

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 165
5527608, 5531825 & 5541492

5527608

BETWEEN A LABOUR INSPECTOR OF
THE MINISTRY OF
BUSINESS INNOVATION
AND EMPLOYMENT
Applicant

AND FREEMIND ENTERPRIZE
LIMITED
Respondent

5531825

BETWEEN A LABOUR INSPECTOR OF
THE MINISTRY OF
BUSINESS INNOVATION
AND EMPLOYMENT
Applicant

AND GURMAIL LALLY
Respondent

5541492

BETWEEN A LABOUR INSPECTOR OF
THE MINISTRY OF
BUSINESS INNOVATION
AND EMPLOYMENT
Applicant

AND JASVIR SINGH
Respondent

Member of Authority: Vicki Campbell

Representatives: Alastair Dumbleton for Applicant
Gurmail Lally for Freemind Enterprize Ltd and in
Person
Rebekah Revell for Jasvir Singh

Investigation Meeting: 22, 23 and 24 March and 18 April 2016

Submissions Received: 11 April and 4 May 2016 from Applicant
26 April 2016 from Mr Singh
2 May 2016 from Freemind Enterprize Ltd and Gurmail
Lally

Determination: 26 May 2016

DETERMINATION OF THE AUTHORITY

- A. The Labour Inspector is authorised to bring an action for the recovery of money payable by way of holiday pay and minimum wages of employees of Freemind Enterprize Ltd against Mr Lally and Mr Singh.**
- B. Freemind Enterprize Ltd is ordered to pay to the Labour Inspector for the use of the named employees the appropriate sums as set out in the attached schedule totalling \$153,522.27 gross within 28 days of the date of this determination.**
- C. Freemind Enterprize Ltd is ordered to pay to Mr Pannu the sum of \$7,821.40 gross within 28 days of the date of this determination.**
- D. Freemind Enterprize Ltd and Mr Lally are jointly and severally to pay the amounts ordered in paragraphs [84] and [93] of this determination.**
- E. Freemind Enterprize Ltd and Mr Lally are ordered jointly and severally to pay interest at the rate of 5% per annum on the amounts set out in paragraphs [84] and [93] of this determination. Interest is to be calculated from 14 January 2015 until the amounts have been paid in full.**
- F. Freemind Enterprize Ltd is ordered to pay the following penalties into the Authority within 28 days of the date of this determination:**

- a) **\$15,000 for its failure to provide written employment agreements pursuant to section 65(4) of the Employment Relations Act 2000;**
- b) **\$15,000 for its failure to keep holiday records pursuant to section 81 of the Holidays Act 2003;**
- c) **\$15,000 for its failure to pay annual holiday pay;**
- d) **\$10,000 for its failure to pay public holiday pay to 15 of its employees; and**
- e) **\$10,000 for its failure to pay the statutory minimum wages and holiday pay to Mr Pannu.**

G. Costs are reserved.

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment (the Labour Inspector) claims on behalf of 121 Employees that Freemind Enterprize Limited (“Freemind”) has defaulted in the payment of holiday pay amounting to \$152,870.99, defaulted in its statutory obligation to pay 15 employees the rate of time and a half for work performed on a public holiday amounting to \$651.28 and defaulted in its statutory obligation to pay Mr Hardeep Singh Pannu minimum wages and holiday pay of \$7,821.40.

[2] Further, the Labour Inspector claims Freemind has failed to provide written employment agreements to its employees and has failed to keep wage and time or holiday records. The Labour Inspector seeks the imposition of penalties for these breaches.

[3] The total claim by the Labour Inspector for unpaid holiday pay and minimum wages amounts to \$161,343.67. The claims are denied by Freemind and Freemind also denies Mr Pannu was its employee.

[4] After lodging and serving the statement of problem, the Labour Inspector lodged two further applications under section 234 of the Employment Relations Act 2000 (the Act) for authority to bring an action to recover money payable by way of minimum wages or holiday pay against Mr Gurmail Lally, the sole Director and a major shareholder of Freemind, and Mr Jasvir Singh who is Mr Lally's brother and one of two minor shareholders of Freemind.

[5] As permitted by section 174E of the Act this determination has not recorded all the evidence and submissions received from the Labour Inspector and the respondents but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[6] Freemind employed workers to harvest kiwifruit in the Bay of Plenty region. The company contracted with pack houses to harvest the fruit for sale.

[7] There is no dispute that 119 of the 121 employees named in the schedule attached to this determination were employed by Freemind as Kiwifruit workers between 1 April 2009 and 30 September 2013. Two of the 121 employees, were engaged as an office/business manager and a supervisor of Kiwifruit workers.

[8] In the course of investigating the employment of a former Freemind employee the Labour Inspector wrote to Freemind giving notice of the matters being investigated and requested wage and time records for all employees of the respondent for the previous six years.

