IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 507
3033952

	BETWEEN	PALAV BRAHMBHATT First Applicant
	AND	HARDIK GEDIYA Second Applicant
	AND	MANINDER SINGH Third Applicant
	AND	HEMANT DHAMIJA Fourth Applicant
	AND	BHUMIKA KOHLI First Respondent
	AND	NZ CLEAN MASTER 2013 LIMITED Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Nathan Santesso, advocate for the Applicants David Jaques, counsel for the Respondents
Investigation Meeting:	30 November 2018 and 11 and 12 December 2018
Submissions and further information:	For the Applicants on 17 January 2019, for the Respondents on 24 January 2019 and for the Applicants on 8 February 2019
Determination:	30 August 2019

DETERMINATION OF THE AUTHORITY

A. Palav Brahmbhatt, Hardik Gediya and Hemant Dhamija were employees of New Zealand Clean Master 2013 Limited (NZCM) throughout all the time they each worked for the company.

B. NZCM must pay the following sums as wage arrears due under s 131 of the Employment Relations Act 2000 (the Act):

(i) $70,908.02 (gross) to Palav Brahmbhatt for wages, annual leave and public holidays.

(ii) $5,634.13 (net) to Maninder Singh for wages, annual leave, public holiday and reimbursement of an unlawful deduction.

(iii) $4,284.82 (net) to Hemant Dhamija for wages, annual leave and public holidays.

(iv) $12,933.02 (gross) to Hardik Gediya for wages, annual leave, public holidays and reimbursement of an unlawful deduction.

C. NZCM must pay to the Authority a penalty of $20,000 under s 134(1) of the Act for breaches of the Applicants' employment agreements.

D. NZCM director Bhumika Kohli must pay to the Authority a penalty of $10,000 under s 134(2) of the Act for aiding and abetting breaches of the Applicants' employment agreements.

E. All sums to be paid under these orders must be paid within 28 days of the date of this determination.

F. Once the penalties imposed on NZCM and Ms Kohli are paid to the Authority, the Authority is to transfer to each Applicant $2,500 of the penalty paid by NZCM and $1,250 of the penalty paid by Ms Kohli. The Authority must then pay the remainder of each penalty to the Crown Account.

G. Ms Kohli is declared under s 142W of the Act to be a person involved in a breach of employment standards.

Employment Relationship Problem

[1] Palav Brahmbhatt, Hardik Gediya, Maninder Singh and Hemant Dhamija each worked for NZ Clean Master 2013 Limited (NZCM) for various periods between April 2016 and March 2018. They sought findings that NZCM had breached employment standards by not keeping proper records of their time, wage, holiday and leave entitlements and had not properly paid wages and holiday pay due to them. If those findings were made, they sought orders requiring NZCM to pay wage arrears and a penalty. They also sought an order imposing a penalty on NZCM director Bhumika Kohli for instigating breaches of their employment agreements and a declaration she was a person involved in breaches of employment standards. A finding of "involvement" under s 142W of the Employment Relations Act 2000 (the Act) would enable them to seek leave to pursue Ms Kohli for any wage arrears ordered if NZCM was unable to pay those amounts.[1]

The Authority's investigation

[2] Ms Brahmbhatt, Mr Singh, Mr Gediya, Mr Dhamija and Ms Kohli each gave written and oral evidence during the Authority's investigation of this application. The investigation included an initial meeting Ms Kohli was required to attend under a witness summons. The summons ordered her to bring "days sheets", the company's records of work assignments given to its workers that showed the length of time scheduled to be spent at each job. The summons was issued, at the Authority's own volition, after delays in providing those documents. Ms Kohli had reported difficulties in locating and sorting the relevant pages.

[3] After the Applicants' representative had an opportunity to review the documents provided under the summons, filling five Lever Arch folders, the investigation continued with a two day meeting. During that meeting the applicants and Ms Kohli answered questions from me and the parties' representatives. The representatives later provided written submissions on the issues for resolution.

[4] As permitted by s 174E of the ER 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. This determination has been provided outside the three-month statutory period after

[1] Employment Relations Act 2000, s 142Y.

the date when the last information was received because the Chief of the Authority decided there were exceptional circumstances.[2]

The issues

[5] Arising from the investigation the following factual and legal issues required determination:

(i) How did NZCM operate?

(ii) How could wage arrears be assessed?

(iii) What was the real nature of the relationships of Mr Singh and Mr Dhamija with NZCM during the time they worked for the company?

(iv) What was the real nature of the relationship of Ms Brahmbhatt with NZCM during the time she worked for the company?

(v) Are wage arrears owed to each Applicant and, if so, of what amount?

(vi) Was NZCM liable under s 134(1) of the Act to a penalty for breaches of the Applicants' employment agreements and, if so, of what amount?

(vii) Was Ms Kohli liable under s 134(2) of the Act to a penalty for aiding and abetting any breaches of the Applicants' employment agreements and, if so, of what amount?

(viii) Should any part of any penalties imposed on NZCM and Ms Kohli be paid to the Applicants?

(ix) Was Ms Kohli a person involved in a breach of employment standards under s 142W of the Act?

(x) Should any party contribute to the costs of representation of the other party?

NZ Clean Master 2013 Limited and its business model

The business history

[6] The company now called NZ Clean Master 2013 Limited was first registered in March 2013 with Ms Kohli as its sole shareholder and director. In June 2015 she changed the company name to Bhandari Enterprises Limited, around the time that Ms Kohli was attempting to establish a domestic cleaning business. She changed the name again, to its present name, in July 2017. By April 2016 the company was using the trading name NZ Clean Master.

[2] Employment Relations Act 2000, s 174C(4).

[7] Ms Kohli has lived in New Zealand since 2010, initially as a student and then, from 2012, working full-time in the IT sector. In 2013 she began a weekend job as a cleaning supervisor for a district health board. Her husband also worked as a part-time cleaner for the board. She said she gained her knowledge and skills in the cleaning industry from that experience.

[8] From around June 2015 Ms Kohli began operating her own domestic cleaning business, through the company. The initial employees in the business were Mr Gediya and two students. Ms Kohli ran the business part-time. She and her husband worked with the cleaners in the weekend. She grew the business by joining two commercially-operated 'coupon' schemes, offering services for a set price, and by getting sub-contracts to carry out work for other cleaning companies.

[9] The Respondents' statement in reply accepted all the Applicants were, at some stage, employees of NZCM but not necessarily for the same length of time claimed by the Applicants. The reply said NZCM had begun operating its "start-up" domestic cleaning business by using what it called a "zero-hour contract", when they were permitted, and later moved to "a normal wages agreement before it realised this was not a sustainable business model". During some of the period relevant for this determination NZCM also used what were purported to be independent contractor arrangements with some people working for the business. Whether there was a genuine change in the nature of the employment relationship, from employee to contractor, was one of the issues for resolution in the claims made by Mr Gediya and Mr Dhamija.

