

**NOTE: This determination includes an order prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 93  
3248319

BETWEEN	A LABOUR INSPECTOR Applicant
AND	FWP First Respondent
	LEM Second Respondent

Member of Authority:	Peter van Keulen
Representatives:	Greg La Hood and Claudia Milesi-Humm, counsel for the Applicant Ginrick Credo, counsel for the Respondents
Investigation Meeting:	On 17 October 2024 by AVL
Submissions Received:	23 August 2024, 6 October 2024, 17 October 2024, and 19 November 2024 from the Applicant 11 September 2024, 17 October 2024 and 13 November 2024 from the Respondents
Date of Determination:	19 February 2025

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**THIRD DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] FWP operated a business in a small community. LEM was the director of FWP and managed the business, although he did not work directly in the business all of the time.

[2] FWP relied on employees to ensure its business operated effectively and in the course of their employment, those employees they reported failures by FWP to meet various employment standards.

[3] The Labour Inspector investigated the operation of FWP's business in connection with relevant employment standards. As a result of its investigation the Labour Inspector issued enforcement proceedings against FWP and LEM.

[4] The enforcement proceedings had a protracted history but eventually, just before the investigation meeting for this matter was to commence the Labour Inspector, FWP and LEM reached an agreement on the extent of the breaches of employment standards and the arrears of wages, holiday pay and sick leave to be paid to the employees.

[5] In a determination dated 12 August 2024 I made orders in this matter based on a joint memorandum of the parties (the First Determination).<sup>1</sup>

[6] Following the First Determination two further matters need to be resolved. First an application for non-publication orders sought by FWP and LEM and second the application for penalties by the Labour Inspector.

### **Non-publication orders**

#### *Progress of the application*

[7] On 14 August 2024 FWP and LEM applied for non-publication orders in respect of their names and other identifying information, including information pertaining to affected employees of FWP.

[8] On 15 August 2024 I made interim non-publication orders to protect FWP and LEM's identities pending resolution of the application for non-publication (the Second Determination).<sup>2</sup>

[9] I then held an investigation meeting by AVL on 17 October 2024 to hear oral submissions from the parties' representatives.

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<sup>1</sup> *A Labour Inspector v FWP and LEM* [2024] NZERA 480.

<sup>2</sup> *A Labour Inspector v FWP and LEM* [2024] NZERA 482.

[10] I intended to issue my determination on non-publication by the end of October 2024 and advised the representatives of this. This timeframe was disrupted when I underwent surgery, which had not been planned and was scheduled on short notice, on 29 October 2024. Given my recovery time, the impact of the time I had away from work on my workload and the intervening holiday period, this determination has been delayed until now.

*Grounds for the application*

[11] FWP and LEM seek non-publication orders as they say publication of both FWP and LEM's identities would:

- a. have a negative impact on LEM's health, which has deteriorated as a result of this matter; and
- b. negatively impact on FWP's relationships with its suppliers leading to a loss of income.

[12] The Labour Inspector opposes orders for non-publication for the following reasons:

- a. LEM's evidence of health concerns is not sufficient to depart from the fundamental principle of open justice.
- b. FWP's reputational concerns are not sufficient to depart from the fundamental principle of open justice.
- c. The nature of this matter being regulatory proceedings by a Labour Inspector weigh against non-publication given that they are enforcement proceedings; non-publication is contrary to the objects of the Employment Relations Act 2000 (the Act) and policy considerations for the effective enforcement of minimum employment standards.
- d. The making of any non-publication order now is futile as the First Determination was issued and published with both FWP and LEM being named and identified directly.
- e. In the circumstances, the public interest supports, and the interests of justice

weigh in favour of, publication of FWP and LEM's identities.

*Analysis of the application – the principles*

[13] The principles that apply to consideration of an application for non-publication orders in the Authority have recently been addressed by the Employment Court in *MW v Spiga Ltd*.<sup>3</sup> In *Spiga* the Court said the principles set out by the Supreme Court in *Erceg v Erceg* continue to apply.<sup>4</sup> Specifically, the Court stated:

[55] [t]he statutory context mandates open justice, and there is nothing in the objects or the policy of the act that forms the basis for finding that the general rule does not apply for the purposes of nonpublication issues in the employment jurisdiction.

...

[87] Open justice is of fundamental importance. Open justice may be departed from, but only to the extent necessary to serve the ends of justice. This means there must be sound reasons for the making of an order of non-publication such that a departure is justified.

