

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 8
3220839

BETWEEN	A LABOUR INSPECTOR Applicant
AND	H & S CHISHOLM FARMS LIMITED First Respondent
AND	HUGH RODERICK CHISHOLM Second Respondent

Member of Authority: Shane Kinley

Representatives: Michelle Brown and Aarshdeep Kaur, counsel for the applicant
Jaime Lomas and Alastair Clarke, counsel for the respondents

Investigation Meeting: On the papers

Submissions and further information: Up to 16 October 2024

Determination: 14 January 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In February 2022 the applicant Labour Inspector Erin Spence undertook a proactive inspection of a farm owned by H & S Chisholm Farms Limited (the Farm), including providing information about the inspection to Hugh Chisholm, Director and Shareholder of the Farm. Following this inspection the Labour Inspector interacted with the Farm, Mr Chisholm and the respondents' representatives as part of an investigation process, which culminated in an investigation report being finalised on 2 March 2023.

[2] The Labour Inspector found a number of breaches of employment standards had been established on the part of the Farm and in at least one aspect by Mr Chisholm, and that Mr Chisholm was a person involved in breaches of employment standards as defined in s 142W(3)(a) of the Employment Relations Act 2000 (the ERA), due to his being a director of the Farm. The Labour Inspector lodged a statement of problem with the Authority on 29 March 2023 seeking:

- a. orders for arrears of minimum wage payments under s 6 of the Minimum Wage Act 1983 (MWA) against the Farm;
- b. orders for payments for entitlements under ss 22, 24, 25, 27, 49 and 77 of the Holidays Act 2003 (HA) against the Farm;
- c. penalties under the MWA, Wages Protections Act 1983 (WPA), ERA and HA to be imposed on both respondents; and
- d. to recover under s 142Y of the ERA arrears of minimum wages and holidays entitlements from Mr Chisholm, should the Farm be unable to pay amounts owing under the MWA and HA.

[3] By way of an agreed statement of facts lodged on 31 July 2024 the respondents accepted the Labour Inspector's findings, Mr Chisholm accepted he was a person involved in breaches of employment standards and the respondents accepted they may be liable for penalties.

The Authority's investigation

[4] The parties are to be commended for reaching an agreed statement of facts, which resolved arrears claims and meant by agreement this matter could be investigated on the papers and focused on the penalties aspect of the Labour Inspector's original application.

[5] I have considered the agreed statement of facts, submissions on behalf of the Labour Inspector and respondents, and reply submissions on behalf of the Labour Inspector. Attached to the respondents' submissions was an affidavit from Mr Chisholm and a letter from the Farm's accountant.

[6] As permitted by s 174E of the ERA this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination are:

- (a) Should penalties be ordered against the Farm for acknowledged breaches of the MWA, WPA, ERA and HA?
- (b) Should penalties be ordered against Mr Chisholm as a person involved in the acknowledged breaches by the Farm of the MWA, WPA, ERA and HA?
- (c) Should either party contribute to the costs of representation of the other party?

Should penalties be ordered against the Farm and Mr Chisholm?

[8] I have approached these issues together as the facts relevant to the penalties sought overlap.

Relevant Law

[9] In deciding whether to impose a penalty, and if I decide to how much that penalty should be, I need to consider the factors in s 133A of the ERA and the approach as set out by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*¹, *Labour Inspector v Daleson Investment Ltd*² and *Nicholson v Ford*.³

[10] I have summarised the agreed statement of facts, followed by an application of the factors relevant to a determination of penalties with reference to submissions of the parties. Submissions approached this matter on the basis of the four step assessment in *Preet*, which I adopt with the third and fourth steps combined.

Summary of agreed statement of facts relevant to penalties

[11] I summarise the agreed statement of facts relevant to penalties as follows:

- a. Following an initial proactive visit to the Farm and discussions with Mr Chisholm in February 2022 the Labour Inspector undertook an investigation into compliance with employment standards by the Farm. This investigation involved engagement with the respondents and their representatives between March 2022 and March 2023, with the Labour Inspector finalising their investigation report on 2 March 2023;

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143 at [137] to [151].

