

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 474
3053952
3098932

BETWEEN A LABOUR INSPECTOR
 Applicant

AND JOSE BUENAVENTURA
 Respondent

Member of the Authority: Andrew Dallas

Representatives: Rebecca Denmead and John Hilario, counsel for the
 Applicant
 No appearance of the Respondent

Investigation Meeting: 24 May 2023 at Auckland and by audio-visual link

Submissions: On the day

Determination: 24 August 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Jackie Sun, lodged two statements of problem in the Authority alleging breaches of minimum employment standards. The statements of problem named two Respondents: TNCommunications Limited (TNCommunications) and an alleged person involved in those breaches, Jose Buenaventura.¹ TNCommunications was placed in liquidation on 16 April 2019. While the liquidator made it clear they did not wish to be involved in the Authority’s proceedings, this was not formalised until the company was removed from the Companies’ Register on 21 July 2022.

¹ The evidence disclosed that Mr Buenaventura is also known as “Nikko”.

[2] According to the Companies' Register, Mr Buenaventura was joint 50 percent co-owner of TNCommunications with his partner, Anna Buenaventura. At the time of the liquidation, Ms Buenaventura was the sole director. However, it was clear from the evidence before the Authority that Mr Buenaventura effectively controlled and operated the business.

[3] The Labour Inspector's first statement of problem (3053952) (SoP One) pertained to two workers: Harpreet Singh and Marcwin Dorado. Mr Dorado reached a private settlement and the Labour Inspector said no further claims in respect of Mr Dorado were being pursued against Mr Buenaventura.

[4] In respect of Harpreet Singh, the Labour Inspector said:

- (i) TNCommunications failed to pay minimum wages for every hour worked resulting in arrears of \$6,510.84 (gross) in contravention of s 6 of the Minimum Wage Act 1983 (MW Act); and
- (ii) Mr Buenaventura was a person involved in TNCommunications' failure to pay minimum wages to Mr Singh under s 142W of the Employment Relations Act 2000 (The Act) and was liable to pay these to the extent TNCommunications; and
- (iii) as a person involved penalty Mr Buenaventura was liable for penalties under the Act;
- (iv) TNCommunications failed to keep wage, time and holidays records in contravention of s 65(4) and s 130 of the Act and s 81 of the Holidays Act 2003 (H Act); and
- (v) as a person involved in those breaches, Mr Buenaventura was liable for penalties.

[5] The second statement of problem (3098932) (SoP Two) pertained to five workers: Iqbal Singh, Pratik Patel, Siva Perabattula, Venkat Kasarla and Innocent Nkala. However, Mr Nkala subsequently withdrew from the proceedings and the Labour Inspector said no claims in respect of Mr Nkala were being pursued against Mr Buenaventura.

[6] In respect of Iqbal Singh, Pratik Patel, Siva Perabattula, and Venkat Kasarla, the Labour Inspector said:

- (i) TNCommunications failed to pay the workers minimum wages for every hour worked in breach of s 6 of the MW Act resulting in arrears of wages as follows:
 - (i) Iqbal Singh \$2,022.30 (gross);
 - (ii) Pratik Patel \$1,507.80 (gross);
 - (iii) Siva Perabattula \$2,474.66 (gross); and
 - (iv) Venkat Kasarla \$1,917.30 (gross).

- (ii) TNCommunications failed to pay the workers annual holiday pay on termination of employment in accordance with ss 24, 25 and 27 of the H Act resulting in arrears of holiday pay as follows:
 - (i) Iqbal Singh \$3,161.30 (gross);
 - (ii) Pratik Patel \$3,456.65 (gross);
 - (iii) Siva Perabattula \$3,498.29 (gross); and
 - (iv) Venkat Kasarla \$3,216.66 (gross).

- (iii) As a person involved in those breaches, Mr Buenaventura was liable for penalties.

The Authority's investigation

[7] These matters were consolidated by the Authority for ease of prosecution and response. The respondents initially engaged in the Authority processes including by being represented, lodging statements in reply to both matters, attending a case management conference and providing some documentation. However, the participation of TNCommunications effectively ceased with its liquidation. Mr Buenaventura's own direct involvement diminished over time. Mr Buenaventura did not attend the Authority's investigation or make any arrangements for someone to attend on his behalf. The investigation meeting was adjourned for a period to offer Mr Buenaventura a further opportunity to participate but he did not avail himself of this.

