

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 678
3154163

BETWEEN	A LABOUR INSPECTOR Applicant
AND	ASAD HORTICULTURE LIMITED (IN LIQUIDATION) First Respondent
AND	MOHAMMAD ASADUZZAMAN Second Respondent

Member of the Authority: Andrew Dallas

Representatives: Martin Denyer, counsel for the Applicant
Jeremy Sparrow, counsel for the Respondents

Investigation Meeting: On the papers

Submissions 8 May, 19 July and 16 August 2024 for the Applicant
12 July and 8 August 2024 for the Respondents

Determination: 15 November 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By lodgement of a statement of problem, a Labour Inspector, George Shorrock commenced proceedings against Asad Horticulture Limited (Asad), now in liquidation, which was a labour supply company operating in the kiwifruit industry in the Bay of Plenty, and Mohammad Asaduzzaman, its sole director and shareholder.

[2] The Labour Inspector's problem is brought in respect of three employees: Gurjant Singh, Devraj Subedi and Ranjana Sapkota Subedi (the employees) and sought findings of breaches of minimum standards, arrears of minimum standards entitlements and penalties.

[3] To assist the resolution of the Labour Inspector's problem against Asad and Mr Asaduzzaman, the parties reached an agreed summary of facts as follows:¹

- a) Asad is a limited liability company that was incorporated on 30 May 2006. Mr Asaduzzaman is the sole director and shareholder of Asad.
- b) Asad trades as a horticulture labour supply company in the kiwifruit industry in the Bay of Plenty region.
- c) Mr Asaduzzaman was personally involved in each of Asad's breaches that are set out in this summary of facts. Mr Asaduzzaman was responsible for recruiting employees (including the affected employees in this matter) and instructing employees as to when and where they would work and whether they could take leave. While he did not personally carry out all payroll functions, Mr Asaduzzaman was in control of Asad's bank account and managed the payment of employees. He accepts that he was a person involved in accordance with s 142W(1)(c) of the Employment Relations Act 2000 (the Act).
- d) Prior to 30 October 2020, Asad and Mr Asaduzzaman had been investigated by the Labour Inspectorate in both 2017 and 2018 and had not been found to be in breach of any minimum standard obligations. This is the first time Asad and Mr Asaduzzaman have been found to be in breach of any minimum standard obligations.
- e) The present matter arises out of a complaint made about Asad and Mr Asaduzzaman to the Labour Inspectorate by Gurjant Singh ("Gurjant") on 30 October 2020. Gurjant's complaint was that he had not been paid holiday pay on termination of his employment.
- f) The Labour Inspector carried out an investigation into this complaint. As part of his investigation, he analysed records provided by Asad, Mr Asaduzzaman and by employees of Asad. The records analysed included wages and time records, employment agreements, holiday and leave records, and the bank statements of employees and Asad.

¹ These have been amended for consistency and style.

- g) The Labour Inspector carried out calculations of arrears owed based on the records provided to him. The outcome of those calculations (as well as analysis of record-keeping breaches) is set out at paragraphs 2.15 to 2.44 of the Statement of Problem (SoP). These calculations were based on the wages and time records provided by Asad and Mr Asaduzzaman. When these records were compared to the actual payments made to employees in the bank statements, it appeared that three affected employees had been paid less than the minimum wage.
- h) The SOP for this matter was lodged on 22 October 2021. The matter was referred to mediation on 6 December 2021. Mediation was held on 5 April 2022.
- i) Since 5 April 2022, the parties have been in ongoing discussions regarding a resolution of this matter, and in particular about the correct amount of arrears owed and the basis for calculating those arrears. Asad and Mr Asaduzzaman have provided further information and explanations of the records that have been provided to the Labour Inspector.
- j) Based on further information received, the Labour Inspector has revised his position from what is in the SOP. It is now agreed that the affected employees were paid at least minimum wage for each hour worked. Asad's records of wages paid are inaccurate, which led the Labour Inspector to previously have the impression that the employees had not been paid minimum wage. The parties agree that the actual hours worked by employees can be established based on the payment they actually received, as recorded in bank statements.
- k) The Labour Inspector has analysed holiday pay paid to the affected employees, based on the actual hours they are agreed to have worked and pay received. Each of the three employees has been underpaid minimum holiday pay entitlements. A spreadsheet of the Labour Inspector's agreed calculations of arrears was provided.
- l) There are three affected employees in this matter. Gurjant was employed by Asad from 5 June 2018 to 10 September 2020. Devraj Subedi (Devraj) was employed by Asad from 1 March 2017 to 22 June 2020. Ranjana Sapkota Subedi (Ranjana) was employed by Asad from 31 July 2016 to 28 June 2020.
- m) The parties agree that Gurjant was owed \$23,957.53 total arrears, comprising:

- a. \$5,032.67 annual holiday pay arrears for holidays taken (s 21 and s 22 of the Holidays Act 2003);
 - b. \$16,016.36 annual holiday pay at end of employment (s 25 Holidays Act 2003);
 - c. \$1,833.50 arrears for unworked public holidays (s 49 Holidays Act 2003); and
 - d. \$1,075 arrears for alternative holidays (s 60 Holidays Act 2003).
- n) The parties agree that Devraj was owed \$19,540.88 total arrears, comprising:
- a. \$1,643.07 annual holiday pay arrears for holidays taken (s 21 and s 22 of the Holidays Act 2003);
 - b. \$15,764.81 annual holiday pay at end of employment (s 25 Holidays Act 2003);
 - c. \$1,908.00 arrears for unworked public holidays (s 49 Holidays Act 2003); and
 - d. \$225 arrears for alternative holidays (s 60 Holidays Act 2003).
- o) The parties agree that Ranjana was owed \$1,805.46 total arrears, comprising:
- a. \$133.74 annual holiday pay at end of employment (s 25 Holidays Act 2003); and
 - b. \$1,671.72 arrears for unworked public holidays (s 49 Holidays Act 2003).
- p) Asad and Mr Asaduzzaman have breached s 130 of the Employment Relations Act in respect of each affected employee, in that wage payments recorded did not correspond with the amounts of actual payments made.
- q) Asad and Mr Asaduzzaman have breached s 81 of the Holidays Act 2003 in respect of each affected employee, in that they failed to record the dates on which the employees became entitled to alternative holidays.
- r) The parties have agreed that arrears will be repaid to the affected employees in instalments and this has now been paid in full.
- s) The parties agree that in each case where arrears are owed, there has been a breach of minimum entitlements. Penalties are available for these breaches and for breaches of s 130 of the Employment Relations Act and s 81 of the Holidays Act 2003.
- t) The Labour Inspector intends to seek the imposition of penalties. Asad and Mr Asaduzzaman intend to submit that penalties should not be imposed. The parties agree that this can be dealt with by way of submission.

- u) The parties agree that Asad and Mr Asaduzzaman's payment of arrears being made by instalments as soon as agreement was reached on the correct amount of arrears, and their participation in mediation are mitigating factors in the assessment of penalties.
- v) The parties agree that if penalties are to be imposed, they can be globalised to an extent. The Labour Inspector will submit that annual holiday pay breaches (s 21, s 22 and s 25) can be globalised into one breach per employee, and public holiday pay breaches (s 49 and s 60) can be globalised into one breach per employee.

The Authority's investigation

[4] It was agreed with the parties this matter would be heard "on the papers". In addition to the agreed facts and the parties' submissions and an application for non-publication orders in favour of Asad and Mr Asaduzzaman, which was supported by an affidavit sworn Mr Asaduzzaman. For the reasons set out below, these orders were not granted.

[5] Asad was placed into receivership on 14 August 2024. On 25 August 2024, the Labour Inspector applied for concurrence from the liquidator to continue proceedings against Asad under s 248 of the Companies Act 1993. This was granted on 26 August 2024.

[6] In this determination I have not referred to all submissions advanced by the parties during my investigation, however I have fully considered them.

The Labour Inspector's claim for penalties

[7] The Authority has jurisdiction to hear and determine an application by a Labour Inspector for recovery of penalties under the Act.² The standard of proof for the imposition of a penalty by the Authority is on the balance of probabilities.