² *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 at [19].

³ *Nicholson v Ford* [2018] NZEMPC 132 at [19].

- b. The Labour Inspector was unable to complete full arrears calculations due to incomplete and inconsistent records, and did not accept the Farm's calculations. However, the Labour Inspector based their claims for arrears on those calculations as the minimum amount owing;
- c. The Labour Inspectorate found breaches by the Farm of:
 - i. section 6 of the MWA in relation to two employees, resulting in arrears of at least \$3,021.90 for one employee and \$400.13 for another employee;
 - ii. section 22 of the HA in relation to two employees, resulting in arrears of at least \$222.53 for one employee and \$317.31 for another employee;
 - iii. sections 24, 25 and 27 of the HA in relation to three employees, resulting in arrears of at least \$406.19 for one employee, \$2,700.00 for a second employee and \$6,278.91 for a third employee;
 - iv. section 49 of the HA in relation to three employees, resulting in arrears of at least \$117.37 for one employee, \$484.05 for a second employee and \$44.00 for a third employee;
 - v. section 5 of the WPA in relation to deductions from the final pay of two employees without consent – this breach was also attributed to Mr Chisholm; and
 - vi. record-keeping requirements under ss 65(2) and 130 of the ERA and 81 of the HA.
- d. The Labour Inspectorate also found the Farm had:
 - vii. failed to provide four weeks leave after 12 months of employment, as required under s 16 of the HA, to three employees; and
 - viii. included holiday pay in wages for two employees, contrary to s 28 of the HA.
- e. Mr Chisholm accepted he was a person involved in breaches of employment standards as defined in s 142W(3)(a) of the ERA;
- f. The respondents accepted the Labour Inspector's findings and acknowledged they had breached relevant employment standards. The respondents made payments to three employees on 17 June 2024 and

made efforts to contact a further former employee to make payments to them;⁴ and

- g. The parties agreed this matter proceed to a penalties determination on the papers.

Step 1: What are the number and nature of breaches, what are the maximum penalties available and to what extent is globalisation appropriate?

[12] The Labour Inspector said there were 34 discrete breaches involving breaches of:

- a. section 6 of the MWA in relation to two employees;
- b. seven different types of breaches of the HA, involving between one and four employees for each type of breach – these breaches involved ss 16, 22, 24, 25, 27, 28, 46, 49 and 81 of the HA;
- c. sections 65(2) and 130 of the ERA in relation to record-keeping, involving two and four employees respectively; and
- d. section 5 of the WPA in relation to two employees.

[13] The Labour Inspector said the maximum penalties available were \$680,000 for the Farm and \$340,000 for Mr Chisholm, based on maximum penalties of \$20,000 for a company and \$10,000 for a person involved in breaches of employment standards.

[14] The Labour Inspector submitted penalties should be consolidated on a per-breach per-employee basis, which it said resulted in two breaches of the MWA, four breaches related to annual holidays entitlements under the HA, three breaches of public holidays entitlements under the HA, four breaches of record-keeping requirements under the ERA and HA, and two breaches of the WPA. This resulted in maximum available penalties for the Farm of \$300,000 and for Mr Chisholm of \$150,000.

[15] The respondents said the breaches should be reduced to three breaches being:

- a. record-keeping breaches;
- b. breaches of the MWA and WPA, being failures to pay and deduct correctly; and
- c. breaches of the HA.

⁴ Submissions for the Labour Inspector record a payment was made on 31 July 2024 to the Ministry of Business, Innovation and Employment's account for arrears owed to this former employee.

[16] The respondents said this approach to globalisation was consistent with the Court's approach in *A Labour Inspector v Matangi Berry Farm Limited*⁵ and would result in maximum penalties available of \$60,000 for the Farm and \$30,000 for Mr Chisholm.

