**IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI TE WHANGANUI A TARA**

[2025] NZERA 404
3245679

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| | BETWEEN | A LABOUR INSPECTOR<br>Applicant |
| | AND | HUTT FOOD LIMITED<br>First Respondent |
| | AND | WELL SUSHI LIMITED<br>Second Respondent |
| | AND | YI JIANG<br>Third Respondent |
| Member of Authority: | Davinnia Tan | |
| Representatives: | Jessica Ellison, counsel for the Applicant<br>Ben Sheehan and Beth Clearwater, counsel for the Respondents | |
| Investigation Meeting: | On the papers | |
| Submissions received: | 28 March 2025 from the Applicant<br>28 April 2025 from the Respondent | |
| Determination: | 9 July 2025 | |

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**DETERMINATION OF THE AUTHORITY**

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## Application for imposition of penalties

[1] This matter involves an application by a Labour Inspector on behalf of the Ministry of Business, Innovation and Employment (MBIE) for the imposition of penalties against the Second Respondent, Well Sushi Limited (Well Sushi) for breaches of minimum employment standards, including failures to pay minimum wage, holiday

pay, and to keep accurate wage and time records, in relation to Gaoqing Tian, a former employee of the First Respondent and Well Sushi.

[2] Penalties are not sought by the Labour Inspector in relation to the First Respondent due to a statutory time bar under s135(5) of the Employment Relations Act 2000 (the Act). As such, the Labour Inspector's claim and this determination only addresses the issue of penalties as they apply to Well Sushi.

*Consent determination*

[3] On 15 October 2024, I issued a consent determination[1] which set out the terms agreed between the parties, including the agreed breaches by Well Sushi Limited of the following[2]:

(a) Failure to record the number of hours worked in each pay period and the pay for those hours and by failing to record the wages paid to Gaoqing Tian for each pay period and the method of calculation for Mr Tian's period of employment (ss 4 and 130 of the Employment Relations Act 2000; s81(2)(d) of the Holidays Act 2003);

(b) Section 6 of the Minimum Wage Act 1983 (MWA) by failing to pay minimum wage for all hours worked by Mr Tian during his employment;

(c) Section 16 of the Holidays Act 2003 (HA) by failing to provide Mr Tian his full annual holiday entitlement;

(d) Section 49 of the HA by failing to pay relevant daily pay or average daily pay for an otherwise working day;

(e) Section 50(1) of the HA by failing to pay time and a half for working public holidays;

(f) Section 24 of the HA by failing to calculate and pay the correct annual holiday pay on termination of employment;

(g) Section 25 of the HA by failing to pay 8% from the date of the last entitlement to the date of termination;

(h) Section 28A(2)(b) of the HA by paying out over a maximum of one week of Mr Tian's annual holiday entitlement;

[1] *Labour Inspector v Hutt Food Limited and Ors* [2024] NZERA 620.
[2] Above n1, at paras [13] and [15].

(i) Section 40(3) of the HA by failing to pay a public holiday that fell during the annual holiday period after Mr Tian's employment came to an end;

(j) Section 60(2)(b) of the HA by failing to pay alternative holiday pay on termination of their employment;

(k) Section 71 of the HA by failing to pay relevant daily pay or average daily pay for each day of sick leave taken; and

(l) Section 72 of the HA by failing to pay sick leave in the pay period in which the leave was taken.

[4] The agreed terms included an agreed lump sump to be paid by the Respondents to the Labour Inspector for arrears. This payment has been made.

[5] The parties proposed that the issue of penalties be dealt with on the papers following parties' filing of submissions. As part of its agreed terms, the parties also globalised the breaches as follows into five breaches on the basis that the breaches were repeated and/or similar in nature:

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| **Globalised breach one:** Holidays Act s 81(2)(d) and Employment Relations Act s 130 | Both relate to record keeping in respect of the wage and time record and holidays and leave record |
| **Globalised breach two:** – Holidays Act ss 16, 21, 24, 25 | All relate to annual leave requirements |
| **Globalised breach three:** – Holidays Act s 28A(2)(b) | Relates to pay out of annual leave entitlements |
| **Globalised breach four:** – Holidays Act ss 40(3), 49, 50(1), 60(2)(b), 71, 72 | All relate to public holiday entitlements and the appropriate calculation of sick leave |
| **Globalised breach five:** – Minimum Wage Act s 6 | Relates to payment of minimum wage entitlements |

## Issues

[6] The issue for the Authority's determination is whether penalties should be awarded and if so, what quantum.

