

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2017] NZERA Auckland 134  
3001319**

BETWEEN

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

AND

AUCKLAND DRAINAGE  
PLUMBING SERVICES  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Alastair Dumbleton, Counsel for Applicant  
No appearance by Respondent

Investigation Meeting: 2 May 2017 at Auckland

Submissions received: 26 April 2017 from Applicant  
None from Respondent

Date of Oral Determination: 2 May 2017

Date of written Determination: 3 May 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, a Labour Inspector, seeks a total of \$7,872.10 in arrears of wages and holiday pay on behalf of the former employees of the Respondent, Auckland Drainage Plumbing Services Limited (ADPSL), in the application to the Authority.

[2] Mr Sanjesh Lal, sole Director and Shareholder of ADPSL, confirms that monies are owed to the former employees.

## **Note**

[3] ADPSL was served with the Statement of Problem which had been filed with the Authority on 20 December 2016 on 23 December 2016 and was also served with the email and documents amending the Statement of Problem on 13 April 2017.

[4] Mr Lal confirmed receipt of the documents in emails sent to the Authority.

[5] ADPSL failed to file a Statement in Reply by the required due date. Mr Lal emailed the Labour Inspector on 26 April 2017 claiming ill health, and that he had not been able to read the documents supplied to him.

[6] On the morning of the investigation meeting Mr Lal emailed the Authority stating that he was unable to attend because he was not well, but provided no medical confirmation. Mr Lal asked that he be notified either if the matter was to be rescheduled, or sent the determination.

[7] I was satisfied that no good cause had been shown for the failure of ADPSL to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000.

## **Issues**

[8] The issues for determination are whether or not:

- ADPSL is liable to pay minimum wages and holiday pay to 6 former employees
- The amount of minimum wages and holiday pay due to the 6 former employees
- ADPSL should be ordered to pay a penalty/penalties for breaches of the Minimum Wages Act 1983 (MWA) and/or breaches of the Holidays Act 2003 (HA)
- The quantum of such a penalty (penalties)
- The Applicant be authorised to bring an action for recovery of minimum wages and holiday arrears from the Director of ADPS Mr Sanjesh Lal

- Mr Lal directed or authorised the default in the payment of minimum wages and holiday arrears
- Mr Lal be made jointly and severally liable to pay the arrears sought

### **Background Facts**

[9] Mr Corey Ohlson was employed by Auckland Drainage Plumbing Services Ltd (ADPSL) as a plumber and drainlayer from 26 November 2015 to 15 December 2015. He was employed to work 40 hours a week at an hourly rate of \$20.00.

[10] He was provided with an individual employment agreement (the Employment Agreement) which he signed on 28 November 2015 and Mr Sanjesh Lal, sole Director and Shareholder, signed on 30 November 2015.

[11] Mr Ohlson said that during his employment with ADPSL he received only one payment of \$500.00 in cash. Mr Lal agreed to pay him the remaining balance however he did not receive this. Subsequent attempts to discuss the matter with Mr Lal resulted in him becoming angry.

[12] Mr Ohlson resigned from his employment with ADPSL on 15 December 2015 which was his last day of employment.

[13] On 21 December 2015 Mr Ohlson lodged a complaint with the Labour Inspector in an attempt to resolve the unpaid wages issue.

[14] The Labour Inspector assigned to investigate the complaint of non-payment of Minimum Wage and Holiday Pay by Mr Ohlson contacted and interviewed Mr Ohlson, and received documents from him including payslips, timesheets and the Employment Agreement.

[15] The Labour Inspector subsequently interviewed Mr Lal and supplied him with a Notice to Supply Records by 3.00 p.m. on 8 April 2016 for all past and present employees of ADPSL since 30 September 2014. Mr Lal requested, and was granted an extension to meet the request until 5.00 p.m. on 11 April 2016.

[16] The Labour Inspector received the requested documents from Ms Swasty Swamy, Account Assistant, on 11 April 2016. However upon inspection these proved to be incomplete with missing documents, duplicated documents and a lack of records to confirm payment of wages to all past and present employees of ADPSL.

[17] During the period 26 May to 19 July 2016 the Labour Inspector received a number of responses to his requests for an interview from Mr Lal. In one such response Ms Swamy advised him that ADPSL was facing a civil dispute involving the sum of \$180,000.00 with an undisclosed third party.