[17] Submissions in reply for the Labour Inspector said the respondent's approach involved two substantial difficulties. First, it failed to recognise annual holiday and public holidays as fundamentally different types of entitlements, and the differences between breaches of the MWA and WPA. Second, *Matangi Berry Farm* was said to not be a useful comparator due to its unique circumstances and the application for ordinary and pecuniary penalties. The Labour Inspector maintained its approach to globalisation was an appropriate application of the principles in *Preet*.

[18] I accept the Labour Inspector's calculation of the maximum penalties, which was not disputed by the respondents, with the key dispute relating to the approach to globalisation. I consider there is merit in aspects of both the Labour Inspector and the respondents' submissions in relation to globalisation.

[19] I consider applying *Matangi Berry Farm* it is appropriate to globalise to one penalty for each type of breach, as submitted by the respondents, however, I consider the Labour Inspector is correct in identifying the respondents did not recognise the fundamentally different types of entitlements which had been breached. This results in five breaches being:

- a. breaches of the MWA;
- b. breaches in relation to annual holidays;
- c. breaches in relation to public holidays;
- d. record-keeping breaches; and
- e. breaches of the WPA.

[20] I proceed on the basis maximum total penalties after globalisation are \$100,000 for the Farm and \$50,000 for Mr Chisholm.

⁵ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

Step 2: What is the severity of each breach, what is the appropriate starting point and are there any aggravating or mitigating features which impact on what penalties are appropriate?

[21] The Labour Inspector submitted the respondents incomplete and inconsistent approach to record-keeping had undermined their ability to effectively enforce employment standards and placed employees at a disadvantage. The respondents were said to have fallen short of the expected good faith behaviour of employers. While payments of arrears have now been made, this occurred some time after the matter was lodged at the Authority, with the affected employees losing the use of money at the time it was due to them. Two prior matters involving the Farm were identified where arrears had also been identified as owing, which were promptly corrected.

[22] The Labour Inspector submitted as this matter involved minimum standards breaches “there is a need to “bring home” to the employer the standards it is required to meet”.⁶ The following adjustments were proposed to penalties:⁷

	Adjustments	Amount for Farm	Amount for Mr Chisholm
Labour Inspector’s globalised penalties	Starting point	\$300,000	\$150,000
Minimum wage breaches x 2 employees	Less 60%	\$16,000	\$8,000
Annual holiday pay breaches x 4 employees	Less 50%	\$40,000	\$20,000
Public holiday breaches x 3 employees	Less 70%	\$18,000	\$9,000
Record-keeping breaches x 4 employees	Less 30%	\$56,000	\$28,000
Deductions breaches x 2 employees	Less 50%	\$20,000	\$10,000
	Sub-total	\$150,000	\$75,000
Deduction for payments made	Less 10%	\$15,000	\$7,500
	Sub-total	\$135,000	\$67,500

[23] The respondents submitted this was not a case of an employer seeking to systematically undermine employment standards and, while acknowledging delays in engagement with the Labour Inspector, said there were various health-related reasons for this. The respondents said the breaches were minor, they did not take advantage of vulnerable employees and breaches were inadvertent rather than intentional. Loss to affected employees was said to be minimal, with steps taken to mitigate the breaches

⁶ Citing *Daleson*, above n 2, at [39].

⁷ This is a simplified and amalgamated version of tables from submissions for the Labour Inspector.

and prevent future breaches, with amounts outstanding paid as soon as possible after agreement was reached on the value of the breaches. While at least one prior interaction with a Labour Inspector was acknowledged, it was promptly remedied. In totality the respondents said a significant reduction of 70% was appropriate.

[24] Submissions in reply for the Labour Inspector disputed the claim the breaches were minor and said the record-keeping failures were significant, with the paper-based records deficient, incomplete and inconsistent, meaning the arrears calculations could not be undertaken with any certainty.

