IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 222
5603550

	BETWEEN	LABOUR INSPECTOR of the MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
	A N D	BAHN THAI RESTAURANT LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Claire English, Counsel for Applicant Jeff Goldstein, Counsel for Respondent
Investigation Meeting:	Determined by consideration of the papers by consent
Submissions Received:	7 October, 7 November, 21 November and 6 December 2016 from the Applicant 27 October and 30 November 2016 from the Respondent
Date of Determination:	16 December 2016

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

A. The respondent is to pay a penalty to the Crown in the sum of $25,000 in respect of three categories of breaches of minimum code requirements, plus $71.56 to the Labour Inspectorate as reimbursement of its Authority lodgement fee.

B. Costs are otherwise reserved.

Employment relationship problem

[1] In her statement of problem, the Labour Inspector (Eva Belley) seeks the imposition of penalties against the respondent for having failed to comply with minimum statutory employment standards, as follows:

(a) Failing to provide written employment agreements to staff, in breach of s 65(1) of the Employment Relations Act 2000 (the Act);

(b) Failing to keep holiday and leave records, in respect of annual holidays, alternative holidays, and sick and bereavement leave, in breach of s 81 of the Holidays Act, and

(c) Failing to keep wages and time records in breach of s 130 of the Act.

[2] Further penalties in respect of additional breaches of minimum code employment legislation were sought by the Labour Inspectorate in its submissions dated 21 November. I address this below.

[3] The Labour Inspector had also originally sought payment of arrears in relation to working on a public holiday, which the respondent conceded, and all outstanding payments have been made by the respondent. Accordingly, the only matter to consider is whether penalties should be imposed as requested by the Labour Inspector, and if so, in what sum or sums.

[4] The respondent admits that it failed to provide temporary workers employed by it with individual employment agreements and that it failed to keep the required wage and time and holiday and leave records.

[5] The parties agreed that this matter could be determined by consideration of the papers, which includes sworn affidavits by Ms Belley and by Mr Sucheep Sowichai, a director of the respondent, and written submissions.

[6] Shortly before the issuing of this determination, but after it had received the initial written submissions from counsel, the Authority became aware[1] of a very recent judgement of the full court of the Employment Court which provides definitive guidance on the principles to be applied by the Authority in the imposition of penalties for breaches of minimum code employment law statutes. I refer to *Jeanie*

[1] On 8 November 2016

May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited[2]. As this judgement effectively imposed a staged approach on the Authority when it is considering the imposition of penalties for the breach of minimum code requirements, and not all of those stages had been addressed by counsel for the parties, I required them to make further submissions in relation to how *Preet* affected the current matter. Their submissions received after 8 November did so.

Background

[7] The respondent is a registered company which operates a Thai restaurant in Christchurch.

[8] On 14 August 2015 the Labour Inspector received a complaint from a former employee of the respondent, alleging that she had not received the adult minimum wage for each hour worked, had not received an employment agreement, had not been paid at a rate of time and a half for working on a public holiday and had not received her final holiday pay upon her termination.

[9] In October 2015 the Labour Inspector carried out a site visit, and interviewed Mr Sowichai and three employees and, in November 2015, spoke to the respondent's accountant and retrieved wage and annual leave records in relation to the respondent.

[10] The Labour Inspector identified a number of employees of the respondent whose minimum employment requirements were breached. These will be detailed below.

[11] An Improvement Notice was issued to the respondent on 15 December 2015. This Improvement Notice required the respondent to:

(a) Start keeping time, wage and holiday records;

(b) Provide employment agreements to all employees; and

(c) Pay arrears of final holiday pay and alternative holidays to one of the employees.

[12] All arrears of pay have been paid by the respondent.

---

2 [2016] NZEmpC 143.

[13] The main thrust of Mr Sowichai's affidavit is that he complied with the minimum employment standards with respect to his company's permanent employees, but not with respect to temporary employees, because he did not realise that he had to do so.

[14] However, from November 2015 the respondent has engaged the services of a bookkeeper who operates the Smart Payroll System, and so the respondent now ensures that all employees' records are correct and that all employees receive their correct remuneration and entitlements. In addition, the respondent deducts PAYE and issues payslips via the bookkeeper.