[8] As Asad and Mr Asaduzzaman accepted that they have breached minimum employment standards; with Mr Asaduzzaman being a person involved in Asad's breaches, this matter comes down to the level of penalties to be imposed on each.

² Employment Relations Act 2000, s 161(m)(ii).

[9] The starting point for a penalty for a body corporate, as is the case here, is a maximum of \$20,000 per breach.³ The maximum penalty for an individual found liable for a penalty is \$10,000 per breach.⁴

[10] The methodology for assessing various factors relevant to the imposition of penalties is well-known to the Authority and applied below under various headings.

Nature and number of breaches

[11] The Labour Inspector seeks penalties for breaches of the Act and the Holidays Act 2003 (H Act). The breaches are:

- (i) two breaches for failing to properly pay annual leave entitlements: s 21 and 22 of the H Act
 - i. \$40,000 for Asad
 - ii. \$20,000 for Mr Asaduzzaman
- (ii) three breaches for failing to properly pay holiday pay on termination: s 25 of the H Act;
 - i. \$60,000 for Asad
 - ii. \$30,000 for Mr Asaduzzaman
- (iii) two breaches for failing to provide alternative holiday entitlements: s 60 of the H Act;
 - i. \$40,000 for Asad; and
 - ii. \$20,000 for Mr Asaduzzaman
- (iv) three breaches for failing to properly pay unworked public holidays: s 49 of the H Act;
 - i. \$60,000 for Asad; and
 - ii. \$30,000 for Mr Asaduzzaman
- (v) Three breaches for failing to maintain holiday and leave records: s 81 of the H Act;
 - i. \$60,000 for Asad; and
 - ii. \$30,000 for Mr Asaduzzaman;
- (vi) Three breaches for failing to maintain wage and time records: s 130 of the Employment Relations Act.
 - i. \$60,000 for Asad; and
 - ii. \$30,000 for Mr Asaduzzaman.

³ Employment Relations Act, s 135(2)(b).

⁴ Employment Relations Act, s 135(2)(a)

[12] The parties agreed that penalties set out in (i), (ii), (iii) and (iv) above could be approached on a “globalised” on per-employee basis. This means the total number of penalties to be considered reduces from 16 to 12: so, four breaches in respect of three employees.

[13] So, the total potential breaches at this stage are \$240,000 for Asad and \$120,000 for Mr Asaduzzaman. Asad and Mr Asaduzzaman agreed with the Labour Inspector’s identification of the breaches of employment standards and the maximum penalties to be imposed.

Were the breaches intentional, inadvertent or negligent?

[14] The Labour Inspector said that Asad and Mr Asaduzzaman had accepted responsibility for the breaches, and it was “common ground”, Mr Asaduzzaman while not solely responsible for payroll was in control when the employees worked and how much they got paid. The Labour Inspector said the breaches were intentional in the sense that Asad and Mr Asaduzzaman were “well aware” of the matters which comprised the breaches, even in the absence of “malicious intent”. The Labour Inspector said this was not a case of lack of knowledge or understanding and noted Asad’s previous two interactions with the inspectorate. The Labour Inspector further said the records initially provided by Asad and Mr Asaduzzaman were “inaccurate and misleading”.

[15] Asad and Mr Asaduzzaman said none of the breaches were intentional, inadvertent or negligent. They said there was no concealment and they “genuinely” believed that the systems in place were satisfactory. Asad and Mr Asaduzzaman also observed that the H Act was “incredibly difficult” to comply with and took issue with the Labour Inspector’s submission that they were “well aware of the matters which comprised the breaches”; suggesting if they had have known about such, they would have “immediately taken steps to rectify the issues”.

Severity of the breaches

[16] The Labour Inspector submitted for the globalised penalties an appropriate starting point was 70% of the maximum penalty. This was because the failures resulted in an obvious financial advantage to Asad and Mr Asaduzzaman who received labour without having to pay for it fully and properly. The Labour Inspector observed this also reflects that for two of the affected employees there are two different breaches globalised into one, and the amounts involved are substantial, over \$21,000 for Gurjant, and over \$17,000 for Devraj.