[9] On or about 19 November 2013 Freemind provided a copy of a wage book and timesheets kept for employees. The records provided were from 1 April 2011. Contrary to the Labour Inspector's request, the records did not go back six years and had not been provided in relation to all of the employees Freemind had engaged during the six year period.

[10] In December 2013 Freemind provided copies of its IRD 345 forms and monthly IRD schedules. These documents related to employees for whom no wage and time records had been provided.

[11] During an interview between the Labour Inspector and Mr Lally, Mr Lally advised the Labour Inspector that as all of his employees were casual he did not provide written employment agreements to them with the exception of Mr Sunil Kumar who was employed as the office/business manager.

[12] Mr Lally advised the Labour Inspector that the produce growers to which Freemind contracted its services did not compensate Freemind for the cost of paying its employees for annual or public holidays. Following the interview the Labour Inspector was advised that the hourly rates paid to the employees were intended to include a component for holiday pay.

Issues

[13] There are a number of issues to be determined which are whether:

- a) there is a bar to the Labour Inspector taking a claim on behalf of employees who have not had contact with the Labour Inspector and whose addresses are unknown;
- b) the Labour Inspector should be authorised pursuant to section 234(2) to bring an action for the recovery of money payable by way of minimum wages or holiday pay against Mr Lally and/or Mr Singh;
- c) Freemind has failed to pay holiday pay including payment for working on a public holiday;
- d) Freemind has failed to pay Mr Hardeep Singh Pannu at least the minimum wage for all hours worked;
- e) Mr Singh and/or Mr Lally directed or authorised the default in payment and if so, whether one or both should be jointly and severally liable to pay the amounts recoverable;
- f) Freemind has failed to provide written employment agreements to its employees;
- g) Freemind has failed to keep wage and time or holiday records; and

h) what if any penalties should be imposed.

Jurisdictional issue

[14] It was common ground that the Labour Inspector does not have contact details for all 121 employees named in the schedule and has not spoken to or otherwise discussed this claim with them. A number of the named employees are no longer resident in New Zealand. The Labour Inspector gave evidence of the steps she has put in place to locate all of the named employees including seeking the assistance of the Inland Revenue through the identification of IRD numbers obtained for the employees.

[15] Mr Singh submitted that the Labour Inspector has no standing to bring a claim on behalf of employees who have not consented to or have knowledge of the proceedings.

[16] Section 228 of the Act empowers a Labour Inspector to:

...commence an action in the name and on behalf of an employee to recover any wages or holiday pay or other money payable by an employer to that employee under the Minimum Wage Act 1983 or the Holidays Act 2003. [my emphasis]

[17] Mr Singh submits that based on the plain meaning of the words “...*in the name and on behalf of an employee...*” the Labour Inspector may only commence an action both in the name of an employee and on that employee’s behalf, that is, as a representative of the employees.

[18] In submissions Mr Singh relied on section 236 to support his argument that the Labour Inspector was required to establish her authorisation for her representation. Section 236 states:

- (1) Where any Act to which this section applies confers on any employee the right to do anything or take any action-
 - (a) In respect of an employer; or
 - (b) In the Authority or the Court,-that employee may choose any other person to represent the employee for the purpose.
...
- (3) Any person purporting to represent any employee or employer must establish that person’s authority for that representation.

[19] The Authority was referred to the decision of the Employment Court in *Adams v Alliance Textiles (New Zealand) Ltd*¹ in support of submissions that the Labour Inspector was required to establish that she was authorised to represent all of the named employees on whose behalf she was taking action.

[20] The *Adams* case was decided under the Employment Contracts Act 1991. That case involved a number of applicants who were represented by Counsel in an action for compliance and penalties. The union initiated that application in the name of 32 employees who were the applicants and who were represented by the union.

[21] When considering the wording in section 58(3) of the 1991 Act, which is similar to the wording in section 236 of the Employment Relations Act, the Court held that the union had to establish its authority to represent the employees who were the named applicants. The Court accepted oral evidence of such authorisation but found only 18 of the 32 had authorised the union to act on their behalf.

[22] This present case can be distinguished from the *Adams* case on the basis that the Labour Inspector is taking an action in her own right and is the applicant. In *Adams* the applicants were the named employees and were represented. The Court reasoned in *Adams* that where applicants are being represented the rule that representatives establish their authority for that representation was sensible. This would avoid a situation where an unsuccessful applicant may find himself or herself burdened with an order for costs. Also the Court held that no person may become an applicant against their will or without their consent.²

[23] In this case, the applicant is the Labour Inspector and any liability found against the Labour Inspector for matters such as costs, would lie directly with the Labour Inspector and cannot be sheeted home to the 121 employees on whose behalf the Labour Inspector is seeking unpaid holiday pay.

[24] Section 236 of the Act allows an employee to choose any other person to represent them where the Act “...confers on any employee the right to do anything or take any action.” [my emphasis]

¹ [1992] 1 ERNZ 982.

² Ibid at pages 988.