Who was the employer?

[10] From the outset Ms Kohli clearly operated the business through the company she had incorporated two years before she began attempts to build a domestic cleaning business. As Ms Kohli accepted in her oral evidence she was, as director, responsible for all key decisions, including what wages and leave were paid and what employment arrangements were entered.

The business model

[11] A good part of the Authority investigation meeting was spent examining how the company's records of the work assigned on each working day to each of the Applicants. This examination focussed on what work the Applicants actually did and

how long they spent doing it, including by travelling to, from and between jobs at customers' houses or premises. It identified a fundamental flaw in how NZCM calculated what the Applicants should be paid for their work. Those calculations did not properly allow for time spent over the whole working day. The working day typically started at the NZCM office, loading cleaning materials and equipment into vehicles and travelling to the first job. It continued by travelling to jobs at different houses, and ended when materials, equipment or staff were returned to the company office. NZCM failed to include the time spent travelling to, from and between jobs as part of the hours worked.

[12] A further flaw concerned the division of time allocated for domestic cleaning jobs between the number of workers sent to the job location. On NZCM's account two workers sent to a job scheduled for two hours were to be paid one hour each, thereby reaching the two hour estimate of cleaning time given to the customer. However the practice, according to the Applicants' evidence, was that both workers in such a scenario would work for two hours, thereby generating an entitlement to two hours pay each. Ms Kohli, in her evidence, said that level of wages would not have been sustainable on the coupon system or set price offered to customers.

[13] One of those set price deals was $69 for three hours' cleaning. This amount, which included GST, had to cover the workers' wages and a commission to the business that ran the coupon scheme. Two workers each spending three hours at that job would generate a wage entitlement (using the minimum wage of $15.25 from 1 April 2016) of $91.50 – well in excess of the amount NZCM charged its customer.

[14] That was clearly not a viable and lawful business proposition, as it would not cover operating costs or generate any profit, unless the workers were paid less than their statutory entitlements or were paid for only some of the hours they worked. Ms Kohli denied that happened. She insisted the workers knew that the total number of hours to be spent between them at each house was guided by the bedroom size. She said, as a general rule, two hours were to be spent cleaning a two bedroom house and three hours on a three bedroom house.

[15] Workers were also sometimes required to return to a customer's house, if there had been a complaint about the quality of the cleaning provided, and carry out a "re-do" without any further pay. If the re-do was not completed, the workers were told

they would not be paid for the hours spent on the original work. The re-do was clearly additional work for which they should have been paid. Even if there were a genuine complaint about the quality of the original work, a deduction or withholding of pay could not legitimately be used to address inadequate performance.

[16] The Applicants' evidence about the unpaid hours of work was not negated by Ms Kohli's explanation that the business could not operate profitably if it had to pay for all those hours. Rather, her explanation showed NZCM has used a flawed business model based on not paying the workers for all the time that they was under the control of the company, including the time spent travelling between jobs and carrying out 're-do' work.

Calculating wages arrears

[17] Against that background the Applicants had, from the outset, a strong claim for the payment of wage arrears. Assessing the extent of those arrears was a major challenge in the circumstances of this case because NZCM did not have any proper or reliable system of time and wage records. Workers were given a "Day Sheet" each day listing the customer name and addresses and the time allocated for the job. The names or initials of the workers given that sheet were noted on it. At the end of the day they were expected to return the sheet. Any additional work, such as cleaning an oven, or extra hours requested by a customer at an address, were noted in handwriting on the sheet. Hours worked were then calculated from the time allocated for each job and any additional noted hours. Those figures were then transferred to a spreadsheet for calculating wages and tax payments due.

[18] In closing submissions NZCM accepted its responsibility to show it had paid the correct wages. It contended this onus was discharged by showing it had paid each employee the hours described as "claimed" on the Day Sheet. It said the hours recorded on those day sheets matched the hours on its spreadsheets, apart from some minor input errors, and the pay then recorded on PAYE returns to Inland Revenue. However, while there was a large (but not complete) measure of internal consistency between the Day Sheets, spreadsheets and PAYE returns, NZCM's failure to keep time and wage records of the kind required by s 130 of the Act remained a fundamental inadequacy. As a result the consequences set by s 132 of the Act came into effect in assessing the wage arrears claims made by the Applicants:

132 Failure to keep or produce records

(1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—
(a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
(b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.

(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—
(a) the wages actually paid to the employee:
(b) the hours, days, and time worked by the employee.

[19] The assumed proof of all claims made by the workers in those circumstances is subject to two qualifications allowed under s 132(2). Firstly, the assumption can be negated by positive proof from the employer that the claims are incorrect. Secondly, the use of the word "may" in the subsection, reserves a discretionary power for the Authority not to accept some or all of the workers' evidence about wages paid and hours worked.[3] Acceptance is permitted, not mandatory. The standard of proof is the balance of probabilities.[4]

[20] A similar provision applies to accepting claims regarding holiday and leave claims where an employer has not complied with its obligations to keep and providing access to holiday and leave records.[5]

[21] Those provisions serve three general purposes. They help workers who are owed arrears but, through no fault of their own, are unable to precisely quantify the sum. They help the Authority in an area where satisfactory evidence is notoriously difficult to get. They act as a deterrent to employers who might otherwise seek to ignore those important requirements to keep and, when asked, provide those records.[6]

[22] The Respondents' submissions trenchantly criticised the Applicants' wage arrears claims as lacking particulars and supporting evidence. However that criticism really only added weight to the Applicants' contention that their ability to prove and quantify their claims was fundamentally prejudiced by NZCM's own initial failure to keep the required records. And while criticising those claims, the Respondents'

[3] *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136 at [29].
[4] *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [37].
[5] Holidays Act 2003, s 83(4).
[6] *Mazengarb's Employment Law* ERA 132.3

evidence did not, on the balance of probabilities, prove they were fundamentally incorrect.

[23] Some hours were spent during the Authority investigation meeting going through specific examples of what hours were worked and paid. Two of those examples, discussed in depth, provided particularly compelling insights into NZCM's systemic underpayment of its employees. For both examples a diagram was drawn on a whiteboard to explore and explain the difference between the hours spent on work and in work-related travel and what NZCM's pay records showed as paid for those hours.