The relevant legislation and legal principles

[15] The Labour Inspectorate, in its post-*Preet* submissions dated 21 November, identified five separate categories of statutory requirement which it says were breached by the respondent, and in respect of which it says penalties should be imposed. These requirements, some of which were lumped together by the Labour Inspectorate in its 21 November submissions, are as follows:

a. Section 65 of the Act, which provides, inter alia, that an individual employment agreement of an employee must be in writing. Section 65(4) of the Act provides that an employer who fails to comply with s 65 is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority;

b. Section 130 of the Act, which requires an employer at all times to keep a wages and time record, and which provides at s 130(4) that every employer who fails to comply with any requirement of s 130 is liable to a penalty imposed by the Authority;

c. Section 27 of the Holidays Act, which requires, inter alia, an employer to pay an employee annual holiday pay in the pay that relates to the employee's final period of employment;

d. Section 49 of the Holidays Act, which requires an employer to pay an employee who does not work on a public holiday which would otherwise be a working day for the employee;

e. Section 50 of the Holidays Act, which requires an employer to pay an employee at least time and a half for working on a public holiday[3];

f. Section 56 of the Holidays Act, which requires the provision of an alternative holiday to an employee who works on a public holiday; and

g. Section 81 of the Holidays Act, which provides that an employer must keep a holiday and leave record that complies with the section[4].

[16] Section 135 of the Act provides, inter alia, that where a company or other corporation is liable to a penalty under the Act, the penalty will not exceed $20,000. Section 75 of the Holidays Act renders an employer liable to a penalty, not exceeding $20,000 in the case of a company or other body corporate, for a failure to comply with, inter alia, ss27, 49, 50 and 56 of the Holidays Act and for failing to keep or provide access to holiday and leave records. It is established law that a separate penalty may be imposed in respect of each relevant breach, subject to *Preet.*

[17] With regard to s 75 of the Holidays Act, it does not refer to s 81 of the Holidays Act, but refers to s83 instead. Section 83 does not impose a requirement to keep holiday and leave records, but refers to the consequences of such a failure. However, I am satisfied that, adopting a purposive interpretation of s 75(2)(e) of the Holidays Act, it means to refer to s 81 instead. This addresses Mr Goldstein's submission that the statement of problem does not contain a claim in respect of s 81.

[18] Section 135(5) of the Act provides that an action for the recovery of a penalty under the Act must be commenced within 12 months after the earlier of the date when the cause of action first became known to the person bringing the action, or the date when the cause of action should reasonably have become known to the person bringing the action. Section 76(5) of the Holidays Act contains an equivalent provision.

[19] Before analysing these alleged breaches further, it is helpful to summarise the approach required by the Court in *Preet*, as it dictates the framework within which I must do so. *Preet* requires a four step approach, with a number of factors to be considered under each step. I summarise these as follows:

---

[3] The Labour Inspectorate lumped this breach together with the failures under s49 of the Holidays Act for the purposes of the imposition of penalties in its submissions.

[4] The Labour Inspectorate lumped this breach together with the failures under s130 of the Act for the purposes of the imposition of penalties in its submissions.

Step 1[5]

[20] The Authority must first identify the nature and number of applicable breaches for statutory penalty purposes. Different sections of different minimum code statutes must be identified.

[21] If there are materially similar or identical multiple breaches committed by a respondent, these may be treated as making that respondent liable for a single penalty in respect of each separate affected employee. This approach does not encompass breaches of different enactments however.

[22] It is also necessary to identify the maximum penalty available in respect of each penalisable breach that has been identified.

[23] Finally, it is necessary to consider whether global penalties may be appropriate. If multiple and very similar breaches, such as repeated non- or under-payment of an employee, have been identified, globalisation may be appropriate, although it should not diminish the significance of a repeated and/or long running series of breaches.

Step 2[6]

[24] The severity of the breach should then be assessed in each case. This establishes the provisional starting point for each penalty, potentially up to the maximum, and will include a separate adjustment for aggravating and mitigating factors respectively in relation to each breach. Each penalty may be expressed as a dollar amount or a percentage of the maximum.