[25] Section 228 does not confer a right on an employee to take action, but confers a right on a Labour Inspector directly to take an action to recover money payable under the Minimum Wage Act or Holidays Act. This can be contrasted with section 131 of the Act which specifically confers on an employee the right to recover wages or other money payable by an employer.

[26] Public policy in relation to the minimum code is to discourage any form of exploitation of employees. Employers not meeting their minimum obligations under the law cannot be allowed to profit from their wrong. It cannot be correct that the Authority can order payment of minimum code entitlements against one employer because all of its employees are locatable and allow an employer to retain as profits the underpayments due to its employees not being immediately locatable. If this situation were to be condoned the unscrupulous employers may feel encouraged to take the chance that employees underpaid may later on not be able to be found and the money then retained by the employer.

[27] Further, vulnerable employees may not feel able to take action against their employer because of a fear of possible consequences for them. A Labour Inspector is able to take an action on their behalf without the fear of any consequences to particular individual employees.

[28] I agree with the submissions of the Labour Inspector that the words of the provisions empowering the Labour Inspector to bring actions in the Authority are enabling provisions. These provisions cannot be read as prescribing that the consent of an employee has to be given before the Labour Inspector can bring an action regarding that employee. The only limitation is that the Labour Inspector must take an action in the employee's name and on their behalf. This means any money recovered in that action will be payable to the named employees.

[29] My approach is supported by the wording used in section 82(1) of the Holidays Act which sets out the persons who may request access to, or a copy of, or a certified extract from information in the holiday and leave record relating to an employee. The list includes as separate persons an authorised representative and a Labour Inspector.

Section 234 Application

[30] The Labour inspector applies for authority to bring an action to recover money payable by way of minimum wages or holiday pay against Mr Lally and Mr Singh under section 234(2) of the Act.

[31] Section 234 is now repealed following the passage through Parliament of the Employment Standards Legislation Bill which came into force on 1 April 2016. New provisions in Part 9A of the Act now impose liability on persons previously within the ambit of section 234. Under clause 3(7) of Schedule 1AA of the Act, section 234 continues to apply to proceedings brought in relation to conduct that occurred before 1 April 2016 regardless of whether or not the proceedings were brought before that date.

[32] The conduct relating to this matter occurred between 2009 and 2013. On that basis I have proceeded to determine this matter under the now repealed section 234 pursuant to clause 3(7) of Schedule 1AA of the Act.

[33] The repealed section 234 states:

- (1) This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.
- (2) Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because—
 - (a) the company is in receivership or liquidation; or
 - (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—

the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director, or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.

- (3) Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.
- (4) In this section,—
company has the meaning given to it by section 2(1) of the Receiverships Act 1993

holiday pay means any amount payable under the [Holidays Act 2003] to an employee as pay for an annual holiday or public holiday

minimum wages means minimum wages payable under the Minimum Wage Act 1983.

- (5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

[34] A full bench of the Employment Court in *Labour Inspector v Cypress Villas Limited & Barry Brill*³, held that the purpose of section 234 is to ensure minimum employment entitlements are available to employees, even where employers which are companies may either be insolvent or otherwise unable to pay those minimum entitlements. Third parties may be held liable (jointly or severally) for the defaults of their companies if they directed or authorised the defaults.⁴

Proceedings commenced

[35] Before granting an application under section 234 a Labour Inspector must have commenced an action in the Authority against a company to recover any money payable as minimum wages or holiday pay to an employee of the company.

[36] The Labour Inspector commenced proceedings by lodging a statement of problem in the Authority on 6 November 2014 seeking to recover unpaid holiday pay and minimum wages. On 14 January 2015 the Labour Inspector lodged an amended statement of problem increasing the number of affected employees from 113 to 121.

[37] The Labour Inspector has commenced an action as envisaged under section 234(1) of the Act.

Ability to pay amount claimed

[38] The Labour Inspector must establish to my satisfaction, on the balance of probabilities, the amount claimed in the action, if judgment is given for that amount, is unlikely to be paid in full. The Labour Inspector must establish the improbability of the amount being paid in full because either:

- a) the company is in receivership or liquidation; or
- b) there are reasonable grounds to believe the company does not have sufficient assets to pay the amount claimed.⁵

³[2015] NZEmpC 157.

⁴Ibid at [34].

⁵ Employment Relations Act 2000, section 234(2).

[39] I am satisfied Freemind continues to be a registered company and is neither in receivership nor liquidation.

[40] The Labour Inspector relies on the second limb of section 234(2) of the Act, that is, that there are reasonable grounds to believe the company does not have sufficient assets to pay the amount claimed. The total amount claimed is \$161,343.67.

[41] Soon after a visit to the company by the Labour Inspector on 1 November 2013 Freemind ceased trading. A new company was incorporated on 22 November 2013 called Win Tin Paul Ltd (Win Tin). Win Tin took over Freemind's business operations and began providing labour to the Kiwifruit industry in the Bay of Plenty.

