

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 771
3169344 and 3246799

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	E4 RECORDS LIMITED First Respondent
	AND	HARRISON TOMAS MORGAN Second Respondent
Member of Authority:	Jeremy Lynch	
Representatives:	Ella Rainthorpe, counsel for the Applicant Harrison Morgan for the First Respondent, and in person as the Second Respondent	
Investigation Meeting:	On the papers, and on 25 July 2024, by AVL	
Submissions Received:	16 April 2024, 21 and 30 October 2024, 5 November 2024 and 19 December 2024 from the Applicant 30 July 2024 from the Respondent	
Determination:	20 December 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The first respondent, E4 Records Limited (E4) is a limited liability company, which operated an audio recording business in Auckland.

[2] The second respondent, Harrison Morgan is the sole director and majority shareholder of E4. Mr Morgan says his business has failed and is no longer trading. The Companies Office website records that the Registrar of Companies has initiated action to remove the company from the Register, but as at the time of this determination, E4 remains a registered company.

[3] The applicant is a Labour Inspector designated under s 223 of the Employment Relations Act 2000 (the Act).

[4] This matter stems from an application brought by the Labour Inspector (under Authority file 3169344) seeking wage arrears owed to three employees, together with penalties against E4.

[5] In addition, the Labour Inspector sought a determination that Mr Morgan was a person involved in breaches of employment standards under s 142W of the Act and sought penalties against him personally.

[6] After this matter was lodged in the Authority, the parties were able to partially resolve the disputed matters following a mediation. The terms of the parties' settlement were recorded in a record of settlement (ROS) under s 149 of the Act and signed by a mediator.

[7] The Labour Inspector says that neither E4 nor Mr Morgan have complied with their obligations under the ROS, and has lodged a second statement of problem (under Authority file 3246799) seeking a compliance order under s 137 of the Act, together with an additional penalty against E4 and Mr Morgan for their breaches of the ROS, and costs.

[8] This determination resolves the outstanding claims under Authority file 31693444, as well as the compliance and penalties application proceeding brought under Authority file 3246799.

The Authority's investigation

[9] The parties agreed that both matters were suitable for an investigation on the papers.

[10] Sworn affidavit evidence was lodged by the Labour Inspector.

[11] Mr Morgan lodged an unsworn statement on behalf of E4 and himself. The Authority convened an investigation meeting (by AVL) for the purpose of Mr Morgan affirming his evidence.

[12] Written submissions were lodged by the Labour Inspector.

As permitted by s 174E of the Act, this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matters, and specified orders made. It has not recorded all the evidence and submissions received.

First statement of problem – Authority file 3169344

[13] In April 2021 the Labour Inspectorate received a complaint from the mother of an employee of E4. Amongst other things, the complaint alleged that E4 had failed to provide the complainant's son with a written employment agreement, and that significant wage arrears were owed.

[14] Upon receiving the complaint, the Labour Inspector commenced an investigation, not only into the complaint received, but also into E4's general compliance with minimum employment standards.

[15] As a result of the investigation, the Labour Inspector identified three affected employees, namely Anton Demetriades-Holt, Zachary Adamson, and Ivan Kolesnikov (the employees).

[16] The Labour Inspector set out the findings of her investigation in a report dated 17 February 2022 (the investigation report).

[17] The Labour Inspector's investigation report found that at all relevant times, E4 was the employer of the employees. In addition, the investigation report found that E4 had failed to comply with minimum employment standards, including:

- a failure to pay the employees the minimum wage;
- a failure to pay annual holiday on termination of the employees' employment and for this payment to be made in the pay period that relates to the employees' final period of employment;
- a failure to pay Mr Demetriades-Holt for an unworked public holiday;
- a failure to provide Mr Demetriades-Holt with a written employment agreement;
- a failure to keep a compliant wages and time record for the employees;
- a failure to keep a compliant holiday and leave record for the employees.

[18] In addition, the investigation report found that Mr Morgan, being the sole director of E4, was a person involved in E4's breaches, under s 142W(1)(c) of the Act.