[24] The first example compared Mr Gediya's pay for 13 May 2016 with the work assigned to him and one other worker as shown on NZCM's Day Sheet for that day. Five assignments were listed at five separate locations across Auckland (from Bayswater in the north to Grafton and Parnell in the centre and Howick in the east). The jobs were listed as being of varying durations from one hour to four hours. There was a break of one-and-a-half hours listed after the first job, no break between the second and third job, and a half-hour break after the third and fourth jobs. Although the last job was scheduled for the period from 4.30 to 8.30pm, a possible 6.30pm finishing time for that day was discussed during the investigation meeting. Allowing for a half hour to travel from Howick at 6.30pm to NZCM's Mount Eden office to return house keys, this example indicated the earliest Mr Gediya could have finished work that day was 7pm. His working hours, including travelling time between jobs, ran from 7am to 7pm. His time over those 12 hours was not effectively his own but had been sold to the company. However his pay for the day, as calculated by NZCM, was for 8.5 hours. This example suggested that NZCM was effectively 'trimming' more than one-quarter from the working hours for which it paid Hardik that day.

[25] The second example compared Maninder Singh's pay for 17 October 2016 with what was shown on the Day Sheet as work assigned to him and two other workers that day. Five assignments were listed at five widely-separated locations across Auckland (from Albany in the north to Mount Wellington in the south and Swanson in the west). Four of the jobs were listed as of one-and-a-half hours duration. The other was for two hours. The time between each job was half an hour for three jobs and one hour for another. The first job was scheduled to start at 8am. The last was scheduled to finish at 6.30pm.

[26] The span of hours listed in the Day Sheet totalled 10.5 (from 8am to 6.30pm). Deducting half an hour as a lunch break from the two-and-a-half hours' travelling time listed between jobs, the total hours of work time totalled 10 hours, without allowing for any time to travel to the first job and back from the last job.

[27] Maninder Singh was paid for 6.5 hours for the day. Relying only on the record of what was paid Ms Kohli said Mr Singh must have finished work by 4pm that day. Mr Singh's evidence, to the contrary, was that he believed he was at the office by 7.30am that day to travel to the first job for the 8.00 am start and had not finished by the 6.30pm time shown on the Day Sheet for the completion of the last job that day. He said it "more like 7.30pm or 8pm".

[28] Even if Ms Kohli's suggestion that Mr Singh had finished work by 4pm that day was correct, there was a considerable shortfall between the time spent on the job and what he was paid for that day. Allowing for work to have begun at 8am, the last job completed by 4pm and the workers having returned to the office by 4.30pm, the span of hours Maninder Singh spent working and travelling to carry out the work that day totalled at least 8.5 hours. This example showed that NZCM was effectively 'trimming' between one-third and one-quarter from the working hours for which it paid.

[29] Along with the evidence about many other days explored through examination of the limited records available and questions to the witnesses, those two examples – for 13 May and 17 October 2016 – confirmed NZCM underpaid the Applicants by a consistent margin of around 30 per cent. Due to NZCM's failure to keep proper records, and in exercise of the discretion given to the Authority in s 132 of the Act, this margin could reasonably be applied in the assessment of the Applicants' wage arrears claims made later in this determination.

Employment status of Mr Gediya and Mr Dhamija – employees or contractors?

[30] Part of NZCM's defence to the wage arrears of claims of Mr Gediya and Mr Dhamija was that they were independent contractors rather than employees for some of the time they worked for the cleaning business. Both men initially had employment agreements but later signed agreements in which they were described as independent contractors. A determination was needed on the real nature of the relationship at the times that they were said, by NZCM, to have been contractors.

[31] Mr Dhamija had a written employment agreement, dated 25 November 2016, naming his employer as NZ Clean Master, the company's trading name. The agreement described his position as a "casual cleaner" and stated his hourly pay rate as $15.25, the statutory minimum wage at the time. NZCM said Mr Dhamija became an independent contractor in January 2017. On 23 February 2017 he had signed an agreement describing him as an independent contractor. The terms of that latter agreement included requirements that he wear a uniform provided by NZ Clean Master and comply with its policies. A clause stating that "the supplier", referring to Mr Dhamija, was responsible for his "own Taxes, Duties, GST and any other fees" was struck through with a line and the letters N-A. Those letters appeared to mean "not applicable". Other terms included an acknowledgement that he was an independent contractor, not an employee; was "not entitled to holiday pay or sick leave with pay"; and had to find someone to cover his work if he took time off.

[32] Mr Gediya had a written employment agreement with NZ Clean Master dated 27 October 2015 and bearing the heading: "Principal Statement of Terms and Conditions – Zero Hours Casual Cleaner Contract". On 7 May 2017 he signed a document bearing the heading "Service Level Agreement" in which he was described as an independent contractor who is not in an employment relationship with NZ Clean Master.

[33] The Act defines the word 'employee' and directs the Authority how to determine whether the real nature of a working relationship is one of employment:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, **employee**—
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
> …
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purposes of subsection (2), the court or the Authority—
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[34] Relevant matters and information to be considered in the intensely factual and often case-specific assessment required under s 6(2) and (3) include:[7]

a) what the written and oral terms of agreements between the parties indicated about their common intention as to status;
b) any differences or additions to those terms and conditions, evident from how the relationship operated in practice – that is how the parties actually behaved in implementing their agreement;
c) consideration of the tests developed by the common law, including the features of control and integration, and whether the contracted person effectively worked on his or her own account (the fundamental test); and
d) industry practice (which may assist the analysis but is not of itself determinative).

[35] The respective weight given to each common law test depends on the overall factual matrix as no one test will necessarily be conclusive.[8] What is important is an overall impression of the underlying and true nature of the relationship between the parties.[9]

[36] Both men had signed written agreements which used the label of a contractor and had used the term in some of their exchanges with Ms Kohli. However neither had sought a change of status from being an employee to one of providing services on a contractor basis. Rather, the evidence overall established that change was at her initiative and they had to agree that superficial nomenclature in order to keep getting work and income from NZCM. The degree of control of their work remained consistent with that of an employee – they continued to wear the company uniform and, by and large, take whatever work was offered. They were required to use their own vehicles and meet running costs but that indicated no real independence.

[37] As part of the changes in which the label given to their work changed, NZCM moved to a system of assigning work through Google calendar which Mr Gediya and Mr Dhamija had to use to accept cleaning appointments. However their evidence suggested they did not have any real freedom to decline work offered or to pick or choose what work they did. Mr Dhamija said he had only once attempted to decline a

[7] *Bryson v Three Foot Six Ltd (No 2)* [2005] ERNZ 372 at [32] (SC).
[8] *Clark v Northland Hunt Incorporated* (2006) 4 NZELR 23 at [22] (EC).
[9] *Noble v Ballooning Canterbury.Com Limited* [2019] NZEmpC 98 at [70].

job but then received a phone call five minutes later from NZCM's office asking why. He was told no-one else was available and he had to do the job.

[38] They provided invoices for their work on a template provided for them by NZCM. In reality that documentation was nothing more than a timesheet.

