IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 355
3383845

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	SAMRACH SAY IN PARTNERSHIP WITH SINA NIN trading as THE GRANGE BAKERY ESPRESSO First Respondent
	AND	SINA NIN IN PARTNERSHIP WITH SAMRACH SAY trading as THE GRANGE BAKERY ESPRESSO Second Respondent

Member of Authority:	Peter Fuiava
Representatives:	Owen Zheng, counsel for the Applicant Samrach Say in person and for the Second Respondent
Investigation Meeting:	On the papers
Submissions and other information received:	30 January, 5 March, and 4 June 2026 from the Applicant 17 February 2026 from the First Respondent
Determination:	5 June 2026

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] This a claim for penalties brought by the Labour Inspector on behalf of a Cambodian national (the complainant) who came to New Zealand on an Accredited Employer Work Visa to work as a baker for Samrach Say and his wife, Sina Nin, both of whom are also from Cambodia.

[2] The statutory breaches comprise breaches of s 130 of the Employment Relations Act 2000 (the Act);[1] s 6 of the Minimum Wage Act 1983 (the MWA);[2] ss 4 and 12A of the Wages Protection Act 1983 (the WPA);[3] and various breaches of the Holidays Act 2003 (the HA).[4]

The Authority's investigation

[3] Following mediation, the parties were able to find common ground on the material facts which has resulted in an Agreed Statement of Facts (ASOF) being filed with the Authority. While the only issue that the parties agree to disagree on is the quantum of penalties, both agree for this to be determined 'on the papers' without the need for a hearing.

[4] As permitted by s 174E of the Act 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.

What happened?

[5] The complainant arrived in New Zealand on 26 August 2023, and worked full time as a baker at The Grange Bakery Espresso from 28 August 2023 to 11 June 2024.

[6] On 12 June 2024, the complainant made a complaint to the Labour Inspector alleging that he was required to pay a premium for his job of approximately NZD 20,000; worked 12-hour days six days per week but was only paid for 30 hours per week at his contractual rate of $29.66; was never given a day off on a public holiday; was not paid correctly for working on a public holiday; and was dismissed on 11 June 2024 after raising concerns about unpaid wages.

[7] Mr Say and Mrs Nin operate a small locally owned bakery that trades using the structure of an unlimited liability partnership. Although business partners, Mr Say was more actively involved in the management of the complainant's work, including setting his hours and arranging his pay. Because it was a condition of the complainant's work

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[1] Non-compliance with an employer's obligation to keep a compliant wages and time record.
[2] Breach of an employer's obligation to pay an employee no less than the minimum wage rate.
[3] Unlawful deduction from wages and payment of a premium for employment.
[4] Notably failing to pay correctly for working on a public holiday and not keeping a compliant holiday and leave record.

visa that he work as a baker solely for the respondents, he was in a particularly vulnerable position as his right to remain lawfully in New Zealand was tied to his employment.

[8] Mr Say and Mrs Nin failed to maintain compliant wages and time and holiday and leave records for the complainant; did not pay him for all hours worked including for work on public statutory holidays; failed to provide the complainant with alternative holidays having worked 10 public holidays; required him to pay a premium for his employment; and made unlawful deductions from his wages for rent contrary to the statutory requirements of the WPA.

[9] Arrears totalling $76,468.17 were paid by Mr Say and Mrs Nin on 24 June 2025 which have been disbursed to the complainant. The Labour Inspector accepts that this step, along with the couple's cooperation during its investigation, are relevant mitigating factors.

What is the relevant law?

[10] The starting point in the penalty-setting exercise is s 133A of the Act which states:

> **Matters Authority and court to have regard to in determining amount of penalty**
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> In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—
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> (a) the object stated in section 3;[5] and
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> (b) the nature and extent of the breach or involvement in the breach;[6] and
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> (c) whether the breach was intentional, inadvertent, or negligent;[7] and
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> (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;[8] and
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> (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;[9] and

[5] Statutory Consideration 1 – The object of the Act.
[6] Statutory Consideration 2 – The nature and extent of the breach.
[7] Statutory Consideration 3 – Whether the breach was intentional, inadvertent, or negligent.
[8] Statutory Consideration 4 – The nature and extent of any loss or damage.
[9] Statutory Consideration 5 – Steps to mitigate effects of the breach.

(f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;[10] 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.[11]

[11] The seven statutory considerations expressly referred to in s 133A(a) to (g), do not constitute an exhaustive list of factors. In *Borsboom v Preet PVT* a further five additional considerations were identified which are set out below:[12]

- when assessing deterrence, to do so both in relation to the particular person to be penalised and to the wider community of employers;[13]
- when considering the seriousness of the breach, the degree of culpability of the person in breach;[14]
- the general desirability of consistency in decisions;[15]
- the employer's ability to pay.[16]
- when assessing a penalty or penalties, to stand back and evaluate whether the anticipated outcome is one which is proportionate to the breach or breaches for which the penalty is imposed.[17]

[12] Before the Authority considers quantum, I pause to record that penalties against Mr Say and Mrs Nin are appropriate because as employers they were responsible in ensuring that the complainant's employment complied with all relevant New Zealand employment law.

