[184] The respondents acquired recordings made of some communications between Agus Sutaji and Falentino Sembiring. They had been co-workers and lived in the same house while working for RPL.

[185] As this information was only brought to the Authority's attention after they had given evidence several weeks earlier and the investigation meeting was nearing its end, the Authority deferred accessing the information until the parties had made final submissions.

[186] The respondents asked for the recordings to be received by the Authority as evidence that Mr Sutaji and Mr Sembiring had colluded to give to the Inspector details about their employment which were untrue or incorrect. It is contended that the workers did this to gain financially from claims the Inspector was investigating with a view to recovering wages and other money, if she found any was owing to them by RPL from their employment.

[187] Persuasive grounds were put forward by the Inspector for her opposition to having this material provided to and considered by the Authority. The Authority advised counsel that it would receive and consider the material but reserve the question of its relevance and the weight to be given it.

[188] The recorded communications were made by cell phone which captured moving images and sound. The Authority was offered no background information as to how they came into the respondents' possession or when the respondents became aware of them.

[189] As the recorded sound was of Mr Sutaji and Mr Sembiring conversing in Indonesian, a language the Authority does not understand, a translation of the sound was made by the respondents in the form of printed sub-titles which were imposed onto the images.

[190] Having accessed the video recordings, the Authority concludes the information contained in them does not assist its investigation. That conclusion has been reached for the following reasons.

[191] The images show that Mr Sutaji and Mr Sembiring had an opportunity to collude, because it is clear they met and conversed at length. Their words are of greater importance. As counsel for the respondents submitted, the value of the evidence can only be assessed by the Authority seeing and hearing the video.

[192] Translating sound into writing limits the usefulness of the recordings. The inflection and intonation of the speaker's speech cannot be closely aligned with the writing to give an understanding of what the speakers may have meant in their discussion. The way they used their words may be just as important as the words themselves. Whether they were speaking seriously, jokingly or with irony, and what they actually meant, cannot be determined from facial expression or body language alone.

[193] To provide full context for the discussion between Mr Sembiring and Mr Sutaji, all the recorded words need to be translated. It seems that not all words have been.

[194] The subtitles have apparently been translated from speech by Amanda Rahma, who is Indonesian and whose CV includes video editing among her skills and experience. What her connection is with the respondents is not explained by them, nor is her expertise if any, in the field of translation for use by a body such as the Authority. A transcript of the entire conversations has not been provided to show how much of them have been put in subtitles. The Authority concludes that it cannot safely rely upon the subtitles as an accurate translation of all the actual words spoken by Mr Sembiring and Mr Sutaji in the video recordings.

[195] The evidential value of the recordings is also significantly lessened because Mr Sutaji and Mr Sembiring, the subjects of the recorded communications, have not had an opportunity to address the material. They may have had nothing to say about it but they ought to have had the chance to comment on the existence of the recordings, the purposes of their communications, and what words they had used were as far as they can remember.

[196] In the context of the circumstances of this Authority investigation and the Inspector's claim, the images and subtitles shown in the videos by themselves do not provide proof on a balance of probabilities, that Mr Sutaji and Mr Sembering were in collusion as contended.

Remuneration of Tedi Pribadi

[197] In the course of her investigation the Inspector was provided with two documents, each purporting to be an IEA of Mr Pribadi. She received one from RPL and the other from INZ.

[198] The dates of signature by Mr Abdul-Jabbar and Mr Pribadi are the same in each document. The position of employment is also the same; 'Assistant Herd manager', to commence 'as soon as possible upon work visa approval'.

[199] The details that are different in each are remuneration, initials written on each page of one document but not the other, and a road number given for the address of the rented accommodation on the farm.

[200] One IEA provides for a salary of \$40,000 with \$5,000 per annum deductible for accommodation. The rented accommodation is to be at '426' Marshall Road. The address given for the employer's separate residence is 514 Marshall Rd. This IEA has two sets of initials at the foot of each one of its nearly 70 pages. A reader is likely to view these as the initials of Mr Pribadi and Mr Abdul-Jabbar.

[201] Their full signatures are on four of the initialled pages. The dates of signature are 21 March 2019 for Mr Abdul-Jabbar, and 22 April²² 2019 for Mr Pribadi.

[202] The other IEA provides for a salary of \$55,000 with '\$10,00 per week' expressed to be deductible for accommodation. It seems likely that '\$10,00 per week' was written in error both as to amount and frequency of deduction, and \$10,000 per annum was intended. The rented accommodation is to be at '585' Marshall Road. This IEA is not initialled at all on any of its 70 pages but has full signatures on four pages.

²² In the unclear way the number has been written, '4' may be '9', making 22 September 2019 the date.

They are placed over the same dates of 21 March 2019 for Mr Abdul-Jabbar and 22 April ²³ 2019 for Mr Pribadi.

[203] From the face of the two IEA's, it might appear that for the same position of employment commencing at the same time, on the same dates Mr Abdul-Jabbar and Mr Pribadi signed two different IEA's, one for salary of \$40,000 and one for \$55,000. The rental accommodation was at different Marshall Road addresses and subject to different amounts of deduction from salary. Initials were written on every page of one IEA (for \$40,000) but not on the other (for \$55,000).

[204] The existence of multiple IEA's for the same employee and the same position and commencement date but with different remuneration, is a circumstance that calls for explanation from the employer. RPL has offered no explanation and instead has submitted there is no purpose to be gained by seeking one, since the arrears claimed have now been paid. The Authority's attention is not diverted by that occurrence. The circumstances of multiple IEA's and how that came about goes beyond the arrears claims made against RPL and their subsequent settlement, and they raise further serious concerns for the Authority about the probity of the respondents.

[205] In determining the Inspector's claims, the Authority has repeatedly assessed whether RPL and its directors acted with honest intent to perform the employer's obligations under the applicable employment standards of the ER Act, the WPA, the HA and the MWA. The same applies to the employment agreement entered into with each employee and presented to INZ for visa approval to be given. The conduct of RPL and its directors has a bearing on the reliance the Authority should place on the evidence generally of RPL's principal witness Mr Abdul-Jabbar.

[206] The alteration of IEA's depending on who was intended to read them, is a pattern present in the case of Mr Sutaji and Mr Sembiring, as well as Mr Pribadi. Mr Abdul-Jabbar has offered no explanation for the dual IEA's in Mr Pribadi's name.