[42] The sole director and shareholder of Win Tin is Mrs Rajwinder Lally, Mr Lally's wife. Mrs Lally is, together with Mr Singh, a minor shareholder of Freemind each owning 20 shares with Mr Lally owning 60 shares.

[43] The Labour Inspector says assets of Freemind have been devolved to the extent that it will be unable to pay, in full, the amounts claimed. Freemind denies devolving its assets and denies it does not have sufficient assets to satisfy an order made against it.

[44] Mr Lally says that while Freemind has ceased trading its statement of position shows a total equity of \$159,126.00. Part of this equity position is made up of shareholder current accounts and upon repayment of the current accounts Freemind will be in a position to satisfy an order made against it. The current accounts are in the names of Mr Lally and Mr Singh.

[45] In addition to its current accounts, Freemind's only other stated assets are vehicles. One vehicle, a Nissan Navara Vehicle valued at \$13,185.00 has been transferred to Win Tin. The other vehicle, a Toyota Hilux valued at \$34,997 has been retained by Mr Singh personally.

[46] The amount claimed is \$161,343.67. Even if the current accounts were able to be repaid there is not enough equity in the company to meet the total claim. In any event, I am not satisfied the current accounts will be repaid. Mr Lally has taken no

steps to repay his current account and Mr Singh disputes the money is owed by him and no steps have been taken to try and recover the money from him.

[47] I am satisfied that the Labour Inspector has established that there are reasonable grounds to believe Freemind does not have sufficient assets to pay the total amount claimed in full.

Was Mr Lally a Director, Officer or Agent

[48] The Labour Inspector must establish that Mr Lally was either a director, officer or agent of the company at the time of the alleged default.

[49] The identity of a company's director is easily ascertained through the company registration documentation. Mr Lally is recorded as a director of Freemind on the companies register. He has been a director since the inception of the company in 2003.

[50] For the purposes of section 234(2) of the Act, I find Mr Lally is a director and held office at the time of the alleged defaults.

Was Mr Singh a Director, Officer or Agent

[51] The Labour Inspector must establish that Mr Singh was a director, officer or agent of the company at the time of the alleged default. Mr Singh is not listed on the companies register as a director. Mr Singh has a 20% interest in the company by way of his shareholding and received drawings from the company and was not employed on a wage or salary.

[52] In relation to whether a person is an "officer" the Court held in *Cypress Villas* that section 234 of the Act is:

...intended to cover persons involved at a senior level in the directorate or management of a company and, in particular, who may have an executive or managerial responsibility for the employment of staff and the payment to them of their remuneration. Whether someone is an "officer" under s 234 will not turn only or even substantially on whether that word is present or absent in his or her title. Determining whether someone is an officer will be a question of fact and degree to be determined in each case by the Authority or the Court.⁶

⁶ *Supra* n 2 at [101].

[53] The Court of Appeal has noted that company officers can be expected to have as much knowledge of a company's business and financial affairs as an individual has of his own.⁷

[54] Mr Singh says his role was as a supervisor in the field. He told me he had responsibility for supervising the workers on the orchard and denies he acted as an officer, director or agent of Freemind. Mr Singh says he was not responsible for calculating wages or negotiating the employment terms and conditions with employees. His sole involvement in the payment of employees of Freemind was in providing the number of hours worked each week for the employees working in the group of workers he supervised in the orchard.

[55] Ms Susan Gernhoefer has been the accountant for Freemind since 2010. Ms Gerhoefer told me Mr Singh received regular payments by way of shareholder salary from Freemind which were recorded as drawings. Mr Singh accepts he received some payments but denies receiving all of the payments attributed to him.

[56] Mr Robert Dunseath is the Compliance Manager with Seeka Kiwifruit Industries Ltd (Seeka). Seeka is a recognised seasonal employer under an Immigration New Zealand scheme. When Seeka engages contractors it has to ensure each contractor is aware of their relevant immigration and employment legal obligations. To do that Seeka provides training and conducts briefings with contractors.

[57] Mr Dunseath has provided the Authority with copies of Seeka's records recording the attendees at all trainings and briefings at which Freemind were represented. It is notable that Mr Lally was the only person attending the sessions where training was provided on the legal requirements of being an employer including:

- a) the need to have employment agreements and the minimum content to be included;
- b) the obligation to pay the minimum wage and the applicable rate;

⁷ *Re GJ Mannix Ltd* [1984] 1 NZLR 309, judgment of McMullin J at page 2 line 13.

c) the requirement to pay holiday pay at 8%; and

d) the obligation to maintain accurate and complete employee records.

[58] If Mr Singh was, as is contended by Mr Lally, responsible for the hiring and firing and payment of wages for staff then it does not make sense that Mr Singh did not attend the training or briefing sessions dealing with employer obligations on behalf of Freemind.

[59] Mr Singh's role was to manage the workers in the orchards, allocating the work of each employee and the orchard on which the work would be undertaken based on the pre-negotiated contracts entered into by Freemind.

