

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 33
3009596

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS, INNOVATION
 AND EMPLOYMENT
 Applicant

AND AHEAD LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Sarah Blick for Applicant
 Manpreet Singh for Respondent

Investigation Meeting: On the papers

Submissions Received: 1 December 2017 from the Applicant
 15 December 2017 from the Respondent

Date of Determination: 31 January 2018

DETERMINATION OF THE AUTHORITY

- A. Ahead Limited (Ahead) is ordered to pay to the Labour Inspectorate of the Ministry of Business, Innovation and Employment on behalf of the Crown, within 28 days of the date of this determination, a total penalty of \$12,000.00 for its failure to comply with its obligations under the Holidays Act 2003, and the Minimum Wage Act 1983, along with \$71.56 for the filing fee.**

Employment relationship problem

[1] In April 2016 a Labour Inspector of the Ministry of Business, Innovation and Employment, Alex Magill, began an investigation into Ahead Limited (Ahead or the

company), which provides labour to kiwifruit businesses in the Bay of Plenty area. Ahead has two joint directors and shareholders, Manpreet Singh and Rajesh Sarao.

[2] The investigation was later assigned to Labour Inspector Clare Lyons-Montgomery.

[3] Over a period of months the Labour Inspectorate sought information from Ahead, including specific records for a small sample group of employees.

[4] Ms Lyons-Montgomery completed an Investigation Report outlining the employment standards breaches which had been identified including issues with individual employment agreements, time and wage records, the non-payment of public holiday entitlements, the non-payment of 8% holiday pay entitlements and the lack of a holiday and leave record.

[5] Although Ahead had supplied some documents as requested, the Report notes that the employer had not had as full an engagement with the Inspectorate as could be expected, and the investigation was delayed through slow responses and at times no responses. No comment was provided in response to the Investigation Report.

[6] Ms Lyons-Montgomery brought this proceeding in May 2017. The total amount of arrears claimed was \$842.69 for six employees, ranging between \$70.95 and \$197.52 gross per employee.

[7] The parties were referred to mediation and entered into agreed terms of settlement which were not confidential. The agreement included Ahead agreeing to pay arrears sought to six employees, and these payments were subsequently made.

[8] An amended statement of problem was then filed by the Labour Inspector, indicating that the issue of penalties is still outstanding.

The Authority's investigation

[9] The parties agreed to have the penalties issue determined on the papers. The information available in making this determination included the statement of problem and amended statement of problem, the statement in reply, affidavit evidence from the Labour Inspector, the Investigation Report, the terms of settlement and submissions from both parties.

[10] The Labour Inspector's position is that penalties were being sought because of Ahead's failure to engage during the investigation process and the fact that the company had previously received education on employment standards from the Labour Inspectorate in 2010.

[11] Ahead accepts that it did not comply with its obligations, as identified by the Labour Inspector. It says that this was due to administrative lacks and that it is still learning the proper procedures. It says that all the employees identified as being owed money are still working for them. Further, the woman who used to look after the pay records is no longer with the company.

[12] As is permitted by s 174 E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings, expressed conclusions and specified orders made.

Setting the appropriate penalty

[13] Some of the conduct in question in this case occurred before the commencement of the Employment Relations Amendment Act 2016 and some after. The amendments apply to this proceeding, in particular s 133A of the Act which outlines matters which the Authority must take into account in determining the amount of penalty.

[14] In *Borsboom v Preet PVT Ltd*¹ (*Preet*) the Full Bench of the Employment Court outlined the four step process for the assessment of statutory penalties. The objectives for the penalty regime were identified as punishment of those who breach their obligations, deterring that party and others, compensating the victim and attempting to eliminate unfair competition. Appendix 1 summarises the workings of the steps.

The first step – nature and number of breaches

[15] The first step of the process outlined in *Preet* is to identify the nature and number of the breaches involved to determine the maximum potential penalties. Here the following breaches of the specified provisions are identified:

¹ [2016] NZEmpC 143

- (i) Failure to pay annual holiday pay as an identifiable 8% component of pay to six employees (s 28 of the Holidays Act 2003);
- (ii) Failure to pay time and a half for work on a public holiday to six employees (s 50 of the Holidays Act);
- (iii) Failure to keep a holiday and leave record for four employees (s 81 of the Holidays Act); and
- (iv) Failure to pay the minimum wage at all times for four employees (s 6 of the Minimum Wage Act 1983).

[16] The Labour Inspector opposes the use of a globalisation approach describing the number of employees as relatively small and the circumstances of the various breaches as quite distinct from each other. I agree that the circumstances are distinct from each other and the breaches should not be globalised.

[17] The maximum penalty for each breach is \$20,000, as the employer is a company. There are breaches regarding six employees each of ss 28 and 50 of the Holidays Act, totalling \$120,000 of penalties regarding each section. There are breaches involving four employees of s 81 of the Holidays Act totalling \$80,000. Lastly, there is one breach of the Minimum Wage Act for four employees, totalling \$80,000. The total of those amounts is \$400,000.

The second step – severity and mitigation

[18] I move on to look at the severity of the breach considering aggravating factors, and then any mitigating factors involved.

[19] There was limited evidence before the Authority regarding the vulnerability or otherwise of the named employees. However, there are a large number of employees identified by the Labour Inspector as having worked for Ahead, apparently often on a casual basis, and the investigation involved only an analysis of a sample of employees. Some of the employees are of Indian origin and were on student visas, with limited entitlement to work, when working for Ahead. I am satisfied that there is a degree of vulnerability.