Application

Statutory consideration 1 – the object of the Act

[13] The present case reinforces the need to promote the following objects of s 3 of the Act namely:

(i) Recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour;

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[10] Statutory Consideration 6 – Circumstances of the breach, and any vulnerability.
[11] Statutory Consideration 7 – Previous conduct.
[12] *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514 at [68] and [80].
[13] Additional Consideration 8 – Deterrence.
[14] Additional Consideration 9 – Culpability.
[15] Additional Consideration 10 – Consistency.
[16] Additional Consideration 11 – Ability to pay.
[17] Additional Consideration 12 – Proportionality of outcome.

(ii) acknowledging and addressing the inherent inequality of power in employment relationships; and

(iii) promoting the effective enforcement of employment standards.

[14] Because the complainant's visa status was dependent on his employment, this significantly increased the power imbalance between him and his employers and limited the complainant's ability to challenge Mr Say and Mrs Nin's unlawful practices while the employment relationship was ongoing.

[15] The respondents' failure to keep adequate wages and time and holiday and leave records placed the complainant at a disadvantage and made it difficult for the Labour Inspect to verify entitlements and calculate arrears. The record keeping requirements of the Act and the HA are there not only for the employee's protection but also the employer's as a fair and reasonable employer will want to keep an accurate and accessible record of their compliance with minimum standards.

Statutory consideration 2 – the nature and extent of the breach

[16] The ASOF records a total of nine breaches of various provisions of the WPA, the Act, the HA and the MWA. Of particular note are the breaches of s 12A of the WPA in which the respondents required the complainant to pay a premium for his employment and a breach of s 6 of the MWA when the complainant was paid less than the minimum wage for every hour worked.

Identifying the number of breaches and maximum penalty

[17] The maximum penalty available against Mr Say and Mrs Nin is $10,000 each per breach.[18] As there are nine breaches, the maximum total penalties available against each of the respondents is $90,000.

[18] The nine breaches can be condensed into seven distinct categories as these all relate to one employee over a finite period of employment of a little under a year. The breaches can be globalised down to seven breaches or a maximum penalty of $70,000 per respondent.

[18] The Act, s 135(2)(a).

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

[19] Mr Say submits that he and his wife had a poor understanding of their employment law obligations at the time and they have since improved on their knowledge of what is required of them while also paying arrears of $76,468.17. However, ignorance of the law is no excuse and a search of the New Zealand Business Register by the applicant's counsel, Mr Zheng, shows that the respondents had operated their business for five years at the time the complainant commenced employment. The respondents therefore had ample time to familiarise themselves with the statutory obligations imposed on them as employers. The actions of Mr Say and Mrs Nin were not inadvertent or negligent but intentional.

[20] That said, some allowance needs to be made for Mrs Nin on account of her limited involvement in the day-to-day operations of the bakery. Mr Zheng submits a starting point of 50 percent of her husband's is appropriate and which brings Mrs Nin's starting point down to $35,000.

Assessing the severity of the breaches

[21] To avoid the cumulative effect of double counting with respect to the HA breaches, and to acknowledge the benefit that the complainant received from living in rented accommodation provided by the respondents, some minor downward adjustment is required.

[22] For the failure to maintain adequate holiday and leave records, the aggravating starting point percentage in Mr Zheng's schedule of penalties is reduced from 80 to 70 percent; and for failing to pay wages without lawful deductions, the aggravating starting point of 60 percent is reduced to 50 percent. Modifying the schedule of penalties at Step 2(a), this brings the total penalties for Mr Say down to $49,000 from $51,000, and being half of her husband's, Mrs Nin's penalties equate to $24,500.

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

[23] The unpaid entitlements to the complainant amounted to $76,468.17 which is significant. While the arrears have now been repaid, the delay in receiving those entitlements was to the complainant's disadvantage and was also contrary to statutory protections that require workers to be paid fairly and on time. The delay had the effect

of providing Mr Say and Mrs Nin with an unfair business advantage by reducing their labour costs artificially.

Statutory consideration 5 – steps to mitigate effects of the breach

[24] Mr Say and Mrs Nin have mitigated matters for themselves by paying what was owed to the complainant. However, even so, the Employment Court has observed that care needs to be taken with such payments so as not to create perverse outcomes that encourage employers to sit on their hands until forced by the Authority to pay what is due.[19]

[25] While it is to Mr Say and Mrs Nin's credit that restitution was made and that their cooperation with the Labour Inspector has spared it the cost and expense of a formal investigation, these outcomes are but the direct outcome of the Labour Inspector's involvement rather than the respondents acting voluntarily. That said, the couple have since engaged specialist advice to put in place systems to ensure their compliance with minimum employment standards in the future. Further, their conduct will make it that much more harder for them to recruit overseas workers for their business until such time they can demonstrate to Immigration New Zealand that they now have a history of compliance with all relevant New Zealand employment law.

[26] Cumulatively considered, Mr Say and Mrs Nin's efforts to mitigate the effects of the breaches deserves a 20 percent reduction in penalty. This brings penalties down from $49,000 to $39,200 for Mr Say and $24,500 to $19,600 for Mrs Nin.