[60] Seeka provided copies of company documents signed by Mr Singh. I accept Mr Singh's evidence that he signed these documents because he was the Manager on the orchard at the time and he was authorised to sign the documents confirming an agreement that had already been reached between Freemind and Seeka. While Mr Singh was never involved in any direct negotiating with Seeka the documents signed by Mr Singh were a confirmation of contracts negotiated by Mr Lally on Freemind's behalf. In order to sign these documents Mr Singh must have been aware of the terms entered into by Freemind and Seeka.

[61] I accept that Mr Singh did not have responsibility for the payment or calculation of wages, that task was undertaken by Mr Lally or his office/business manager. Mr Singh provided information to Mr Lally about the employees who had worked under his supervision each day and the number of hours worked by each of those employees. Mr Lally or his office/business manager would then calculate the wages to be paid to each employee and either pass the money with instructions on the amount to be paid to each employee to Mr Singh or another employee.

[62] There was conflicting evidence about whether Mr Singh had any responsibility for the employment of staff. I find on the balance of probability it is more likely than not that Mr Singh did not directly employ staff or negotiate wage rates or other terms of employment.

[63] The Authority has received copies of company documents signed by Mr Singh as if he was a director of the company. In November 2010 Mr Singh signed a “Certificate of Directors as to Fair Value” acknowledging his interest in the remuneration being certified. On 22 August 2010 Mr Singh signed a “Letter of Compilation Engagement” confirming Ataxz Accountants Ltd as Freemind’s accountants.

[64] On 14 November 2012 Mr Singh was one of two guarantors on a contract committing Freemind to the purchase of a Toyota Hilux vehicle from Toyota. Mr Singh and Mr Lally are both recorded as being guarantors for the purchase. This was done in accordance with the purchase agreement which stipulates that two signatures of directors is required where a purchase is being made by a company. Mr Singh is now in possession of this vehicle.

[65] I find Mr Singh was an officer of Freemind. He was part of the executive of the company and was involved at a senior level in the management of the company.

[66] For the sake of completeness I have also considered whether Mr Singh was an agent. The Court in *Cypress Villas* found that the word “agent” was added to take into account the now common out-sourcing of payroll functions although the provider of the outsourced electronic services may not fall into the definition of agent but the person providing the data may be caught.⁸

[67] Although in the context of whether a director was an agent, Justice Hardie Boys in *Trevor Ivory Ltd v Anderson*⁹ stated:

Essentially, I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for the personal liability of both a director and an employee.

[68] I am satisfied Mr Singh’s role was to work in the orchards with other employees in a management capacity but also entered into contracts and signed company documents on behalf of Freemind. Mr Singh had executive and managerial responsibility both actual or imputed.

[69] Mr Singh was an officer and agent of Freemind Enterprize Limited.

⁸ Supra n 2 at [102] – [103].

⁹ [1992] 2 NZLR 517 (CA).

Authorisation to take action against a director, officer or agent

[70] The Court held in *Cypress Villas* that under section 234(2) of the Act a Labour Inspector is required only to name and identify a third party as being either one or more of a director, officer or agent of the company and to allege that they directed or authorised the default and proof of the allegation is not required at this stage.¹⁰

[71] I have found Mr Lally to be a director and Mr Singh to be an officer and agent of Freemind. The Labour Inspector alleges that Mr Lally and Mr Singh have authorised the default in payment of holiday pay and minimum wages.

[72] The Labour Inspector is authorised to bring an action for the recovery of money payable by way of holiday pay and minimum wages of employees of Freemind against Mr Lally and Mr Singh.

Claim for Holiday Pay and payment for Public Holidays

[73] The Labour Inspector claims outstanding holiday pay in the amount of \$152,870.99 plus the amount of \$651.28 being outstanding payment for work performed on a public holiday by 15 of Freemind's employees. The total claim for outstanding holiday pay and payment for public holidays is a total of \$153,522.27.

[74] When the Labour Inspector interviewed Mr Lally he told her that the produce growers to which Freemind contracted its services did not compensate Freemind for the cost of paying its employees for annual or public holidays. Mr Lally then advised the Labour Inspector that the hourly rate paid to employees was intended to include a component for holiday pay.

[75] Section 28 of the Holidays Act allows employers to regularly pay holiday pay with an employees pay if the employee has agreed to this arrangement in their employment agreement and the holiday pay is an identifiable component of the employees pay at the rate of not less than 8%.

¹⁰ *Supra* n 2 at [82].

[76] Only one of the 121 employees employed by Freemind had a written employment agreement and there was no reference in that agreement to the employee having agreed to his holiday pay being paid with his pay.

[77] The wage and time records provided to the Labour Inspector specified an hourly rate of \$13.75 per hour, which was the minimum wage rate required to be paid from 1 April 2013. Holiday pay is an additional payment and is not included as part of the minimum wage. Freemind has not established that a calculation of 8% was one of the components that made up the payment of the pay for any of the 121 employees.