[25] I consider it is appropriate to adopt the Labour Inspector's proposed adjustments, rather than a global amount. The record-keeping breaches hindered the Labour Inspector's ability to enforce employment standards and warrant only a modest adjustment. Greater adjustments are appropriate for the other breaches, to take into account the amounts involved in the accepted breaches.

[26] I do not consider a significant adjustment should be made to recognise payments made, as the time for this to occur was approximately 15 months, which is a considerable period of time even taking into account the health issues. Overall, this results in an adjustment to the globalised penalties of approximately 57% which I consider reasonable in the circumstances, as set out in the table below:

	Adjustments	Amount for Farm	Amount for Mr Chisholm
Globalised penalties	Starting point	\$100,000	\$50,000
Minimum wage breaches	Less 60%	\$8,000	\$4,000
Annual holiday pay breaches	Less 50%	\$10,000	\$5,000
Public holiday breaches	Less 70%	\$6,000	\$3,000
Record-keeping breaches	Less 30%	\$14,000	\$7,000
Deductions breaches	Less 50%	\$10,000	\$5,000
	Sub-total	\$48,000	\$24,000
Deduction for payments made	Less 10%	\$4,800	\$2,400
	Sub-total	\$43,200	\$21,600

Steps 3 and 4: Adjustments for ability to pay and proportionality

[27] The Labour Inspector said no adjustment should be made for ability to pay as no information had been provided relating to this factor. In terms of proportionality, they said a small reduction was appropriate. Reference was made to the Court's judgment in *A Labour Inspector v Prabh Limited*⁸ where penalties of \$100,000 were imposed, as well as a number of Authority determinations said to involve similar circumstances.⁹ Recommended penalties were \$30,000 to \$35,000 for the Farm and \$10,000 to \$15,000 for Mr Chisholm.

[28] The respondents made an overall submission the penalties sought were "at the higher end of the scale when considering the level of breaches involved ... reserved for cases involving more significant breaches" and with other factors which are not present in this case. The respondents said the Farm had been operating at a loss over the past couple of years and had projected losses for the 2024 tax year. The respondents referred to a number of recent Authority determinations¹⁰ where they submitted there were breaches of a comparable level or higher than in this matter, but the penalties were lower.

[29] The respondents said this matter could be differentiated from one of the recent Authority determinations referred to by the Labour Inspector, *Alam Horticulture*, as in that matter I referred to "the inability of the employer to establish mitigating factors, and accepting the applicant submissions that suggested the breaches were more than inadvertent or unintentional". The respondents said in this matter payments were made as soon as the amount owing was agreed, advice was sought to ensure a full and accurate understanding of obligations and a new payroll system had been implemented to ensure ongoing compliance with employment legislation.

[30] The respondents also said this matter could be differentiated from the Court's judgment in *Prabh* as that matter involved severe breaches and a finding of an ongoing

⁸ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

⁹ *A Labour Inspector v Alam Horticulture (2017) Ltd and Morshed Alam* [2024] NZERA 371, *A Labour Inspector v Zaafran Moroccan Cuisine Limited and Mangal Singh* [2023] NZERA 241 and *A Labour Inspector v RBM Communication Limited, Viral Bharatbhai Vala and Dharam Bharatbhai Vala* [2022] NZERA 229.

¹⁰ *A Labour Inspector v Palace Restaurant Company Limited* [2024] NZERA 371, *A Labour Inspector v Mirac Limited* [2024] NZERA 294, *A Labour Inspector v LaxmiNarayan Restaurant Limited* [2023] NZERA 660, *A Labour Inspector v Zaafran Moroccan Cuisine Limited* [2023] NZERA 241 (also referred to by the Labour Inspector), *A Labour Inspector v Basra & Khella Limited* [2020] NZERA 534 and *A Labour Inspector v Yuan* [2024] NZERA 189.

deliberate course of action to undermine the employment relationship and take advantage of vulnerable workers. This matter was said to not involve intentional breaches or evidence of the same impact on employees.