[88] In most cases, there first must be reason to believe that the specific adverse consequences could reasonably be expected to occur. The necessary evaluation will focus on such evidence has been submitted and/or is available. Inferences may be required by the Authority or the Court. But these must be reasonable inferences that may be taken from the evidence, based on the specific circumstances of the case, when considered in context.

[89] Second, the Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case. This is a weighing exercise. Equity and good conscience may play a part. Consideration of tikanga will, where appropriate, be woven through that weighing exercise.

[14] In summary, there is nothing in the employment jurisdiction that suggests that the general rule in relation to non-publication does not apply to the resolution of employment relationship problems in the Authority. The general rule is that open justice is paramount and the starting position is that parties' identities and relevant information can and will be published. However, non-publication orders can be made where there are sound reasons for doing so. Sound reasons arise if:

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<sup>3</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

<sup>4</sup> *Erceg v Erceg* [2016] NZSC 135.

- a. Firstly, there are specific adverse consequences that can be reasonably expected to occur for someone (or some entity) on publication of information; and
- b. Secondly, on a weighing exercise that takes into account various factors, those specific adverse consequences justify non-publication orders being made.

*Analysis of the application – specific adverse consequences*

[15] FWP operates a business that is reliant on suppliers and the business operates in circumstances that means switching between suppliers and/or negotiating favourable terms of supply are problematic for FWP. Essentially FWP is heavily reliant on the suppliers it can use and is concerned about negative publicity impacting on that supply, which in turn would lead to a loss of business and at worst closure. FWP is also concerned about potential loss of licences (for selling certain items) as a result of publication.

[16] I accept on the affidavit evidence I have reviewed that there are specific adverse consequences for FWP that can reasonably be expected to occur if FWP's identity is published in connection with this matter. I am not satisfied that the adverse consequences would be as extreme as FWP suggests, particularly the complete loss of supply of certain goods, but accept the adverse consequence of publication could be the disruption of supply to some extent.

[17] LEM says publication of his identity will have an adverse impact on his health. In particular he points to the deterioration of his health since the Labour Inspector's investigation began. LEM refers to his health worsening through the Labour Inspector's application.

[18] LEM says his health is currently compromised due to diabetes, anxiety, insomnia and concentration issues. He says he is currently under the care of his GP and is being monitored; he is on medication to deal with his health issues and may be referred to a specialist if required.

[19] Whilst I must accept LEM's evidence that his health has deteriorated as a result of the Labour Inspector's investigation, there is no specialist medical evidence to support this. And,

importantly there is no evidence either from him or a medical specialist that concludes that his health will deteriorate further on publication of his identity in this matter. I am not able to draw any inferences in this regard as there is no clear assumption that can be made about the finalisation of this matter on LEM – he may find his health improves once everything is resolved – let alone his identity being disclosed.

[20] So, I conclude that there are specific adverse consequences for FWP that might reasonably be expected to arise for it on publication of its identity in this matter. I do not conclude that there are specific adverse consequences that might reasonably be expected to arise for LEM on publication of his identity in this matter.

[21] I note here however, if I determine that non-publication is appropriate for FWP then it would follow that non-publication would extend to LEM as FWP can be identified through him.

*Analysis of the application – weighing exercise*

[22] Whether the specific adverse consequence of loss of business for FWP as a result of publication of its identity justifies a non-publication order is to be assessed in the context of relevant factors. I will turn to this now.

[23] This matter concerns enforcement proceedings brought by the Labour Inspector against FWP for significant breaches of employment standards. Those breaches resulted in a shortfall of payments to employees of \$108,618.93 and many of the breaches relate to a vulnerable migrant employee.

[24] FWP operated a business that benefited from those breaches of employment standards. It is now concerned about the potential loss of business as a result of being “caught” in relation to these breaches. That potential loss of business in many respects seems to be a consequence of the breaches for which FWP was entirely responsible for and probably undertook deliberately - it is difficult to accept that the potential loss is any more than a consequence that FWP should have considered when it acted as it did. To offer reprieve from this to FWP through non-publication orders, which would protect its reputation and consequently its business interests does not seem balanced.

[25] This same rationale applies to any potential loss of business licences as a result of publication. And further, if breaches of minimum standards are relevant to the retention and/or renewal of any business licence then the Authority should not assist the concealment of those factors by issuing non-publication orders.

[26] Migrant exploitation is a major concern for the public and for the government. The Labour Inspector leads a public function that assists in regulating the labour market through enforcement of employment standards. For this role to be effective and to raise awareness of employment standards and consequences of non-compliance with those, publication of those entities or people found to have breached those standards is vital.