## Submissions

*Object of the Act*

[7] The Labour Inspector submits that the Well Sushi has fallen short of the good faith behaviour expected of employers, and that Well Sushi's conduct has undermined the obligations of mutual trust and confidence that should exist in any employment relationship.

[8] Well Sushi acknowledged that Mr Tian was on a work visa but says his employment situation can be distinguished from other cases involving breaches of employment standards for migrant workers due to the following factors: Mr Tian's primary language was the same as the Third Respondent; Mr Tian was not employed from overseas and he did not move to New Zealand for this role. Rather, Mr Tian had been employed previously in New Zealand by another employer.

[9] For the above reasons, Well Sushi submits that any power imbalance was not as great as may be inferred from Mr Tian being a migrant employee. Mr Tian had a previous community connection from his previous work role and was able to freely communicate with his employers. However Well Sushi accepts that there is an inherent power imbalance in an employment relationship particularly when a work visa is involved and that its conduct fell short of expected standards of good faith and mutual trust and confidence.

*Nature and Number of breaches and Maximum Penalty*

[10] The Labour Inspector submits that each maximum penalty per globalised breach is $20,000.00, and therefore the maximum penalty liable is $100,000.00. The Labour Inspector submits that globalising in this way creates an appropriate starting point for penalties and is representative of the gravity of the respondents' overall conduct. Well Sushi agrees with the approach of globalisation of the agreed breaches and acknowledges that this means the maximum quantum of penalty (for 5 globalised breaches) that may be ordered is $100,000.

[11] However, Well Sushi submits that the above breaches only relate to one employee, Mr Tian. During the period that Mr Tian worked for the First Respondent and Well Sushi, approximately 73 employees were also employed by the companies. The wage and time records alongside the holiday and leave records for each and every employee employed by the First Respondent and Well Sushi were provided to the Labour Inspector as part of its investigation. With the exception of Well Sushi's holiday and leave records not recording all employees' current entitlement to annual holidays,

there was no issue found with these records and no additional claim has been raised by the Labour Inspector.

[12] Well Sushi submits that the above breaches can be distinguished from cases involving multiple distinct repeated breaches across a number of employees.

*Whether the breach was intentional, inadvertent, or negligent*

[13] When considering whether the breach was intentional, inadvertent or negligent, the Labour Inspector noted that the Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited (Preet)*[3] observed that it would be very difficult for employers to assert ignorance of minimum code statutes, and that such ignorance will not provide a defence to employers in respect of their liabilities to meet those minimum requirements and when faced with a claim for penalties for their breach.

[14] Well Sushi submits that the breaches were partially inadvertent due to it being unaware of the total amount of hours that Mr Tian worked. Well Sushi accordingly made incorrect payments to Mr Tian on this basis and its mistaken belief that the alternate arrangement was appropriate and to Mr Tian's benefit.

[15] It accepts its responsibility as an employer to be aware of its legal obligations and the true nature of its employees' work.

[16] However Well Sushi says that it was also, as many employers appear to have been demonstrated by widespread remediation payment schemes in recent years, unaware of the proper calculation of holiday pay. In support it cited *Preet*[4] which it says "discussed that the intricacies of calculating holiday pay could be argued to be difficult to grasp."

[17] Well Sushi says it has now reviewed its processes. Payment of wages is now completed after conferring with its employees whether the hours of work recorded by them are correct. If an employee has recorded more hours than Well Sushi's record, an adjustment to the wage/time record and resulting payment to the employee is made to account for the additional hours of work. MYOB Payroll software is now also utilised by Well Sushi to record all employees' leave and holiday pay.

[3] *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.
[4] Above n3, para [87].

[18] Well Sushi submits that through its participation in this process, it is mindful of immigration requirements and that it should not have tried to subvert these in the way that it sought to do so even if it perceived this to be agreed with Mr Tian.

*Nature and extent of any loss or damage*

[19] The Labour Inspector submits that in assessing the severity of the breaches, it is necessary to consider the nature and extent of loss or damage. The total arrears amounted to $53,940.03 which it says is not an insignificant sum. Further, the affected employee lost the use of money at the time at which they were entitled to receive it. Conversely, Well Sushi benefited financially by retaining monies to which it was not entitled, thereby improperly reducing its costs and gaining an unfair advantage in the marketplace.[5]

[20] Well Sushi disagrees with the total sum of arrears that the Applicant has recorded was owed to Mr Tian by the Second Respondent and submits that the calculation of arrears attributable to them is approximately $20,589.85 based on the globalised table of breaches. This is because the First Respondent is statutorily barred from being ordered penalties, and although Mr Tian's employment with Well Sushi began on 1 February 2021, a complaint was made to the Applicant on 6 July 2021 that was not investigated. Accordingly, the relevant period for assessment of the penalty is the arrears owing between 6 July 2021 and 6 October 2022.