[31] Finally, the respondents said while Mr Chisholm accepted he was a person involved in employment standards breaches, following the Court's judgment in *Shah Enterprise NZ Ltd v Labour Inspector of Ministry of Business, Innovation and Employment*¹¹, penalties against him should be assessed "in light of the fact that he and the first respondent are, in essence, one and the same and should avoid a double count". A total maximum penalty across both respondents was said to be appropriate, with any penalties against Mr Chisholm proposed to be modest and in the range between \$2,000 to \$5,000, with penalties against the Farm of between \$5,000 to \$10,000.

[32] Submissions in reply for the Labour Inspector reiterated their view *Alam* was an appropriate comparator and said the comparators presented by the respondents "(absent discussion of the facts) fails to assess the circumstances of the breaches in each case, and does not account for the fact that the total arrears in this case cannot be known due to the insufficiency of record keeping". The Labour Inspector also said cases with highly deficient record-keeping may lead to substantial penalties and while accepting this matter was not at the "high-end" said it still "represents a significant departure from minimum employment standards by an employer that has previously been the subject of intervention by the Labour Inspectorate on two occasions".

[33] While the respondents provided limited evidence of the Farm making losses through a letter from their accountant, they did not provide any evidence of their overall financial position. I am not satisfied in the absence of evidence about overall financial position the respondents cannot pay penalties at an otherwise appropriate level and make no adjustment at this stage of the penalty assessment.

[34] In relation to proportionality, having considered other matters in the Authority and judgments of the Court including those referred to by the Labour Inspector and the respondents, I consider it appropriate to set penalties in this matter at \$20,000 for the Farm and \$10,000 for Mr Chisholm.

¹¹ *Shah Enterprise NZ Ltd v Labour Inspector of Ministry of Business, Innovation and Employment* [2022] NZEmpC 177 at [54] and [61].

[35] While I accept care is needed to avoid a double count, reflecting the Court's comments in *Shah*, in that matter the Court still ordered a penalty against Mr Shah. I consider a penalty against Mr Chisholm in this matter remains appropriate to reinforce his liability as a person involved in breaches of employment standards.

Costs

[36] The Labour Inspector submitted costs should follow the event in this matter and as this matter was determined on the papers a contribution to costs for no more than the tariff for a half a day hearing would be appropriate.

[37] The respondents submitted costs should lie where they fall given the agreed statement of facts and penalty only determination on the papers, as well as payment of all arrears once the quantum had been agreed.

[38] The Authority has the power to award costs.¹² This power is discretionary and is to be used in a principled manner, considering equity and good conscience. Other factors include costs generally following the event, not being used as a punishment and frequently being based on a notional daily tariff.

[39] The Labour Inspector has been successful in pursuing this matter and is entitled to a contribution towards their costs.¹³

[40] Although this matter was investigated on the papers rather than through an investigation meeting, work was still required on behalf of the Labour Inspector. Their representative attended a case management conference and provided submissions including reply submissions.

[41] I consider an appropriate contribution to the Labour Inspector's costs in this matter is \$1,500 and reimbursement for the Authority's filing fee. The respondents are jointly and severally liable for these amounts.

Orders

[42] For the above reasons I order within 28 days of the date of this determination:

- a. H & S Chisholm Farms Limited pay the Labour Inspector for transfer to a Crown account a penalty in the amount of \$20,000;

¹² Under cl 15 of sch 2 of the ERA.

¹³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

- b. Hugh Roderick Chisholm pay the Labour Inspector for transfer to a Crown account a penalty in the amount of \$10,000; and
- c. H & S Chisholm Farms Limited and Hugh Roderick Chisholm are jointly and severally liable to pay \$1,500 to the Labour Inspector as a contribution to their costs and \$71.55 for the Authority's filing fee.

Shane Kinley
Member of the Employment Relations Authority