[20] I look firstly at the failure to pay annual holiday pay as an identifiable component. I consider that this should be assessed as 20% of the maximum penalty, amounting to \$24,000.

[21] Regarding public holiday pay, the Labour Inspector rightly acknowledges that the amounts owing are relatively small and this should be taken into account. I also assess this at 20%, amounting to \$24,000.

[22] The failures to keep holiday and leave records are described by the Labour Inspector as negligent. I recognise that the absence of proper records caused the Labour Inspector difficulties in establishing whether minimum code breaches had occurred. The Holidays Act record-keeping breaches relate to a one year period, which while not a short period, is also not usually considered a lengthy period in this context. I consider that a 50% assessment of the maximum, amounting to \$40,000.

[23] Regarding the failure to pay the minimum wage the Labour Inspector appropriately recognises that the amounts involved are not significant, with the largest individual amount in arrears having been \$56.70. I assess this as warranting a 10% assessment, amounting to \$8,000.

[24] Having looked at the individual breaches, I have reached a sub-total of \$96,000.

[25] I turn now to look at mitigating or ameliorating factors. For Ahead, it was said that the directors were working contractors who were lacking in a few administrative areas. They kept time sheets and pay records but recognise that there were a few errors which they were not aware of, presumably until these were drawn to their attention by the Labour Inspector.

[26] Looking at the schedules completed by the Labour Inspector for two employees over a year it is apparent that in a significant number of pay periods the amounts paid equalled or were greater than what the Labour Inspector calculated the employee was due. The schedules do not give the impression of a systematic underpayment. However, the calculations for six employees for Labour Day 2015 show all being owed public holiday arrears, and holiday pay arrears, with two also not being paid the minimum wage.

[27] Deterrence both of Ahead and employers in general is important. The obligation to ensure that adequate systems are maintained to ensure that minimum wages and holidays are paid and proper records kept is basic and fundamental.

[28] The Labour Inspector supports a reduction of 50% across the board, in light of Ahead's co-operation during the mediation process, paying the arrears identified by the Labour Inspector and an indication of its intention to rectify its behaviour. I also note some co-operation by Ahead during the investigation and the co-operation with the Authority process.

[29] Employers should be encouraged to act promptly once inadequacies in their processes have been identified by the Labour Inspectorate. A reduction of 65% to \$33,600 is appropriate.

The third step – ability to pay

[30] The third step of the *Preet* process involves considering the employer's ability to pay. The employer's submission raises this issue, although no financial records are provided to support this. It was said that fines would put the company and the two director/shareholders' families under financial pressure.

[31] I am prepared to make a modest deduction for this factor, but cannot go further given the lack of financial evidence. I deduct 10% from the provisional total, leaving \$30,240.

The final step – proportionality

[32] The last step of the *Preet* process involves an assessment of whether the provisional penalty of \$30,240 is proportionate to the seriousness of the breach. In some cases this assessment can involve considering the provisional penalty against the level of any underpayments. The Labour Inspector seeks that that not occur in this case, or only to a modest extent, if it has already been undertaken under step two, which it has.

[33] I consider that the amount of the underpayments needs to be taken into account at this stage. The amounts owing were modest being just over \$1000. Although reached through a somewhat different calculation process to that which I have used, the Labour Inspector proposes a final penalty which is many times that amount, as is my provisional total of \$30,240.

[34] I recognise the Labour Inspector's concern that there might have been a wider picture of non-compliance had more employees, a longer period, and additional

public holidays been closely examined. On the other hand the Respondent says that the person who did their wages left and implies that that may have contributed. In that case, the non-compliance may not be significantly wider.

[35] I consider that there needs to be a reduction to make the penalty consistent with amounts awarded in other determinations. However, compensation to employees is not a factor as the arrears have already been paid and there is no specific evidence of harm caused by the late payment.

[36] A final total penalty of \$12,000 is sufficient to punish and deter Ahead and to deter other similar businesses from any such non-compliance with their obligations.

[37] I order Ahead Limited to pay a total penalty of \$12,000 to the Labour Inspectorate of the Ministry of Business, Innovation and Employment on behalf of the Crown, within 28 days of the date of this determination.

Costs

[38] No order for costs is sought other than as regards the filing fee. I order Ahead Limited to pay to the Labour Inspectorate the sum of \$71.56 for the filing fee within 28 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority

APPENDIX 1

AHEAD LIMITED		
STEP 1: Nature And number of breaches – potential maximum penalties		
	Number of employees	Total penalty
S 28 of the Holidays Act (HA)	6	\$120,000
S 50 HA	6	\$120,000
S 81 HA	4	\$80,000
S 6 of the Minimum Wage Act (MWA)	4	\$80,000
Subtotal		\$400,000
STEP 2(a) : Aggravating factors - relative seriousness		
S 28 HA	20%	\$24,000
S 50 HA	20%	\$24,000
S 81 HA	50%	\$40,000
S 6 MWA	10%	\$8,000
Subtotal		\$96,000
STEP 2(b) : Ameliorating factors		
65% reduction		
Subtotal		\$33,600
STEP 3 : Ability To pay		
10% reduction		
Subtotal		\$30,240
STEP 4 : Proportionality		
Total Penalty		\$12,000

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