[207] A possible explanation is that one document has been copied and then, after whiting out with Twink or similar application, had the remuneration and address of the rented accommodation altered. Initials have either been twinked from one document or added to the other.

²³ Above, the '4' may be a '9'

[208] The Authority accepts the Inspector's conclusion that the IEA for \$55K was most likely created and provided by RPL to INZ, to comply with requirements for the grant of a work permit. It was provided to INZ to mislead it into believing that RPL intended performing the IEA by paying Mr Pribadi the salary of \$55,000.

[209] The Authority considers it likely the initialled IEA for \$40,000 was a version of the IEA for \$55,000, which was altered for the Labour Inspector to be able to read and check with Mr Pribadi that he was paid no less than \$40,000 per annum. It was intended to mislead the Inspector into believing that RPL was required to pay Mr Pribadi no more than a salary of \$40,000 per annum.

[210] The Authority finds that RPL breached s 4 of the WPA by not paying Mr Pribadi his contractual remuneration when it was due and making unlawful deductions from his wages. Although arrears of \$10,330.23 have now been paid by RPL, claims for penalties remain to be determined.

RPL breached the Wages Protection Act by failing to pay the workers their contractual entitlement to wages or remuneration

[211] For the above reasons the Authority finds that the Inspector's action to recover underpayments of contractual remuneration, has been brought to the Authority on a sound basis of fact and law.

[212] The Authority finds and determines that RPL breached an employment standard, s 4 of the WPA, during the employment of Mr Sutaji, Mr Sembiring and Mr Pribadi.

The claim to recover wages under the Minimum Wage Act

[213] RPL and the workers Mr Sutaji, Mr Sembiring and Mr Pribadi, each signed an employment agreement in the form of the IEA for permanent employees and which was generally and widely used by members of Federated Farmers of New Zealand. It is a well-developed comprehensive agreement.

[214] At clause 12 of the IEA, details of remuneration are to be specified. The three employees each signed their consent to employment by RPL as 'salaried employees'.

A figure for 'gross annual salary' was written into each IEA at clause 12.4, together with the market value of the accommodation provided by RPL on the farm, which was to be deducted from salary.

[215] Clause 12.6 confirmed that although remuneration was by salary, the provisions of the MWA still had to be complied with by RPL;

12.6 If you are on a salary (clause 12.4 above has been selected) your salary also compensates you for any additional hours or days that we require you to work However, we will ensure that you are paid at least the applicable minimum wage for any hours worked.

(underlining added)

[216] The Inspector claims that throughout their employment, the hours worked by Mr Sutaji and Mr Sembiring lowered their remuneration below the minimum wage.

[217] Although the workers were paid monthly, the Inspector has assessed arrears in fortnightly periods, noting that Minimum Wage Orders do not provide a monthly rate of wages but do provide an 'all other cases' rate per fortnight.

[218] The assessment of minimum wage arrears provided by the Inspector, is based on daily hours worked during the milking season and also during the winter season when less hours are worked. The winter season lasts about five fortnights, from mid-June until near the end of August.

[219] For Mr Sutaji, the Inspector made her assessment on the basis that in a fortnight during the milking season he usually worked on 12 days for 12.75 hours each day and on 2 days for 4.75 hours. During the winter season the assessment for each fortnight is 12 days of 8 hours worked and 2 days not worked.

[220] The assessment is made on the basis that this work pattern was much the same for almost the entire period of Mr Sutaji's employment, 9 March 2019 to 19 December 2020.

[221] The minimum wage arrears claimed for Mr Sutaji as shown in the Amended Statement of Problem of 15 March 2022, are \$31,869.09.

[222] For Mr Sembiring, the assessment of his arrears has been made on the basis that in a fortnight during the milking season he usually worked on 12 days for 13 hours a day, and on 2 days he either did no work at all or worked for 5 or 6 hours. During the winter season the assessment is 12 days for 8 hours a day, and on 2 days either no work at all or work for only 3 or 4 hours.

[223] The assessment is made on that basis for almost the entire 3 year period of Mr Sembiring's employment, from 24 December 2017 to 27 December 2020. The minimum wage arrears claimed by the Inspector for him are \$43,960.73.

[224] The Inspector has not claimed minimum wage arrears for Mr Pribadi.

[225] RPL's response to the minimum wage claims is that Mr Sutaji and Mr Sembiring had no need to work 12 or 13 hours a day at any time during the milking season, and they were not required to work those hours and nor did they in fact work them. The claims are strongly denied by RPL.

Section 132 of the ER Act

[226] To support her minimum wage claim the Inspector asked the Authority to apply s 132 of the ER Act. The Authority may do so where an employer has failed to keep or produce a wages and time record in respect of an employee for whom an arrears claim has been made, and where that failure has prejudiced the bringing of an accurate claim. When s 132 is applied, unless the employer proves the claims are incorrect, the Authority may accept as proved the claims made for an employee as to the hours, days and time worked by the employee.

Wages and time record – Holiday and leave record

[227] The ER Act intends that factual disputes as to the hours, days and time worked by an employee will be avoided or resolved more speedily and with greater certainty, through the keeping of wages and time records. In the same way, disputes as to HA entitlements are to be more efficiently and effectively addressed by reference to holiday and leave records, which are also required to be kept.

[228] The keeping of proper records also allows a Labour Inspector to more readily check or audit, from time to time, whether the employment standards of the ER Act, MWA, HA and WPA have been or are being met by an employer.

[229] The responsibility for having the necessary records and maintaining them up to date, falls squarely on an employer, under s 130 of the ER Act and s 81 of the HA.

[230] Under both statutes the requirement is an employment standard as defined by s 5 of the ER Act. The elevation to employment-standard level, reflects the importance of avoiding or minimising disputes about the number of hours or days worked or the amount of time worked. Having witnesses rely on their memory of the details, sometimes several years after the event as in this case, is an inexact and inefficient way of trying to resolve conflicts of information and evidence. From a policy point of view, it is also wasteful of the time and resources of parties and witnesses involved, including Labour Inspectors and the Authority.

[231] As the Inspector's claim is concerned with minimum entitlements, s 4B of the ER Act must also be complied with in addition to s 130 of the Act and s 81 of the HA. The requirement of s 4B is for records to be kept in sufficient detail to demonstrate that the employer has complied with minimum entitlement provisions.

Section 132 of the ER Act - Section 83 of the HA

[232] As a disincentive to employers who may be inclined not to comply with their record keeping obligations, s 132 of the ER Act and s 83 of the HA, where invoked, shift the burden of proof to the employer to show, on the balance of probabilities, that the employee's claims as to hours, days and time worked, and holiday entitlements, are incorrect.

