

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 19  
5580295

BETWEEN                      JOSAINE INGHAM, LABOUR  
   INSPECTOR  
   Applicant

AND                              CHARGRILL BURGERS  
   LIMITED  
   Respondent

Member of Authority:        Andrew Dallas

Representatives:             Alastair Dumbleton, Counsel for the Applicant  
   Behzad Darvish, Director of the Respondent

Investigation Meeting:        19 November 2015

Submissions Received:        At the investigation meeting, with further information  
   received up to, and including, 27 November 2015

Determination:                18 January 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Chargrill Burgers Limited (Chargrill) has breached the provisions of the Holidays Act 2003.**
- B. Chargrill is liable for penalties for those breaches.**
- C. Within 14 days of the date of this determination, Chargrill must pay the Labour Inspector the following sums:**
- (i) \$8000 as a penalty;**
  - (ii) \$350 as a contribution to costs; and**
  - (iii) \$71.56 being reimbursement of the Authority's filing fee**

## **Employment Relationship Problem**

[1] Labour Inspector, Josaine Ingham (Labour Inspector), has brought an application for penalties under s 75(2)(a), s 75(2)(c) and s 75(2)(e) of the Holidays Act 2003 (the Act) against Chargrill Burgers Limited (Chargrill).

[2] The contraventions of the Act for which the penalties are sought relate to a complaint to the Labour Inspector from Ms Manpreet Kaur about non-payment of holiday pay.<sup>1</sup> A subsequent investigation by the Labour Inspector also disclosed that Ms Kaur was owed public holiday and alternative holiday entitlements.<sup>2</sup>

[3] Ms Kaur was employed by Chargrill between July 2011 and early 2013. Subsequently, she was otherwise involved with the business or operated from its premises but not as an employee. The application by the Labour Inspector against Chargrill does not relate to this subsequent period.

[4] The Labour Inspector's investigation was impeded by a failure by Chargrill to respond to a notice to produce wage and time records, holiday and leave records and employment agreements issued on 9 October 2014.<sup>3</sup> The Labour Inspector completed her investigation based on information provided by Ms Kaur and also information provided by Chargrill to the Labour Inspector in response to an earlier improvement notice issued on 14 November 2012.

[5] The Director of Chargrill, Behzad Darvish, was advised of the findings of the investigation by the Labour Inspector on 25 May 2015.

[6] Mr Darvish responded to these findings by suggesting that Ms Kaur's outstanding entitlements had been set-off against money owed by Ms Kaur to Chargrill.

[7] In response to this claim, Mr Darvish was given an opportunity by the Labour Inspector to provide evidence for consideration. No such evidence was forthcoming.

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<sup>1</sup>Holidays Act 2003, s 50 and s 25

<sup>2</sup>Holidays Act 2003, s 56 and s 60(2)(b)(i)

<sup>3</sup>Holidays Act 2003, s 81 and s 82

## **Issues**

- [8] The issues for determination are:
- (i) Whether penalties should be imposed on Chargrill?
  - (ii) What principles are to be applied and what factors are to be taken into account?
  - (iii) What quantum of penalties, if any, should be imposed on Chargrill?
  - (iv) Should the Authority exercise its discretion to award part of the penalty to the complainant?

## **The Authority's investigation and findings**

[9] The Labour Inspector lodged a statement of problem with the Authority on 9 September 2015.

[10] On 16 October 2015, Ms Kaur advised the Labour Inspector that all monies owing under the Act had been paid by Chargrill.

[11] In response, the Labour Inspector withdrew her claim for arrears, but resolved to continue with the application for the imposition of penalties against Chargrill.

[12] During a case management conference on 21 October 2015, leave was granted by the Authority for Mr Darvish to file a statement in reply out of time. He was also granted leave to attend the investigation meeting via telephone from Iran.

[13] Mr Darvish provided a statement in reply on 30 October 2015. This reply conceded the Labour Inspector's claim for arrears and stated these had been paid. It also conceded that Ms Kaur was an employee of Chargrill during the material period for the claim.

[14] Mr Darvish also provided a short witness statement which included a submission about, and opposition to, the imposition of penalties.

[15] A witness statement was provided by the Labour Inspector on 11 November 2015.

[16] Mr Dumbleton provided written submissions on behalf of the Labour Inspector at the commencement of the investigation meeting.

[17] During the investigation meeting, evidence was heard from the Labour Inspector and Mr Darvish. Mr Darvish was also given the opportunity to provide further submissions about penalty.

[18] The Labour Inspector gave considered and confident evidence. She was a convincing witness. Mr Darvish's evidence was punctuated by telephonic outages to Iran. Despite this, he was able to fully respond to the evidence of the Labour Inspector and also provide rebuttal evidence. Unfortunately, there were many inconsistencies and contradictions in this evidence.