[19] On 26 October 2022, the parties signed an agreed statement of facts (agreed statement). The agreed statement records at paragraph [11]:

The respondents [E4 and Mr Morgan] agree and accept with the Labour Inspector's findings as set out in the investigation report and in the statement of problem, including that:

- (a) The second respondent [Mr Morgan] was a person involved in the breaches identified in the Labour Inspector's statement of problem and investigation report. The second respondent decided to employ the employees after Anton Demetriades-Holt had re-acquainted with him and after Zachary Adamson and Ivan Kolesnikov had volunteered for the first respondent. The employees reported directly to the second respondent who, as sole director of the first respondent, exercised significant influence over the management and administration of the business and was responsible for the payroll, payment of wages, providing the employees with employment agreements, and record-keeping.
- (b) The employees were employed by the first respondent [E4] as follows:
 - (i) Anton Demetriades-Holt was employed by the first respondent from 16 September 2020 to 5 December 2020 and worked as a workshop manager. He was 21 years old during his employment. Mr Demetriades-Holt made several requests to the second respondent for the payment of his wages.
 - (ii) Zachary Adamson was employed by the first respondent from 16 June 2020 to 18 December 2020 as an assistant to the second respondent. Mr Adamson's employment with the first respondent ended after he told the second respondent that he would have to leave unless he was paid his wage arrears.
 - (iii) Ivan Kolesnikov was employed by the first respondent from 15 June 2020 to 30 September 2020 as an events manager until he became frustrated as a result of the non-payment of wages. Mr Kolesnikov was 21 years old and on a student visa during his employment.

[20] Paragraph [12] of the agreed statement records the parties' agreement that:

The respondents accept the Labour Inspector's findings that the first respondent breached the following minimum employment standards:

- (a) Section 6 of the Minimum Wage Act 1983 by failing to pay the employees the minimum wage for every hour worked.
- (b) Sections 23 and 27 of the Holidays Act 2003 (the "HA") by failing to pay annual holidays on termination of the employee's employment and for failing to make this payment in the pay period that relates to the employee's final period of employment.
- (c) Section 49 of the HA by failing to pay Anton Demetriades-Holt for an unworked public holiday.
- (d) Section 65 of the Employment Relations Act 2000 (the "ERA") by failing to provide Anton Demetriades-Holt with an individual employment agreement in writing.

- (e) Section 130 of the ERA by failing to keep compliant wages and time records for the employees.
- (f) Section 81 of the HA by failing to keep compliant holiday and leave records for the employees.

[21] Paragraph [13] of the agreed statement records the parties' agreement that:

The respondents acknowledge that arrears totalling \$8,842.08 (gross – before interest) are owed to the employees. This figure breaks down into gross arrears under the following headings:

- (a) \$4,239.53 in minimum wage arrears due to Anton Demetriades-Holt.
- (b) \$2,569.55 in minimum wage arrears due to Zachary Adamson.
- (c) \$1,171.92 in minimum wage arrears due to Ivan Kolesnikov.
- (d) \$358.56 in annual holiday pay arrears due to Anton Demetriades-Holt.
- (e) \$251.56 in annual holiday pay arrears due to Zachary Adamson.
- (f) \$158.46 in annual holiday pay arrears due to Ivan Kolesnikov.
- (g) \$92.50 in public holiday pay arrears due to Anton Demetriades-Holt.

[22] On 6 December 2022 the parties attended mediation, and reached a full and final settlement except as to penalties and interest.

[23] As noted above, the parties' agreement was recorded in a ROS, and was signed by the parties and a mediator on 12 December 2022. The parties to the ROS were the Labour Inspector, and E4 and Mr Morgan jointly as the employer.

[24] The ROS records that the parties accept the agreed statement (which is attached to the ROS as an appendix).

[25] In addition, under the ROS the parties agree that on or before 16 March 2023 Mr Morgan and E4 agreed to pay the sum of \$9,123.36 (gross) being arrears of minimum wage, annual holiday pay and public holiday pay due to the employees as set out under the agreed statement; and interest on the arrears calculated from the date of termination of the employees' employment up to and including 6 December 2022.

[26] The ROS records that although matters discussed during the parties' mediation are to remain confidential, the terms of the ROS itself are not confidential.

[27] The ROS also records that the Labour Inspector reserves the right to pursue interest on the arrears calculated up to the final date of payment if payment obligations are not met.

[28] Additionally, under the ROS the Labour Inspector reserved its rights to pursue

penalties against the respondents for all breaches set out in the agreed statement.

[29] In respect of Authority file 3169344, the Labour Inspector seeks a determination as to arrears and liability by consent, together with penalties for the breaches of minimum employment standards.

[30] By consent and by this determination, the terms agreed between the parties (as set out at paragraphs [19] – [28] above) are now orders of the Authority in partial resolution of this matter. The parties have agreed that the only matters outstanding are whether penalties should be imposed on the respondents in respect of the breaches, and if so the quantum of penalties; and whether the respondents should be required to pay further interest on the wages and holiday pay arrears, from the date the arrears became owing (as set out in the ROS), to the date of full payment, together with the issue of costs.

Authority File 3246799

[31] As set out above, following the parties' mediation, a settlement was reached. The ROS signed by the parties provides that the agreed amount of minimum wage arrears, holiday pay, and interest would be paid to the Labour Inspectorate on behalf of the employees on or before 16 March 2023. It is not disputed that no payment was received by the Labour Inspectorate by this date, which is a clear breach of the terms of the ROS.

