

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 469
3081753

BETWEEN A LABOUR INSPECTOR
Applicant

AND SIDDHARTHA DOMA
Respondent

Member of Authority: Robin Arthur

Representatives: Sarah Blick, counsel for the Applicant
Respondent in person

Investigation: On the papers

Determination: 21 October 2021

DETERMINATION OF THE AUTHORITY

- A. Siddharta Doma was a person involved in breaches of minimum employment standards. For his involvement in those breaches Mr Doma must pay a penalty of \$28,000 to the Authority within 28 days of the date of this determination. On recovery the penalty is to be transferred to the Crown Account.**
- B. Mr Doma must also pay \$2,071.56 to the Labour Inspector within 28 days of the date of this determination. This amount is required as a contribution to expenses and costs of representation incurred by the Inspector in pursuing this matter.**

Employment Relationship Problem

[1] Labour Inspector Emilie Woodd sought orders for a penalty against Siddharta Doma as a person involved in breaching minimum employment standards. The breaches related to two workers employed by Fabril Solutions Limited (FSL) from 2017

to 2019. Mr Doma was FSL's sole director and held 99 per cent of its shares. FSL was placed in liquidation in February 2020.

[2] An investigation by the Inspector had identified 11 instances of FSL failing to pay minimum wage; failing to pay for annual holidays, public holiday entitlements, time-and-a-half, alternative holiday and days that would otherwise be working days; and failing to keep required records of wages, time, holidays and leave. FSL also failed to pay sick pay to one of the workers.

[3] In a memorandum of understanding they signed on 22 June 2021 the parties resolved payment of the arrears due to the workers for minimum wages and holiday pay. Each worker was owed more than \$16,000. Arrears and interest totalling \$32,646 were paid and the relevant amounts distributed to each worker.

[4] The remaining issue for resolution was whether a penalty should be imposed on Mr Doma. The memorandum settling the arrears due to the workers did not acknowledge the breaches but in a case management conference held by the Authority on 25 June 2021, Mr Doma accepted the breaches had occurred.

[5] The parties agreed the penalty issue should be determined 'on the papers'. Those papers comprised an amended statement of problem lodged by the Inspector, Mr Doma's statement in reply, the parties' memorandum of understanding and the written submissions they each provided on the penalty issue.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the ER Act) 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.

Legal framework

[7] The ER Act, the Holidays Act 2000 (the HA) and the Minimum Wages Act 1983 (the MWA) allow a Labour Inspector to seek a penalty against a person involved in breaches of the employment standards set in each of those statutes.¹

¹ Employment Relations Act 2000, s 142X and s 142W; Holidays Act 2000 s 75 and s 76(1A); and Minimum Wages Act 1983 s 10.

[8] Each act uses the definition in the ER Act to identify who may be determined to be a person involved in such a breach. The aspects of that definition relevant in this case are as follows. The person must have aided or procured the breach or have been knowingly involved in the breach. If the breach is by a company, the person must also have been an officer of the company. A director of the company is defined as an officer.²

[9] There are 12 factors recognised as relevant to setting penalties for breaches of employment standards:³

- The object stated in s 3 of the ER Act (statutory consideration 1);
- the nature and extent of the breach or involvement in the breach (statutory consideration 2);
- whether the breach was intentional, inadvertent or negligent (statutory consideration 3);
- the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (statutory consideration 4);
- whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5);
- the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6);
- previous conduct (statutory consideration 7);
- deterrence, both particular and general (additional consideration 1);
- culpability (additional consideration 2);
- consistency of penalty awards in similar cases (additional consideration 3);
- ability to pay (additional consideration 4); and
- proportionality of outcome to breach (additional consideration 5).

² Employment Relations Act 2000 s 142W.

³ See Employment Relations Act 2000, s 133A and *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

Mr Doma was a person involved in breaches and is liable to a penalty

[10] There is no real contest that the breaches of employment standards occurred or that Mr Doma, in his role as founder and sole director of the company, was involved in them. As noted in his submissions Mr Doma started his small company in 2016. He worked in it as a technician alongside its employees and was the sole person responsible for wage and time records. He was knowingly involved in procuring the breaches through his role as director and in carrying out those functions. He is liable to a penalty as a person involved in breaches of employment standards.

Assessing the penalties

[11] The remainder of this determination has considered the relevant factors in assessing the level of penalty for which Mr Doma is liable.

Object of the ER Act

[12] The object of the ER Act recognises employment relationships must be built on good faith behaviour, acknowledges the inherent inequality of power in those relationships and promotes effective enforcement of employment standards.

[13] As the Inspector submitted, the breaches showed Mr Doma's conduct fell short of the good faith behaviour expected of a company and its director, including by meeting minimum employment standards. This shortfall took advantage of the relative inequality of power in that relationship, particularly as both affected workers were migrants whose work status was dependent on their employment.