[233] Failure to keep records does not by itself provide proof of claims as to time worked. The burden of proving allegations made in a claim under s 131 of the ER Act is shifted but the need for them to be proved is not removed.

[234] If the employer fails to discharge the burden shifted to it, the Authority is not compelled to accept all the claims made by an employee but ‘may’ accept them²⁴. Any information or evidence contradicting the Inspector’s claims must be considered.

[235] The provisions of s 132 of the ER Act and s 83 of the HA, apply regardless of whether claims under s 131 of the ER Act have been brought by an employee or by a Labour Inspector.

[236] The shifting onus provisions are focussed on *proving* not on *punishing* which is the object of s 130(4) of the ER Act and s 75 of the HA. In this case the Inspector has brought separate claims for penalties against RPL for failing to keep proper records.

Content of records required to be kept

[237] A wages and time record required to be kept at all times under s 130 of the ER Act, must be in written form (or able to be readily converted to written form), and it must show information which includes;

(g) the number of hours worked each day in a pay period and the pay for those hours:

(h) the wages paid to the employee each pay period and the method of calculation:²⁵

[238] In relation to minimum entitlements, Section 4B of the ER Act also requires a standard of detail to be met in the keeping of records.

[239] The Authority is required to determine claims to recover minimum wage arrears of approximately \$75,000 in total for Mr Sutaji and Mr Sembiring, over a combined period of employment of about four years and nine months. With that scope of claim, any lack of wages and time records is likely to make investigation and adjudication a more extensive exercise.

²⁴ ER Act, s 132(2)

²⁵ ER Act, s 130(1)(g) and (h)

[240] Determination of the claims for annual and public holiday pay will also be less straightforward, if RPL is found not to have kept a holiday and leave record as required under the HA.

[241] If records have not been kept, a determination of the minimum wage claims in dairy farm employment will need to take into account seasonal changes leading to different hours and days of work, particularly outside the milking season when the herd is dried - off, or when it is milked only once a day instead of twice, or is milked three times over two days.

[242] Evidence was given by the Indonesian workers and by Mr Abdul-Jabbar, his daughter Aisha, and others who worked and lived on the farm. Silvia Abdul-Jabbar also provided information to the Inspector relevant to the claims.

[243] Distances were measured for the journey made by the herd to the rotary milking shed. Depending on which the paddock the cows were in, the time required by the workers to bring in the cows could vary considerably. During the winter season there were periods from mid-June until the end of August when less hours needed to be worked than during the milking season.

[244] The claims may also take into account the amount of time reasonably necessary to perform the various duties RPL required of Mr Sutaji, Mr Sembiring and Mr Pribabi, and their relative experience or inexperience in the work. Considerable evidence was given on behalf of the respondents and by the workers about that. Levno technical production reports and other documentation was produced in support of the evidence.

[245] Also relevant is a common feature of agricultural work that workers may reside in or at the workplace. For that reason they may be able to commence work without the travel and other requirements of domestic routine that may use up the time of workers who live away from the jobsite. In the more formative period of their employment immediately after relocating to Invercargill from their home country of Indonesia, the workers were also tied to the workplace when not working because initially they lacked their own transport and had few if any family members or friends to travel away to and visit.

[246] It is also a factor that the workers had the incentive of being able to earn from their work, considerably more than they could expect from working in Indonesia.

[247] Ultimately, what is of most importance is the evidence of the hours and days actually worked by the Indonesian workers for whom the claims have been made by the Inspector.

[248] In considering the evidence to see whether it discloses the existence of the statutory records RPL was required to keep, the Authority is assisted by the list of documents the respondents provided to the Inspector during her investigation²⁶. For the applicant it is submitted that none of the listed documents is a record of hours worked on a particular day, and nor do any assist in determining the hours actually worked on any day.

[249] The documents include payslips. In principle, payslips provided throughout a period of employment are capable of comprising a wages and time record, providing they state the hours worked each day and pay for those hours, and also the method of calculating pay, and other information required by s 130 of the ER Act. They must also meet the standard of detail required by s 4B of the ER Act.

[250] The evidence of the workers is that payslips were not given to them. If so the employer's purpose in creating payslips and their accuracy must be questioned.

[251] For the Inspector it is submitted that RPL's payslips are unreliable because for a 12 month period the respondents produced two versions of them in the name of Mr Sembiring. One set was given to INZ and the other to the Inspector.

[252] One set recorded relevant HA information whereas the other did not, and the two sets for the same pay periods gave quite different information about the hourly rate of pay and hours worked.

[253] In the absence of any explanation at all, or any credible or innocent explanation by the respondents for the differences between the versions, the Authority concludes that at least one set was created not primarily as an accurate wage and time record but as information intended to mislead INZ or the Inspector.

²⁶ Applicant's Closing Submissions, para 75

[254] Although a wage and time record may have inaccurate information in it because a genuine mistake has been made, it may still be regarded as a wage and time record, subject to correction of the mistake. The payslips in this case are in a quite different category, given the purpose and intent evident from their creation. The submission of the Inspector is accepted that the payslips are unreliable, as they are likely to contain untrue or inaccurate information.

[255] A further problem with many of the payslips is a lack of correlation between net payment recorded and the payment actually received by direct credit into the bank account of each worker. The differences are much more than a few dollars. Although the workers sometimes received more in their banks than shown in the payslips, that detail is immaterial to the exercise of establishing the accuracy of the payslips and whether they were a record of fact.

[256] There is also the peculiar recording of hours worked to an unusual two decimal places, for example '163.98' hours²⁷, implying the unlikely measurement of work time in minutes and seconds.

[257] The Authority accepts the Inspector's submission that the payslips were not a contemporaneous record but were created some time after work was performed and wages were paid, for presentation to INZ or the Inspector or both. Their primary purpose was not the provision of information to the workers.

[258] The appearance of the payslips is that hours worked were calculated by working backwards from the net payment made (an amount potentially able to be cross-checked by INZ or the Inspector from an employee's banking records). The core information of hours worked has therefore been derived from net pay, rather than the other way around. The Inspector aptly described this as 'reverse engineering'.

[259] The Authority concludes in the circumstances that the payslips are not a wage and time record or holiday and leave record. They are not a record of what really did occur.