[25] In assessing severity, the Authority must take into account whether the breaches were committed knowingly and/or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. Any history of previous breaches may be relevant in assessing the starting point.

[26] Examples of mitigation may be co-operation with a Labour Inspector, actions taken to rectify or compensate for the breaches, and the points at which these may be undertaken before the hearing.

[27] These are only some examples of aggravating or mitigating factors.

---

5 *Preet* Paragraphs [139] et seq.

6 *Preet* Paragraphs [142] et seq.

Step 3[7]

[28] The Authority is now to consider the means and ability of the person in breach to pay the penalty reached under step 2. There may be downward adjustment if evidence establishes real financial or other hardship. The consequences for the business and for continued employment of other employees may be a relevant consideration if these are established to the Authority's satisfaction.

Step 4[8]

[29] This final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached after the first 3 steps is proportionate to the seriousness of the breaches, and harm occasioned by it/them. This step is to ensure that the imposition of a penalty and the amount of it is just in all the circumstances.

[30] This step also requires the Authority to assess other relevant cases decided by application of these tests, to ensure that the result is not inconsistent with others, at least without an explanation of any significant inconsistency.

[31] Other considerations to address include whether the penalties are capable of being paid, whether the employer has an incentive to avoid paying them and the optimum deterrent effect of the penalties imposed.

[32] Finally it is necessary to decide whether, and to what extent a penalty should be paid to the Crown or the victim or anyone else. Where victims can be properly compensated and the party bringing proceedings can be reimbursed in costs, there will not be a strong case for payment of any penalty to the victim or anyone other than the Crown. Where the breach has resulted in non-compensable loss, the Authority may consider directing a proportion of the penalty be paid to the party bringing the proceedings, especially if and to the extent that costs may not adequately compensate.

Application of the four step test in the current matter

Step one, part one - The nature and number of breaches

[33] The Labour Inspectorate asserts there have been 53 breaches, as follows:

---

7 *Preet* paragraph [146]

8 *Preet* paragraphs [147] et seq.

a. Eleven breaches of s 65 of the Act by way of failures to provide an employment agreement.

b. Thirteen breaches of s 130 of the Act and s 81 (or 83) of the Holidays Act by way of failures to keep time and wages records and holiday and leave records.

c. Thirteen breaches of ss 49 and 50 of the Holidays Act in relation to public holiday pay.

d. Ten breaches of s 56 of the Holidays Act in relation to not providing alternative holidays; and

e. Six breaches of s 23 of the Holidays Act in relation to payment of final holiday pay.

[34] However, Mr Goldstein, for the respondent, points out that the statement of problem did not seek penalties in respect of ss 23, 49 and 50 and 56 of the Holidays Act. The orders for penalties sought in the Statement of Problem only sought penalties in respect of breaches of ss 65 of the Act, 130 of the Act and s 83 of the Holidays Act. This is correct and, it is noteworthy that, in its statement of problem, the Labour Inspectorate did not lump together breaches in respect of the two record keeping requirements.

[35] In its submissions dated 7 October 2016, the Labour Inspectorate also refers to a breach of s 50 of the Holidays Act (at paragraph 1 ii) but does not claim penalties in relation to that breach in paragraph 33 of its 7 October submissions, where it summarises the penalties it is seeking.

[36] Contrary to Mr Goldstein's assertion, I do not accept that the Labour Inspectorate omitted a claim in relation to wages and time records in the 7 October submissions. The Labour Inspectorate refers to seeking penalties for a breach of s 130 of the Act in paragraph 33iii of the 7 October submissions. In any event, failing to refer to a claim in submissions alone does not mean that a party has dropped it.

[37] I am satisfied that the Labour Inspectorate became aware that there had been breaches of the Holidays Act in relation to public holiday pay by no later than 19 November 2015, when Mr Sowichai made admissions relating to having traded on

certain public holidays, contrary to his previous denials. It had become aware of breaches of s 23 and s 27 of the Holidays Act (in relation to final holiday pay) prior to that date I believe. It was, however, only in its submissions dated 21 November 2016 that the Labour Inspectorate specifically sought penalties in relation to breaches of ss 23, 49 and 50 and 56 of the Holidays Act. This is over 12 months from the date when the Labour Inspectorate first became aware of the breaches under this legislation.