[18] Despite the numerous requests, the Labour Inspector was unable to arrange interviews with Mr Lal and Ms Swamy.

[19] The Labour Inspector emailed a draft investigation report and provided Mr Lal with an opportunity to comment by 17 November 2016.

[20] Mr Lal responded on 17 November 2016 stating he had financial difficulties and his family was facing hardship. He expressed a willingness to meet his obligation to pay the outstanding arrears as calculated by the Labour Inspector, although he could not pay the arrears at that time due to financial difficulties.

[21] The Labour Inspector met with Mr Lal with a colleague on 1 December 2016 in order to negotiate a repayment plan. Mr Lal was unable to provide a detailed plan to meet repayment of the outstanding arrears, but agreed to pay them by the end of February 2016.

[22] On 20 December 2016 the Labour Inspector lodged an application with the Authority against ADPSL for repayment of the outstanding arrears and for penalty action.

[23] The Labour Inspector claims that the following amounts are due to Mr Ohlson and 5 other employees:

Corey Ohlson: minimum wage arrears of \$1,230.02 gross and annual holiday pay arrears of \$142.08 gross

Poppy Mafeleo: annual holiday pay arrears of \$216.24 gross

Rahul Rajiv: annual holiday pay arrears of \$252.80 gross

Sione D Dale: minimum wage arrears of \$2,707.28 and annual holiday pay arrears of \$340.94 gross

Stephen Pillay: annual holiday pay arrears of \$1,387.36 gross

Vishaw Reddy: annual holiday pay arrears of \$1,904.00 gross

**Is ADPSL liable to pay minimum wages and holiday pay to 6 former employees?**

[24] I am satisfied that the Labour Inspector has established that six former employees have not been paid by ADPSL and that they are entitled to payments in respect of minimum wages and holiday pay.

[25] I determine that ADPSL is liable to pay minimum wages and holiday pay to the 6 named former employees.

**What are the amount of minimum wages and holiday pay due to the 6 former employees?**

[26] I determine and order that ADPSL is to pay the following employees the following amounts:

Corey Ohlson: minimum wage arrears of \$1,230.02 gross and annual holiday pay arrears of \$142.08 gross

Poppy Mafeleo: annual holiday pay arrears of \$216.24 gross

Rahul Rajiv: annual holiday pay arrears of \$252.80 gross

Sione D Dale: minimum wage arrears of \$2,707.28 and annual holiday pay arrears of \$340.94 gross

Stephen Pillay: annual holiday pay arrears of \$1, 387.36 gross

Vishaw Reddy: annual holiday pay arrears of \$1,904.00 gross

[27] Payment is to be made into the Trust account of the Ministry of Business, Innovation and Employment (MBIE) for the benefit of the named employees.

[28] I further order that Mr Lal provide contact details of the employees to assist the Labour Inspectorate in paying out the arrears to the employees.

***Penalty action***

[29] The Labour Inspector also seeks penalties against ADPSL pursuant to s10 of the MWA for failing to pay full minimum wages in respect of two past employees, and pursuant to s 8A MWA for not keeping full wages and time records in respect of the six employees.

[30] The Labour Inspector further seeks penalties against ADPSL pursuant to s75 HA for failing to pay holiday pay upon termination of employment to the six employees, and failing to keep holiday and leave records for each employee.

[31] In determining the penalty claim I follow the four step approach as set out by the Employment Court in *Borsboom v Preet PVT Limited*<sup>1</sup>.

**Step 1: identify the nature and number of the breaches and the maximum penalty available:**

[32] In this case there have been breaches under 4 separate heads.

1. A failure to pay minimum wages to two employees. The maximum penalty is \$40,000.00 (2 x \$20,000.00)
2. A failure to pay annual holidays to 6 employees. The maximum penalty is \$120,000.00 (\$20,000.00 x 6)
3. Record keeping breaches under s8A MWA. The maximum penalty is \$120,000.00 (\$20,000.00 x 6)
4. Failure to keep holiday and leave records under s81 HA. The maximum penalty is \$120,000.00 (\$20,000.00 x 6)

[33] I consider that in the circumstances of this case global penalties are appropriate.