[78] Based on the wage and time records provided to the Labour Inspector, she has calculated the annual holiday pay due to 77 of 121 employees. The rate of 8% has been applied to the gross earnings shown in the wage and time records for each employee.

[79] No wage and time records were provided for the remaining 44 employees. The Labour Inspector has, instead, relied on the IRD Employer Deduction forms and the employer's monthly schedules to quantify the annual holiday pay due for those employees by applying the rate of 8% to the gross earnings shown in the IRD forms.

[80] Mr Singh has submitted that the claim for holiday pay made on behalf of the 44 employees is speculative and based on assumptions. Section 228(3) of the Act applies section 132 of the Act with necessary modifications. Section 132 of the Act allows the Labour Inspector to call evidence to show that Freemind has failed to keep or produce a wages and time record in respect of the named employees and that this failure has prejudiced the Labour Inspector's ability to bring an accurate claim. Once that has been established the Authority may, unless Freemind proves that the claims are incorrect, accept as proved all claims made.

[81] The Labour Inspector has established Freemind has failed to produce a wages and time records in respect of the 44 employees and that failure has prejudiced the Labour Inspector's ability to bring an accurate claim.

[82] On that basis and as provided for in section 132(2) of the Act, in the absence of any evidence from Freemind that the claims are incorrect, I have accepted as proved all claims made by the Labour Inspector in respect of the underpayment of holiday pay for the 121 employees.

[83] The Labour Inspector claims Freemind has failed to pay 15 employees the statutory rate of time and a half for work performed on a public holiday. Mr Lally told the Labour Inspector that his employees did not work on public holidays and therefore no payment was due to them. This evidence is not consistent with the records provided to the Labour Inspector which showed that work had been performed by 15 employees on public holidays. With no evidence to the contrary from Freemind, I have accepted as proved the Labour Inspector's claims for underpayment of wages for work carried out on public holidays by the 15 employees.

[84] Freemind Enterprize Ltd is ordered to pay to the Labour Inspector for the use of the named employees the appropriate sums as set out in the attached schedule totalling \$153,522.27 gross within 28 days of the date of this determination.

Mr Hardeep Singh Pannu

[85] The Labour Inspector claims Mr Hardeep Singh Pannu has not been paid at the statutory minimum rate of pay for all hours worked. The Labour Inspector claims the sum of \$7,242.04 for minimum wages plus holiday pay in the amount of \$579.36 being a total of \$7,821.40, on Mr Pannu's behalf.

[86] Mr Pannu says he worked for Freemind from 26 March 2013 until he was arrested on 27 August 2013. Mr Pannu was an illegal immigrant with no right to work in New Zealand. He was arrested on 27 August 2013, convicted of criminal offences and was imprisoned for nine months. Mr Pannu was deported from New Zealand on 2 October 2013.

[87] Freemind denies Mr Pannu was ever an employee and says he never undertook work for it. Mr Singh told the Authority that he was asked by Mr Lally to provide accommodation for Mr Pannu which he did but Mr Pannu did not carry out any work for Freemind.

[88] Mr Pannu says he was living in Auckland in February 2013 when he asked a friend of his if he could help find him a job. His friend rang Mr Lally who picked Mr Pannu up from the Takanini Sikh Temple and took him back to Tauranga. Mr Pannu was dropped off at Mr Singh's house where he stayed.

[89] Mr Pannu says he started work the following day picking fruit. After the picking season had ended Mr Pannu says he worked doing pruning work. Mr Pannu has provided comprehensive evidence of the orchards he worked on and the names of employees he worked with.

[90] Seeka documents provided to the Authority show that Mr Pannu undertook training with other employees employed by Freemind in winter pruning and tractor driving. Mr Pannu says he was not paid for his work for Freemind except for \$1,000 which he says Mr Singh sent to India for him through a Western Union money transfer. Mr Singh acknowledges he sent this money for Mr Pannu.

[91] Mr Pannu did not keep a record of the days and hours he worked for Freemind and as a result he was unable to tell the Labour Inspector what hours he worked and should be paid for. The Labour Inspector has assessed the wages owed to Mr Pannu based on the same or similar hours worked by another employee, Mr Jadi Magshoud, who Mr Pannu says worked at the same times as he did. The Labour Inspector's calculation has taken into account the \$1,000 Mr Singh sent to India on Mr Pannu's behalf.

[92] I am satisfied it is more likely than not that Mr Pannu worked for Freemind for the period 26 March 2013 to 27 August 2013. Mr Pannu is entitled to receive wages for the hours he worked at the minimum rate of \$13.75 per hour plus holiday pay at the rate of 8%. In the absence of any wages and time records with information to the contrary and pursuant to section 132(2) of the Act I have accepted the Labour Inspector's claim as proven.

