

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 172
5635132**

BETWEEN

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

AND

BBS HORTICULTURE LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Annabelle Skadiang, Counsel for Applicant
Ravi Singh, Representative of Respondent
Investigation Meeting: On the papers
Submissions received: 17 May 2017 from Applicant
None from Respondent
Date of Determination: 14 June 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, a Labour Inspector, seeks a total of \$1,818.02 in the application to the Authority in respect of arrears of wages and holiday pay on behalf of employees of the Respondent, BBS Horticulture Limited (BBS).

[2] The Labour Inspector also claims penalties for failure to retain employment agreements in breach of the Employment Relations Act 2000 (the Act), breaches of the Holidays Act 2003 (the HA) and breaches of the Minimum Wages Act 1983 (the MWA).

[3] BBS accepted that there had been failures to maintain the correct records.

Note

[4] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties.

[5] The Labour Inspector filed an Amended Statement of Problem on 27 April 2017. An amended Statement in Reply was due to be filed on 19 May 2017, however despite reminders sent by the Authority on 31 May and 2 June 2017, no amended Statement in Reply in response has been filed by BBS.

[6] Legal submissions were scheduled to be filed with the Authority on 17 May 2017. The Labour Inspector duly filed submissions. No submissions were received from BBS despite reminders.

[7] There having been no further communication from BBS I was satisfied that no good cause had been shown for the failure of BBS to comply with the agreed timetable and I consequently proceeded with the investigation.

Issues

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

- a. Wage arrears are outstanding in respect of Chanderdeep Singh
- b. Holiday pay arrears are outstanding for Chanderdeep Singh, Prasad Satendra, Jagdeep Singh, Vikash and Ravind Kumar
- c. Holiday pay arrears for time and a half pay for working on a public holiday are outstanding for Prasad Satendra and Jagdeep Singh
- d. BBS failed to retain employment agreements for Prasad Satendra, Jagdeep Singh, Vikash, Ravindra Singh, Chanderdeep Singh, Xian Zhong She, Xing Ling Wang, Hua Lin Wang, Jun Ru Li, Sheng Liang Sun, Lee Wong, Cui Lian Chen, Xiu Lan Li, Ruo Wen Chen, Ping Li Chun and You An Lin (the employees);
- e. BBS failed to keep wage and time records in respect of Chanderdeep Singh, Xian Zhong She, Xing Ling Wang, Hua Lin Wang, Jun Ru Li, Sheng Liang

Sun, Lee Wong, Cui Lian Chen, Xiu Lan Li, Ruo Wen Chen, Ping Li Chun and You An Lin

- f. BBS failed to keep holiday and leave records in respect of Prasad Satendra, Jagdeep Singh, Vikash and Ravind Kumar, Chanderdeep Singh,
- g. BBS should be ordered to pay penalty/penalties in respect of its failures to keep holiday and leave records, to keep wage and time records, to retain copies of employment agreements, to pay minimum wages to Chanderdeep Singh, and to pay the minimum holiday entitlements for the employees as required.
- h. The quantum of such a penalty/penalties

Background Facts

[9] BBS is a horticultural company which contracts services to horticultural growers, particularly asparagus producers in the Waikato. Mr Davinder Singh is the sole director and shareholder.

[10] Following receipt of a complaint on 29 October 2013 the Labour Inspector conducted a site visit to the BBS workplace on 22 November 2013.

[11] Pursuant to the site visit the Labour Inspector ascertained that BBS had one Indian national and 3 Fijian nationals working in breach of their visitor visa conditions.

Improvement Notice 2013

[12] An Improvement Notice was issued to BBS on 29 November 2013 in respect of non-compliance with the requirement to provide individual employment agreements, no time and wage records, no payment for holiday pay and no payment for public holiday pay.

[13] The Labour Inspector sent a letter to BBS on 26 August 2014 informing it that she was satisfied it had complied with the Improvement Notice because it had provided time sheets which were compliant with s 130 of the Act, individual employment agreements compliant with a 65 of the Act, and that payslips recorded a separate component of 8% holiday pay paid and recording the wages paid for the hours worked.

Follow Up Audit (2014 Season)

[14] The Labour Inspector advised BBS on 23 February 2015 that it was conducting a follow-up audit to ensure BBS had continued to maintain compliance in the areas identified on the Improvement Notice. BBS was requested to supply various records.