[38] Therefore, the Authority does not have the jurisdiction to consider the application in relation to breaches of ss 23, 49 and 50 and 56 of the Holidays Act, and it can only consider the application in relation to the breaches of ss 65 of the Act, 130 of the Act and s 81 of the Holidays Act.

[39] In its submissions dated 6 December 2016, the Labour Inspectorate decoupled the lumped together record keeping breaches under s 130 of the Act and s 83 of the Holidays Act, and identified nine breaches under s 130 of the Act and thirteen under s 81 of the Holidays Act. I accept that this is the proper approach, as the requirements under these two enactments are quite distinct, albeit overlapping in part. It also accords with the way the statement of problem was drafted.

Step one, part two – identify the maximum penalty available in respect of each penalisable breach

[40] The maximum penalty available to be imposed upon a corporate entity is $20,000 per breach in respect of all three categories of alleged breach. Mr Goldstein does not argue that the Labour Inspector has miscalculated in respect of the number of breaches (i.e., the number of employees affected by each category of breach) under ss 65 of the Act, 130 of the Act and s 81 of the Holidays Act. I therefore accept the Labour Inspector's calculations.

[41] Therefore, the maximum penalties that could be imposed are $220,000 for the 11 breaches of s 65 of the Act, $180,000 in respect of the 9 breaches of s 130 of the Act, and $260,000 in respect of the 13 breaches of s 81 of the Holidays Act. With a total of 33 breaches of three different statutory requirements, that makes a total maximum possible exposure to penalties of $660,000.

Step one, part three – consider whether globalising any of the potential penalties may be appropriate

[42] It is appropriate to globalise the penalties in respect of multiple breaches within each legislative code requirement, but not across them. Such globalisation can take place where there are multiple and very similar breaches, such as the repeated non-payment or below minimum payment of wages to an employee.[9]

[43] However, as the three relevant categories of breach in this case relate to record keeping failures and failures to provide employment agreements, the only possible globalisation that could be adopted would be across employees, as one cannot say there have been multiple separate failures in respect of any given employee.

[44] *Preet* does not state expressly that globalising across employees is not permissible, but I disagree with Mr Goldstein that paragraph [159] of *Preet* raised the possibility that breaches could be globalised across employees. However, it was only when the Court applied its principles to the particular facts of its own case (which related only to two employees of the first respondent and three employees of the other) that it did not globalise across the employees for the different breaches. It does not explain in any detail why it chose not to do so.

[45] Not globalising across employees causes a particular inflationary effect, and where there are a large number of affected employees, that effect will be disproportionately large. Even in the present case there is a large inflationary effect created by not globalising across employees for each particular breach. It is arguable that a better approach, at least where there are many employees, is to globalise across all the affected employees, but to treat the number of affected employees as potentially an aggravating factor in step 2. This would drastically calm the inflationary effect where there are many affected employees. However, the Court did not adopt that approach, so I feel compelled to follow the same approach as the Court did, in the absence of clearer guidance, and not globalise across employees. I deal with the inflationary effect at step 4.

[46] In other words, it appears that I cannot globalise in respect of any of the three categories of breach in this case. Therefore, the total at this stage remains $660,000.

---

[9] See paragraph [141] of *Preet.*

Step two, part one - assessment of the severity of the breaches

Aggravating factors – failure to provide employment agreements

[47] Ms English submits that the failure to provide written employment agreements applied to eleven employees, and Mr Sowichai admitted that it was a deliberate choice not to issue employment agreements until he deemed an employee to be "permanent". However, even then, there was one employee who Mr Sowichai accepted was a permanent employee, to whom no written employment agreement was issued. Ms English submits that the severity should be assessed at 50%, which was the same percentage applied in *Preet.*

[48] Mr Goldstein argues that the breach was not severe, and that there is no evidence that vulnerable migrants were impacted. Only temporary employees were affected.