[260] The Authority agrees with the Inspector that RPL's Required work (Seasonal Requirement) Guidelines document²⁸ is not a wages and time record or holiday and

²⁷ Common Bundle of Evidence, Doc 21, p 363

²⁸ Common Bundle of Evidence, Doc 26, p 387

leave record. It is written advice given by the employer as a guide to employees generally. It records aspirations rather than occurrences. Even if it was viewed as providing a standard or pattern of hours for daily work, contradictory data was produced in the form of the Levno reports and the monthly hours calculations Mr Abdul-Jabbar provided to the Inspector for Mr Sutaji and Mr Sembiring²⁹.

[261] In conclusion on this aspect of the Inspector's claims, the Authority finds that RPL failed to keep a wages and time record and a holiday and leave record, as required by s 130 and s 4B of the ER Act and s 81 of the HA. Those statutory employment standards were breached by RPL.

[262] By its failure RPL disregarded the express advice it had given in the standard IEA document used for each worker. Under the section Hours of Work, RPL advised employees³⁰;

The Employer is under a legal obligation to keep a record of working hours and wages for employees, timesheets are required even for those on salaries, and those who have regular working hours.

[263] The Authority finds that RPL's failure to keep those records prejudiced the Inspector's ability to bring accurate claims under s 131 of the ER Act for wages and statutory and annual holiday pay.

[264] It is no answer for RPL to say that because the workers were remunerated by payment of an annual salary, paid monthly to them, there was no need to record hours of work. RPL recognised at clause 12.6 of the IEA the effect a sufficient increase in hours in a pay period could have on the application of the minimum wage. If the workers were employed to work the hours the Inspector's claim is based on, RPL was required to keep a wages and time record. In those circumstances any failure to keep one will make it more difficult for the Inspector to bring an accurate claim and to establish that claim as far as the Inspector is required to.

²⁹ Common Bundle of Evidence, Doc 27, p 391 and Doc 34, p 525

³⁰ For example, Common Bundle of Evidence, Doc 115, p 1234

[265] RPL took pride in its hi-tech ‘state-of-the-art’ milking operation and Mr Abdul-Jabbar was clearly intelligent, well educated, energetic and experienced in dairy farming, but nevertheless the respondents collectively failed to comply with basic, long-standing and well-known employment requirements to keep proper records. Ironically, although the milking operation is designed and installed to be labour-saving, the respondents did not properly monitor or manage their labour usage. They must bear all or most of the responsibility for the situation they found themselves in after the Inspector began to investigate Mr Sutaji’s complaint.

[266] It is surprising and unacceptable in terms of the statutory requirements, that there should have been any dispute about the date a worker commenced work after arriving at RPL’s farm, where they were going to be living. The situation was entirely avoidable and should not have been left to continue for so long during the employment of each worker.

[267] The law relating to minimum employment entitlements and standards is long established and the respondents are to be taken as being well aware of that law. As the Employment Court has observed ³¹, it is common knowledge among the community generally and employers in particular, that statutory minima or standards exist and that they apply to all employment ³². That was said by the Court in 2016, before RPL employed Mr Sutaji, Mr Sembiring and Mr Pribadi.

[268] Ignorance or carelessness of the respondents are not a likely explanation for the situation. In the way they had decided to run their business, it appears to have suited them not to keep proper records. The Authority agrees with the observation made by the Inspector in her Investigation Report ³³, that failing to keep full and accurate records is potentially a way of concealing non-compliance with legal requirements to provide workers their wage and holiday entitlements. Understandably, the Inspector said she viewed RPL’s failure with serious concern, as does the Authority.

[269] Accordingly, for this investigation of the Authority, an onus was transferred to RPL to show the Inspector’s claims, based upon and supported by evidence from the employees, were incorrect.

³¹ *Labour Inspector v Preet PVT Ltd and another* [2016] NZEmpC 143

³² Above at [86]

³³ Common Bundle of Evidence, Doc 49, pages 806 and 823

The information and evidence relevant to claims for minimum wages

[270] Although relatively large amounts of arrears have been claimed, there is no rule that the greater the amounts the more stringently the provisions of s 132(2) of the ER Act and s 183(4) of the HA must be applied, where they have been invoked. The amount claimed is directly proportionate to the number of employees and the length of time over which the employer failed to comply with its obligations to keep records of their wages, time, holidays and leave.

[271] The claims are based on the following hours, days and time worked, during the milking season and in winter, provided to the Inspector by Mr Sutaji and Mr Sembiring;

[272] **Agus Sutaji;**

- Start 3.30am/4.00am
- Breakfast 7.00am to 7.30am
- Lunch 12.30pm to 1.30pm
- Finish 6.00pm
- In milking season 6 and a half days per week
- In winter 2019 6 days on; one day off
- In winter 2020 2 days on; one day off

[273] The Inspector in her assessment of the minimum wage claim for Mr Sutaji, has used 12.75 as the hours worked in a day, not including breakfast or lunch, for six days a week during the milking season. For about five or six fortnights during winter, 8.00 hours a day has been used as the hours worked.

[274] **Falentino Sembiring;**

- Start 3.30am
- Breakfast 7.00am/8.00am
- Lunch 12.30pm to 1.30pm

- Finish 6.00pm
- In milking season 12 days on and 2 days off
- June 2018 every day for about five months
- Early 2019,
after Agus started 6 and a half days per week
- In winter 2019 6 days on; one day off
- In winter 2020 2 days on; one day off

[275] The Inspector in her assessment for Mr Sembiring has used 13 as the hours worked in a day, not including breakfast or lunch, for six days a week during the milking season. For about five or six fortnights during winter, as with Mr Sutaji, 8.00 hours a day has been used as the hours worked.

[276] Mr Sutaji's IEA at clause 5 provided for work hours of 8 am to 4 pm in winter, and 5 am to 5.30 pm in the milking season. The weekly hours were expressed to be 40 to 45 in the IEA for \$55K, but they were not written into the IEA for \$45K. Under the IEA's, breakfast was to be for 1 hour and the same for lunch.

[277] Mr Sembiring's IEA for \$50K, at clause 5, provided for work hours of 8 am to 4 pm in winter, and 5 am to 5.30 pm in the milking season. Breakfast was to be for 1 hour and lunch also 1 hour.

[278] His IEA for \$62.5K specified fortnightly hours of work only, at 80.

[279] Mr Pribadi's IEA for \$55K at clause 5 provided for work hours of 8 am to 4 pm in winter, and 5 am to 5.30 pm during the milking season. The weekly hours were expressed to be no less than 40. Breakfast was to be for 1 hour and lunch for 1 ½ hours.