[15] Approximately seven months following this request the Labour Inspector received various records from Mr Ravi Singh, Accountant, comprising IRD monthly Schedules, individual employment agreements, and time records. A further request for wage records was made to Mr Ravi Singh, dated 24 August 2015.

[16] Mr Ravi Singh responded by email dated 26 August 2015 advising the Labour Inspector to contact Mr Davinder Singh regarding the wage records.

[17] The Labour Inspector telephoned Mr Davinder Singh on 28 September 2015 to request the missing wage records. Mr Davinder Singh's response was that the time sheets and the IRD monthly schedules should be sufficient information.

[18] The Labour Inspector checked the breaches identified in the follow up audit and asked Mr Davinder Singh why he had reverted to having non-compliant employment records, following which a meeting was scheduled.

[19] The meeting with BBS took place on 1 October 2015. During the meeting Mr Davinder Singh advised the Labour Inspector that Mr Ravi Singh could provide the wage and holiday records.

Follow Up Audit (2016 Season)

[20] BBS was audited again on 27 October 2016. That audit revealed that one Chinese National was working in breach of her visitor visa conditions and ten other employees of Chinese descent were identified in total; all 11 employees informed the Labour Inspector who assisted with the audit that they had not been given individual employment agreements and had not completed timesheets for BBS.

[21] When questioned by the Labour Inspector Mr Davinder Singh said he had not given the 11 employees individual employment agreements. He had not recorded individual names for the employees working on 27 October 2016, the diary showing that 9 employees started at 6.30 a.m. and 2 employees started at 7.15 a.m. but there were no names to identify the 9 employees that started work earlier. Nor could Mr Davinder Singh tell the Labour Inspector the employee names.

[22] At the date of the Labour Inspector's visit to BBS, no timesheets were being kept in accordance with s 130(1) of the Act.

[23] Mr Davinder Singh provided Employer monthly schedules to the Labour Inspector on 28 August 2015 showing typewritten or handwritten information under the name and IRD number of the employees who are the subject of this claim.

Is BBS to pay arrears of wages and holiday pay to the named former employees?

[24] The Labour Inspector calculated the arrears of wages and holiday pay owing to the employees from BBS's own records.

[25] I am satisfied that the Labour Inspector has established that the named employees have not been paid correctly by BBS and that they are entitled to payments in respect of arrears of wages and holiday pay.

[26] I determine that BBS is liable to pay arrears of wages and holiday pay to the named former employees as follows:

Type	Name	Amount: Total
Minimum Wages Arrears	Chanderdeep Singh	\$28.50
Annual Holiday Pay	Chanderdeep Singh (\$184.68) Prasad Satendra (\$268.60) Jagdeep Singh (\$562.38) Vikash (\$182.40) Ravind Kumar (\$259.20)	\$1,457.26
Public holiday pay for Time and a Half and Time and a Half Component	Prasad Satendra (\$188.48) Jagdeep Singh (\$143.78)	\$332.26
Total owed		\$1818.02

[27] I determine that BBS is liable to pay arrears of wages and holiday pay as set in the table above. Such payments are to be made to the Labour Inspector via the Ministry of

Business, Innovation and Employment (MBIE)'s Trust Account. The Labour Inspector will be responsible for taking appropriate steps to have the arrears paid out to the employees.

Did BBS fail to retain employment agreements for the 16 named employees and to keep wage and time records in respect of the named employees?

[28] At the time of the Labour Inspector's visit to the premises of BBS on 27 October 2016 Mr Davinder Singh was unable to produce individual employment agreements or wage and time records for any of the employees identified as working for BBS upon the Labour Inspector's request.

[29] Mr Davinder Singh provided a diary showing start and finish times to the Labour Inspector, but without the names of the employees recorded beside those times.

[30] I determine that BBS failed to retain employment agreements and to keep wage and time records in respect of the named employees as required by statute.

Did BBS fail to keep holiday and leave records in respect of named employees Prasad Satendra, Jagdeep Singh, Vikash, Ravindra Kumar, and Chanderdeep Singh?

[31] At the time of the Labour Inspector's visit to the premises of BBS on 27 October 2016 Mr Davinder Singh was unable to produce holiday and leave records for any of the named employees upon the Labour Inspector's request.

[32] I determine that BBS failed to retain employment agreements and to keep holiday and leave records in respect of the named employees as required by statute.