[49] I believe that a failure to provide employment agreements is not a minor breach, as the failure prevents the employees from knowing what rights and obligations they are subject to. This facilitates unlawful practices in respect of them, by fettering their ability to enforce their rights. It does not matter whether the affected employee is a temporary or a permanent employee in my view. A temporary employee is not somehow inferior in respect of his or her rights and the likely effect on him or her of unlawful behaviour is not less.

[50] I assess that the starting point for quantifying the penalty in this case should be 50% of the maximum penalty available per employee. This results in a provisional total of $110,000 for this particular breach.

Aggravating factors – holiday and leave records

[51] Ms English submits that the failure to maintain holiday and leave records was common to all employees, and was ongoing. In the absence of records, Mr Sowichai was able to attempt to mislead the Labour Inspector about whether the business was operating on public holidays[10].

[10] Ms Belley deposes that it was only when Mr Sowichai was confronted with evidence of eftpos transactions having occurred on seven public holidays that he admitted in December 2015 that his business had opened on public holidays.

[52] Ms English further submits that the respondent's failure to keep records, and its refusal to provide accurate information with respect to the days worked, made it more difficult for the Labour Inspector to carry out her regulatory functions. Ms English points out that the record keeping requirements in employment law legislation serve to protect the interests of the employee and allow the employer to demonstrate compliance at the same time. An employer who fails to keep records undermines the protective purposes of minimum standards legislation.

[53] Ms English also submits that none of the breaches could be classified as technical or minor, and that there was no effort made by the respondent to undertake any form of compliance or to educate themselves about compliance matters until the Labour Inspector got involved.

[54] Ms English also submits that the employees were vulnerable as being mostly young, transient and migrants in New Zealand.

[55] Ms English assesses that the severity of this breach merits a penalty at 60% of the maximum available.

[56] Mr Sowichai deposes that, if the Authority chooses to impose a penalty, then it should be *minor* as the significant failure relates to record keeping and that the respondent has made every effort to pay, and has paid, unpaid holiday pay.

[57] Mr Goldstein says that the breaches related to inadvertent record keeping, and that there was no evidence that the records were committed knowingly and/or calculatedly. He submits that no penalty should be imposed for carelessness. He assesses that a reduction of 60% should be applied; presumably, he is arguing for 40% of the maximum to be applied at this stage.

[58] I am particularly in agreement with the submission of Ms English that, far from being minor, a failure to keep proper records, as required, is a serious matter as it prevents employees from keeping track of their payments and prevents the Labour Inspectorate, and indeed the Authority and the Courts, from understanding what payments have been made to an employee and what holiday and leave they have taken and accrued.

[59] I accept that these breaches have also been sustained ones, not being one-off, and apparently due to a deliberate decision by the respondent not to comply with the well-known minimum requirements of employment law legislation for temporary employees.

[60] I believe that the severity of this breach is worse than that of failing to provide an employment agreement. This is because the nature of the restaurant business is not entirely predictable. Therefore, it was not possible to extrapolate from predictable work patterns what days each employee worked. Sometimes the business would have been operating, and sometimes it would not have been. In such a case, accurate holiday and leave records are crucial.

[61] I assess that the failure to keep holiday and leave records and time and wage records should attract a penalty at 60% of the maximum per employee, as submitted by the Labour Inspectorate. This results in a provisional total of $14,000 per affected employee, and a maximum of $156,000.

Aggravating factors –time and wage records

[62] Ms English submits that the failure to pay entitlements has a particular potential for adverse impact on employees in an environment where they are already being paid only minimum wages and were unable to adequately monitor or get information about their entitlements due to a lack of record keeping on the part of the employer.

[63] Ms English submits that the deliberate choice not to maintain time and wages records means that no-one can be absolutely certain that minimum entitlements were paid to all employees of the respondent's business over time.

[64] Mr Goldstein did not submit in respect for this matter as he had argued that the Labour Inspectorate had dropped this aspect of her claim.

[65] My assessment is that the breach is as equally serious as the failure to keep holiday and leave records. I therefore assess the appropriate percentage at 60%. This results in a provisional total of $14,000 per affected employee, and a maximum of $108,000.