[21] Well Sushi submits that any benefit that it has received financially by retaining these monies and/or reducing its costs is limited and can be distinguished from *Daleson*[6] where large amounts of employees were affected and reduced the employer's costs substantially.

*Mitigation of effects of breach*

[22] The Labour Inspector acknowledges that Mr Tian has had his arrears paid in response to its investigation and these proceedings, and that through consent determination the need for an investigation meeting was avoided.

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[5] *A Labour Inspector v Daleson Investment* [2019] NZEmpC 12.
[6] Above n4.

[23] Well Sushi says that it was cooperative with the Labour Inspector's investigation and has paid the arrears owed to Mr Tian within the time frame requested by the Labour Inspector

[24] Further, Well Sushi has now changed its processes in respect of its calculation of hours worked, time, wage, holiday, and leave records, and its payment of any leave owing to employees.

*Circumstances of the breach, and any vulnerability*

[25] The Labour Inspector submits that the affected employee was a migrant worker on a work visa, sponsored by the respondents, and he was inherently vulnerable particularly because he was likely to have little personal experience of New Zealand employment standards and little ready access to support and information about those standards or enforcement of them.

[26] Well Sushi reiterates its submission that Mr Tian was not as vulnerable for the reasons it provided in paragraphs [8] and [9].

*Previous Conduct*

[27] The Labour Inspector says that the respondents had not come to the attention of the Labour Inspectorate prior to this investigation, other than the earlier complaint in relation to the First Respondent which had not been investigated at that time. Well Sushi says that there has been no previous conduct.

*Deterrence*

[28] The Labour Inspector submits that the Authority should impose penalties on Well Sushi that reinforce the objects of the Act, in particular, addressing the inequality of power in the employment relationship. Further, it submits that because the breaches in this case are minimum standards there is a need to deter the employer (and other employers) from repeating its non-compliant employment practices in the future.

[29] Well Sushi submits that penalties are not required to achieve the aim of deterrence. The participation in these proceedings and the cost of repayment of arrears and legal fees have been sufficient to deter them from similar conduct.

[30] Well Sushi says that it, and the First Respondent have experienced a significant financial and emotional burden as a result of these proceedings and the lump sum repayment of the arrears to Mr Tian.

*Culpability*

[31] The Labour Inspector submits that this step involves a consideration of the severity of the breaches in order to establish a provisional starting point for penalties to be imposed. This includes an adjustment for any aggravating and mitigating factors in relation to the breaches.

[32] It notes that the following aggravating features of the breaches already set out above include:

- The fact the affected employee was a migrant worker and were therefore inherently vulnerable; and
- The nature of the breaches which meant the affected employee lost the use of the monies owed to him at the time he was entitled to receive it.

[33] The Labour Inspector says that these aggravating features must be weighed against the steps taken by the respondents in mitigation, which include the payment arrears identified by the applicant and an acceptance of the breaches identified.

[34] Having regard to all of the above, the Labour Inspector seeks penalties at 50% of the maximum for each globalised breach.

[35] Well Sushi submits that each "globalised" breach could be assessed individually as it related to culpability.

[36] For ease of reference, I have summarised its submissions in respect of each globalised breach as follows:

| **Globalised breaches** | **Well Sushi's submissions** | **Assessment by Well Sushi** |
|---|---|---|
| one: *Holidays Act s 81(2)(d) and Employment Relations Act s130* | Least serious of the total breaches due to it relating to the appropriate standard of record keeping rather than any employee actually losing out on an entitlement | 20% of the maximum $20,000 penalty, being $4,000. |

| *two: Holidays Act ss 16, 21, 24, 25* | Inadvertent breach in the context of disputed hours due to:<br>- Lack of knowledge of the appropriate method of calculation; and<br>- Lack of knowledge of the correct work hours to base this calculation upon. | 50% of the maximum $20,000 penalty, being $10,000. |
|---|---|---|
| *Three – Holidays Act s 28A(2)(b)* | The least serious of the total breaches and an inadvertent breach due to the Second Respondent being unaware that it could not pay out the total sum of holiday pay owing to an employee upon request. Mr Tian requested his outstanding holiday pay of 152.57 hours to be paid out as $4,119.39.<br><br>The Second Respondent complied with this request. The Applicant has included $1,228.50 of the $4,119.39 paid to Mr Tian in its calculation of holiday pay owing. In reality, Mr Tian retained the balance of $2,890.89. | No penalty is appropriate for this breach.<br><br>If a penalty is considered appropriate, this breach should be assessed at 10% of the maximum $20,000 penalty, being $2,000. |
| *Four – Holidays Act ss 40(3), 49, 50(1), 60(2)(b), 71, 72* | It is acknowledged that the failure to correctly pay Mr Tian for his work on public holidays is a serious breach.<br><br>However this was an inadvertent breach as | 40% of the maximum $20,000 penalty, being $8,000. |