Penalty action

Should BBS be ordered to pay a penalty or penalties in respect of its failures to keep holiday and leave records, to keep wage and time records, to retain copies of employment agreements, to pay minimum wages to Chanderdeep Singh, and to pay the minimum holiday entitlements for the employees as required?

[33] The Authority has jurisdiction under s 161(1)(m)(iii) of the ER Act to hear and determine an application by a Labour Inspector for recovery of a penalty under ER Act, s 76 of the HA, s 10 of the MWA and s 13 of the WP Act.

[34] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.¹

[35] The Labour Inspector seeks penalties against BBS pursuant to:

- **ss 64(4) and 135 of the Act:** for failing to retain employment agreements for Prasad Satendra, Jagdeep Singh, Vikash, Ravindra Singh, Chanderdeep Singh Xian Zhong She, Xing Ling Wuang, Hua Lin Wang, Jun Ru Li, Sheng Liang Sun, Lee Wong, Cui Lian Chen, Xiu Lan Li, Ruo Wen Chen, Ping Li Chun and You An Lin
- **ss 75 and 88 10 of the HA:** for failing to keep holiday and leave records for Prasad Satendra, Jagdeep Singh, Vikash, Ravindra Kumar, and Chanderdeep Singh
- **s 10 of the MWA:** for failing to pay statutory minimum wages to Chanderdeep Singh as required by s 8A of the MWA
- **s 10 of the MWA:** for failing to keep a wage and time record in respect of Chanderdeep Singh as required by s 8A of the MWA
- **s 75 of the HA:** for failing to pay annual holiday pay to Chanderdeep Singh, Prasad Satendra, Jagdeep Singh, Vikash and Ravindra Kumar
- **s 75 of the HA:** for failing to pay Prasad Satendra and Jagdeep Singh public holiday pay.

[36] Penalty claims have to be brought within 12 months pursuant to s 135 of the Act which states:

S135 Recovery of penalties

(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of –

(a) the date when the cause of action first became known to the person bringing the action, or

(b) the date when the cause of action should reasonably have become known to the person bringing the action.

[37] The penalty breaches first came to the attention of the Labour Inspector on 12 November 2015 and the Statement of Problem was filed on 15 July 2016 which is within the

¹ *Xu v McIntosh* [2004] 2 ERNZ 448 at [28] and [29]

12 month limitation period. The second set of breaches came to the Labour Inspector's attention at the earliest on 27 October 2016, and the amended Statement of Problem was filed on 3 April 2017.

[38] I am satisfied that the penalty claims have been brought within the statutory time period.

[39] In *Borsboom v Preet PVT Limited*² (*Preet*) a full court of the Employment Court identified the factors for imposing a penalty for breach of minimum employment standards under the Act. In doing so, it considered the previous approaches taken by that Court and its predecessor, the Labour Court.

[40] In determining the penalty claim I follow the four step approach as set out by the Employment Court in *Preet*³.

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

[41] In this case there have been breaches under 7 separate heads.

1. A failure to retain employment agreements for to 16 employees. The maximum penalty is \$320,000.00 (16 x \$20,000.00)
2. A failure to keep a wage and time record for 16 employees. The maximum penalty is \$320,000.00 (16 x \$20,000.00).
3. A failure to keep a holiday and leave record for Chanderdeep Singh, Prasad Satendra, Jagdeep Singh, Vikash and Ravindra Singh. The maximum penalty is \$100,000.00 (5 x \$20,00.00)
4. Failure to pay Chanderdeep Singh minimum wages. The maximum penalty is \$20,000.) The maximum penalty is \$20,000.00.
5. Failure to pay annual holidays to Chanderdeep Singh, Prasad Satendra, Jagdeep Singh, Vikash and Ravindra Singh. The maximum penalty is \$100,000.00 (5 x \$20,000.00).
6. Failure to pay Prasad Satendra and Jagdeep Singh public holiday pay. The maximum penalty is \$40,000.00 (2 x \$20,000.00)

² *Borsboom (Labour Inspector) v Preet Pvt Ltd and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

³ [2016] NZEmpC 143 at [151]

7. Failure to provide Prasad Satendra and Jagdeep Singh an alternative day for working a public holiday (or to pay an alternative day on termination). The maximum penalty is \$40,000.00 (2 x \$20,00.00)

[42] This results in maximum penalties of \$940,000.00.

[43] It is submitted for the Labour Inspector that global penalties are appropriate under the three heads of breaches claimed⁴ on the basis that the lack of correct system in terms of record keeping is essentially one of ongoing breach.