Mitigating factors

[66] I shall address all breaches together, as the same mitigating factors are relevant for each.

[67] The respondent did take steps to rectify its breaches, once they were drawn to its attention, in November 2015, by engaging the services of a bookkeeper to ensure that the correct records will be kept thereafter. I understand that employment agreements have also been issued to all employees.

[68] Mr Goldstein submits on behalf of the respondent that the admitted breaches were not deliberate, but occurred because the respondent did not know how long each employee would work for it. Mr Goldstein asserts that the respondent co-operated with the Labour Inspector, but was careless, inadvertent and misunderstood all of its obligations. This was not surprising, according to Mr Goldstein, because the legislation is not as clear as it should be.

[69] Mr Goldstein also submits that there is no history of previous breaches of minimum code legislation, and that Mr Sowichai attempted to co-operate with the Labour Inspector once he understood what was sought. He also says that the respondent did have employment agreements in place for full time staff. Mr Goldstein assesses that the percentage reduction should be 75%.

[70] In his affidavit sworn on 21 September 2016, Mr Sowichai deposes that, while his business has been operating for ten years, he is still not proficient in English. Ms English submits in reply that Mr Sowichai's apparent unfamiliarity with the English language, or apparent unfamiliarity with New Zealand law, is not relevant to the case. She points out that Mr Sowichai has successfully run the business for ten years and obviously has a sufficient grasp of both the English language and relevant law to do so successfully. She states that his grasp of English was sufficient for Mr Sowichai to attempt to mislead the Labour Inspector as to whether or not employees of the respondent had worked on public holidays.

[71] I do not agree that Mr Sowichai's purported lack of proficiency in English is relevant as a mitigating factor, as it has not stopped him from operating a business in New Zealand for several years. I also do not accept that a purported ignorance of the law is any excuse for failing to comply with very well-known minimum employment law standards.

[72] In any event, it is almost inconceivable that a businessman operating for ten years in a major city of New Zealand genuinely did not become aware that his business was obliged to issue its employees with employment agreements, keep wage and time, and holiday and leave records. As a businessman operating in New Zealand who employed people, Mr Sowichai was obliged to be familiar with the legal requirements of operating a business and employing staff.

[73] I also note that Mr Sowichai cannot be said to have co-operated at first, given that he attempted to mislead the Labour Inspector as to whether he had opened his business on public holidays. He was able to attempt this lie by not having time and wage records for many staff.

[74] I assess that the efforts to rectify the breaches should attract a reduction in each penalty of 50%. That results in penalties of $55,000 in respect of the failure to provide employment agreements, $78,000 in relation to failures to keep holiday and leave records and $54,000 in relation to failures to keep wages and time records. This makes a provisional total of $187,000.

Step 3 – the financial circumstances of the respondent

[75] Mr Sowichai deposes that the respondent's business, and its continued employment of staff, would be jeopardised if a significant penalty were awarded against the respondent and it is required to pay the penalty in one lump sum. He asked that the respondent be permitted to pay any penalty by instalments.

[76] Mr Sowichai attached a draft of the respondent's 2016 annual accounts. This shows that the restaurant's trading income is relatively modest and that, after shareholder remuneration has been deducted, the company made a net loss of $108 to the year ended 31 March 2016. It is clear, however, that the shareholder remuneration was the exact sum that was left from the total trading income after deduction of the cost of sales and operating expenses and that, therefore, the total shareholder remuneration is a variable sum equivalent to net profit. The loss of $108 appears to be due to a, presumably unexpected, tax penalty.

[77] The balance sheet shows modest cash and bank balances, together with shareholder current accounts, shown as an asset of $35,161. The value of the company's fixed assets is relatively modest.

[78] Ms English points out that the total shareholder remuneration in the years ending 31 March 2015 and 31 March 2016 were $170,884 and $125,504 respectively, which was significantly greater than the wages and salaries for the two years in question[11]. She says that the owners have received significant benefits from the business, which is still operational. She submits that the reduction should be 20%.