[27] The media plays an important part in public awareness of employment standards and the impact on businesses and people of not complying. The effectiveness of deterrence that arises in relation to enforcement, in particular the imposition of penalties and payment of any arrears, is increased with full publication of the circumstances of the breaches of those standards.

[28] Further the object of the Act at s 3(ab) - to promote the effective enforcement of employment standards - is enhanced by publication in relation to employers who breach those standards.

[29] Other relevant factors include:

- a. The employees involved in the breaches of employment standards do not support non-publication. And it would appear they have no concerns about FWP and LEM's identities and their identities being published.
- b. The business FWP operates is in a small community and arguably that community should know the full extent of what went on.
- c. The First Determination was issued on the basis of an agreement between the parties as to the resolution of this matter. That agreement did not include non-publication orders.

[30] I consider that it is appropriate to weigh the interests of FWP and the adverse

consequences against upholding and enhancing the effectiveness of the Labour Inspector role, improving the awareness and deterrence in relation to breaches of employment standards and maintaining public confidence in upholding and protecting employees' entitlements. This balancing exercise leans heavily towards publication of FWP's identity.

[31] An analysis of the circumstances of this matter does not indicate any matters or issues that in equity or good conscience lend themselves towards granting non-publication orders. In fact, the opposite is apparent, that many of the circumstances support the principle of open justice.

*Conclusion on non-publication*

[32] Overall, I conclude that there is no basis for departing from the principle of open justice and I decline to grant the orders for non-publication sought by FWP and LEM.

*Orders on non-publication*

[33] In the interim, in order to not render any possible challenge by the FWP and LEM moot, I will restate the interim orders for non-publication made in the Second Determination and record that they remain in place for a further 28 days to allow FWP and LEM to challenge this aspect of my determination if they wish to do so.

[34] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication the names and identities of the first and second respondents:

- a. The first respondent will be referred to as FWP.
- b. The second respondent will be referred to as LEM.
- c. The names of the employees subject of the breaches of employment standards will be redacted.

[35] These interim orders are to remain in place for 28 days from the date of this determination. At the expiry of 28 days:

- a. If FWP and LEM have lodged a challenge to my decision not to issue non-publication orders then the interim orders will extend until any order on non-publication by the Employment Court.
- b. If FWP and LEM have not lodged a challenge to my decision not to issue non-publication orders then the interim orders will lapse and the First Determination, the Second Determination and this determination will be replaced on the Authority's determination database with determinations that are not anonymised and redacted.

## **Penalties**

[36] Having reached agreement on the extent of the breaches of employment standards and the arrears to be paid to the employees, the parties agreed that the question of penalties should be determined on the papers.

[37] I made directions for lodging and serving submissions on penalties. There was some delay in complying with those directions by FWP and LEM but I received all of the relevant information and submissions by 19 November 2024. This part of my determination deals with penalties and is based on the information and submissions received.

[38] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to finalise the question of penalties, and then I have specified the orders made as a result.

## **The breaches by FWP and LEM**

[39] In the First Determination I found that FWP had breached:

- a. section 6 of the Minimum Wage Act 1983 by failing to pay minimum wage for all hours worked by [REDACTED], [REDACTED] and [REDACTED] during their employment;
- b. sections 16, 21, 23, 24, 25, and 27 of the Holidays Act 2003 by failing to

correctly provide and pay annual holidays during and on termination of their employment to [REDACTED], [REDACTED] and [REDACTED];

- c. Sections 40, 49, 50, 55, 56, and 60 of the Holidays Act 2003 by failing to pay [REDACTED], [REDACTED] and [REDACTED] their correct public holiday entitlements, including time and a half, alternative holidays, and payment for public holidays not worked;
- d. section 71 of the Holidays Act 2003 by failing to pay correct sick leave entitlements to [REDACTED] and [REDACTED];
- e. section 69ZD of the Act by failing to provide [REDACTED], [REDACTED] and [REDACTED] with rest and meal breaks;
- f. section 130 of the Act by failing to keep compliant wages and time records for [REDACTED], [REDACTED] and [REDACTED]; and
- g. section 81 of the Holidays Act 2003 by failing to keep compliant holidays and leave records for [REDACTED], [REDACTED] and [REDACTED].

[40] I also found that LEM:

- a. was a person involved in the above breaches, pursuant to s 142W(1)(c) of the Employment Relations Act 2000; and
- b. is liable pursuant to s 142Y(1) of the Employment Relations Act 2000.