[280] RPL's Required Work Seasonal Guidelines³⁴, records 4.15 am, 4.30 am and 4.45 am for 'getting cows'. Breakfast is recorded as from 45 minutes to 1 ½ hours, depending on the season. Lunch is 1 hour, or 2 hours in winter. Depending on the

³⁴ Common Bundle of Evidence, Doc 26, pages 387 to 389

season, total daily hours are recorded as 5 hours in winter and up to 9.5 hours in December to January.

[281] There is considerable variation in the work hours given in the IEA's, the Guidelines and the accounts of the workers.

[282] The broad thrust of the very detailed and extensive evidence given by several witnesses for the respondents, is that the nature of the work on RPL's farm and the sophistication of the plant and machinery and the operation generally, was such as not to require the amount of labour the Inspector claims was provided by the Indonesian workers. Also, the workers were not instructed or directed by the respondents to work the hours they claim. The employer provided written guidelines as to the start-finish times and hours necessary, which were not as wide as those the employees claimed. Mr Abdul-Jabbar firmly rejected the assertion of the workers as to the hours required to carry out milking and related dairy farm tasks ³⁵.

[283] One of the workers, Mr Pribadi, provided information to the Inspector which to some extent supported the respondents' accounts of the time required for doing the work. Mr Pribadi had first-hand knowledge of that and he should have been viewed as potentially a valuable source of information. The Inspector said in her report that she regarded him as an unreliable witness, because he was then in an employment relationship with RPL on a work visa sponsored by his employer. The Inspector supposed that he might not tell the truth because he would be beholden not to say anything contrary to the respondent's interests, in case RPL retaliated in some way that affected his job or his permit to work in NZ.

[284] It may equally be supposed that he would not have wanted to give false information to a Labour Inspector, in case he was charged with and convicted of the offence of deceiving a Labour Inspector. For that offence under s 235 of the ER Act, the Employment Court may impose a fine of up to \$10,000. The Authority considers that Mr Pribadi's statement should not have been rejected as potentially unreliable but should have received greater consideration as to whether it was consistent with other information.

³⁵ Respondents' Closing Submissions, para 68

Application of s 132 of ER Act to the circumstances

[285] The Authority concludes that whether the Inspector's minimum wage claims are to be upheld or declined, is an outcome that can only be properly determined by the way s 132 is intended to be applied to the circumstances.

[286] The Authority has found that throughout the employment of Mr Sutaji and Mr Falentino a wages and time record was not kept for them. Section 132 provides that where that failure has prejudiced the ability of the employees or the Inspector to bring an accurate claim, and where the employer fails to prove those claims are incorrect, the Authority may accept as proved all claims made by the employee in respect of wages paid and hours, days and time worked by the employee.

[287] Furthermore, the Authority has not accepted the respondents' evidence produced to show that the workers colluded to present false claims.

[288] The state of the evidence is that RPL has not proved the workers claims to be incorrect *in every fortnight* of the Inspector's period of assessment. The Inspector has not proved her claims are correct *in every fortnight*. The lack of records and the evidence makes it an impossibility to determine with any accuracy which fortnights have been proved and which have been disproved.

[289] The Authority finds it unlikely that Mr Sembiring started work at 3.30am and did not finish until 6pm, on most days throughout three years of employment. The Authority accepts that he would have or should have known that he did not need to work those hours, because the milking could be handled by 1 or 1½ workers when at times, near the end of 2019 there were 3 Indonesian workers employed. For longer periods there were 2 workers employed. In addition Mr Abdul-Jabbar was available to relieve.

[290] There were a number of variables which would have affecting milking and work time on a daily or fortnightly basis. They include the season of the year, the weather from day to day, and the location of the cows which determined how long was needed to bring them in for milking.

Levno Data

[291] Printed milk production reports were provided by the respondents and were closely examined and analysed during the investigation meeting. The data is for a period of three years from March 2020. It shows when milking began and ended each day from cups-on to cups-off, the number of milkings in any day, and the total volume of milk collected. The data covers the rotary milking shed operated by the employees and the herringbone shed located elsewhere on the farm and operated by other workers.

[292] The Levno data does not relate to individual workers or how efficiently a worker worked or for how long. The data relates principally to outputs and time taken to achieve them.

[293] The Authority considers it likely that on some days in some fortnights the workers did work the 12.75 hours and 13 hours claimed. But it also considers it likely that on some days in some fortnights, they did not. There is no way of determining on which days in which fortnights, remuneration fell below the minimum wage.

[294] There is also the circumstance that the employees were not hourly workers paid an hour rate of pay. They were salaried employees. Therefore, 'unders and overs' may apply within a fortnight period. One long day worked could be offset by a short day in the same fortnight.

[295] The Authority concludes from the IEA's and the Guidelines, that the parties did not intend that work would begin as early as 3.30 am, at least not on a regular or normal milking season day, or in winter. Neither did they intend in their agreement that 160 hours or more a fortnight would be worked by Mr Sutaji during the season, and 180 or more by Mr Sembiring.

[296] The IEA's show an intention for the workers to be remunerated on an annual rather than hourly basis (although payment frequency was monthly). The IEA's show hours of work and times of starting and finishing, more in conformity with the respondents' account.

[297] While the Authority accepts that there were starts as early as 3.30 am on occasions, as evidenced by the text messages sent at the time, the Authority does not

accept that those occasions were required or directed by the employment agreement or were an option for the employee to exercise. They were not such occurrences in frequency and within the reasonable contemplation of employer and employee, that they should now open the door under s 132 of the ER Act to *all* weeks being treated as underpaid, whether worked in the milking season or in winter.

[298] The Authority considers that s 132 does not have blanket application to every fortnight, especially where there are so many in a period of claim. It could be applied to some fortnights, if dates were able to be determined. While the Authority may accept *all* claims as proved, s 132 in the circumstances of this case is not intended to be applied in that global way.

[299] The Authority does not accept there is sufficient proof of the claims on a fortnight by fortnight basis. Even to apply equity and good conscience, there needs to be a reasonable way of identifying a percentage of the total claims as proved.

[300] For the above reasons, the Inspectors claims to recover minimum wages for Mr Sutaji and Mr Sembiring are not upheld.

[301] There is therefore no basis for the claims for 8% holiday pay on the assessed minimum wage arrears.