[19] Of further concern was that Mr Darvish had been given several opportunities to involve himself in the Labour Inspector's investigation into Ms Kaur's complaint before it was finalised, but had declined to do so. However, as the matter before the Authority was a penalty action against Chargrill, Mr Darvish was granted some latitude to explain the actions of Chargrill.

[20] As a mixture of evidence and submissions, Mr Darvish advanced two propositions. First, he claimed that Ms Kaur had not been an employee during the material period. Second, he claimed he had leased the business, part of the business or its premises in Victoria Street, central Auckland to Ms Kaur during that period.

[21] Mr Dumbleton, for his part, sought to rely on the concessions made in the statement in reply and on the evidence of the Labour Inspector, which attached two individual employment agreements which Ms Kaur entered into with Chargrill. A review of both employment agreements disclosed that they contained provisions dealing with Chargrill's obligations under the Act.

[22] In response to these submissions, Mr Darvish gave evidence to the effect that Ms Kaur had, at his request, been involved in the preparation of the statement in reply. Mr Darvish's explanation for involving Ms Kaur was, variously, that he was "in a hurry", he "did not understand" or, subsequently, he was "sick". In evidence and subsequently in an email to an Authority Officer dated 24 November 2015, Mr Darvish said he was in Iran to receive medical treatment.

[23] After the investigation meeting, Mr Darvish provided emails to the Authority which tended to corroborate his evidence of Ms Kaur's involvement in the preparation of the statement in reply to some extent.

[24] Ms Kaur did not provide direct evidence to the Authority or attend the investigation meeting and, therefore, Mr Darvish's evidence on this point could not be put to her.

[25] There was no dispute on the facts that Mr Darvish and Ms Kaur had some form of business relationship which postdates the period during which she and the Labour Inspector claim she was an employee of Chargrill. This relationship may, perhaps, while unusual, have resulted in her involvement in the statement in reply's preparation due to Mr Darvish's absence in Iran.

[26] In response to Mr Darvish's evidence about the statement in reply, Mr Dumbleton withdrew from reliance upon it and instead sought to rely primarily on his second submission that the evidence of the Labour Inspector was overwhelming against Chargrill and was more than sufficient to enliven the Authority's penalty jurisdiction.

[27] In his evidence and submissions, Mr Darvish was adamant that Ms Kaur was not an employee during the material period. He claimed he had documentation which would corroborate his position, but he needed time to access his business records held in New Zealand.

[28] In response to this, and despite the previous opportunities Mr Darvish had to provide such information, he was granted leave at the close of the investigation meeting to provide any further information he sought to rely on.

[29] On 24 November 2015, Mr Darvish provided the Authority with an Agency Agreement entered into between Chargrill Burgers and Chargrill Burgers and Pizza Ltd. However, this agreement was entered into on 28 June 2015, which was outside the material period of the Labour Inspector's claim against Chargrill. All this agreement demonstrates, therefore, is that some form of business relationship continues to exist between Chargrill and/or Mr Darvish and Ms Kaur.

[30] The statement in reply lodged by Chargrill on 9 September 2015 was tainted by the involvement of Ms Kaur, the complainant to the Labour Inspector. Consequently, I decline to take it, or the concessions made therein, into account in determining this matter.

[31] Taking into account all other relevant information provided by the parties during my investigation and the evidence of the Labour Inspector and Mr Darvish, both written and oral, given during the investigation meeting, I find that Ms Kaur was an employee of Chargrill during the material period.

[32] I further find, taking into account the same information and evidence, that Chargrill breached the Act in respect of Ms Kaur as alleged by the Labour Inspector in her statement of problem.

[33] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.<sup>4</sup> The Labour Inspector's evidence has met this standard.

[34] Standing back and reviewing the matter in toto, I conclude it is appropriate in all the circumstances to impose penalties on Chargrill for breaches of the Act.

#### **Penalties: the principles to be applied**

[35] The Authority has jurisdiction under s 161(1)(m)(iii) of the Employment Relations Act 2000 to hear and determine an application by a Labour Inspector for recovery of a penalty under s 76 of the Act.

[36] A Labour Inspector must bring an action under s 76(5) of Act within 12 months. I accept Mr Dumbleton's submission that this was the situation in the present matter.

[37] Under s 75(1)(b) of the Act, Chargrill is liable for a maximum penalty of \$20,000 for each breach of the Act.

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<sup>4</sup>*Xu v McIntosh* [2004] 2 ERNZ at para [29].