[17] The Labour Inspector acknowledged that the annual holiday arrears owed to Ranjana were only \$133.74. Taking all of this into account, it is submitted that 70% is appropriate. For the globalised failures to pay public holiday pay, the Labour Inspector said the appropriate starting point was 60% which reflects for Gurjant and Devraj these are globalised breaches. The arrears here is lower but still substantial and similar across all three employees. The Labour Inspector said failures to maintain holiday and leave records could be assessed at 40% and this reflects that the records were kept but failed to record employee entitlement to alternative holidays (which the employees were not provided with and form part of the arrears in this case). The Labour Inspector said failures to maintain wage and time records should be assessed at 60% because these breaches are more serious because erroneous information was recorded and provided which hindered the calculation of arrears.

[18] While Asad and Mr Asaduzzaman sought significantly lower starting points of 40% for all breaches, I accept the Labour Inspector's approach at this stage as being more appropriate in all the circumstances. So, the total potential breaches at this stage are \$138,000 for Asad and \$69,000 for Mr Asaduzzaman.

Mitigation of breaches

[19] The Labour Inspector said Asad and Mr Asaduzzaman's willingness to participate in mediation, agree upon arrears of wages and pay these in full were mitigating factors. However, the Labour Inspector said that full payment was not achieved for three years from the complaint being made and should be considered "late performance of duty" rather than being seen as an act of contrition. Asad and Mr Asaduzzaman said late payment should be attributed to the complexity of the calculations and their ability to pay.

Circumstances of the breach and vulnerability

[20] The Labour Inspector said the workers were temporary visa holders and, as such, were vulnerable. This was accepted by Asad and Mr Asaduzzaman. It was also submitted by the Labour Inspector the arrears owed were significant and Asad and Mr Asaduzzaman's recording keeping breaches were "systemic".

Previous conduct

[21] While Asad and Mr Asaduzzaman have had previous contact with the Labour Inspectorate, they have not been found to have breached minimum employment standards.

Deterrence

[22] The Labour Inspector said that as the breaches related to minimum employment standards, there was a need to "bring home" to Asad and Mr Asaduzzaman that they are required to meet the same and not just when it is financially convenient or they are under pressure from a Labour Inspector to do so. Asad and Mr Asaduzzaman said they had learned from their mistakes but disputed the Labour Inspector's convenience argument and their financial circumstances necessitated payment of arrears by instalments.

Culpability

[23] The Labour Inspector said there were a number of factors which increased Asad and Mr Asaduzzaman's culpability including: multiple affected workers, the workers lost the use of the money they were entitled to at the time it became due and for several years thereafter and the recordkeeping breaches made it difficult to properly calculate arrears.

[24] Asad and Mr Asaduzzaman said the breaches were unintentional and the number of affected workers small and the quantum of arrears is relatively low. Asad and Mr Asaduzzaman said they had paid the arrears, there was no history of breaching minimum entitlements and there has been no breach of the Wages Protection Act 1983, which would have likely increased their culpability.

Consistency

[25] The parties provided various determinations which they submitted were more, or less, on all fours with this matter. Having reviewed those determinations, I am confident the result here is consistent but by no means the same. The Labour Inspector said the Authority has imposed significant penalties for breaches of minimum employment standards including matters involving holiday pay breaches and relatively small numbers of employees. The Labour Inspector said total arrears here was \$45,303.87 and while there is often a correlation between arrears and penalties, the penalty should reflect the totality of the breaches and not just the monetary amounts involved.

[26] Asad and Mr Asaduzzaman at this stage, in addition to providing comment on various determinations, said the breaches here only involved a small number of employees and occurred over a short time. It was also observed there were no “aggravating” factors such as the payment of premiums.

[27] Having considered all foregoing matters leading to this stage including consistency, I believe a further discount can be applied here. Twenty-five percent is appropriate, and in that sense, I agree with the Labour Inspector. So, the total potential breaches at this stage are \$103,500 for Asad and \$51,750 for Mr Asaduzzaman.