Nature and extent of the breaches

[14] The breaches of employment standards, spanning two years, were a result of how Mr Doma organised and administered his company's affairs. Those breaches comprised:

- Failing to pay two workers the minimum wage, in breach of s 6 of the MWA;
- Failing to pay two workers annual holiday pay, in breach of ss 16, 24, 25 and 27 of the HA;

- Failing to pay two workers public holiday entitlements, time and a half, alternative holidays and for public holiday that would otherwise be a working day in breach of ss 49, 50, and 60 of the HA;
- Failing to maintain wage and time records for two workers in breach of s 130 of the ER Act;
- Failing to maintain holiday and leave record for two workers in breach of s 81 of the HA; and
- Failure to pay one worker sick leave pay, in breach of ss 65 and 71 of the HA.

[15] An individual liable to a penalty may be ordered to pay up to \$10,000 for each breach.⁴ Mr Doma therefore had a maximum potential liability of \$110,000 for the five breaches in respect of one worker and for the six breaches in respect of the other worker.

Intention

[16] Mr Doma submitted the breaches were not intentional. He said they occurred because FSL was his first business and he lacked an understanding of employment standards. However, as submitted by the Inspector, those breaches occurred over an extended period. Mr Doma was responsible throughout that period, as the hands and mind of the company, for keeping employment documentation. As he was closely involved in the operation and work of the company, he was aware over an extended period of the hours worked by the two workers. In that context, those breaches had not incurred inadvertently. Objectively observed, they were known and intended. This did not warrant any reduction of the provisional level of penalty.

Loss or damage suffered, gains made, losses avoided?

[17] As shown by the amount of arrears eventually paid in June 2021, both workers were deprived of significant amounts of money they should have got much earlier, and at least by the time their employment ended in 2019. Mr Doma's company benefitted financially through that period by avoiding paying money due to them. Having considered that factor, no reduction of the provisional level of penalty was warranted.

⁴ Employment Relations Act 2000, s 135(2)(a).

Steps taken to mitigate adverse effects

[18] Mr Doma, to some extent, mitigated the effect of the breaches of standards by eventually agreeing to pay arrears. However the belated payment of what was owed anyway should not be given undue weight in setting penalties. To do so risks creating a perverse incentive for some employers “to sit on their hands” until an investigation by a Labour Inspector or a determination of the Authority forces them to pay what the law required to be done earlier.⁵

[19] While Mr Doma had co-operated with the Inspector by eventually paying the arrears, his submissions on the penalty issue sought to minimise the breaches as “just lack of record keeping”. He also sought to denigrate both workers by alleging they had ulterior motives for complaining to the Inspector about breaches of their rights. He demonstrated no remorse or contrition for the effect of those breaches on them.

[20] Having considered that factor, no reduction of the provisional level of penalty was warranted.

Circumstances of the breach, including the vulnerability of employees involved

[21] Both workers were Indian nationals. They came to New Zealand for employment opportunities. Their visas were employer-specific. This tied them to working only for FSL and amplified the inherent inequality of the employment relationship. Both were vulnerable to exploitation in a situation where they relied on their New Zealand employer to do the right thing.

[22] No reduction of the provisional level of penalty was warranted from consideration of that factor.

No previous breaches or penalties

[23] Mr Doma had not come to the attention of the Labour Inspector prior to this investigation. There was no record of any other breaches by FSL since its incorporation in 2016.

⁵ *Daleson*, above n 3, at [33]-[35].

Deterrence

[24] The Inspector submitted a significant penalty should be imposed to deter employers generally, and to those who might fall within the definition of “a person involved” in any employing entity, from misusing their power in the employment relationship to breach employment standards. It would also send an important message that exploitation of migrant workers would not be tolerated.

Culpability

[25] The quantum of arrears due, the length of time over which breaches occurred, the vulnerability of the migrant workers involved and the intentional nature of Mr Doma’s conduct all supported a finding that he had a high degree of culpability for what happened. Some downward adjustment of the maximum provisional penalty was, however, appropriate to account for the relative severity of the breaches. The highest penalty has to be reserved for the most outstandingly bad instances. Reductions proposed by the Inspector in this case were in line with adjustments made in other cases.

[26] Adopting the Inspector’s submission on this point, the provisional starting point for the two record keeping breaches could appropriately be reduced to 50 per cent of the maximum, that is down to \$20,000. For the breach relating to failure to pay sick leave a reduction to 20 per cent of the maximum could be made, that is down to \$2,000. For the other four categories of breach, comprising eight breaches, a starting point of 60 per cent of the maximum was submitted to be appropriate, that is down to a total of \$32,000. The total provisional penalty after making those adjustments was \$58,000.