Statutory consideration 6 – circumstances of the breach and any vulnerability

[27] More often than not, those most vulnerable to breaches of employment standards are migrant workers and the complainant is a prime example of a temporary visa holder who has come to New Zealand for economic betterment but who has instead fallen victim by an employer who should know better.

Statutory consideration 7 – previous conduct

[28] The respondents have not previously come to the attention of the Labour Inspector before. Having regard to Mr Zheng's submissions, a modest discount of

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[19] *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 at [33].

10 percent for this factor is appropriate. This brings penalties down for Mr Say from $39,200 to $35,280, and for Mrs Nin, from $19,600 to $17,640.

Additional consideration 8 – deterrence

[29] While I accept that the respondents have made amends, there is still a need to send a clear message to others contemplating such conduct. There is zero tolerance for those who would exploit workers especially those who are vulnerable owing to their temporary visa status.

Additional consideration 9 – culpability

[30] Mr Say and Mrs Nine accept responsibility for their actions and this is evident by their attendance at mediation and by making restitution. However, while there is no need to instil in them a sense of ownership for their actions, it remains that their victim was a migrant worker and a fellow Cambodian and these are aggravating factors.

Additional consideration 10 – consistency

[31] Consistency in setting penalties under s 133A of the Act goes a long way in assisting representatives to properly advise their clients of likely outcomes. In other words, consistency provides for predictability and transparency. Moreover, consistency drives legitimacy as outcomes that are within range of each other are more likely to be accepted and complied with by members of the public.

[32] Of the cases cited by Mr Zheng in his written submissions, *A Labour Inspector v Shen Yuan & Linlin Sun Preet* [2024] NZERA 189, is the closest to Mr Say and Mrs Nin's circumstances. That case involved two individuals that operated a company that ran as a restaurant. When the company went into liquidation, proceedings continued against the sole director and the restaurant manager as persons involved in breaches of employment standards.[20]

[33] *Shen Yuan* compares well the present case in terms of the breaches and migrant workers involved. While the present case has higher arrears of $76,468.17 compared to $64,943.42 in *Shen Yuan*, Mr Say and Mrs Nin made payment of their outstanding

[20] The Act, s 142W.

arrears whereas the respondents in *Shen Yuan*, who received penalties of 40 and 30 percent of the maximum respectively, did not.

Additional consideration 11 – ability to pay

[34] This factor is but one of many that requires consideration but is not, of itself, pivotal to the penalty-setting exercise.[21] Mr Say advises that his business's current financial circumstances are challenging and his ability to pay penalties while simultaneously continuing to trade in difficult economic times would depend on the quantum of penalties awarded against him.

[35] While no financial information has been provided, I accept what Mr Say has said on face value. On balance, a 15 percent reduction ought to apply which reduces his penalty from $35,280 to $29,988, and Mrs Nin's from $17,640 to $14,994.

Additional consideration 12 – proportionality of outcome

[36] The final step involves the proportionality or totality test in which the Authority must consider whether the provision or penalty reached is proportionate to the seriousness of the breaches and the harm occasioned by them. This step is to ensure penalty is just in all the circumstances.

[37] In considering this factor, the reality is that the penalties awarded against Mr Say and Mrs Nin individually will effectively be funded from the same purse. Proportionality requires further adjustment. I therefore reach a penalty end point of $22,500 for Mr Say and $11,250 for Mrs Nin which represent 25 percent of the potential maximum of $90,000 and takes into account the additional factor of payment of arrears which was an absent mitigating factor in *Shen Yuan*.

Should a portion of the penalty be paid to the complainant?

[38] I have sought further comment from Mr Zheng on this matter who is not opposed to an apportionment to the complainant in the range of 30 to 35 percent under s 136(2) of the Act. Accepting that submission, on recovery of the penalties, the Labour Inspector is ordered to pay one third or 33.33 percent of the amounts recovered to the complainant.

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[21] *Daleson*, n 19, at [45].

Costs and expenses

[39] As the successful party, the Labour Inspector is entitled to costs which must be awarded on a principled basis and not arbitrarily.[22] As this matter has been determined on the papers, which has cost savings for both parties, the notional tariff for a half-day hearing in the Authority or $2,250 shall apply.

[40] The applicant is also entitled to be reimbursed the $71.55 filing fee for its application.

Summary of Orders

[41] The Authority makes the following orders which must be paid within 28 days of the date of this determination into a Crown Bank Account:

(i) Samrach Say to pay penalties totalling $22,500 for his part in nine breaches of employment standards.

(iii) Sina Nin to each pay $11,250 for her part in nine breaches of employment standards.

(iii) On recovery of these penalties, the Labour Inspector must pay one third to the complainant and transfer the remainder to a Crown Bank Account.

(iv) The respondents to reimburse the Labour Inspector the filing fee of $71.55.

(v) The respondents to pay $2,250 in costs to the Labour Inspector.

Peter Fuiava
Member of the Employment Relations Authority

[22] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].