[32] On 22 March 2023 MBIE's Regulatory Enforcement Collection Team sent a notice of demand for payment to E4 and Mr Morgan, setting out the total amount for payment, together with a new payment date of 4 April 2023.

[33] The respondents failed to comply with this new date for payment. No payment was received by the Labour Inspectorate on or before 4 April 2023.

[34] On 22 August 2023 the Labour Inspector commenced a new proceeding in the Authority under Authority file 3246799) in respect of the respondents' failure to comply with the ROS.

[35] In their statement in reply, E4 and Mr Morgan accept that the ROS has not been complied with.

[36] Since the lodging of the statement in reply, Mr Morgan has advised the Labour Inspector on many occasions that he was hoping to be approved for a loan which would be used to satisfy the obligations under the ROS. However, this has not occurred.

[37] On 15 November 2023 E4 and Mr Morgan advised the Labour Inspector they wished to enter a payment plan. The Labour Inspector agreed to receive instalment payments of \$80.00 per fortnight (initially), starting on 24 November 2023, and then increasing to \$415.00 per fortnight from 5 January 2024, until the debt was cleared.

[38] Mr Morgan says that for various reasons he has not been able to increase the instalments as agreed. No variation to the instalment agreement of November 2023 was sought from the Labour Inspector. Fortnightly payments of \$80.00 have simply continued.

[39] In all, the respondents have made 26 payments of \$80.00, commencing on 21 November 2023, to the date of this determination. In addition, a one-off payment of \$3,800.00 was made on 21 May 2024. Total payments in the sum of \$5,880.00 have been made.

[40] Despite the payments made, the amount the parties agreed under the ROS of December 2022 still has not been fully paid, the effect of which is that E4 and Mr Morgan are in breach of the terms of the agreement.

[41] The proceeding under Authority file number 3246799 is an application by the Labour Inspector for a compliance order under s 137(1)(a)(iii), and s 151 of the Act, ordering the respondents to comply with the terms of the ROS.

[42] In addition, the Labour Inspector seeks a penalty against E4 and Mr Morgan under s 149(4) of the Act, for their breaches of the ROS.

Penalties – general principles

[43] Comprehensive legal principles apply when the Authority is required to determine an application for penalties. Those principles are set out at s 133A of the Act. In addition, the Employment Court has provided further guidance in recent decisions including *Labour Inspector v Preet Pvt Limited*,¹ *Labour Inspector v Prabh*

¹ *Labour Inspector v Preet Pvt Limited* [2016] NZEmpC 143.

Limited,² and *Labour Inspector v Daleson Investment Limited*.³ The Authority is also guided by the Court's judgment in *Labour Inspector v Samra Holdings Limited T/A Te Puna Liquor Centre*, where penalties for breaches of employment standards by employers and a person involved were considered.⁴

[44] The appropriate quantum of penalty is to be determined after considering the circumstances of each proven breach in light of the legal principles.

[45] A penalty may be awarded in any amount up to the maximum prescribed by s 135(2) of the Act, which for each breach or involvement in a breach is \$20,000 in the case of a company such as E4, and \$10,000 in the case of a natural person such as Mr Morgan.

[46] If a penalty is ordered by the Authority, under s 136(2) of the Act, all or part of it may be awarded to any person (such as the employees), instead of being paid to the Crown. The Labour Inspector seeks that the Authority exercise its discretion to award part of any penalty ordered to the complainant employees.

[47] The Employment Court, in the decisions referred to above, has considered the purpose of penalties.⁵ When ordering penalties the Authority should seek to:

- punish those who breach minimum employment standards;
- deter companies and individuals from committing employment breaches;
- compensate victims of such breaches;
- eliminate unfair competition.

[48] In *Preet*, the Court developed a four-step methodology to be followed by the Authority when fixing the quantum of penalties, so that consistency and transparency might better be achieved between cases:⁶

Step One: Identify the nature and number of statutory breaches.
Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether

² *Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

³ *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

⁴ *Labour Inspector v Samra Holdings Limited T/A Te Puna Liquor Centre and Four Others* [2022] NZEmpC 234.

⁵ *Preet*, above n 1 at [49-63].

⁶ *Preet*, above n 1 at [139-147].

global penalties should apply, whether at all or at some stages of the four-step approach.

- Step Two: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
- Step Three: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step Two.
- Step Four: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[49] Section 133A of the Act provides a list of matters the Authority must have regard to in determining the amount of any penalty awarded:

In determining an appropriate penalty for a breach referred to in s 133, the Authority or Court (as the case may be) must have regard to all relevant matters. Including –

- (a) the object stated in s 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the Court in proceedings under this Act, or any other enactment to have engaged in any similar conduct.