**Step 2: Assessment of the severity of the breaches**

[34] In an email dated 17 November 2016 Mr Lal referred to his ignorance of the statutory requirements as regarding payment of holiday pay upon resignation.

[35] Employers in New Zealand are expected and considered to know the minimum legal requirements in respect of their employees, and to adhere to them. Ignorance of the law is no defence.<sup>2</sup>

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<sup>1</sup> [2016] NZEmpC 143

[36] Resources offering advice on the statutory obligations and providing assistance are also widely available to employers.<sup>3</sup>

[37] I consider it is appropriate to reduce the breaches of the MWA to 30% of the maximum payable (i.e. \$12,000.00) on the basis of the minimum amounts owed.

[38] I consider it is appropriate to also reduce the breaches of the MWA to 30% of the maximum payable (i.e. \$12,000.00) on the basis of the varying amounts due to the employees and the fact that there is no evidence of vulnerability or exploitation.

[39] I reduce the MWA record keeping breaches to 50% of the total amount (i.e. \$60,000.00) given the fact that some payslips were provided, however these were inaccurate or non-compliant.

[40] I reduce the HA record keeping breaches also to 50% of the total amount (i.e. \$60,000.00) Employment law in respect of non-payment of holiday pay.

[41] The provisional total is therefore \$144,000.00, to which is applied an overall 20% reduction in light of ADPSL's early acknowledgment that arrears are owed.

[42] The Step 2 subtotal is \$115,200.00.

### **Step 3: financial circumstances of the Respondent Employer**

[43] Mr Lal has indicated that ADPSL is currently facing financial difficulties.

[44] No financial information has been provided to the Authority to substantiate this and Mr Lal has indicated in his email dated 26 April 2017 that legal action may result in the financial circumstances of ADPSL being favourably impacted.

[45] I am therefore not persuaded that the financial circumstances currently faced by ADPSL are of a permanent and irreversible nature, and I make no reduction to the Step 2 total amount on this basis.

### **Step 4: Proportionality or totality test**

[46] In *Preet* the Court said that the penalties imposed should be proportionate to the amount of money unlawfully withheld. Additionally that the final penalties set should not be

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<sup>2</sup> *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [29]

<sup>3</sup> *Preet* at [87]

at such a level that the liable employer either has an incentive for not paying or cannot pay them.<sup>4</sup>

[47] The overall amount of penalties assessed at step 2 is \$115,200.00. The total amount owed to the employees as minimum wage arrears and annual holiday pay arrears is \$7,872.10 gross.

[48] The amount of the penalties is clearly disproportionate to the amount of unlawfully withheld payments of minimum wages and annual holiday pay.

[49] I consider in all the circumstances that applying a penalty of 15% of total provisional breaches is appropriate.

[50] I order that ADPSL pays the MBIE Trust account a total of \$17,280.00. Payment is to be made within 28 days of this determination

### ***Section 234 Application***

[51] The Labour Inspector applies for authorisation to bring an action to recover money which is payable by way of minimum wages or holiday pay against Mr Lal pursuant to s.234(2) of the Employment Relations Act 2003 (the Act).

[52] Although s.234 is now repealed following the passing of the Employment Standards Legislation Bill which came into force on 1 April 2016, there are new provisions in Part 9A of the Act which now impose liability on persons previously covered within the ambit of s.234 of the Act.

[53] Under clause 3(7) of Schedule 1AA of the Act, s.234 continues to apply to proceedings brought in relation to conduct which occurred before 1 April 2016, this is regardless of whether or not the proceedings were brought before that date.

[54] The conduct as claimed by the Labour Inspector in this case occurred prior to 1 April 2016. On that basis, I have proceeded to determine the matter under the now repealed s.234 of the Act pursuant to clause 3(7) of Schedule 1AA of the Act.