[39] While Mr Gediya did sometimes have someone working with him, at his expense, this did not reach the level of being able to rearrange work and have others carry it out in the way that a truly independent contractor could do to improve their chance of profit. The work of Mr Gediya and Mr Dhamija remained part and parcel of the business of NZCM to be done in ways and at times set by NZCM. Neither man could, objectively, be said to be in business on their account. Rather, the move to a supposed contractor status was a business strategy by which NZCM could have the work carried at rates below the costs associated with meeting the statutory entitlements to wages and holiday pay.

[40] While there was no evidence on wider industry practice, it is well known that the cleaning services sector, both commercial and domestic, uses both employee and contractor arrangements. In the particular circumstances of this case, assessment of the real nature of the relationship was also guided by the object of the Act to address the inherent inequality of power in the employment environment. The applicants were not knowledgeable in the legal implications of the difference between an employee and contractor arrangement. They did not have equal contracting strength with NZCM or sound reasons to accept the formal, written change in status to which NZCM asked them to agree.[10] This supported the conclusion, reached by considering the factors identified in s 6 and the common law tests, that Mr Gediya and Mr Dhamija were really in employment relationships for the entire time that they worked for NZCM.

Employment status of Ms Brahmbhatt – employee or volunteer?

[41] In April 2016, as the business began to grow, Ms Kohli and her husband decided they needed to have someone to answer phone calls from customers calling to make bookings. Ms Kohli, working full-time in her IT job at the time, said she could clear emails during her lunch breaks but did not have time to respond to all the phone messages left on the answerphone at the NZCM office. She arranged for Mr Gediya

[10] Contrast *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22 at [30].

to post a Facebook message offering what was called an "intern" role with the business. In her witness statement Ms Kohli said the intern role was a volunteer position for a person who wanted work experience. She said it was not a paid employee position but the company "was willing to give some donations towards travel costs".

[42] Ms Palav was one applicant interviewed for the role. In her witness statement Ms Kohli said she told Ms Brahmbhatt the role was offered on the condition that it was "intern not paid". She described Ms Palav as "very desperate and open for this role" as she was not working at the time. Ms Brahmbhatt, at that time, had a student visa allowing her to undertake paid work up to 20 hours a week.

[43] Ms Brahmbhatt had previous work experience with a cleaning company and Ms Kohli said she was convinced during the interview that Ms Brahmbhatt was "the perfect one for this role". However she said Ms Brahmbhatt had "one condition", to be paid travel expenses for travelling from the central city to the office in Mount Eden. Ms Kohli agreed to pay those expenses along with "food, coffee and other benefits too". Asked at the Authority investigation meeting what those "other benefits" were, Ms Kohli said she sometimes gave Ms Brahmbhatt cash. She denied however that Ms Brahmbhatt was an employee and said the role was an internship because Ms Brahmbhatt "knew nothing" and took the role in order to be trained and gain experience in running a business.

[44] Ms Brahmbhatt worked in the office from April dealing with calls from customers and cleaners, reporting by text and telephone to Ms Kohli about any issues during the day.

[45] In September 2016 Ms Kohli, at Ms Brahmbhatt's request, agreed to provide a job offer for a position as a full-time office administrator. Ms Brahmbhatt needed to have a job offer to meet the criteria of a work visa application she wanted to make. Ms Kohli said she agreed to support Ms Brahmbhatt's efforts to get a visa "only at the condition that she will look after the business in every aspect". Asked what that meant Ms Kohli said she had "hired [Ms Brahmbhatt] as an intern with [the] expectation that she would replace me one day and for me not to do the business and she can be standalone making the decision".

[46] Ms Brahmbhatt's claim to the Authority said she worked 20 hours a week as "an office intern" for the period from April to June 2016 before being offered a position as a part-time office administrator, again for 20 hours a week, until she was offered a full-time role in September 2016. She sought payment, at the minimum wage, for all hours spent working from April 2016.

[47] Her claim required an assessment under s 6 of the Act as to whether she was really an employee in the period she was described as an intern. She could be excluded from the scope of the term 'employee' if she was really a "volunteer". A volunteer is a person who does not expect to be rewarded for work to be performed as a volunteer and receives no reward for work performed as a volunteer.[11]

[48] The tasks Ms Brahmbhatt carried out in the NZCM office from April 2016 were performed for a commercial organisation to assist its goal of profitable operation.[12] It was not a situation such as where a relative is working in a family business, hoping to share in the overall benefit to the family, rather than both parties intending to enter a wage-work bargain. It was also clear from text messages exchanged with Ms Kohli during the period that Ms Brahmbhatt's office work, including dealing with calls from customers and cleaners, was under the control of, and fully integrated with, the business. Ms Brahmbhatt was not in business on her own account. While, according to Ms Kohli's account, Ms Brahmbhatt sought only bus fare as reward, she also received some cash payments and payment in kind in the form of coffee and food from Ms Kohli.

[49] What Ms Brahmbhatt did in the NZCM office during this period that she was called an intern was clearly valuable to the business. It enabled customers' calls to be dealt with immediately, rather than returning phone messages, and thereby helped secure and book more cleaning work. She did many of the tasks that Ms Kohli was previously doing herself in lunch breaks or after hours from her own full-time job elsewhere. On those grounds alone, what Ms Brahmbhatt did fell well short of the role of a volunteer as contemplated in the Act. The so-called intern work was integral to the business and was of economic benefit to it rather than being any genuine form of 'work experience' that might be done without expectation or provision of reward.

[11] Employment Relations Act 2000, s 6(1)(c).
[12] *Kidd v Beaumont* [2016] NZEmpC 158 at [104].

[50] Ms Brahmbhatt, because of what she did in her role as a so-called intern, was really an employee of NZCM from the outset. She was entitled to receive the minimum statutory entitlements for minimum wages and holidays for the hours she worked.

The wage arrears claims

[51] The nature of the information available for assessing amounts due for arrears has resulted in some amounts due to two Applicants being calculated on a gross basis and on a net basis for the two others.

Palav Brahmbhatt

[52] In September 2016 Ms Kohli provided Ms Brahmbhatt with an individual employment agreement for a position as office manager, working between 35 to 40 hours at the rate of $17 an hour. Ms Brahmbhatt had sought the job offer to support her application for a visa to remain in New Zealand after the expiry of her student visa.

[53] However Ms Kohli, in her witness statement, said the $17 pay rate stated in the employment agreement was only for the purpose of satisfying Immigration New Zealand criteria. Ms Kohli said she had made it clear to Ms Brahmbhatt that she would actually be paid only the minimum wage for her work, which was $15.25 an hour at that time.

[54] While Ms Brahmbhatt's visa was not approved until early 2017, the evidence from text messages, day sheets and pay records showed she was working on both administrative and cleaning tasks from September 2016 onwards as part of her full-time role. Her visa was a 'tied' visa, allowing her to work only for NZCM.