[50] In addition, the Court in *Daleson Investment* summarised additional considerations (from the *Preet* judgment) which include:⁷

- deterrence
- culpability
- consistency of penalty awards in similar cases
- ability to pay
- proportionality of outcome

⁷ *Daleson Investment*, above n 3 at [19].

Consideration of penalties

Statutory consideration 1 – the object of the Act

Authority files 3169344 and 3246799

[51] The object of the Act is set out at s 3. The stated objects include:

- promotion of good faith in all aspects of the employment environment and the employment relationship;
- to promote the effective enforcement of employment standards, in particular by Labour Inspectors; and
- to acknowledge and address the inherent inequality in employment relationships.

[52] The respondents accept they have failed to comply with employment standards. In addition, at the time of their employment, two of the employees were relatively young, at 21 years of age. There was a clear inequality of power between the employees and the respondents.

[53] The record keeping obligations required by New Zealand employment legislation is designed to promote and administer the enforcement of employment standards. The failure to keep accurate records impedes the Labour Inspectorate in its regulatory function.

Statutory consideration 2 – the nature and extent of the breaches

Authority file 3169344

[54] For file 3169344, the breaches (accepted by E4 and Mr Morgan) are set out in the agreed statement (paragraphs [20] to [23] above).

[55] The Labour Inspector has identified 14 separate breaches:

- three breaches (one for each of the three employees) of s 6 of the Minimum Wage Act 1983 (MWA) for failing to pay the employees the minimum wage for every hour worked;
- three breaches of the provisions of the Holidays Act 2003 (HA), by failing to pay the employees in accordance with ss 23 and 27 of that Act;

- one breach of s 49 of the HA for failure to pay an unworked public holiday to Anton Demetriades-Holt;
- one breach of s 65 of the Act by failing to provide Mr Demetriades-Holt with a written employment agreement;
- six record keeping breaches, comprising three breaches of s 130 of the Act by failing to keep a compliant wages and time record, and three breaches of s 81 of the HA by failing to keep a compliant holiday and leave record for the employees.

[56] Some globalisation of penalties is appropriate to meet the interests of this case, and in accordance with the Court’s approach to penalties as set out in *Preet and Daleson Investment*.

[57] The failure to pay minimum wages and pay holiday pay to the employees, despite arising out of the same “single course of conduct”, is not globalised.⁸ It is appropriate that the record keeping breaches (that is, the failure to keep a compliant wages and time record, and a holiday and leave record) be globalised into one breach.

[58] In addition, the HA breaches, which relate to public holidays and annual holidays can also be globalised into one breach of the HA.

[59] The Labour Inspector submits that the circumstances surrounding the public holiday breach, given that it involves only one employee, and a relatively modest amount, is not necessary to attract its own penalty. This is an appropriate concession to make.

[60] A refocus brings those 14 breaches to nine breaches in total, comprising:

- three HA breaches (one for each of the three employees);
- three record keeping breaches (one for each of the three employees); and
- three MWA breaches (one for each of the three employees).

[61] The total maximum penalty against E4 is therefore \$180,000.00, being \$20,000.00 per breach. The total maximum penalty available against Mr Morgan is

⁸ *Preet*, above n 1 at [139].

\$90,000.00, being \$10,000.00 per breach.

Authority file 3246799

[62] In respect of the compliance application commenced following the respondents' failure to comply with the terms of the ROS, there is one breach for E4 pursuant to s 149(4) of the Act for its failure to comply with a ROS. In addition, there is one breach by Mr Morgan under the same section for his failure to comply with the ROS.

[63] The maximum penalty available in respect of this breach is \$20,000.00 for E4, and \$10,000.00 for Mr Morgan.

[64] This is a discrete proceeding, and as such it is appropriate that these breaches are not globalised with the penalties being considered under the proceeding brought under Authority file 3169344.

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

Authority file 3169344

[65] The respondents' MWA breaches, record keeping breaches and HA breaches were clearly intentional, and not inadvertent.

[66] Mr Morgan's evidence is that E4's failure stemmed from the business not fully recovering from the pandemic, and also suffering from a lack of "business knowledge". However, cash flow issues and lack of business acumen are no excuse for failure to comply with employment standards. Mr Morgan exercised significant influence over the management and administration of E4 and was responsible for the payment of wages. E4 had been operating since 2017. This was some years prior to the employment of the three employees. Both E4 and Mr Morgan ought to have been aware of their obligations in respect of employment standards and record keeping. The Labour Inspector submits that neither E4 nor Mr Morgan took reasonable steps to fulfil their legal obligations to the three employees. I accept this submission.