[8] During the investigation meeting, I heard from Harpreet Singh, Iqbal Singh, Pratik Patel, Siva Perabattula (by audio-visual link), Venkat Kasarla (by audio-visual link) and former Labour Inspector Jackie Sun. Labour Inspector also advanced oral and, subsequently, written submissions and answered questions about the same. I commend Ms Denmead and Mr Hilario for the highly professional way they conducted the litigation on behalf of the Labour Inspector.

[9] This determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.² However, all material placed before the Authority has been considered.

Issues

[10] The issues identified for investigation and determination are:

- (1) Whether TNCommunications:
 - (i) failed to pay minimum wages to Harpreet Singh, Iqbal Singh, Pratik Patel, Siva Perabattula, and Venkat Kasarla;
 - (ii) failed to pay annual holiday pay on termination to Iqbal Singh, Pratik Patel, Siva Perabattula, and Venkat Kasarla;
 - (iii) failed to keep wage, time and holidays records;
 - (v) whether Mr Buenaventura was a person involved in TNCommunications' breaches; and
- (2) if so, is Mr Buenaventura:
 - (i) liable for any arrears found owing to Harpreet Singh, Iqbal Singh, Pratik Patel, Siva Perabattula, and Venkat Kasarla;
 - (ii) liable for penalties for breaches of the Act, H Act and MW Act as a person involved;
- (3) Should either party contribute to the cost of representation for the other?

² Employment Relations Act 2000, s 174E.

The Labour Inspector's case against TNCommunications and Mr Buenaventura

Minimum employment standards breaches

[11] The Labour inspector's allegations of breaches of employment standards by TNCommunications are as follows:

- (i) Harpreet Singh worked for TNCommunications between June 2016 until April 2019. Mr Singh was a fulltime employee between 17 June 2016 to 25 September 2016 but was only paid an "allowance" ranging between \$250 and \$300 a week during this period;
- (ii) Iqbal Singh worked for TNCommunications from July 2016 to April 2019. In April 2019, Mr Singh did not receive, at least, minimum wages for hours worked on two occasions. Mr Singh also did not receive his outstanding annual leave entitlement at the conclusion of his employment;
- (iii) Mr Patel worked for TNCommunications between March 2018 to April 2019. On two occasions in April 2018 and April 2019 he did not receive, at least, minimum wages for hours worked on two occasions. Mr Patel also did not receive his outstanding annual leave entitlement at the conclusion of his employment;
- (iv) Mr Perabattula worked for TNCommunications between February 2018 to April 2019. On two occasions in December 2018 and February 2019, he did not receive, at least, minimum wages for hours worked on two occasions, Mr Perabattula also did not receive his outstanding annual leave entitlement at the conclusion of his employment; and
- (v) Venkat Kasarla worked for TNCommunications between April 2018 and April 2019. On two occasions in February 2019 and April 2019, he did not receive, at least, minimum wages for hours worked on two occasions, Mr Kasarla also did not receive his outstanding annual leave entitlement at the conclusion of his employment.

[12] Based on the evidence before the Authority and a complete the lack of any evidence to the contrary, I find on the balance of probabilities that TNCommunications failed to pay minimum wages to Harpreet Singh, Iqbal Singh, Pratik Patel, Siva Perabattula and Venkat Kasarla in the amounts set out in paragraph [6] above. For the same reason, I find on the balance of probabilities that TNCommunications failed to pay holiday pay upon termination of employment to Iqbal Singh, Pratik Patel, Siva Perabattula and Venkat Kasarla in the amounts also set out in paragraph [6].

[13] Further is also clear from the evidence presented by Labour Inspector to the Authority which, again, was unchallenged that TNCommunications failed to keep wage, time and holidays records in contravention of the Act and the H Act. Accordingly, on the balance of probabilities, I also make this finding against TNCommunications.