[38] Alternatively, it is permissible to impose an aggregated penalty for multiple breaches. The Labour Court first applied what it described as this ‘totality principle’ for awarding penalties in *Otago Hotel, Hospital, Restaurant and Otago and Southland Laundry and Related Trades Industrial Union of Workers v Pacific Park Motor Inn Limited trading as Pacific Park, Dunedin and Others*.<sup>5</sup> The Employment Court has taken a similar approach, although now described as the ‘global penalty’ principle.<sup>6</sup>

[39] The Authority has discretion to award a penalty, in whole or in part, to any person. However, more often than not penalties are ordered payable to the Crown, as the holder of the public interest in the administration of justice.

[40] The Court has examined the principles to be applied in imposition of penalties under the Act. In *Xu v McIntosh*, Chief Judge Goddard observed:

[47] ...[a] penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breached occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[48] The next question focuses on the perpetrator’s culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.

[41] In *Tan v Yang and Zhang*, the Court identified a non-exhaustive list of factors when examining the imposition of a penalty.<sup>7</sup> These were:

- the seriousness of the breach;
- whether the breach is a one-off or repeated;
- the impact, if any, on the employee/prospective employee;
- the vulnerability of the employee/prospective employee;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.<sup>8</sup>

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<sup>5</sup>[1989] 1 NZILR 175. The Labour Court derived this principle from the Court of Appeal decision in *R v Bradley* [1979] 2 NZLR 262.

<sup>6</sup>See, *Xu v McIntosh* [2004] 2 ERNZ at para [44] and *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 at para [92].

<sup>7</sup> [2014] NZEmpC 65.

<sup>8</sup>*Ibid* at para [33]

[42] On behalf of the Labour Inspector, Mr Dumbleton sought penalties in the range of \$5000 to \$10,000 for each breach of the Act, although he also acknowledged the globalisation of penalties approach noted above. He also referred me to a number of recent decisions dealing with the imposition of penalties.<sup>9</sup>

[43] Not surprisingly, Mr Darvish opposed the imposition of penalties orally and in writing.

[44] Applying the principles in *Xu* and *Tan* and taking into specific account the following relevant factors about Chargrill:

- (i) it has been the subject of previous Authority determinations about enforcement of employment standards;<sup>10</sup>
- (ii) it was issued with an improvement notice by the Labour Inspector in November 2012, for which there was no objection;
- (iii) it deprived a modestly paid employee of entitlements under the Act for a significant period;
- (iv) it was intransigent in the face a complaint to a Labour Inspector by the employee;
- (v) it was non-compliant with the Labour Inspector's notice to produce; and
- (vi) it begrudgingly made payment of outstanding entitlements after enforcement action was commenced in the Authority,

I have formed the view that it must pay a global penalty of \$8000 for breaches of the Act in respect of Ms Kaur's employment.

[45] The Labour Inspector in her statement of problem had sought favourable exercise of discretion by the Authority for payment of part of the penalty to Ms Kaur. However, Mr Dumbleton's submissions during the investigation meeting on this point were neutral. Given the unusual circumstances of the involvement of Ms Kaur in the drafting of the statement in reply, I decline to exercise discretion to award part of the penalty to her.

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<sup>9</sup>For example, *Labour Inspector v Civic City Ltd and Others* [2013] NZERA Auckland 385 and *Bridget Zonneveld, Labour Inspector v Maudaara Ltd* [2015] NZERA Christchurch 99.

<sup>10</sup>See, *Josaine Verena Ingham (Labour Inspector) v Chargrill Burgers Ltd* [2013] NZERA Auckland 152 (consent determination) and *Josaine Verena Ingham (Labour Inspector) v Chargrill Burgers Ltd* [2013] NZERA Auckland 429 (order for compliance with consent determination)

[46] Chargrill must pay the Labour Inspector \$8,000 as a global penalty for breaches of the Act within 14 days of the date of this determination.

### **Costs**

[47] The Labour Inspector sought a contribution towards legal costs of \$350 being one tenth (1/10<sup>th</sup>) of the Authority's current notional daily tariff of \$3500.<sup>11</sup>

[48] The Labour Inspector has been wholly successful in bringing her action for penalties against Chargrill. I can see no reason to depart from the principle that, in the ordinary course, costs follow the event.

[49] The amount sought by the Labour Inspector is fair and reasonable in all the circumstances. Indeed, I would have been minded to award a higher contribution to costs if one was sought.

[50] Chargrill must pay the Labour Inspector \$350 within 14 days of the date of this determination.

### **Filing Fee**

[51] The Labour Inspector sought reimbursement of the Authority's filing fee.

[52] I see no reason in the circumstances of this matter why this should not occur.

[53] Chargrill must pay the Labour Inspector the amount of \$71.56. This is to be paid by Chargrill within 14 days of the date of this determination.

Andrew Dallas  
Member of the Employment Relations Authority

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<sup>11</sup>As to this concept and the Court's approval thereof see: *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.