Authority file 3246799

[67] In respect of the compliance proceeding arising from the failure to comply with the record of settlement, this breach can only be seen as intentional. The evidence before the Authority is that the Labour Inspector made multiple efforts to contact E4 and Mr Morgan in relation to the outstanding payment, but to no avail.

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

Authority file 3169344

[68] The unpaid arrears amount to \$8,842.08 across the three employees. Interest was added to this amount under the ROS, bringing the total amount owing to the three employees to \$9,123.36. The employees have lost the use of this money to which they were entitled at the time it became due.⁹

[69] The Labour Inspector submits that the arrears owing are substantial, given the employees' relatively short employment of between three to six months in total. While I make no finding as to the substantiality of the arrears, I do observe that in depriving the three employees of their minimum entitlements, E4 has reduced its costs and gained an unfair advantage over its competitors through retaining funds that would otherwise have been paid in wages and holiday pay.¹⁰

Authority file 3246799

[70] Although payments towards the amount agreed under the ROS have been made, such payments began only relatively recently, given the employees' employment ended in 2020.

[71] E4 and Mr Morgan's failure to comply with their obligations under the ROS has not only deprived the employees of the benefit of the funds to which they are entitled, but has created additional and unnecessary work for the Labour Inspector.

Statutory consideration 5 – steps taken to mitigate effects of the breach

Authority file 3169344

[72] E4 and Mr Morgan have cooperated with the Labour Inspector's investigation. They signed an agreed statement, and entered into a ROS, making a number of concessions.

[73] There was no effort to make any payments towards the ROS until November 2023, which was nearly a year after the ROS was entered into.

[74] A payment plan was then entered into, and to date \$5,880.00 has been paid by the respondents (notwithstanding these payments have not been according to the agreed

⁹ *Daleson Investment*, above n 3 at [31].

¹⁰ *Daleson Investment*, above n 3 at [31].

instalment plan).

[75] E4 has now ceased trading, meaning there is no ongoing risk of noncompliance with employment standards.

Authority file 3246799

[76] The obligations set out under the ROS have not been complied with, necessitating the commencement of a further proceeding for compliance.

[77] Although a payment plan was entered into by the respondents, the full amount to which the employees are entitled has not been satisfied. Nor have the respondents complied with their obligations under the agreed instalment arrangement.

[78] No other steps have been taken by either E4 or Mr Morgan to mitigate the effects of their breaches.

Statutory consideration 6 – circumstances of the breach and any vulnerability

Authority file 3169344

[79] The employees were relatively young at the time they commenced their employment. Two of the employees were only 21 years of age. In addition, it is not disputed that one of the employees was on a migrant student visa at the time of his employment. The Labour Inspector submits this creates an inherent power imbalance. I accept this submission.

Authority file 3246799

[80] As set out above, E4's and Mr Morgan's obligations under the ROS have not been complied with for a significant period, the effect of this is that the employees have not had the benefit of the money to which they are entitled, and has been owing to them since 2020.

Statutory consideration 7 – previous conduct

Authority files 3169344 and 3246799

[81] Neither E4 nor Mr Morgan have previously come to the attention of the Labour Inspectorate, or the Authority.

Additional consideration 8 – deterrence

Authority file 3169344

[82] The breaches under this proceeding relate to minimum standards. As the Court held in *Daleson Investment*, there is a need to bring home to the respondents the employment standards they are required to meet. The Court also considered that it should be made plain to other employers that minimum entitlements are non-negotiable.¹¹

[83] The Labour Inspector submits that penalties should be imposed consistent with the objects of the Act, the MWA and the HA, particularly those relevant to the upholding of principles of good faith, mutual trust and confidence. I accept this submission.

[84] The Labour Inspector submits that both employers, and persons involved in breaches of employment standards, need to be accountable for any non-compliance. I accept this submission.

Authority file 3246799

[85] I observe that as a matter of public policy, a penalty against a party who breaches a term of a ROS can be necessary to uphold the integrity of the full, final, binding and enforceable nature of such agreements under s 149 of the Act.

[86] It is important public confidence is maintained that there will be compliance with records of settlement entered into under s 149 of the Act.

Additional consideration 9 – culpability

Authority file 3169344

[87] The Labour Inspector submits that the aggravating features, while serious, are not the most serious breaches, and therefore the provisional starting point for penalties for this matter (before deductions) will not be the maximum penalty. I accept this submission.

[88] The Labour Inspector acknowledges the initial cooperation and provision of information by E4 and Mr Morgan, including the agreed statement, which has obviated

¹¹ *Daleson Investment*, above n 3 at [39].

the need for an in-person investigation meeting. In addition, the Labour Inspector notes that some instalment payments towards the arrears owing have been made. The Labour Inspector submits that a 20 per cent discount should be applied in such circumstances.