[93] Freemind Enterprize Ltd is ordered to pay to Mr Pannu the sum of \$7,821.40 gross within 28 days of the date of this determination.

Liability of Mr Lally and Mr Singh

[94] The Labour Inspector applies to have Mr Lally jointly and severally liable for the recovery of wages and holiday pay. Mr Lally will be liable if the Labour Inspector establishes on the balance of probabilities that he, as a director of Freemind, directed or authorised the default in payment of the minimum wages or holiday pay or both.¹¹

¹¹Employment Relations Act 2000 section 234(3).

[95] In *Cypress Villas* the Court considered the meaning of “default in payment” and “directed or authorised the default in payment” in relation to the payment of minimum wages and holiday pay. The Court held:

We conclude that a “default” in the payment of minimum wages or holiday pay, or both, is the non-payment of those amounts, whether by a failure to pay, a refusal to pay, or any other description or qualification of the non-payment. It does not connote implicitly notions of intention or deliberateness. It is well established ‘minimum code’ employment law that these additional attributes are irrelevant to recovery for non-payment.¹²

...

We consider that the word default ... simply means the failure to comply with the relevant minimum code legislation and to make a required payment. It does not import necessarily notions of deliberateness to breach the law on the part of the third party who directed or authorised the default just as the company’s default or failure to pay does not need to be shown to have been deliberately intended¹³

...

... the doing of something by the third party as opposed to the person’s passivity alone, for which that person will not be liable. ‘Directing’ connotes the giving of consent to another to do something, sometimes at the request of another person.¹⁴

[96] Freemind has defaulted in its obligations to pay holiday pay and minimum wages to its employees and orders for the payment of the money owed has been made earlier in this determination.

[97] As made clear in *Cypress Villas*, persons employing employees are expected and deemed to know the minimum legal requirements and to comply with them. Ignorance of the law or even ability to pay or similar excuses are unavailable to employers to avoid liability.¹⁵

[98] The evidence and documentation produced for the investigation meeting shows that Mr Lally attended training with Seeka about the obligations Freemind had as an employer. This included the obligation to pay holiday pay and to keep accurate and complete employee records.

¹² Supra n 2 at [92].

¹³ Supra n 2 at [94].

¹⁴ Supra n 2 at [96].

¹⁵ Supra n 2 at [31].

[99] I am satisfied, given Mr Lally's direct involvement in calculating and paying the wages of Freemind's employees, that he directed or authorised the default in the payment of holiday pay and minimum wages. Mr Lally knew what his employees were being paid and he is deemed to have known what should have been paid. When Mr Lally calculated the pay each week and/or at the end of the employment relationship he authorised the default in payment of the holiday pay.

[100] Mr Lally was responsible for ensuring all of Freemind's employees received payment for all hours worked at the minimum wage rate or higher. I have found it is more likely than not that Mr Pannu worked for Freemind but did not receive the minimum rate of pay for his labour.

[101] Given his prominent role in the payment and calculation of wages and the training he received from Seeka, I am satisfied the Labour Inspector has proved that Mr Lally has directed or authorised the default in the payment of holiday pay and minimum wages in respect of Mr Pannu.

[102] Mr Singh however, had no involvement in the calculation and payment of wages except to the extent that he provided information to Mr Lally on the number of hours the employees in his group had worked each day and then distributing from time to time the wages which had previously been calculated by Mr Lally. Mr Singh and Mr Lally had split up responsibilities for the operation of the business. Mr Singh looked after the workers on the orchards during the working day, while Mr Lally had responsibility for the employment of staff including all decisions relating to the payment and calculations of wages including holiday pay.

[103] The Labour Inspector has failed to prove that Mr Singh directed or authorised the default in the payment of holiday pay and minimum wages.

[104] Freemind Enterprize Ltd and Mr Lally are jointly and severally to pay the amounts ordered in paragraphs [84] and [93] of this determination.

Interest

[105] The Labour Inspector seeks interest on the sums payable as holiday pay, payment for public holidays and minimum wages from the date the claim was lodged on 5 November 2014 until payment has been made in full.

[106] Clause 11 of Schedule 2 of the Act empowers the Authority to order interest on the whole or any part of the money and for the whole or part of the period between the date the cause of action arose and the date of payment in accordance with the determination of the Authority.

[107] The Labour Inspector lodged two statements of problem. The amended statement of problem included additional employees and was lodged on 14 January 2015. This creates some difficulties in determining the interest to be paid for those employees included in the statement of problem on 14 January 2015.

[108] I have concluded that the most efficient way to deal with the calculation of interest is to order Freemind Enterprize Ltd and Mr Lally jointly and severally to pay interest at the rate of 5% per annum on the amounts set out in paragraphs [84] and [93] of this determination. Interest is to be calculated from 14 January 2015 until the amounts have been paid in full.