[302] While it seems likely the MWA was breached, there is insufficient certainty about the date or dates of such breaches. This must be taken into account when considering penalties to be imposed against the first or second respondents for any breaches of the MWA.

Unlawful deductions from wages

[303] The Inspector claimed a total of \$48,829.67 under s 4 of the WPA, for unlawful deductions from the wages of Mr Sutaji, Mr Sembiring and Mr Pribadi. RPL has now paid that amount, and interest on it as well.

[304] Although payment was made without admission of liability, the Authority is satisfied from the evidence of the Inspector and the three workers, that RPL did make deductions from their wages in breach of s 4 of the WPA and the employment standard

set by that provision. The deductions were made without consent, which under s 5 the employer was required to obtain from the workers.

[305] The Inspector claimed that unlawful deductions were made from the wages of Mr Sutaji to pay the fee of Suryo Firmanto, which RPL said it had paid on his behalf. The authenticity of the Suryo Firmanto invoice RPL provided to the Inspector, is an issue relevant to the lawfulness of deductions.

[306] At this stage of its investigation the Authority is able to find from the direct evidence of Mr Sutaji on a balance of probabilities, that he did not engage Mr Firmanto to act as his agent providing recruitment services.

[307] The fixed term employment agreement Mr Sutaji received from Mr Firmanto describes him as the agent of the Rural Practice Trust, not of Mr Sutaji. There was no apparent commercial or contractual basis present for charging such a fee. Mr Sutaji did not authorise RPL to pay a debt he had not incurred and had no knowledge of.

[308] Also, the Authority finds from his evidence, Mr Sutaji did not authorise RPL to make deductions from his pay of the invoiced amount of 50 million Rupiah, or approximately NZ\$5,400.

[309] The Authority accepts the evidence of Mr Sutaji, who it found to be a credible and reliable witness. He presented as an honest, uncomplicated worker who had sought to make a better life for himself and his family who had remained in Indonesia. In coming to New Zealand to work for RPL, he had put faith and trust in the second respondent when he learned Mr Abdul-Jabbar was an Imam.

[310] It follows from Mr Sutaji's evidence that any deductions RPL made from his pay were unlawful under the WPA.

[311] The Authority is satisfied that RPL did much more than plan to make unconsented deductions from Mr Sutaji's pay. It did deduct at least \$80 on two occasions. While the deduction of those amounts for 'Agus's Indonesia employment service repayment' is recorded in a memorandum given to the Inspector by RPL³⁶, the

³⁶ Common Bundle of Evidence, Doc 23 / p 381

Authority accepts the evidence of Mr Sutaji that the signature on the memorandum was not his.

[312] While that memorandum expressly refers to ‘Agus’s Malcolm Pacific invoices’ which Mr Sutaji had agreed were payable by him, it seems inconsistent that there is no reference by name to ‘Suryo Firmanto’ or any invoice in that name.

[313] The Authority concludes that using the invoice of 10 November 2018 bearing the name Suryo Firmanto, RPL had intended to deduct from Mr Sutaji a total of over NZ\$5,000. It is possible that more than \$160 shown in the memorandum had been deducted by the time of the Inspector’s investigation.

[314] For these reasons the Authority finds that RPL breached s 4 of the WPA, which is an employment standard.

[315] RPL is liable to penalties for the breaches of the WPA in the case of each of the three workers.

Premiums

[316] Pursuant to s 12A of the WPA, the Inspector has claimed to recover a total of \$23,560.00 alleged to have been paid by or sought as premiums from Mr Sutaji and Mr Sembiring, by RPL through its director and owner Mr Abdul-Jabbar.

[317] RPL and Mr Abdul-Jabbar deny receiving or seeking premiums. No payment to the Inspector has been made by RPL with reference to this particular claim.

[318] The Employment Court in *A Labour Inspector v Tech 5 Recruitment Ltd*³⁷, considered the nature of a premium within the meaning of s 12A of the WPA.

[319] A premium may be sought or received, unlawfully, prior to the commencement of employment or during employment.

[320] Mr Sutaji and Mr Firmanto gave evidence of cash payments they regularly made to Mr Abdul-Jabbar, after they began working for RPL and once they had received their

³⁷ Full Court, [2016] NZEmpC 167, paras [31] to [54]

first pay. They said they were told by Mr Abdul-Jabbar that the payment was for 'taxes'. They had no experience of New Zealand income tax, and as they received no wage slips they had no way of seeing what tax if any had been deducted before they received their pay.

[321] The 50 million Rupiah 'recruitment fee' the respondents told the Inspector had been invoiced by Suryo Firmanto was, the Authority finds, a premium RPL sought from Mr Sutaji. That seems clear from the description Mr Firmanto gave of his role as acting 'for and on behalf of the Indonesian Agency of the Rural Practice Trust', and by his description of Mr Sutaji as acting without an agent³⁸. Rural Practice Trust was the name RPL used as the employer of workers. That name appears on the IEA's of Mr Sutaji, Mr Sembiring, Mr Pribadi, and other employees. RPL is a trustee of that Trust. RPL told the Inspector it had not charged Mr Sutaji for recruitment but his agent had³⁹.

[322] The Inspector was advised by Mr Sutaji and INZ that Mr Firmanto had previously worked for the Rural Practice Trust.

[323] The amount of premiums sought by the Inspector to be recovered for Mr Sutaji is \$4,960.00. Mr Sutaji's evidence is that each month after his wages began to be direct credited to his bank account, he was required to pay \$160 cash to Mr Abdul-Jabbar. In total the amount was \$4,800.00 over 30 months. In addition two payments of \$80 were deducted towards the recruitment fee of Suryo Firmanto, giving the total amount claimed of \$4,960.00.

[324] The amount sought for Mr Sembiring is \$18,600.00. His evidence is that each month he gave Mr Abdul-Jabbar about \$600 from his wages. He lived on RPL's farm for three years.

[325] There is no reason for the Authority to disbelieve the evidence of the workers that on occasions they were required to pay cash to Mr Abdul-Jabbar. This is consistent with other practices indicating that RPL sought to subsidise the costs of its operations by taking back or reducing payments the workers were entitled to have and retain. An example is the payment to Mr Sutaji at the outset of employment of only \$45,000 per annum or less, instead of the contractually agreed \$55,000.