[44] In terms of the holiday pay breaches, it is submitted that the failures to properly pay holiday pay affected each employee, and that it is not appropriate to impose a global penalty for that reason.⁵

[45] Accordingly at step 1 the Labour Inspector submits that BBS is liable to maximum penalties of \$260,000.00.

Step 2: Assessment of the severity of the breaches

[46] The factors the Court must have in regard to determining the appropriate penalty under s 133A of the Act have been summarised in the recent Employment Court case of *Lumsden v SkyCity Management Limited* as including whether the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.

[47] In this case, BBS had previously been subject to an Improvement Notice and had appropriate systems in place. Employers in New Zealand are expected, especially in this case where BBS was made aware of the compliance requirements by a Labour Inspector, to know the minimum legal requirements in respect of their employees and adhere to them. Ignorance of the law is no defence.⁶

[48] I find that BBS's failures to maintain correct records in respect of employment agreements, wage and time records and holiday and leave records was deliberate. It is no excuse to offer, as did the Director of BBS, the ongoing high costs of compliance due to

⁴ *Labour Inspector v Precise Contracting Limited* [2017] NZERA Christchurch 56

⁵ *Ibid* at n2 at [143] and [144]

⁶ *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [29]

engaging an accountant, as an excuse. On the contrary this may well represent a commercial advantage over those competitors who do meet their compliance requirements.

[49] In the circumstances I find that the penalty should be set at the level submitted as appropriate by the Labour Inspector of 70%, being \$14,000.00 each head of breach.

[50] In respect of the minimum wages breach, the Labour Inspector accepts that this sits at the lower end a reduction to 15% of the maximum is appropriate, or \$3000.00 given that non-compliance was in respect of 1 employee and the amount owed was not significant.

[51] Similarly in respect of the failures to pay holiday pay arrears accounts for 80% of the arrears claims and while not a significant amount, I observe that there is a level of vulnerability given the seasonal nature of the work and the fact that the workers predominantly comprise overseas nationals who may be ignorant of their employment rights.

[52] I find that the penalty for these breaches should be set at 50% of the maximum, being a total of \$50,000.00.

[53] The failures to pay public holiday pay and provide alternative days are acknowledged by the Labour Inspector as not significant.

[54] I find that the penalty should be set at the level submitted as appropriate by the Labour Inspector of 30% of the maximum in respect of the two employees affected in the sum of \$12,000.00 per breach.

[55] This results in a provisional penalty to be paid by BBS of \$119,000.00.

[56] There is no evidence of mitigation before the Authority. However the Labour Inspector has submitted that it is willing to allow a 20% reduction across the board in light of BBS's acknowledgement that it would be willing to pay all outstanding dues.

[57] This results in a step 2 subtotal of \$95,200.00.

Step 3: financial circumstances of the Respondent Employer

[58] There is no evidence before the Authority of BBS's ability to pay these provisional penalties.

[59] There is no information available outlining BBS's financial position, and it is not clear what, if any, cash or assets BBS may have.

[60] In the absence of evidence about BBS's ability to pay the penalties, there is no adjustment made to the provisional penalties at this stage of the process.

Step 4: Proportionality or totality test

[61] 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 at such a level that the liable employer either has an incentive for not paying or cannot pay them.⁷

[62] The overall amount of penalties assessed at step 2 is \$95,200.00. The total amount owed to the employees as wage and holiday arrears is \$1,818.02 gross.

[63] I consider that a penalty of \$95,200.00 is disproportionate to the amount owed.

[64] However I observe that BBS was made aware of the need for compliance, and has had ample time in which to seek to rectify the situation.

[65] Balancing the need to avoid setting the level of penalty at such a level that there would be a significant risk of non-payment by BBS against the public interest to impose a penalty which acts a deterrent to others who may contemplate engaging in such behaviour.⁸, I consider in all the circumstances that applying a penalty of 60% of total provisional breaches is appropriate.

[66] I order that BBS pays the MBIE Trust account a total of \$57,120.00. Payment is to be made within 28 days of this determination.

Filing Fee

[67] I further order that the Labour Inspector, be reimbursed for the Authority's filing fee in the sum of \$71.56.

Costs

[68] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority

⁷ *Preet* at [190] and [191]

⁸ *Tan v Yang and Zhang* [2014] NZEmpC 65