[41] In connection with the breaches of employment standards I found that FWP was liable for wage arrears, holiday pay and sick leave in the total sum of \$108,618.93 (gross) made up as follows:

- a. \$84,069.85 to [REDACTED] consisting of: \$57,580.05 for minimum wage arrears; \$8,977.02 for public holiday pay; \$7,773.21 for alternative holiday pay; and \$9,739.57 for annual holiday pay;
- b. \$2,823.81 to [REDACTED] consisting of: \$649.22 for minimum wage arrears;

\$688.72 for public holiday pay; \$1,267.82 for alternative holiday pay; \$195.71 for annual holiday pay; and \$22.34 for sick leave;

- c. \$21,659.27 to [REDACTED] consisting of: \$15,921.20 for minimum wage arrears; \$1,506.93 for public holiday pay; \$778.40 for alternative holiday pay; and \$3,452.74 for annual holiday pay; and
- d. \$66.00 to [REDACTED] for sick leave.

[42] The amount of \$108,618.93 was paid to the Labour Inspector by FWP.

### **Analysis of penalties**

[43] FWP and LEM's primary submission in respect of penalties is that I should not impose any penalties against them as they do not have the financial means to pay.

[44] I do not accept this submission. Financial means may impact on the amount of any penalties imposed but in this case, given the nature and circumstances of the breaches (as discussed below) penalties should be imposed.

### *Quantum of penalties*

[45] There are two key aspects that inform the exercise of quantifying penalties; the considerations set out in s 133A of the Act and the four step approach to fixing penalties set out in *Borsboom v Preet PVT Limited*.<sup>5</sup>

[46] Adopting the approach used by Judge Corkill in *A Labour Inspector v Matangi Berry Farm Limited*,<sup>6</sup> I will first consider the statutory requirements in s 133A of the Act and then I will use that information to assess quantum based on the four steps in *Preet*.

### *The object stated in s 3 of the Act*

[47] The objects of the Act include building productive employment relationships through the promotion of good faith and promoting effective enforcement of employment standards by

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<sup>5</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

<sup>6</sup> *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

Labour Inspectors. In my view this supports the imposition of penalties against employers that breach minimum standards and against persons involved in those breaches.

*The nature and extent of the breaches*

[48] The breaches by FWP were significant, impacting on four employees and spanning a significant period of time. The number of breaches across this period of time and all four employees is 50 and amounted to the employees being deprived of over \$108,000 of payments.

*The nature and extent of any loss or damage suffered*

[49] The loss or damage suffered by the employees in respect of the minimum wage payments, holiday pay requirements and sick leave entitlements is quantified as \$108,618.93.

*Were the breaches intentional, inadvertent or negligent?*

[50] As I did not investigate this enforcement action in terms of assessing the evidence I must be careful making any conclusions on whether the breaches were intentional. It may be that some of the breaches pertaining to sick leave, holiday pay and entitlements for public holidays may have been inadvertent or a result of a lack of knowledge by FWP and LEM. I must add however that this seems unlikely given LEM's business experience and, as the Labour Inspector points out, FWP appears to have treated migrant employees differently to others. Further, the breaches of minimum wages seem most likely to be deliberate as it is not credible to suggest LEM and therefore FWP did not have knowledge of the hours worked by the employees and the requirement to pay minimum wage rates.

[51] On balance I think most of the breaches were deliberate and I assess FWP and LEM's culpability as high.

*What steps have been taken in mitigation?*

[52] FWP and LEM eventually conceded they had breached the employment standards as alleged by the Labour Inspector. As a result, they agreed to pay (and have paid) the wage arrears, holiday pay and sick leave entitlements owed to employees.

[53] However, the circumstances of FWP and LEM's concessions do not reflect well on them. They both resisted the enforcement action by the Labour Inspector and caused significant delays to the progression of the action. Their evidence lodged in support of their opposition to the enforcement action denied any breaches, essentially suggesting the allegations were fabricated by the employees; this evidence included a significant allegation that one employee had edited CCTV footage to support his own evidence – an allegation that did not withstand scrutiny of the evidence lodged. Whilst this matter did not proceed to an investigation meeting, my assessment of the evidence lodged by LEM suggested that his evidence was not consistent with contemporaneous documents and CCTV footage, calling into question his credibility.

[54] All of that said, some credit must be given to FWP and LEM for their admission and payment of amounts owing to the employees.

*The circumstances of the breach and any vulnerability*

[55] Some of the employees were migrant workers with limited knowledge about their employment rights and little support in terms of questioning their pay and other entitlements. My view is that LEM took advantage of this vulnerability and some of the breaches indicate migrant exploitation.

*Previous conduct*

[56] There is no evidence of previous employment standard breaches by FWP and/or LEM.