[55] Ms Kohli's witness statement described Ms Brahmbhatt's work in this way:

> [Her] primary responsibility was to hire the cleaner too and train them the way I taught her to do the task, what is customer service, how to organise the team etc. [She] was also making the customer bookings, taking the calls, covering on floor when staff is short as well as printing the day sheets etc. I never forced her to work, she was looking for help. I helped her in her career to step her up from door to door sales to admin to manage the cleaners, jump on the floor, hire cleaners.

[56] Being "on the floor" referred to instances where Ms Brahmbhatt filled in for absent cleaners or did additional cleaning work, including on weekends.

[57] With her written witness statement, dated 16 November 2018, Ms Brahmbhatt quantified her wage arrears claim as totalling $70,908.02 for the period from 18 April 2016 to 9 March 2018. This included payment for unpaid public holidays and for holiday pay not paid to her.

[58] The evidence clearly established Ms Brahmbhatt was paid for fewer hours than she actually worked for the company. Some of this was established by comparing payslips provided to her with NZCM's own record of hours worked. Three examples in June 2017 were discussed at the Authority investigation meeting.

[59] And while the payslips showed an hourly rate of $17, the actual amounts paid to her were adjusted to provide payment at only the amount of the statutory minimum wage at the time. At the investigation meeting Ms Kohli was asked and agreed that those adjustments were made so it looked like Ms Brahmbhatt was being paid at the rate of $17 an hour but the hours she was actually paid for were paid at the rate of $15.25. Ms Kohli said this was done "because of her visa issues".

[60] As referred to earlier in this determination, the pay Ms Brahmbhatt got for cleaning rather than office work was also subject to the systemic and consistent underpayment of the other Applicants as a result of not counting time spent travelling to, from and between jobs.

[61] For those reasons Ms Brahmbhatt's wage arrears claim has been accepted in full. For the period from 18 April to 2 September 2016 when she was working as a so-called intern and then a part-time administrator, she should have been paid $610 a fortnight, that is the then-applicable statutory minimum wage for 20 hours a week. From 4 September 2016 she was entitled to be paid for all hours actually worked at the rate of $17 as agreed in her written employment agreement.

[62] The order for wage arrears in the amount claimed by Ms Brahmbhatt is made in exercise of the discretion allowed at s 132 of the Act. Her claim is accepted because NZCM's failure to keep and produce proper records prejudiced her ability to bring an accurate claim and NZCM has not proved her claims were incorrect.

Maninder Singh

[63] Maninder Singh worked for NZMC from August to December in 2016. He sought an award of wage arrears totalling $12,170.96. This comprised underpayment of wages and holiday pay and a deduction of $500 he said was unlawfully made for damage to a work vehicle.

[64] He said he was told he would not be paid for travelling time between each cleaning job which would be about 15 to 20 minutes and his jobs would start at 8am and finish by 5pm. The following passage from his written witness statement explained the circumstances that resulted in consistent underpayment for his work:

> As they told me that my travelling time will be in between 15 to 20 minutes but actually it was in between 30 to 40 min and sometime more than that because as you all know about Auckland traffic and they give us jobs in totally different location from one job to another job. For example if my one job is in Papatoetoe and my second job is in North Shore and again next job in West Auckland.
>
> As they told me to start 8am but we started at 7am almost every day. We had to collect all the cleaning equipment and all other stuff from the office and then arrive at the customer's house at 8am. We were supposed to finish at 5pm but that never happened in my working period. Mostly we finished at 7pm or 8pm. If they acquired any new job during the day, they would call us then we had to do that job after so it added more work time. This would happen many times in a week.

[65] The specific example of Mr Singh's work on 17 October 2016, examined earlier in this determination, established a shortfall of around 30 per cent between the hours he actually worked and for which he was paid.

[66] The evidence overall established substantial underpayment to him but NZCM's failure to keep the required wage and time records prejudiced his ability to bring an accurate claim for wage arrears. His claim was calculated on the basis he had worked 66 hours every week during his employment. NZCM had not proved that was incorrect but, on the balance of probabilities, neither could such a consistent level of long hours be reliably established on the available evidence. Exercising the discretion permitted under s 132 of the Act I considered assessment of the arrears due to Mr Singh could appropriately be made by applying the underpayment margin identified from the evidence overall, that is 30 per cent, to the pay he did receive. Relying on an Excel spreadsheet prepared from available information, including payments to Mr Singh's bank accounts, he was paid net total wages of $12,426.14 for

the period from 2 August 2016 to 20 December 2016. Applying the shortfall margin of 30 per cent to that net total, his wage arrears were $3,727.84 net. On his total net earnings (including the shortfall adjustment) of $16,153.98 he was also entitled to holiday pay of $1,292.32 net.

[67] His claim also included pay for the one public holiday that occurred during the time he worked for NZCM, on 24 October 2016. Allowed for at the rate of $17 an hour for eight hours, with tax deducted at the rate that his payslips showed NZMC applied (16.20 per cent), the net amount due to him for that day was $113.97.

[68] Mr Singh was also entitled to reimbursement of $500 deducted from his pay. This was the amount of an insurance excess NZCM said it incurred due to damage to a work vehicle caused by Mr Singh. Although Mr Singh was said to have agreed to the deduction NZCM had not established any lawful entitlement to make it.

[69] The total net amount of wage arrears due to Mr Singh is $5,634.13.[13]

Hemant Dhamija

[70] Hemant Dhamija worked for NZCM from November 2016 to September 2017. He sought an award of wage arrears totalling $22,527.29. This comprised underpayment of wages and holiday pay.

[71] For reasons canvassed earlier in this determination Mr Dhamija was an employee throughout the time he worked for NZCM and never, in reality, an independent contractor to it. Consequently he was entitled to all the statutory minimum entitlements of an employee for the entire period of his employment.

[72] The following passage from Mr Dhamija's written witness statement explained how he was consistently underpaid from when he began working 20 hours a week for NZCM:

> I was working 20 hours but not getting paid for 20 hours, according to [Ms Kohli's] policy if the two people are going for work and cleaning the house, for example I worked for eight hours in one house, if there were two people with me then we are three in total and hours will get divided into three of us, so eight hours dividing among three people, so per person will get 2.30 hours pay approximately. This thing remains for the whole year.

[13] Comprising $3,727.84 + $1,292.32 + $113.97 + $500.

[73] The evidence overall established Mr Dhamija was substantially underpaid for his work but NZCM's failure to keep the required wage and time records prejudiced his ability to bring an accurate claim for wage arrears. His claim was calculated on the basis he had consistently worked exactly either 50 or 20 hours in each week of his employment. The difference was in part explained by the terms of his student visa which allowed him to work up to 20 hours a week during term time and longer during tertiary holiday breaks. While NZCM had not proved those hours were incorrect, neither could such consistent hours be reliably established on the available evidence and the balance of probabilities. Exercising the discretion permitted under s 132 of the Act I considered assessment of the arrears due to Mr Dhamija could appropriately be made by applying the underpayment margin identified from the evidence overall, that is 30 per cent, to the pay he did receive. Relying on an Excel spreadsheet prepared from available information, he was paid net total wages of $8,067.09 for the period from 16 November 2016 to 15 September 2017. Applying the shortfall margin of 30 per cent to that net total, his wage arrears were $2,420.13 net. On the resulting total net earnings (including the shortfall) of $10,487.22 he was also entitled to holiday pay of $838.98 net.