Authority file 3246799

[89] In respect of this matter, the aggravating and mitigating factors have been set out above. The Labour Inspector submits that an appropriate starting point for both respondents should be 60 per cent of the maximum penalty.

[90] The Labour Inspector acknowledges that a payment plan has been entered into, and regular instalment payments have been made. The Labour Inspector submits that as such, a 20 per cent discount for both E4 and Mr Morgan should be applied in the circumstances.

Additional consideration 10 – consistency

Authority file 3169344

[91] Breaches of MWA and HA obligations are serious matters. The Authority and the Court have imposed significant penalties for such breaches. In *Daleson Investment*, penalties of \$40,000 were ordered in respect of minimum wage arrears, holiday pay arrears, and the failure to provide a written employment agreement.

[92] A penalty should reflect the totality of the breaches, and not just the monetary amounts involved.¹²

Authority file 3246799

[93] The Labour Inspector referred to Authority determinations in which penalties of \$2,500 and \$3,000 were ordered against an employer in default of obligations set out under a ROS.¹³

[94] The Labour Inspector accepts that regular instalment payments have been made towards the agreed amount under the ROS, and the maximum penalty should be reduced accordingly. I accept this submission.

¹² *A Labour Inspector v Pegasus Energy Limited & Anor* [2018] NZERA Wellington 26.

¹³ *King v Premier Forwarding NZ Limited* [2023] NZERA 780, and *Cookson v Right Height Scaffolding Limited* [2023] NZERA 766.

Additional consideration 11 – ability to pay

Authority files 3169344 and 3246799

[95] The Labour Inspector accepts that E4 is no longer trading.

[96] Mr Morgan's evidence is that he has been unable to pay the entire amount due under the ROS due to expenses associated with having a sick cat. Attached to Mr Morgan's affidavit were four veterinary invoices, totalling some \$3,938.00. Notably, the four invoices are all from April 2024, which was some months ago now (and significantly after the date of the ROS). In addition, none of the invoices are made out to Mr Morgan.

[97] Mr Morgan also attached a bond receipt from Tenancy Services, showing the amount of \$2,600.00 being received by way of a bond for a rental property located in Mt Albert. I observe that this too is not in Mr Morgan's name, but is made out to another person.

[98] Neither the veterinary invoices nor the bond for the rental property in Mt Albert are costs associated with E4. No financial information was provided for E4.

[99] Furthermore, despite claiming periods of impecuniosity, Mr Morgan provided no personal financial information. There is no evidence before the Authority of his current income and/or expenses.

[100] Notwithstanding the lack of financial information provided in respect of the respondents, the Authority observes that it is possible to infer that neither E4 nor Mr Morgan enjoy a strong financial position.

[101] The Court has applied relatively modest discounts of 20 per cent in circumstances where a defaulting employer was able to provide financial information showing it to be in a difficult financial position.¹⁴ The Labour Inspector submits that a discount of 20 per cent is appropriate where financial hardship is evident, but beyond that penalties need not be reduced to a level which a respondent says it can pay. I accept this submission. In *Daleson Investment*, the Court observed that "... Parliament has set out an exhaustive list of considerations and the financial circumstances of the defaulting

¹⁴ *Prabh, above n 2* at [64-68].

party is not one of them.”¹⁵

Additional consideration 12 – proportionality of outcome

Authority files 3169344 and 3246799

[102] Penalties should not be reduced so as to create perverse incentives for employers, and inadvertently encourage non-payment.¹⁶ The Court in *Daleson Investment* cautioned that overly reduced penalties would likely undermine the objectives of the Act.¹⁷

[103] The Labour Inspector accepts that the application of the proportionality test may lead to a reduction in penalties properly and fairly payable.

[104] The Labour Inspector also acknowledges that the Authority will need to consider whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk that it could be of such magnitude as to create a significant risk of non-payment.¹⁸ The Labour Inspector submits that the Authority should impose a meaningful and deterrent penalty for the above reasons. I accept this submission.

Penalties ordered

Authority file 3169344

[105] E4 on analysis, and after globalisation as considered above, is liable for maximum penalties of \$180,000.00. Mr Morgan is liable for a total maximum penalty of \$90,000.00. Having considered all matters, and the guidance provided by the Court in respect of penalties, The Authority makes the following orders.

[106] E4 Records Limited is to pay penalties as follows:

- (a) In respect of its breaches of the HA for each of the three employees, I consider the maximum penalty of \$60,000.00 should be reduced by 75 per cent to \$15,000.00;
- (b) in respect of the MWA breaches, I consider there needs to be a deterrent factor reflecting the egregious nature of such a practice. I consider the

¹⁵ *Daleson Investment*, above n 3 at [45].