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| | the Second Respondent did not know this was a requirement. This is similar to Globalised Breach Two and due to the dispute of hours worked.<br><br>The Second Respondent has amended its systems to appropriately account for this if it should arise in the future. | |
| *Five – Minimum Wage Act s6* | It is acknowledged that the Courts have often found this breach to be the most serious.<br><br>This breach can be distinguished from other cases where there is a distinct wilful breach of payment below minimum wage (i.e. an hourly wage substantially below the minimum wage) to the benefit of the employer.<br><br>In this case, there was a dispute of hours worked and of cash payments received. For this breach, there is a comparatively small sum that was owing to Mr Tian. | 40% of the maximum $20,000 penalty, being $8,000. |

[37] Well Sushi further submits that no penalties should be made, but that if they are still viewed as appropriate, then there should be a 50% discount on the total sum of $30,000 (for Globalised Breaches One, Two, Four, and Five) to account for the mitigating factors which include:

a. That the breaches only relate to one employee of over 70 employees employed by the First Respondent and the Second Respondent during the time period Mr Tian was employed;

b. The Respondents have been co-operative throughout the Applicant's investigation;

c. The Respondents recognised its wrongdoing and have paid Mr Tian the full arrears owing to him in a lump sum payment on 25 October 2024; and

d. The Respondents have made active efforts to change the companies processes to ensure that these errors do not occur again.

[38] Well Sushi submits that after a 50% reduction, the total sum of penalty should be $15,000 (prior to the consistency, ability to pay, and proportionality assessments below).

*Consistency*

[39] The Labour Inspector notes that awards of penalties should be broadly consistent while allowing for variation in the particular circumstances of each case in the number, nature, duration and impact of the breaches.

[40] Counsel for Well Sushi cited *Shah Enterprise NZ Ltd v Labour Inspector of Ministry of Business, Innovation and Employment (Shah)*[7] which involved disputed hours and a maximum liability (also based on a globalised sum of penalties) of $80,000.00 for the company and $40,000.00 for Mr Shah. In that decision, the Court awarded total penalties of $19,200 against the company and $9,600 against Mr Shah.

[41] Counsel also referred to the Authority's determination of *Labour Inspector v H & S Chilsholm Farms Ltd*[8] which involved breaches to multiple employees. These breaches resulted in maximum globalised penalties of $100,000 for the company. From these globalised penalties and after appropriate discounts were made, the total penalties awarded were $20,000 for the company and $10,000 for Mr Chisholm.

*Ability to Pay*

[42] The Labour Inspector submits that the onus is on Well Sushi to provide the Authority with information to support any submission that they are financially unable

[7] *Shah Enterprise NZ Ltd v Labour Inspector of Ministry of Business, Innovation and Employment* [2022] NZEmpC 177 at [59].

[8] *Labour Inspector v H & S Chilsholm Farms Ltd* [2025] NZERA Auckland 8.

to meet a potential penalty award. However it notes that the Court in *Daleson* observed that:

> Mere financial incapacity, without more, is unlikely to be regarded as warranting a penalty reduction to nil, or next to nil, having regard to the relevant statutory scheme and its underlying objectives.

[43] Well Sushi acknowledges that it remains trading and that it has the ability to pay penalties for the quantum submitted in these submissions. However it notes that a larger quantum would have adverse financial and impacts on them and the Third Respondent's other companies.

[44] The Labour Inspector notes that Well Sushi continues to trade, and it is submitted that the fact it has now reimbursed the affected employee is suggestive of an ability to pay a penalty award.

*Proportionality*

[45] The Labour Inspector submits that penalties should not be reduced so as to create perverse incentives for employers, and inadvertently encourage non-payment.

[46] Well Sushi submits that if penalties are to be issued, it submits that the quantum of the penalty should be assessed in proportion to the total arrears withheld from Mr Tian (which has since been repaid in full).

[47] Well Sushi submits that penalties in the sum of $15,000 would be proportional to the quantum withheld from Mr Tian which was approximately $20,589.85 for his employment between 6 July 2021 and 6 October 2022.