[74] His claim also included pay the nine public holidays that occurred during his employment. Allowed for at the rate of $17 an hour for eight hours for nine days, the gross total for public holidays was $1,224. NZCM did not deduct tax from its ordinary time payment for Mr Dhamija because it, wrongly, treated them as being made to an independent contractor. Applying the tax rate that NZMC applied to other employees (such as Mr Singh) of 16.20 per cent, the net amount due for public holiday pay is $1,025.71.

[75] The total net amount of wage arrears due to Mr Dhamija is $4,284.82.[14].

Hardik Gediya

[76] Hardik Gediya worked for NZCM from August 2015 to August 2017 but confined his wages arrears claim to one year. His claim totalled $23,745. It comprised underpayment of wages and holiday pay and a deduction of $500 made for supposed loss of a piece of NZCM's carpet cleaning equipment called a wand.

[14] Comprising $2,420.13 + $838.98 + $1,025.71.

[77] For reasons canvassed earlier in this determination Mr Gediya was an employee throughout the time he worked for NZCM. Contrary to NZCM's allegations, he was not really an independent contractor to the company for any of that time. Consequently he was entitled to all the statutory minimum entitlements as an employee.

[78] The following passage from Mr Gediya's written witness statement explained how he was subjected to constant underpayment for his work:

> [NZCM] made a contract of flat 35 hours per week and I was working six days a week. … Normally I was given seven to eight jobs each day. If customer complain about work they would deduct the hours spent on that job.
>
> If they are giving us seven to eight jobs means we were working around 12 hours for two person and further it was divided into two so we were getting paid for six hours which means we were working $90 per day and if the customer complain then they deduct one hour or two hours so we got only four to five hours.

[79] The evidence overall established Mr Gediya was substantially underpaid for his work but NZCM's failure to keep the required wage and time records prejudiced his ability to bring an accurate claim for wage arrears. His claim was calculated on the basis he had consistently worked 60 hours during the one year period for which he claimed wage arrears. While NZCM had not proved those hours were incorrect, neither could such consistent hours be reliably established on the available evidence and the balance of probabilities. Exercising the discretion permitted under s 132 of the Act I considered assessment of the arrears due could appropriately be made by applying the underpayment margin identified from the evidence overall, that is 30 per cent, to the pay he did receive. Relying on Mr Gediya's evidence that he was paid a flat amount for 35 hours work each week at the rate of $15.25 an hour, he was paid the gross total of $27,755 during the one year for which he claimed wage arrears. Applying the shortfall margin of 30 per cent to that net total, his wage arrears were $8,326.50 gross. On the resulting total gross earnings (including the shortfall) of $36,081.50 he was also entitled to holiday pay of $2,886.52.

[80] In the absence of wage and time records he was unable to track his public holiday entitlements and did not include those in his total claim. However, given the smaller margin adjustment used in calculating the arrears and the limit of his claim to one year, allowance should also be made for payment of the ten public holidays in the

year. Allowed for at the rate of $15.25 an hour for eight hours for ten days, the gross total for public holidays was $1,220.

[81] NZCM also unlawfully deducted $500 from Mr Gediya's pay for the 'wand' of carpet cleaning equipment. It must reimburse him for that amount.

[82] The total gross amount of wage arrears due to Mr Gediya is $12,933.02.[15]

Penalty against NZCM for breach of employment agreements

[83] The evidence about underpayments to each of the Applicants throughout their employment showed NZCM repeatedly breached employment standards in the operations of its business. This included not paying the minimum wage for each hour worked, failing to pay holiday pay and public holiday pay, failing to pay wages due in full, making unlawful deductions from wages and failing to keep proper wage and holiday records. The Applicants sought a penalty against NZCM under s 134(1) of the Act on the basis that those breaches amounted to a breach of their employment agreements. Accepting that paying wages and holiday entitlements on time and in full and keeping required records were either express or implied terms in the employment agreements of each Applicant, NZCM was liable to a penalty for the breaches.

[84] Determining whether to impose a penalty and, if so, setting its level is guided by 12 criteria arising from matters identified in s 133A of the Act and case law on setting penalties.[16]

[85] *Object of the Act:* The Act's declared objectives include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.[17] Those objects support the need to impose a penalty on NZCM for its actions in breaching the Applicants' employment agreements.

[86] *Nature and extent of the breaches:* NZCM's actions breached basic employment standards by not paying at least the minimum wage for all work done, not paying wages due in full, not keeping proper records and not paying holiday pay and public holiday pay entitlements. The liability of a company for the resulting

[15] Comprising $8,326.50 + $2,886.52 + $1,220 + $500.
[16] *Nicholson v Ford* [2018] NZEmpC 132 at [18].
[17] Employment Relations Act 2000, s 3.

breach of an employment agreement is a penalty not exceeding $20,000.[18] In this case NZCM's conduct amounted to multiple breaches of the employment standards legislation, which may have attracted separate penalties in their own right, but the claim for a penalty against the company was pleaded only as a breach of employment agreements under s 134(1) of the Act. Treating the breaches in this case as a single course of conduct in respect of each of the four Applicants, NZCM's provisional liability to a penalty for breaching the employment agreement of each one was up to $80,000.

[87] *Whether the breaches were intentional, inadvertent or negligent:* The breaches occurred as part of NZCM's use of a business model that could not have operated successfully if it complied with statutory minimum entitlements. Its actions throughout were deliberate, not inadvertent. No reduction of the provisional level of penalty is warranted on that ground.

[88] *The nature of losses, damages or gains resulting for either party:* The extended and deliberate underpayment of the Applicants deprived them of income they were entitled to have and, inherently, undermined their quality of life. NZCM gained a consequential reduction in its labour costs and gained an unfair competitive advantage over businesses that complied with statutory requirements. This factor did not warrant any reduction of the provisional level of the penalty.

[89] *Any steps to compensate or mitigate any actual or potential adverse effects of the breach:* NZCM, as put in its closing submissions, considered it had conscientiously given each applicant the proper pay for the hours worked and if there was anything wrong, it was minor and accidental. As a result of that stance, maintained steadfastly throughout this proceeding, NZCM had done nothing substantive to compensate for or mitigate effects of its breaches of the Applicant's employment agreements. This factor did not warrant any reduction of the provisional level of the penalty.