Financial circumstances of Asad and Mr Asaduzzaman

[28] The Labour Inspector said the onus was on Asad and Mr Asaduzzaman to provide the Authority with up-to-date and accurate information in support of any contention of any inability to meet a potential penalty award. The Labour Inspector submitted any demonstrated issues around ability to pay should be dealt with by way of payment by instalments rather than a reduction in total penalties. However, it was noted that based on the information currently before the Authority, there was no clear evidence of inability to pay. The Labour Inspector said, in any event, penalties need not be reduced to a level which Asad and Mr Asaduzzaman say they can or will be able to pay.

[29] Asad and Mr Asaduzzaman said they were not a in position to meet a large penalty award. Asad was no longer trading and, indeed, is now in liquidation. Asad and Mr Asaduzzaman sought a 20% reduction at this stage and also sought the ability to pay any penalty award by quarterly instalments.

[30] Given the lack of clear evidence about the ability to pay penalties, I am not prepared to make a further reduction at this stage. However, I am prepared to consider payment by instalment of any penalties to be imposed.

Proportionality of outcome

[31] Taking the submissions of the parties into account and having regard to all the circumstances of the case, it is appropriate to impose significant, but proportionate, penalties on Asad and Mr Asaduzzaman.

[32] The Labour Inspector said there had been “generous” discounts for mitigating factors and that an overall penalty in the order of \$70,000 for Asad was consistent with other determinations when considering the different types of arrears and the record-keeping breaches. The Labour Inspector said penalties in the order of half that of Asad (\$35,000) for Mr Asaduzzaman, given his involvement in those breaches, was an appropriate penalty to impose.

[33] It was submitted by the respondents that penalties \$20,000 for Asad and \$5,000 Mr Asaduzzaman were the appropriate penalties and that all penalties will ultimately have to be funded by Mr Asaduzzaman “somehow” as the “alter ego” of Asad.

Result

[34] Taking these submissions into account and having regard to all the circumstances of the case, it is appropriate to impose significant, but proportionate, penalties of \$70,000 on Asad and \$30,000 on Mr Asaduzzaman.

[35] The Labour Inspector said he does not oppose a portion of the penalties being paid to the affected workers. Asad and Mr Asaduzzaman said they would abide any decision of the Authority in this regard. In the end, having regard to the circumstances of this matter, including that the workers have now been paid their arrears in full, penalties should be made payable to Crown.

[36] So then, Asad and Mr Asaduzzaman must pay the following amounts to the Labour Inspector, for subsequent payment into a Crown bank account:

- i. Asad is to pay total penalties of \$70,000; and
- ii. Mr Asaduzzaman is to pay total penalties of \$30,000.

[37] Payments are to be made quarterly (3 monthly) in equal instalments of \$5,000 for each of Asad and Mr Asaduzzaman commencing with the first instalments being due 28 days from the day of this determination and continuing thereafter until paid in full by each of them.

Non-publication orders declined

[38] The application for permanent non-publication orders in favour of Asad and Mr Asaduzzaman are declined. The Authority is bound by the presumption of “open justice”.⁵ While there *may* be occasions where this presumption can and, indeed, probably should be departed from, this is not one of them. There is the utmost public interest in compliance with, and the enforcement of, minimum employment standards. Conduct of the type evidenced in this determination should not be shielded from the public gaze by legal nicety. In my view at least, and at most in employment relationship problems such as this, consideration may be given to issuing a non-publication order in respect of the names of the exploited and/or vulnerable workers (but that is not sought here by the Labour Inspector). In any event, the same result can be effectively and, indeed, elegantly achieved by referring to this class of persons as “Worker A”, Worker B” and so on, rather than directly naming them in a determination.

[39] While acknowledging the matters raised by Mr Asaduzzaman in his affidavit in support of non-publication and yes, it is appreciated that publication may be disconcerting for others closely associated with him, he must, however, take full, and untrammelled through publication, responsibility for a state of affairs of his own creation.

⁵ See the Supreme Court decision in *Erceg v Erceg* [2016] NZSC 135

Costs

[40] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 28 days from the date of this determination in which to file and serve a memorandum on costs. Asad and Mr Asaduzzaman have a further 14 days in which to file and serve a memorandum in reply.

[41] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Andrew Dallas
Chief of the Employment Relations Authority