*Preet step 1 – nature and number of breaches*

[57] The first step in *Preet* requires me to consider whether any of the breaches should be globalised so that a single breach may reflect two or more of the breaches forming the Labour Inspector's claim. Globalisation is about reducing the number of breaches for penalty purposes so that the actionable breaches are representative of the overall conduct and the starting point for penalties is realistic.<sup>7</sup>

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<sup>7</sup> *A Labour Inspector v Parihar* [2019] NZEmpC 145.

[58] In *A Labour Inspector v Matangi Berry Farm Limited*,<sup>8</sup> Judge Corkill globalised failures across 207 employees and 118 employees down to a single breach for each type of default. This meant globalisation reduced 532 breaches (based on a count per employee affected) down to just three.

[59] Adopting the approach of Judge Corkill, I will globalise the breaches as one breach per type of breach of each statute. This means there are seven globalised breaches:

- a. Breach of the Minimum Wage Act 1983 for failing to pay minimum wage for all hours worked.
- b. Breach of the Holidays Act 2003 by failing to correctly provide and pay annual holidays during and on termination of their employment.
- c. Breach of the Holidays Act 2003 by failing to pay correct public holiday entitlements, including time and a half, alternative holidays, and payment for public holidays not worked.
- d. Breach of the Holidays Act 2003 by failing to pay correct sick leave entitlements.
- e. Breach of the Act by failing to provide rest and meal breaks.
- f. Breach of the Act by failing to keep compliant wages and time records.
- g. Breach of the Holidays Act 2003 by failing to keep compliant holidays and leave records.

[60] Based on this globalisation the starting point for assessing the quantum of penalties to be imposed against FWP is \$140,000 and LEM is \$70,000.

*Preet step 2 – severity of breaches*

[61] In addition to weighing up my consideration of the factors in s 133A of the Act I must also consider the additional factors referred to in *Preet* of deterrence and culpability.

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<sup>8</sup> *A Labour Inspector v Matangi Berry Farm Limited*, above n5.

[62] Considering the aim of the Act, assessing the nature and extent of the breaches and losses suffered and accepting that payment of losses has been made, reflecting on the fact that FWP and LEM acted intentionally and that their culpability is high, and then adding in the need for deterrence, I conclude that 75% of the maximum penalty amount for each breach is an appropriate starting point.

*Preet step 3 – means and ability of the respondent to pay*

[63] I accept the Labour Inspector's submissions regarding FWP's financial position and do not afford it the weight suggested by counsel for FWP and LEM. I do accept however there is some financial difficulty for FWP and LEM and a reduction in the amount of penalties should follow. That reduction is only a further 10%.

*Preet step 4 – proportionality*

[64] Given my assessment up to this point I am satisfied that a reduction of 35% from the starting point for penalties is appropriate. This leaves me with penalty amounts of \$91,000 for FWP and \$45,500 for LEM.

[65] I must now ensure that the final amount of any penalty is proportional to the breaches and in line with other penalty amounts. In this case I do not consider that an extended evaluation of previous penalty amounts is required. Given the number of breaches, the nature of those breaches and the quantum of arrears payable to employees I consider the penalty amounts do not require any further reduction.

[66] In coming to this conclusion, I consider that the Labour Inspector's submission that a reduction of penalty amounts should not reduce quantum so much as to create a perverse incentive for employers, is appropriate – the amount of any penalty must be meaningful in order to punish and create meaningful deterrence.

*Payment to employees*

[67] The Labour Inspector has submitted that some of the penalty imposed by me should be paid to three of the employees subject of the breaches of employment standards. I agree with

this submission; it is entirely appropriate in the circumstances.<sup>9</sup> I order that, from the penalties paid by FWP and LEM, \$20,000 be paid to [REDACTED], and \$10,000 be paid to each of [REDACTED] and [REDACTED].

## **Orders**

[68] Within 28 days of the date of this determination:

- a. FWP must pay \$91,000 to the Labour Inspectorate as penalties for the breaches of employment standards.
- b. LEM must pay \$45,500 to the Labour Inspectorate for his involvement in the breaches of minimum standards.

[69] Once the penalty amounts are received the Labour Inspectorate can transfer:

- a. \$20,000 to [REDACTED];
- b. \$10,000 to [REDACTED];
- c. \$10,000 to [REDACTED]; and
- d. \$96,500 to a Crown Bank account.

## **Costs**

[70] The parties have previously reached an agreement on costs and no order for costs is required at this stage.

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>9</sup> *A Labour Inspector v Prabh Ltd* [2018] NZEmpC 110.