[90] *Circumstances of the breach, including the vulnerability of the workers:* The breaches occurred over a period of around two years and affected people who were migrants to New Zealand with limited knowledge of their employment rights and limited capacity to enforce them. In the case of Ms Brahmbhatt NZCM's actions in

[18] Employment Relations Act 2000, s 135(2)(b).

employing her on a bogus intern basis was done expressly with the knowledge that she was, as Ms Kohli put it, "desperate". The business model adopted and operated by NZCM relied on exploiting the relative vulnerability of each Applicant. This factor did not warrant any reduction of the provisional level of the penalty.

[91] *Previous conduct:* NZCM operated a new business and, as such, there was no instance of similar previous conduct. A fifty per cent reduction of the provisional penalty, to $40,000, is applied as a 'first offender'.

[92] *Deterrence, both particular and general:* In her oral evidence Ms Kohli said NZCM continued to operate a commercial cleaning business. She also said NZCM had a high turnover of cleaners and had employed "many" cleaners who had "left the business because it is a hard job". In those circumstances it was appropriate to impose a penalty, not only to punish prior conduct but also to particularly deter NZCM from breaching employment agreements of any employees in the future. A significant penalty was also warranted as a general deterrence to other similar businesses from committing such breaches. No further reduction of the provisional penalty was warranted for that factor.

[93] *Culpability:* NZCM's level of culpability was high as a result of its business model and the deliberate nature of its actions. No further reduction of the provisional penalty was warranted for that factor.

[94] *Consistency of penalty awards in similar cases:* The circumstances in cases of this type vary widely but two examples give an indication of an appropriate range for setting penalties for breach of employment agreements in similar cases.

[95] In *Nayak v Urban Turban New Zealand Limited* the Authority imposed a penalty of $30,000 where there were failures to pay wages and holiday pay due to an employee.[19] The breaches in that case also amounted to duplicate breaches of minimum entitlements and terms of employment agreement but the Authority treated them as a single breach to avoid a double penalty.

[96] In *Thompson v Phoenix Publishing Limited* [2019] NZERA 117 the Authority imposed a penalty of $15,000 for breaches of an employment agreement by failing to

[19] [2017] NZERA Auckland 160.

pay wages and holiday pay. The employer was a repeat offender, including three occasions where penalties were imposed previously.

[97] Other cases involving a breach of an employment agreement have resulted in penalties ranging from $2,000 to $6,000.[20]

[98] Each of the cases referred to involved one employee only. Here there are four.

[99] Against the background of the range of circumstances and awards in similar cases, a penalty at the level of $5,000 in respect of the breach of each worker's employment agreement appeared appropriate. Applying that adjustment, the total provisional level of penalty was $20,000.

[100] *Ability to pay:* In her oral evidence Ms Kohli said the amount of wage arrears claimed by Applicants amounted to more money than NZCM's business had made. However there was no information provided confirming NZCM's overall revenue or its ability to pay a penalty. Even if NZCM had made little or no money from its business, that was not a reason not to impose a penalty or reduce its level where the penalty was appropriate under the s 133A and case law criteria referred to earlier. A company's fortunes may ebb and flow, generating the ability to meet a penalty from future income, and liability to pay a penalty is different from subsequent enforcement.[21] On the evidence in this case no adjustment of the provisional level of penalty was warranted to take account of NZCM's financial circumstances.

[101] *Proportionality of outcome to breach:* As a final cross check the provisional penalty of $20,000 is proportionate with the amount of around $93,000 wages and other money this determination has found that NZCM unlawfully withheld from the Applicants in breach of their employment agreements. At 25 per cent of the provisional maximum penalty for the breaches, it is not excessive but is sufficient as both a particular and general deterrent.

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[20] *Juutilainen v Len Reid Oils Limited* [2019] NZERA 243 ($2,000 for failure of fair treatment over a redundancy proposal); *Ellis v W Crighton & Son Limited* [2018] NZERA Wellington 103 ($6,000 for failure to pay commission); *Wood v NZ Cupolex Limited* [2018] NZERA Auckland 124 ($2,000 for failure to pay commission); *Green v BSC Solar (New Zealand) Limited* [2018] NZERA Christchurch 109 ($5,500 for failure to pay holiday pay and one month's notice); and *Van der Lee v Bella Vita Day Spa Ltd* [2017] NZERA Wellington 41 ($5,000 for breaches of wage and holiday entitlements to a relatively naïve and vulnerable employee).

[21] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [45].

[102] Accordingly NZCM must pay a penalty of $20,000 for its breaches of the Applicant's employment agreements.

Penalties against Ms Kohli for aiding and abetting breaches

[103] The Applicants sought a penalty against Ms Kohli for aiding and abetting the breaches of their employment agreements. Ms Kohli admitted throughout the Authority proceedings that she, as director and manager of NZCM, was the person responsible for ensuring wages were paid correctly. In closing submissions she said she considered she had acted diligently and carefully at all times and, if there were underpayments, no penalty or personal liability to her should result.

[104] In light of the findings made about the level of wage arrears due to the Applicants, amounting to breaches of their employment agreements, Ms Kohli was plainly liable to a penalty. This was separate and additional to the liability of the distinct legal entity of NZCM as a registered company. The assessment of whether to impose a penalty and, if so, at what level is made by applying the 12 criteria arising from s 133A and case law referred to earlier in this determination.

[105] *Objects of the Act:* The same objectives of the Act regarding productive relationships, addressing inequality and effectively enforcing employment standards support the need to impose a penalty on Ms Kohli personally for her role in making the decisions that led to the breaches of the Applicants' employment agreements.

[106] *Nature and extent of the breaches:* Her decisions were the means by which NZCM came to breach the basic employment standards applying to the Applicants. There is ample authority to confirm that, as the architect of the non-compliance with the terms of the Applicants' employment agreement, Ms Kohli was liable to a penalty as a director and manager, even if she believed she had acted lawfully.[22] For aiding and abetting NZCM's breach of each Applicant's employment agreement, Ms Kohli's provision liability to a penalty under s 134(2) of the Act was $40,000.

[107] *Whether the breaches were intentional, inadvertent or negligent:* While Ms Kohli's evidence was that she was new to running a business in New Zealand, she also said she had joined a business organisation and "gathered the necessary

[22] *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp (NZ) Limited* [1993] 2 ERNZ 513 at 536. See also *Peacock v The New Zealand Performance Workers Union* [1990] 2 NZILR 257(CA) at 260.

information" in setting up NZCM's cleaning business. In that light the decisions she subsequently took that resulted in the substantial underpayments to the Applicants were deliberate. There was also a level of calculation rather than mere naivety in what was done. This was apparent from Ms Kohli's evidence about employing Ms Brahmbhatt as an intern when she was, as Ms Kohli put it, "very desperate and open for the role" and in providing her with an employment agreement with a pay rate intended to deceive Immigration New Zealand but not reflecting what NZCM would actually pay. No reduction of the provisional penalty was warranted for under this factor.