Was Mr Buenaventura a person involved in breaches of employment standards?

[14] Having found that TNCommunications breached employment standards for its former employees now represented by the Labour Inspector, it falls to be decided whether Mr Buenaventura was an accessory to those breaches as a person involved in them.

[15] The Labour Inspector contended that Mr Buenaventura was a person involved within the ambit of s 142W of the Act at all relevant times and that he “aided, abetted, counselled, or procured” the breaches of employment standards by TNCommunications and/or induced the breaches and/or was knowingly concerned in or party to them.

[16] I accept the Labour Inspector’s submission, supported by the evidence, that Mr Buenaventura was, at the least, a person knowingly concerned with TNCommunications’ breaches of employment standards. Mr Buenaventura was a 50 percent shareholder in TNCommunications, he was responsible for its management and the organisation of its work; he held himself out to employees as the Director, New Zealand Operations Manager and New Zealand Director of Operations, employees provided him with their timesheets and he was responsible for the payment of wages, including out of his own bank account.

[17] The effect of s 142Y and the finding that Mr Buenaventura's actions fall within the ambit of s 142W means he is jointly and severally liable with TNCommunications for its former employees' arrears of wages and holiday pay. Given TNCommunications has been liquidated and removed from the Companies' Register, the liability will be for Mr Buenaventura alone to bear. Consequently, the arrears of wages and holiday pay set out in paragraph [6] above must be paid by Mr Buenaventura within 28 days of this determination. These amounts must then be paid by the Labour Inspector to the applicable, affected workers.

The Labour Inspector's claim for penalties against Mr Buenaventura

[18] The Authority has jurisdiction to hear and determine an application by a Labour Inspector for recovery of penalties under the Act, the H Act, and MW Act.³ The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.⁴ As an individual person involved in breaches, the maximum penalty for Mr Buenaventura is \$10,000 per breach.⁵

[19] Section 133A of the Act provides elegantly simple guidance about the matters the Authority needs to have regard to when imposing a penalty under the Act:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

³ Employment Relations Act, s 161(m)(ii) and s 161(m)(iv).

⁴ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁵ Employment Relations Act, s 135(2)(a)

[20] However, there are further legal principles, many overlapping with s 133A of the Act, or each other, currently applicable in respect of penalties and these principles will be applied in the absence of submissions from the Labour Inspector to the contrary.

The nature and extent of the breaches

[21] There are 14 established breaches for which Mr Buenaventura is involved and penalties are sought across the two statements of problem:

SoP One

- (i) one breaches of s 6 MW Act for failing to pay minimum wages; and
- (ii) five breaches of s 130 of the Act and s 81 of the H Act for failing to keep wage, time and holidays records.

SoP Two

- (i) four breaches of s 6 MW Act for failing to pay minimum wages; and
- (ii) four breaches of s 23, 25 and 27 of the H Act for failing to pay final holiday pays to the workers.

[22] At this point of the exercise, the total maximum applicable penalty available to the Labour Inspector against Mr Buenaventura is \$140,000.

Were the breaches intentional, inadvertent, or negligent?

[23] The Labour Inspector said that Mr Buenaventura effectively controlled TNCommunications and he had knowledge of the requirements to comply with standards of employment because he had met these on occasion. The Labour Inspector said Mr Buenaventura seemed to believe he could withhold payments to the workers when and if it suited his purposes. I agree and find this conduct Mr Buenaventura was both self-serving and intentional.

The nature and extent of any loss or damages suffered

[24] The loss or damage incurred by the five workers involved wage and holiday pay arrears quantified cumulatively by the Labour Inspector as \$27,765.80. As these workers were paid at or very close to the minimum wage, this deprivation had very serious consequences for them. Within this context, I accept the Labour Inspector's submission that Harpreet Singh was particularly affected by the intentional conduct of Mr Buenaventura: being only paid an allowance for the first three months of employment before receiving a salary.

What steps have been taken in mitigation?

[25] On the evidence before the Authority, there have been no direct steps taken by Mr Buenaventura mitigate the five workers loss or damage. However, Mr Buenaventura did initially cooperate to some extent with the Labour Inspectorate's investigation.