³⁸ Common Bundle of Evidence ,Doc 55, p 941

³⁹ Common Bundle of Evidence, Doc 18, p 323, para 14

[326] While the Authority accepts that premiums were paid, the amounts cannot be quantified with any reasonable certainty, and it is also likely some of the money paid in cash was to repay loans or advances, or purchases for vehicles and clothing made on their behalf by Mr Abdul-Jabbar to the workers, before they started to accumulate pay in their accounts.

[327] Mr Pribadi acknowledged in his evidence that Mr Abdul-Jabbar had paid \$4,000 or \$5,000 to buy him a car and he had paid him back. There were other things he was advanced money for, he said.

[328] The Authority determines that the employment standard of s 12A of the WPA was breached by RPL but makes no orders for repayment of any premiums.

[329] After any further submissions have been made, the Authority will consider what if any penalties should be imposed and whether any part of those should be paid to the workers, as permitted under s 136(2) of the ER Act, to compensate them for paying premiums.

Holiday pay

[330] The Inspector's claims under the HA are for annual holiday pay, pay for work on public holidays, and pay for alternative holidays remaining untaken at the end of the workers' employment. Where an employee has become entitled to any annual holidays, or alternative holidays, but has not taken them by the time employment ends, the employer is required to pay out the entitlement.

[331] The total amount claimed for the three Indonesian workers is \$67,929.62. Of this, RPL has paid \$15,873.29 leaving \$52,056.33 in dispute.

Record of holidays and leave to be kept

[332] Every employer is required by s 81 of the HA to keep a holiday and leave record.

[333] The information to be shown in that record includes the dates on which employment commenced and terminated, hours worked, pay for those hours and the balance of entitlements to annual holidays. The record must also show entitlements to public holidays and pay for working on any day that the holidays are observed.

Entitlements to alternative holidays where work is performed on public holidays, must be shown. Any payments made for holidays untaken at the end of employment must be shown.

[334] Some of the information required to be shown may be recorded in a wages and time record required to be kept under s 130 of the ER Act.

[335] The Authority finds that RPL did not keep a holiday and leave record as required by s 81 of the HA, and it did not keep a wages and time record either.

[336] A Labour Inspector may, under s 77 of the HA, bring a claim on behalf of an employee. Under s 83(3), if a claimant is prevented from bringing an accurate claim by any failure of the employer to keep a holiday and leave record, upon a finding to that effect being made by the Authority, in the absence of evidence to the contrary it may accept as proved a statement made by an employee as to annual and public holidays actually taken and holiday pay actually paid.

[337] The Authority finds that RPL's failure to keep a holiday and leave record prevented the claimant Inspector from bringing an accurate claim. RPL is entirely responsible for allowing a situation to exist that allows s 83(3) being invoked. It claims to have put its trust in the employees about their taking or not taking any holidays. The Authority finds that is not a defence or even a matter of mitigation, as RPL with the resources it had, and the knowledge and experience of its directors, knew very well the requirements to keep records. An employer in that position will not be heard to say otherwise.

[338] The omission to keep records was simply another part of a wider election by RPL not to comply with employment standards and gain financially at the workers' expense.

[339] The lack of records or reliable records presented a considerable challenge to the Inspector when she came to assess RPL's level of compliance with the employment standards of the HA, and when she came to quantify her claims to recover unpaid holiday pay. The Inspector had an unenviable task and should not be criticised if her investigation and the subsequent Authority investigation, have taken much longer than is likely to have been the case if proper records had been kept.

[340] The Authority must establish the facts for itself and reach its own determination, but it can be assisted by the Inspector's conclusions in her report as well as other evidence. The Authority views the Inspector's work as having been done painstakingly and objectively, without bringing blame or punishment into the difficult search for the facts. Her report shows that she continually revised her calculations where necessary, as more information was obtained from the respondents and the workers.

[341] The Inspector gave very detailed written and oral evidence about the way she went about assessing and quantifying all claims to recover minimum wages, holiday pay and other money. The respondents and the Authority were able to question her about that evidence.

[342] A feature of the workers' employment was that they lived in or at the workplace. It might not be so apparent that a worker was on holiday if he stayed home on days off taken as holidays. Keeping a proper record would make the situation clearer.

[343] Mr Sutaji, Mr Sembiring and Mr Pribadi also gave evidence confirming the statements they had made to the Inspector. As permitted by s 83 of the HA, in the absence of evidence to the contrary, the Authority accepts the worker's statements as proof of the Inspector's HA claims.

[344] A particular issue relevant to the minimum wage and holiday pay claims made for Mr Sembiring, was whether he continued to perform work for RPL for the period of about three months after his work permit expired, before he was granted a new or varied permit on a higher skills basis.

[345] Mr Sembiring's evidence was that he continued working after his permit expired. For the respondents, the evidence was that the employment agreement was not performed during this time.

[346] Mr Sembiring remained living on the farm during this time. He was not dismissed and he did not resign. If he performed work he was entitled to be paid for it, notwithstanding any breach of his permit. That was a separate enforcement matter for INZ.

[347] The Authority accepts Mr Sembiring's evidence. The continuation of work in breach of INZ requirements is entirely consistent with the disregard shown by the

respondents towards INZ requirements and the misleading undertakings RPL had given about the amounts it was going to pay the Indonesian workers. Their prescribed immigration status, and their arrival in New Zealand principally for work, offered some advantages to RPL that local workers may not have provided. RPL was willing to make use of those advantages, and did so without concern for INZ requirements.

[348] Mr Sembiring's holiday entitlements should take into account this non-permit phase as a period of employment even so.

[349] The Authority finds that RPL breached the employment standards of the HA and is liable to penalties.

[350] RPL underpaid holiday pay in the amounts claimed by the Inspector. RPL is ordered to pay the amounts claimed.

[351] No orders are made for proportionate annual holiday pay on the minimum wage arrears claim, as it has been declined by the Authority.

Second and Third respondents – involvement in breaches

[352] The Authority has found that RPL, as an employer, has liability for breaches of the employment standards of the ER Act, the MWA, HA and WPA.

[353] As well as seeking penalties of up to \$230,000 from RPL, the Inspector seeks penalties of up to \$130,000 from Reza Abdul-Jabbar for his involvement in the breaches.

[354] Section 142W(1) of the ER Act defines a person who is involved in a breach. Included is a person who;

- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach;

[355] Under s 142W(2) if the breach is by a company, a person may be treated as a person involved in a breach only if that person is an officer of that company.

[356] Officer includes a person occupying a position of a director of a company.

[357] As company officers, Reza Abdul-Jabbar and Silvia Abdul-Jabbar were each legally capable of being a person involved in a breach.