[108] *The nature of losses, damages or gains resulting for either party:* Ms Kohli's decisions about operation of the business deprived the Applicants of income and undermined their quality of life. She stood to gain from the advantages that NZCM gained in its business operation. No reduction of the provisional penalty was warranted for under this factor.

[109] *Any steps to compensate or mitigate any actual or potential adverse effects of the breach:* Ms Kohli had not taken any substantive steps to compensate or mitigate the effects on the Applicants because she did not accept substantial underpayment had occurred. She had, once proceedings began, made some small adjustments for payments for holiday entitlements but this did not mitigate the extent of the adverse effects on the Applicants. No reduction of the provisional penalty was warranted for under this factor.

[110] *Circumstances of the breach, including the vulnerability of the workers:* Ms Kohli was aware throughout of the relative vulnerability of the workers she recruited and underpaid over an extended period. No reduction of the provisional penalty was warranted for under this factor.

[111] *Previous conduct:* There was no evidence Ms Kohli had been involved in similar previous conduct in what she said was her first 'start up' enterprise. A fifty per cent reduction of the provisional penalty, to $20,000, is applied as a 'first offender'.

[112] *Deterrence, both particular and general:* Ms Kohli remains involved in cleaning industry so a penalty was appropriate as a particular deterrence. As a matter of general deterrence, a penalty was also appropriate to deter directors or managers of other business from similarly aiding and abetting breaches of employment agreements

in this way. No further reduction of the provisional penalty was warranted for under this factor.

[113] *Culpability:* For reasons already canvassed Ms Kohli's culpability was high. No reduction of the provisional penalty was warranted for under this factor.

[114] *Consistency of penalty awards in similar cases:* Three examples give an indication of an appropriate range for setting penalties for breaches of employment agreements in similar cases.

[115] In *Nicholson v Ford* the Employment Court imposed a penalty of $7,500 on a director and shareholder for aiding and abetting breaches of good faith obligations in a redundancy dismissal.[23] In *Gibson v Crane* the Authority imposed a penalty of $3,000 on a director for aiding and abetting breaches of an employment agreement by failing to pay wage and holiday entitlements.[24] In *Sharma v Icon Concepts Limited* the Authority imposed a penalty of $5,000 on a director aiding and abetting a similar failure.[25]

[116] Those three examples each involved one employee only. Here there are four.

[117] A penalty at the level of $3,000 in respect of aiding and abetting the breaches of each worker's agreement would be at the lower end of that range. Applying that adjustment, the total provisional level of penalty was $12,000.

[118] *Ability to pay:* There was no evidence about Ms Kohli's ability to pay a penalty of that level. No reduction of the provisional level of the penalty could be made on that ground.

[119] *Proportionality of outcome to breach:* While a penalty of $12,000 was not disproportionate with the level of arrears awarded to the Applicants, I considered a further adjustment to $10,000 was appropriate to be consistent with the percentage of the provisional maximum applied to penalty imposed on NZCM. A penalty of $10,000 on Ms Kohli was not excessive, given the breaches concerned four workers, but was large enough to have a deterrent effect.

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[23] [2018] NZEmpC 132.
[24] [2018] NZERA Auckland 360.
[25] [2018] NZERA Auckland 154.

[120] Accordingly Ms Kohli must pay a penalty of $10,000 for aiding and abetting NZCM's breaches of the Applicants' employment agreements.

Application of penalties recovered

[121] The Applicants sought an order some or all of any penalties imposed on NZCM or Ms Kohli be paid to them.[26]

[122] The starting point is that penalties are to be paid to the Authority for transfer to the Crown Account. This recognises the public policy role of penalties in deterring breaches of employment agreements or employment standards. However the Act allows for some or all of those penalties, when recovered, to be paid to a person. In *Stormont v Peddle Thorp Aitken Limited* the Employment Court described one instance appropriately warranting such a payment as when an employee had gone to the trouble and expense of bringing before the proceedings that had resulted in a penalty.[27]

[123] Adopting a broadly similar course in this case, once the respective penalties imposed on NZCM and Ms Kohli are paid to the Authority, the Authority is to transfer to each Applicant $2,500 of penalty paid by NZCM and $1,250 of the penalty paid by Ms Kohli. The Authority must then pay the remaining amount from each penalty to the Crown Account.

Was Ms Kohli a "person involved" under s 142W of the Act?

[124] The Applicants sought a finding under s 142W of the Act that Ms Kohli was a person involved in a breach of employment standards. Four questions arose for determination from the relevant parts of the section before Ms Kohli could be declared to be an involved person:

> **142W Involvement in breaches**
>
> (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
> (a) has aided, abetted, counselled, or procured the breach; or
> (b) …
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
> (d) … .

[26] Employment Relations Act, s 136(2).
[27] [2017] NZEmpC 71 at [89]-[91]. See also *Nicholson v Ford* [2018] NZEmpC 132 at [43]-[46].

> (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
>
> (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
>
> (a) a person occupying the position of a director of a company if the entity is a company:
>
> …

[125] *Was the breach a breach of employment standards?* Yes. Employment standards include the requirements of s 130 of the Act to keep wage and time records, the minimum entitlements under the Holidays Act 2003, the minimum entitlements under the Minimum Wages Act 1983, and the provisions of the Wages Protection Act 1983.[28] The evidence and findings regarding wage arrears due to the Applicants confirm that those requirements in four statutes had been breached.

[126] *Had Ms Kohli aided and abetted the breach or has she been in any way, directly or indirectly, knowingly concerned in it?* Yes. Ms Kohli's own written and oral evidence admitted and accepted she knew about and was involved, as the decision maker, in the actions that have now been found to be breaches by NZCM. A finding earlier in this determination has also confirmed she aided and abetted the breach.

[127] *Was the breach by an entity such as a company?* Yes. The breach was committed by NZCM which was and remains a company registered with the Companies Office.

[128] *Was Ms Kohli an officer of the company*? Yes. Ms Kohli was and remains on the Companies Office register as a director of NZCM.

[129] Having satisfied those criteria Ms Kohli is a person involved in breach of employment standards under s 142W of the Act.

Costs

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

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[28] Employment Relations Act 2000, s 2 definition of "employment standards".

[131] If they are not able to do so and an Authority determination on costs is needed the Applicants may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum NZMCL and Ms Kohli would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[132] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[29] In this case, considering additional attendances and preparation required over having the Respondents provide relevant documents, the starting point for that assessment would likely be $10,500. That figure is the notional tariff for a three day investigation meeting (being $4,500 for the first day and $3,500 for each subsequent day).

Robin Arthur
Member of the Employment Relations Authority

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