[55] Repealed s.234A of the Act states:

234 ***Circumstances in which officers, directors, or agents of the company liable for minimum wages and holiday pay***

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<sup>4</sup> Preet at [190] and [191]

- (1) *This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.*
- (2) *Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because –*
- (a) *The company is in receivership or liquidation; or*
- (b) *There are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full –*
- the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director, or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.*
- (3) *Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.*
- (4) *In this section, -*
- company** has the meaning given to it by section 2(1) of the Receiverships Act 1993*
- holiday pay** means any amount payable under the Holidays Act 2003 to an employee as pay for annual holiday or public holiday*
- minimum wages** means minimum wages payable under the Minimum Wage Act 1983.*
- (5) *Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.*

[56] In the Employment Court decision *Labour Inspector v. Cypress Villas Ltd and Barry Brill*<sup>5</sup> (*Cypress Villas*), a Full Bench held that the purpose of s.234 of the Act is to ensure that minimum employment entitlements are available to employees, even in a situation where employers which are companies may either be insolvent or otherwise unable to pay those minimum entitlements. Third parties may be held liable (jointly or severally) for the defaults of their companies if they directed or authorised the defaults<sup>6</sup>.

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<sup>5</sup> [2015] NZEmpC 157

<sup>6</sup> Ibid at [34]

[57] The steps to be completed are therefore firstly that proceedings have been commenced by a Labour Inspector, secondly that to my satisfaction on the balance of probabilities that the amount claimed in the action is unlikely to be paid in full, and thirdly that one or more of the Respondents directed or authorised the default.

***Proceedings commenced***

[58] Pursuant to s.234(1) of the Act, before granting an application, a Labour Inspector must have commenced an action in the Authority against a company to recover any money payable as minimum wages or holiday pay to an employee of the company.

[59] The Labour Inspector commenced proceedings against ADPSL by lodging a statement of problem in the Authority on 20 December 2016.

[60] I find that the Labour Inspector commenced an action against ADPSL as envisaged under s.234 (1) of the Act.

***The amounts claimed unlikely to be recovered?***

[61] Pursuant to s.234 (2) of the Act, the Labour Inspector must establish on the balance of probabilities that the amount claimed in the Act by way of minimum wages or holiday pay or both is unlikely to be paid in full either because:

- (a) The company is in receivership or liquidation; or
- (b) There are reasonable grounds to believe the company does not have sufficient assets to pay the amount claimed.

[62] At the date of the investigation meeting, the Companies office website contains the information that ADPSL: *“is now overdue in its obligation to file an annual return. If the annual return is not filed immediately the Registrar will initiate action to remove the company from the register”*.<sup>7</sup>

[63] A company being removed from the Companies Office register does not mean the company is in receivership or liquidation. Indeed an application may be made in the case of a company which has been removed to restore it to the Companies office register, although the Labour Inspector has not made such an application in this case.

[64] I do not find that the fact of the notification that ADPSL might be removed if the annual return is not filed immediately to fulfil the requirement under s234(2)(a) of the Act.

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<sup>7</sup> [www.companiesoffice.govt.nz](http://www.companiesoffice.govt.nz), 2/05/2017

[65] In order to fulfil the alternative requirement under s 234(2)(b) of the Act, I must be satisfied on the balance of probabilities that the amount claimed in the action is unlikely to be paid in full.

[66] ADPSL is not in receivership and has not been liquidated. Although the communications from Mr Lal indicate that ADPSL is in financial difficulties with equipment having been “lost”, I note that during the period 26 May to 19 July 2016 when Mr Lal and Ms Swamy were in communication with the Labour Inspector, Ms Swamy advised that ADPSL was involved in a civil dispute involving a sum of \$180,000.00. It is not clear whether or not ADPSL is claiming this amount from the third party, or is facing a claim from a third party in this sum.

[67] However in the email sent to the Labour Inspector on 26 April 2017 Mr Lal refers to:

*... all this is only because I got ripped off by my contractors. My lawyer is fighting for my money and should be getting an outcome by next month. As I said to you I will pay each one of them as soon as I have some money.*

[68] In light of this information there is the possibility that ADPSL, which is undoubtedly facing financial difficulties at the moment, may no longer be doing so if there is a positive financial outcome to the indicated legal action during this month.

[69] On this basis I am not satisfied on the balance of probabilities that the amount claimed in the action of \$7,872.10 is unlikely to be paid in full.

[70] Accordingly I do not authorise the Labour Inspector to bring an action for the recovery of the minimum statutory amounts due to the former employees of ADPSL against Mr Lal.

#### **Costs**

[71] Costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**