**Analysis**

[48] As set out above, Well Sushi has admitted to multiple breaches of minimum employment standards across a range of statutes that relate to the minimum employment standards required of employers. For reasons identified by the parties' submissions, this determination only deals with the penalties sought by the Labour Inspector under s 135 of the Act of the multiple breaches by Well Sushi.

[49] Having considered the parties' submissions, the statutory requirements for consideration in s133A of the Act and *Preet*[9], I set out my responses to parties' submissions as follows.

[50] Firstly, I consider that the globalisation of penalties is appropriate in these circumstances given they are repeated and similar breaches in relation to Mr Tian and agree that the maximum quantum of penalty is $100,000.00 across the five globalised breaches.

[51] In response to Well Sushi's submissions, I note that the inherent power imbalance between an employer and an employee is not one that can be minimised or reduced simply because an employee shares the same language as their employer or had prior experience working in New Zealand or had immigration advice. Any breach of minimum standards under the Act is not an insignificant breach of the obligations of good faith.

[52] In response to Well Sushi's submission that globalised breach one (s 81(2)(d) HA and s130 of the Act) was also among "the least serious", I note that it is because of poor record keeping that creates a domino effect of subsequent, and therefore, more serious breaches. I therefore cannot accept that this globalised breach should be assessed at 20% of the maximum. Instead, I find an appropriate penalty be assessed at 30% of the maximum, being $6,000.00.

[53] While I accept that its breaches of s28A(2)(b) of the HA was inadvertent, I consider that Well Sushi had an obligation to understand the complexities of the Holidays Act 2003; it is the obligation of any employer where ignorance of the law is not an excuse. Therefore in response to Well Sushi's proposed reduction of globalised breach three to 10% of the maximum, I consider that its unawareness does not necessarily render the breach "the least serious of the total breaches". I further note that Well Sushi made the assertion, "the least serious", in relation to two globalised breaches. While the breach is not the most serious, it certainly should not be overly minimised. I therefore consider an appropriate penalty be at 20% of the maximum, being $4,000.00.

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[9] Above n3.

[54] I acknowledge Well Sushi's submission that Mr Tian worked for Well Sushi between 6 July 2021 and 6 October 2022 and that therefore "the relevant period for assessment of penalties" is between this period. Well Sushi also provided an approximation "estimate" of $20,589.85 as the wages it owed to Mr Tian (out of the lump sum of the total arrears of $53,940.03 since paid to Mr Tian). However, this has been unsubstantiated. It also does not change or minimise the fact that Mr Tian had lost money that he was entitled to as his main and only source of income to continue building his new life in New Zealand.

[55] I do not accept Well Sushi's submission that Mr Tian was "not as vulnerable as other migrant workers". As discussed above, simply sharing the same language and having one prior employment experience in New Zealand does not remove the vulnerability that migrant workers on a work visa sponsored by their employers have, particularly where there is little personal experience of New Zealand employment standards.

[56] I note that steps were taken to mitigate the breach, including settlement to avoid the need for an investigation meeting and payment of outstanding arrears owing to Mr Tian, and Well Sushi's changes in its internal processes. I also note there has been no previous conduct.

[57] Although I acknowledge that the parties have resolve the substantive dispute between themselves, engaging in a settlement process does not achieve the objective of deterrence. Well Sushi's conduct fell below the minimum standards of good faith, mutual trust and confidence. As s133A of the Act requires, the Authority must, amongst the other considerations discussed above, have regard to the object of the Act which underscores the promotion of good faith.

[58] The breaches at hand were repeated breaches in relation to minimum standards and the importance of deterrence against such behaviour by Well Sushi and/or other employers, must not made light of. I therefore consider an appropriate penalty on globalised breaches two, four, and five to be 50% of the maximum, being $10,000.00 on each of these globalised breaches, and 30% of the maximum for globalised breach one being $6,000.00, and 20% of the maximum for globalised breach three being $4,000.00; a sum of $40,000.00.

[59] On review of similar cases[10] involving multiple breaches of minimum standards against a single employee, and where there were mitigating factors involved (including a settlement as to wages arrears) and no previous conduct, I consider a reduction of $10,000.00 to $40,000.00 appropriate, consistent and proportionate to the level of breaches in relation to one employee.

**Orders**

[60] I therefore order a total penalty of $30,000.00 to be paid by Well Sushi Limited under s 135 of the Employment Relations Act 2000 and is to be paid to the Crown.

**Costs**

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

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

[63] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[11]

Davinnia Tan
Member of the Employment Relations Authority

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[10] Above n7 and 8.
[11] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1