Consistency

[27] Awards of penalties should be broadly consistent while allowing for the variation in the particular circumstances of each case in the number, nature, duration and impact of breaches.

[28] This case should be compared with others where a penalty has been imposed on a person involved in breaches of employment standards that affected a small number of migrant workers. A sample of similar cases show penalties imposed have ranged from \$13,000 to \$50,000.⁶ The variation results from the matrix of factors being assessed.

⁶ *Labour Inspector v La Wheat Ltd* [2019] NZERA 50 (\$10,000 penalty each for two involved persons); *Labour Inspector v Xu* [2019] NZERA 22 (\$30,000); *Labour Inspector v SS & PK Jador Ltd* (\$20,000), *Labour Inspector v Kiran Cuisine Ltd* [2021] NZERA 279 (\$50,000); *A Labour Inspector v*

[29] For consistency within that range, in light of how those factors applied in this particular case, a downward adjustment to half of the provisional penalty reached so far was appropriate – that is to \$28,000.

Ability to pay

[30] A party's ability to pay is not decisive in determining whether a penalty is imposed or its amount. Ability to pay is one relevant consideration among other factors in the circumstances of any particular case. In principle penalties should not be awarded when genuine impecuniosity of a party, properly established, means there is little real prospect of compliance.⁷ However financial incapacity alone is unlikely to warrant reducing a penalty to “next to nil” given the relevant statutory scheme and its underlying objectives in protecting employment standards. The fortunes of a liable party may also ebb and flow. A finding of liability and an order to pay a penalty of a certain amount is different from its subsequent and eventual enforcement.⁸

[31] Mr Doma's submissions described his financial position as “not good”. He said he had borrowed money from family and friends to get the arrears issue resolved. He also provided information about his present income as a full-time employee of a company which the Inspector's submissions said was owned by Mr Doma's wife. His payslips for that job disclosed a modest income, likely also affected by limitations on its business due to restrictions during the Covid-19 pandemic. However Mr Doma did not disclose whether he had other assets or means from which he could meet a penalty, eventually if not immediately, including by further loans from family, friends or a financial institution.

[32] The information he provided was not sufficient to say Mr Doma could not pay a penalty or only a much reduced one. No reduction from the provisional level of penalty reached was warranted from considering the factor of the ability to pay.

Proportionality

[33] The final factor for consideration is a cross check to ensure the level of penalty imposed is proportionate to the seriousness of the breaches, the level of harm done, the

Saloni Holdings Ltd [2021 NZERA 236 (\$15,000); *A Labour Inspector v Janson Trading Ltd* [2021] NZERA 5 (\$13,000).

⁷ *Preet*, above n 3, at [191].

⁸ *Daleson*, above n 3, at [44]-[45].

amounts unlawfully withheld from the workers, a party's ability to pay and for a deterrent effect.

[34] Penalties imposed should be proportionate to the amounts of money unlawfully withheld from workers at a result of the breaches.⁹ In its decision in the *Preet* case the Employment Court imposed penalties totalling \$100,000 after finding arrears of \$73,000 were due. It settled on that penalty amount after making a reduction for proportionality.

[35] In the present case the workers were owed arrears of \$32,000. Requiring Mr Doma to pay of penalty of \$28,000 was well within the proportionality considered appropriate in the *Preet* case.

[36] A further factor *Preet* identified for reaching a proportionate and just outcome was that the final level of penalty set should not be so high there was no realistic prospect that a liable party could ever pay it. The information about Mr Doma's means to pay a penalty did not indicate this was the case here.

[37] Lastly, \$28,000 was an amount of a sufficient proportion to meet a penalty's purpose of deterring other employers from similar conduct.

Order

[38] Accordingly \$28,000 is the amount Mr Doma must pay as a penalty for being a person involved in breaches of employment standards. The penalty must be paid to the Authority within 28 days of the date of this determination. On recovery the penalty is to be transferred to the Crown Account.

[39] If Mr Doma does not comply with this order, the Labour Inspector or the Chief Executive of the Ministry of Business, Innovation and Employment may recover the penalty in the District Court as a debt due to the Crown.¹⁰

Costs and expenses

[40] In her amended statement of problem the Inspector sought an order for costs and expenses. Mr Doma must reimburse the Inspector for the expense of \$71.56 incurred by paying the Authority fee to lodge an application. He must also pay \$2,000

⁹ *Preet*, above n 3, at [190].

¹⁰ Employment Relations Act 2000, s 135A.

as a contribution to the Inspector's costs of legal representation in pursuing the arrears and penalty ordered.¹¹

Robin Arthur
Member of the Employment Relations Authority

¹¹ Employment Relations Act 2000, Schedule 2 clause 15.