[358] A level of knowledge is required to be present before a person may become liable as a person involved in a breach of an employment standard.

[359] In *A Labour Inspector v Southern Taxis Ltd and others*⁴⁰, the Court of Appeal held the requisite knowledge is knowledge of the essential facts that establish the contravention by the employer. It is actual knowledge of all the primary facts that matters, the Court held⁴¹.

[360] Also, a person will be regarded as knowingly concerned in a breach if they are wilfully blind in relation to all the essential facts giving rise to a breach⁴².

[361] By failing to keep wages and time records or holiday and leave records as required by statutory employment standards, the respondents blinded themselves to the reality of the time the workers were spending on the job and any holidays or leave they were taking or were intending to take. The respondents ignored the obligation to keep records for long periods of employment.

[362] A person the Authority has determined was involved in a breach, is liable to a penalty on the application of a Labour Inspector.

[363] A determination is sought that Silvia Abdul-Jabbar was a person involved in a breach but penalties are claimed against Reza Abdul-Jabbar only.

[364] Reza and Silvia Abdul-Jabbar jointly owned and closely managed and controlled RPL. They were the hands and mind of RPL, the *alter ego* of it, during the employment of the workers. It has not been contended that anyone else, a family member or professional advisor, was concerned in the breaches by RPL of employment standards.

[365] The workers were each employed under an IEA, which the employer was required by s 64 of the ER Act to keep a copy of. The importance of that requirement can also be seen from it being made an employment standard. Reza Abdul-Jabbar

⁴⁰ [2021] NZCA 705

⁴¹ Above at [7] and [42]

⁴² Above at [42].

signed the IEA's on behalf of RPL and Silvia Abdul-Jabbar can be fixed with knowledge of the terms and conditions of the IEA's, particularly as to remuneration, because she looked after the payroll side of things. Any failure to read an IEA's provisions as to remuneration, amounted to turning a blind eye, if not deliberate disregard.

[366] The workers' pay was purposefully computed as to hours worked, holiday pay and wages. It is not contended that underpayments resulted from genuine computing error, as can occur with any employer from time to time. That contention if made, would not sit well with the evidence that RPL through its directors had actively contrived to mislead statutory officials of INZ and the Labour Inspector, as to pay details.

[367] The Authority considers that although there was a loose division of responsibilities between Reza Abdul-Jabbar and Silvia Abdul-Jabbar, which saw him work more as the on-the-job farm manager and her work more as the bookkeeper-accountant, the conduct that gave rise to breaches was shared between them. Each had sufficient knowledge of the others actions and decisions to make each equally a person involved.

[368] The Authority determines that Reza Abdul-Jabbar and Silvia Abdul-Jabbar was each a person involved in breaches of employment standards. They were involved, as alleged by the Inspector, in breaches of the standards set by the ER Act, the MWA, the HA and the WPA.

[369] As discussed during the investigation meeting, a determination of the Inspector's claim for penalties against RPL and Reza Abdul-Jabbar is to be given after submissions about those particular claims have been made. The applicant has already made submissions. An opportunity to reply to the respondent's submissions once they are received, will be given to the applicant.

CONCLUSION – SUMMARY OF ORDERS

Payment by RPL of arrears of holiday pay

[370] With reference to part 3 of the Amended Statement of Problem, the first respondent RPL is ordered to pay to the applicant Inspector, arrears in the following amounts;

For Agus Sutaji;

- as claimed at paragraph 3.3 \$5,933.73
- as claimed at paragraph 3.4 \$2,197.25

For Falentino Sembiring;

- as claimed at paragraph 3.9 \$27,444.51
- as claimed at paragraph 3.10 \$11,352.63
- as claimed at paragraph 3.11 \$5,128.21

Total **\$52,056.33**

Payment to be made within 28 days

[371] The above amounts together with interest, are to be paid to the applicant Labour Inspector by the first respondent within 28 days of the date of this determination.

Interest

[372] The payment of interest is ordered pursuant to clause 11 of Schedule 2 of the ER Act. Interest on the amounts ordered is to be paid to the Inspector for the use of Mr Sutaji and Mr Sembiring. The amount may be calculated using the Civil Debt Interest Calculator, which is available at www.justice.govt.nz/fines/civil-debt-interest-calculator. Interest is to be paid from 16 September 2021, the date of the Labour Inspector's Investigation Report, until full payment has been made to the Inspector.

Liability for penalties

[373] The Authority determines the first respondent RPL is liable for penalties, in amounts yet to be quantified, for breach of;

- s 6 of MWA
- s 22 of HA
- ss 49, 50, 55 of HA
- ss 56 and 60 of HA
- s 81 of HA
- s 130 of ER Act
- ss 4 and 12A of WPA

Liability for penalties of second respondent as person involved in a breach

[374] The Authority determines the second respondent Reza Abdul-Jabbar, was a person involved in the breaches of employment standards by the first respondent RPL and is liable for penalties.

Liability of second and third respondents for default in payment by first respondent

[375] The Authority orders that to any extent RPL is unable to pay the applicant Inspector the amounts it is required by this determination to pay, Reza Abdul-Jabbar and Silvia Abdul-Jabbar, jointly and severally, shall become responsible for making the payment. The order is made under s 142Y of the ER Act.

Submissions on penalties

[376] Whether penalties are to be paid by RPL or Reza Abdul-Jabbar and if so the amount, is to be determined after further submissions on penalties have been made by the parties. Penalties have not been sought against the third respondent.

[377] The respondents shall have 14 days from the date of this determination to provide to the Authority and counsel for the applicant, written submissions on penalties.

[378] The respondents may also make any submissions about the documents provided to the Authority as proof of payment by RPL to Suryo Firmanto of 50 million Rupiah. Those documents are the photograph of a receipt provided on 24 August 2023, and the receipt provided on 14 December 2023.

[379] The respondents may also make submissions as to whether there has been an obstruction of the Authority, under s 134A of the ER Act, through the conduct of RPL or Reza Abdul-Jabbar, in presenting the photograph of a receipt and the purported original of the photographed receipt, to the Authority.

[380] The applicant shall have seven days from service of the respondent's submissions, in which to reply to them.

[381] The Authority will then determine whether penalties are appropriate for any breaches including obstruction of the Authority, and if so the amount of those.

Costs

[382] Costs are reserved for further directions which will be given with the Authority's determination of penalties.

Alastair Dumbleton
Member of the Employment Relations Authority