¹⁶ *Daleson Investment*, above n 3 at [44].

¹⁷ *Daleson Investment*, above n 3 at [47].

¹⁸ *A Labour Inspector v Bahn Thai Restaurant Limited* [2016] NZERA Christchurch 222 at [88-89].

maximum penalty of \$60,000.00 should be reduced by 50 per cent to \$30,000.00;

- (c) in respect of the record keeping breaches, I consider the maximum penalty of \$60,000.00 should be reduced by 95 per cent to \$3,000.00;
- (d) in respect of ameliorating factors, there should be a further discount of 25 per cent, followed by a further 20 per cent discount for the financial circumstances of the company, including that it no longer trades.

[107] Having considered proportionality, the total penalty E4 Records Limited must pay is the sum of \$20,000.00

[108] Harrison Tomas Morgan is to pay penalties as follows:

- (a) in respect of the Holidays Act breaches, I consider the maximum penalty of \$30,000.00 should be reduced by 80 per cent to \$6,000.00;
- (b) in respect of the Minimum Wage Act breaches, again there needs to be a deterrent factor reflecting the egregious nature of such a practice. I consider the appropriate penalty should be \$5,000.00;
- (c) in respect of the record keeping breaches, I consider the maximum penalty of \$30,000.00 should be reduced by 95 per cent to \$1,500.00.
- (d) in respect of ameliorating factors, there should be a further discount of 25 per cent, and then a further discount of 20 per cent because of Mr Morgan's financial circumstances.

[109] Taking into account proportionality, the total penalty to be paid by Harrison Tomas Morgan is the sum of \$5,000.00

Authority file 3246799

[110] For its breach of the record of settlement, E4 Records Limited is liable for a maximum penalty of \$20,000.00. Harrison Tomas Morgan is liable for a maximum penalty of \$10,000.00. Having considered all matters, and the guidance provided by the Court in respect of penalties I order as follows.

[111] E4 Records Limited is to pay penalties as follows:

- (a) for breaches of the record of settlement, I consider there needs to be a deterrent factor reflecting the serious nature of such a practice. I consider the maximum penalty should be reduced to \$10,000.00;
- (b) in respect of ameliorating factors there should be a discount of 50 per cent to reflect that instalment payments have been made, followed by a further discount of 20 per cent to reflect that E4 is no longer trading.

[112] Having considered proportionality, the total penalty E4 Records Limited must pay is the sum of \$2,000.00

[113] Harrison Tomas Morgan is to pay a penalty as follows:

- (a) for his involvement in breaching the record of settlement I consider the maximum penalty should be reduced to \$5,000.00;
- (b) in respect of ameliorating factors there should be a discount of 50 per cent, and a further discount of 20 per cent because of Mr Morgan's personal financial circumstances.

[114] Taking into account proportionality, the total penalty to be paid by Harrison Tomas Morgan is \$1,000.00.

Part of the penalty recovered to be paid to the complainant employees

[115] Under s 136(2) of the Act, the Authority may order that the whole or part of any penalty recovered must be paid to any person.

[116] The Labour Inspector submits that it is appropriate that the Authority exercises its discretion under this section, and invites the Authority to award part of the penalties to the complainant employees. I am satisfied that it is appropriate to do so in the circumstances of this matter.

[117] Of the total penalties payable by E4 Records Limited, a total 30 per cent (being \$6,600.00) is to be divided evenly and paid to the three employees, with the remainder to the Crown account.

[118] In respect of the total penalties payable by Harrison Tomas Morgan, 30 per cent (being \$1,800.00) is to be divided evenly and paid to the three employees, with the remainder to the Crown account.

Compliance

[119] Section 137(1)(iii) of the Act empowers the Authority to order a party to comply with any terms of settlement which s 151 of the Act provides may be enforced by way of a compliance order. Section 151 applies to any agreed terms of settlement enforceable by the parties under s 149(3) of the Act.

[120] In addition to E4 being a party to the record of settlement, Mr Morgan in his personal capacity is also named as a party to the agreement. As such, the Authority has power to order both E4 and Mr Morgan to 'do any specified thing, for the purpose of preventing any further non-compliance'.¹⁹

[121] Mr Morgan does not dispute that he and E4 breached the ROS. The agreed sum payable to the Labour Inspector has not been satisfied in full. This is a clear breach of the terms of the ROS. It is appropriate to exercise my discretion under s 137(1)(b) of the Act to order compliance with the sums outstanding.

[122] Within 28 days of the date of this determination, E4 Records Limited and Harrison Tomas Morgan are ordered to comply with cl 4 of the ROS, and pay to the Labour Inspector (without deduction), the outstanding sum of \$3,243.36 (gross).