[79] Mr Goldstein refers to the draft accounts, and submits that a significant fine would prove difficult to pay for the respondent, and that it is "plainly ridiculous" to suggest that the operators of the business should forgo their remuneration in order to pay the penalties. He also refers to the risk of the business closing and staff losing their jobs.

[80] Having reviewed the financial statements provided by the respondent, it is clear that the respondent would not be able to make a one-off lump sum payment in the order of several tens of thousands of dollars. It is clearly necessary to reduce the sum of $187,000 significantly, taking into account the fact that the restaurant is a small business. I reduce the total sum by 50%. This results in a penalty of $93,500.

[81] I am cognisant of the fact that s 135(4A) of the Act provides that the Authority may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it. I shall address this once the final step of the exercise has been completed.

Step four – proportionality of the outcome

[82] Similarly to *Preet* itself, where there were no other cases to refer to which had adopted the same approach, as *Preet* is so recently published, there are no post–*Preet* Authority determinations yet which deal with a comparable number and type of breaches as are addressed in this one, against which to compare penalties.

[83] The Employment Court in *Preet* stated, at [188]:

> Applying the proportionality or totality test to the figures arrived at, this involves assessing the final provisional penalties by reference to all of the relevant circumstances together, to determine whether they are justly proportionate to the seriousness of the breaches and the harm done by them. Potentially, this discretionary final consideration may result in

[11] Wages and salaries were 56% of shareholder remuneration in the year ended 31 March 2015 and 69% of shareholder remuneration in the year ended 31 March 2016.

> an increase to that provisional figure, a decrease to it or an affirmation of its appropriateness in all the circumstances.

[84] Having applied the first three steps, the resultant total penalty liability is $93,500. I need to step back and consider whether this would be a just penalty in all the circumstances in light of the breaches.

[85] As the breaches all relate to record keeping, I cannot take into account the amount of any arrears owed to employees, as the Labour Inspector cannot pursue penalties in respect of non and late payment of monies owed. The approach taken by *Preet* at paragraph [190] is not appropriate in this case therefore.

[86] In respect to proportionality, one relevant factor to consider is the amount originally sought by Ms English on behalf of the Labour Inspector; namely, $10,000 in total. This is not determinative, as the Court made clear in *Preet*, at paragraph [71], which stated that even if an inspector specifies the amount of a penalty, the Authority is not bound to impose no more than that amount.

[87] In addition, this amount was arrived at by Ms English and the Labour Inspector prior to the publication of *Preet.* The *Preet* approach required by the Employment Court is likely to result in higher sums being sought and imposed in many cases, in my view.

[88] Having said that, I am satisfied that a penalty of $93,500 is significantly out of proportion to the gravity of the breaches. It is clearly of such a magnitude that there would be a significant risk of non-payment, and a significant incentive for the shareholders of the respondent to close down the company[12].

[89] This conclusion requires the sum to be reduced, therefore.

[90] Against that, is the need to assess the "optimum deterrent effect of penalties imposed"[13]. In respect for the need for deterrence, Ms English quotes the Employment Court in *Tan v Yang and Zhang*[14], which states, at paragraph [25] that:

> The purpose of a penalty is … to punish and deter others from engaging in such conduct.

---

[12] I refer to paragraphs [191] and [192] of *Preet.*
[13] *Preet,* paragraph [192]
[14] [2014] NZEmpC 65

[91] Ms English also makes reference in her original submissions to the explanatory note to the Employment Relations Amendment Bill (No.2) 16 August 2010 which referred to the intention behind increasing the quantum of penalties was to signal to the Courts that breaches are significant and warrant a higher penalty. Ms English submits that there is a clear need for penalties of such magnitude to send a strong message of denunciation and deterrence to employers who do not comply with their obligations under the minimum co-legislation.

[92] Ms English submits that a reduction of 50% should be made, which results in a total penalty to be imposed of $135,000.

[93] Mr Goldstein refers to the fact that Ms English bases her assessment of the final sum to be imposed on how much was owed to employees in terms of arrears of holiday pay. However, I agree with him that that is not a relevant matter. What is under consideration is a failure to keep records and to provide employment agreements.