The circumstances of the breaches and any vulnerability factors

[26] As migrants on work visas, the workers were objectively vulnerable. The workers also gave very persuasive and passionate evidence to the Authority about this. That Mr Buenaventura engaged in intentional conduct to breach employment standards in respect of these workers is nothing short of disgraceful conduct by an employer.

[27] While there is some scope to take a "global" approach to the penalties sought by the Labour Inspector, principally around the maintenance of wages, time and leave records, there must be a limited tolerance in this approach to prevent diminution of the statutory penalties' regime. Having regard to the various aggravating features, I believe deterrence, where vulnerable workers are involved is the key consideration. I conclude that the breaches of employment standards are reasonably significant, and I believe 80% of the maximum available penalty is appropriate. So then at this point penalties are:

- (i) SoP One: \$48,000: and
- (ii) SoP Two: \$64,000

[28] The ameliorating factors weighing in favour of Mr Buenaventura that I have identified are: (i) some limited cooperation with the Labour Inspectorate's investigation including the provision of some information and (ii) no evidence of previous misconduct in respect of employment standards (however, this could equally arise from a lack of previous detection). In those circumstances, I consider a further discount of 10% to the potential maximum penalty is warranted. So then at this point penalties are:

- (i) SoP One: \$42,000: and
- (ii) SoP Two: \$56,000

[29] In terms of Mr Buenaventura's ability to pay these penalties, there is no evidence before the Authority. Consequently, no further discount is applied at this point of the process. Had Mr Buenaventura attended the investigation meeting, the circumstances may be different. However, he has tempted or chosen his fate.

[30] Standing now to consider consistency with other comparable situations where the Authority has imposed penalties on persons involved in breaches of minimum employment standards, I find that a penalty of \$42,000 for SoP One and \$56,000 for SoP Two is proportionate given the extent and severity of the breaches involving five workers.

[31] For his involvement in the contravention of employment standards, Mr Buenaventura must pay the Labour Inspector a total of the penalties, as set out in paragraph [30] above, of \$98,000 within 28 days of this determination.

Apportionment of penalties

[32] The Labour Inspector does not oppose a portion of the penalties being paid to the affected workers. In the circumstances of this matter, I have decided this is appropriate. Each worker is to receive \$3,000 of the penalty paid by Mr Buenaventura to the Labour Inspector under the respective statements of problem the penalties were claimed.

[33] Payment of the portion of the penalty to the workers should be satisfied prior to balance of \$83,000 being paid into a Crown Bank Account.

Interest

[34] The Labour Inspector sought interest on arrears ordered recoverable by the Authority. This is appropriate. Mr Buenaventura must pay interest on the arrears owing calculated using the civil debt interest calculator as follows:⁶

- (i) from 14 February 2019 for Harpreet Singh, being the date SoP One was lodged in the Authority, until the date of payment; and
- (ii) from 3 April 2020 for Iqbal Singh, Pratik Patel, Siva Perabattula and Venkat Kasarla, being the date SoP Two was lodged in the Authority, until the date of payment.

Costs

[35] The Labour Inspector as the successful party is entitled to a contribution towards legal costs. The Authority has adopted its usual notional daily tariff based approach to costs. The current tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each day thereafter. This matter involved a one day investigation meeting, so the notional starting point for assessing costs is \$4,500. The Labour Inspector did not seek an uplift in costs. In any event, Mr Buenaventura, not being present, did not provide any submissions seeking either a discount or some other approach to costs.

[36] In all the circumstances of this matter, it is appropriate to award costs to the Labour Inspector. Mr Buenaventura must pay the Labour Inspector \$4,500 as a contribution towards costs within 28 days of the date of this determination.

[37] The Labour Inspector also sought reimbursement of the Authority's filing fees. This is also appropriate. There being two statements of problem, Mr Buenaventura must also pay the Labour Inspector, within 28 days of the date of this determination, \$143.12 as reimbursement for filing fees incurred.

⁶ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

Certificate of determination

[38] I direct the Authority Officer to prepare a certificate of determination and furnish the Labour Inspector with the same.

Andrew Dallas
Chief of the Employment Relations Authority