[123] The imposition of a compliance order is a serious matter. Should E4 and Mr Morgan fail to comply with the compliance order as set out above, the Labour Inspector is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000.00, order property to be sequestered, or impose a sentence of imprisonment not exceeding three months.²⁰

[124] Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

Interest

[125] The Authority has power to award interest under cl 11 of Schedule 2 of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

¹⁹ Section 137(2).

²⁰ Sections 139 and 140(6).

[126] Clause 4.2 of the ROS provides that the agreed amount of \$9,123.36 (gross) includes interest on the arrears calculated from the date of termination of the employees' employment up to and including 6 December 2022.

[127] The Labour Inspector seeks interest on the unpaid amount owing under the ROS. Although I am satisfied it is appropriate to make an award of interest on the unpaid arrears as set out in the ROS, it is not appropriate to award 'interest on interest'. In the agreed statement, the parties agree that the total gross arrears (before interest) are \$8,442.08.

[128] The ROS provides for interest for the period up to and including 6 December 2022. This amount was due for payment by E4 and Mr Morgan on or before 16 March 2023. Payment was not received by that date. The Labour Inspector has provided evidence of correspondence with Mr Morgan following this date, in attempt to obtain payment. This includes a notice of demand sent by MBIE's regulatory enforcement collection division, dated 22 March 2023. The demand notice was for the original amount which was provided for under the ROS (being \$9,123.36 gross). There had been no demand for additional interest at that stage. Had the demand for payment been satisfied in full at the time, there would have been no need for the Labour Inspector to file a subsequent proceeding for compliance. The respondents chose not to meet their end of the bargain.

[129] E4 and Mr Morgan have not met their obligations under the ROS. It is therefore appropriate for an order of interest to be made. E4 Records Limited and Harrison Morgan are ordered to calculate and pay interest within 28 days of the date of this determination, on the total outstanding settlement sum of \$8442.08 (less any payments already made). Interest is to be calculated from 17 March 2023 (being the day after the date for payment agreed by the parties under the ROS), until the outstanding amount is paid in full.

[130] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website. Instalment payments already made may be entered into this calculator.

[131] For the sake of clarity, the original agreed amount of interest set out in the ROS remains payable, but this determination makes no award of interest on this sum.

Summary of orders

[132] Within 28 days of the date of this determination, E4 Records Limited and Harrison Tomas Morgan are ordered to pay:

- (a) the sum of \$3,243.36 (gross) to the Labour Inspectorate on account of the amount outstanding under the ROS; and
- (b) interest on this sum, in the manner prescribed at [129] and [130] above.

[133] Within 28 days of the date of this determination, E4 Records Limited is ordered to pay:

- (a) a penalty of \$20,000.00 in respect of the proceeding under Authority file 3169344; and
- (b) a penalty of \$2,000.00 in respect of the proceeding under Authority file 3246799.

[134] Within 28 days of the date of this determination, Harrison Tomas Morgan is ordered to pay:

- (a) A penalty of 5,000.00 in respect of the proceeding under Authority file 3169344; and
- (b) A penalty of \$1,000.00 in respect of the proceeding under Authority file 3246799.

[135] As provided above, 30 per cent of the total penalties payable by E4 and Mr Morgan are to be divided evenly and paid to the three affected employees listed at [16] above, with the remainder to be paid to the Crown account.

Costs

[136] The Labour Inspector has incurred costs in seeking to enforce the ROS, and the application for penalties for breach of employment standards. The Labour Inspector is the successful party and is entitled to a contribution to the actual costs of representation.

[137] When the Authority considers costs, it exercises a discretion. In exercising that discretion it does so in a principled way. Costs are not to be used as a punishment or as an expression of disapproval by the successful party's conduct.

[138] In the Authority, costs are usually awarded on the basis of a daily tariff which is currently \$4,500.00 for the first day. Both these matters were able to be heard and determined together, on the papers, without the need for an in-person investigation meeting (other than for the purpose of affirming Mr Morgan's evidence).

[139] The Labour Inspector seeks a contribution to costs of half the daily tariff. In the circumstances, this is reasonable.

[140] It is also reasonable that the Labour Inspector is reimbursed for the \$71.55 lodging fee for both of these matters.

[141] Within 28 days of the date of this determination E4 Records Limited and Harrison Morgan are ordered to pay the Labour Inspector the sum of \$2,250.00 being a contribution to costs reasonably incurred; together with an additional amount of \$143.10 being the cost of two filing fees incurred in relation to both these matters.

[142] E4 Records Limited and Harrison Morgan are jointly and severally responsible for seeing that these orders are met in full. How the respondent parties apportion payment of costs between themselves is a matter for them.

Jeremy Lynch
Member of the Employment Relations Authority