[94] Mr Goldstein submits that the final sum to be imposed should be $5,200, or $14,400 if I do not accept his arguments on globalisation (which I do not, as I do not believe they are supported by *Preet*). Mr Goldstein also refers me to other penalties imposed by the Authority recently in respect of record keeping failures. However, these are all pre-*Preet*, and *Preet* makes clear that only determinations decided by reference to the *Preet* guidelines should be taken into account. *Preet* really is a game changer.

[95] Having said that, it would not be just in my view for there to be a quantum shift in the amount of penalties to be imposed in respect of breaches which predate *Preet.* Although she is not bound by her original assessment of $10,000 as the appropriate sum of the penalty, it is telling in demonstrating what Ms English regarded as an appropriate sum just a few weeks before her post-*Preet* submissions. A thirteen and a half fold increase in the penalty originally sought cannot be just, and does not demonstrate proportionality.

[96] When I stand back, and consider the breaches for which penalties can be legitimately sought, I consider that $25,000 is an appropriate penalty overall, as it combines effective and realistic punishment and deterrence on the one hand and

"affordability" on the other hand. In terms of the three breaches, this is a penalty of $8,000 each, rounded up by $1,000.

[97] For the avoidance of doubt, this penalty is imposed in relation to the respondent's breaches of ss 65 and 130 of the Act, and s 81 of the Holidays Act (as provided for by reference to s83).

[98] The breaches in question have not obviously resulted in non-compensable loss to the affected employees, so that I do not consider that it is necessary for the Authority to direct any proportion of the penalties be paid to Labour Inspector for distribution to those employees. I consider that the whole of the total penalty should be paid to the Crown.

[99] As stated above, I will now consider whether it is necessary to order payment of the total penalty by instalments. This can only be done if the financial position of the respondent requires it. I am not in a position to assess that, however, as I have not been provided with up to date bank statements, and cannot assess how much liquidity is in the business. I must therefore decline to order payment by instalments.

Orders

[100] The respondent is to pay a penalty of $25,000. It is to pay this penalty to the Authority, which will then pay it into an appropriate Crown Bank Account. The sum is to be paid no later than 6 January 2017.

[101] I also order that the respondent should repay to the Labour Inspector the Authority's lodgement fee of $71.56. The respondent is to pay this sum directly to the applicant no later than no later than 6 January 2017.

Costs

[102] Ms English made no submissions on costs. I therefore reserve costs.

[103] If the Labour Inspectorate wishes to seek an order for a contribution towards its legal costs, apart from reimbursement of the lodgement fee, it is to first seek to reach agreement with the respondent in respect of the amount of that contribution and the date for payment of it.

[104] However, if the parties have been unable to agree within 21 days of the date of this determination (excluding days when the respective counsel are away from their offices because of the Christmas and New year holiday season), then the applicant shall have a further 14 days within which to lodge and serve a memorandum of counsel setting out the amount of the contribution towards its costs that it seeks, and the basis for it, and the respondent shall have a further 14 days within which to lodge and serve a memorandum of counsel in reply. The matter of costs would then be determined by the Authority on consideration of those submissions.

David Appleton
Member of the Employment Relations Authority

SUMMARY

STEP 1 – Nature and number of breaches – potential maximum penalties		
	Number of employees	**Total penalty**
S 65 of the ERA	11	$220,000
S 130 ERA	9	$180,000
S 81 HA	13	$260,000
Ss 29 & 50 HA	DISALLOWED	$0
S 56 HA	DISALLOWED	$0
S 23 HA	DISALLOWED	$0
Subtotal		**$660,000**
STEP 2 – Aggravating factors as a percentage of the maxima in step 1		
S 65 of the ERA	50%	$110,000
S 130 ERA	60%	$108,000
S 81 HA	60%	$156,000
Subtotal		**$374,000**
STEP 2 – Mitigating factors, reducing the aggravating factors subtotal		
S 65 of the ERA	50%	$55,000
S 130 ERA	50%	$54,000
S 81 HA	50%	$78,000
Subtotal		**$187,000**
STEP 3 – respondent's financial circumstances		
Less 50%		**$93,500**
STEP 4 – proportionality		
Reduce significantly		**$25,000**