Penalties

[109] The Labour Inspector seeks the imposition of penalties against Freemind pursuant to sections 133 and 235 of the Act, section 75 of the Holidays Act 2003 and section 10 of the Minimum Wage Act 1983 for the following breaches:

- a) failure to provide written employment agreements pursuant to section 65(4) of the Act;
- b) failure to keep a wage and time record at all times when required and one which showed in writing the information required by section 130 of the Act;
- c) failure to keep holiday records pursuant to section 8 of the Holidays Act 2003 (the Holidays Act);
- d) failure to pay annual holiday pay;
- e) failure to pay public holiday pay to 15 of its employees; and
- f) failure to pay the statutory minimum wages to Mr Pannu.

[110] Section 135(5) of the Act and section 76(5) of the Holidays Act requires actions for the recovery of a penalty to be commenced within 12 months of the earlier date of when the breach first became known or when the breach should reasonably have become known to the Labour Inspector.

[111] It is accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*¹⁶ the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) the seriousness of the breach;
- b) whether the breach is one-off or repeated;
- c) the impact, if any, on the employee/prospective employee;
- d) the vulnerability of the employee/prospective employee;
- e) the need for deterrence;
- f) remorse shown by the party in breach; and
- g) the range of penalties imposed in other comparable cases.

Failure to provide written employment agreements

[112] The Labour Inspector seeks the imposition of a penalty against Freemind for its failure to comply with section 65 of the Act.

[113] During an interview between the Labour Inspector and Mr Lally on 7 November 2013, Mr Lally advised the Labour Inspector that as all of his employees were casual he did not provide written employment agreements to them with the exception of Mr Sunil Kumar who was employed as the administration manager.

[114] The interview took place on 7 November 2013. The Labour Inspector commenced the action for recovery of a penalty by lodging a statement of problem in the Authority on 6 November 2014. The action was commenced within 12 months of the Labour Inspector knowing of the failure to comply with section 65 of the Act.

¹⁶ [2014] NZEmpC 65.

[115] Mr Singh submitted that the Labour Inspector became aware of a potential cause of action on 19 September 2013 when she interviewed Mr Pannu. The Labour Inspector may have been aware of a potential breach or breaches at that time, but it was not until she had interviewed Mr Lally that the actual breaches and the extent of those breaches was identified.

[116] The failure to provide written employment agreements left employees without any knowledge of their legal entitlement to be paid annual holidays or the payment they were entitled to receive for working on public holidays.

[117] The breach was not a one off breach but affected a significant number of mainly migrant employees who were working on a casual basis without the opportunity for permanent ongoing work. Migrant workers are vulnerable to exploitation due to the conflict that would necessarily arise for them if they complain that they are not receiving minimum standards. This is especially so where the workers, as they were in this case, are also reliant on Freemind for their accommodation. A number of the workers were provided accommodation at Mr Singh's house.

[118] It is not acceptable for employers to employ staff and ignore their statutory obligations. Mr Lally was fully aware of his obligations as an employer. He confirmed that he attended Seeka's training which covered his legal obligations including the requirement to have written employment agreements and the minimum requirements to be contained within the employment agreement. Mr Lally has shown little or no remorse for his failure to provide employment agreements.

[119] This case warrants the imposition of a penalty which will also serve as a deterrent message and I have formed the view that an appropriate penalty is \$15,000.

[120] Freemind Enterprize Limited is ordered to pay a penalty of \$15,000 into the Authority within 28 days of the date of this determination which will then be paid to the Crown.

Failure to keep wage and time records

[121] In her first statement of problem the Labour Inspector sought the imposition of a penalty against Freemind under section 130 of the Act for its failure to keep wages

and time records for each of its employees at all times when required and which met the requirements of section 130 of the Act.

[122] In submissions the Labour Inspector has acknowledged that section 130 of the Act does not expressly confer a right on her to seek penalties for the alleged breaches and is withdrawing this claim for a penalty. I will make no determination regarding this claim.

Failure to keep holiday records

[123] The Labour Inspector says holiday records were not kept in accordance with the requirements of section 81 of the Holidays Act 2003 and seeks the imposition of a penalty under section 75 of the Holidays Act.

[124] There is no dispute that holiday records were not kept by Freemind and were therefore not able to be provided to the Labour Inspector. This constitutes a breach of Freemind's statutory obligations under section 81 to keep such records.

[125] Freemind has disregarded its statutory obligations to pay holiday pay. Meetings its obligations to keep records may have brought this issue to Freemind's attention and may have avoided the necessity for this application.

[126] I am satisfied that the breaches are serious and sustained. This was not a one off breach. The breach has continued for at least the six year period from 2009 to 2013. The impact on Freemind's employees, who I have found in the main are vulnerable due to their migrant and casual status, is that they have been deprived of their lawful entitlements, which equate in some instances to several thousand dollars.

[127] No remorse has been discernible from Mr Lally on behalf of Freemind.

[128] The breaches warrant the imposition of a penalty which will also serve as a deterrent message. I have formed the view that an appropriate penalty is \$15,000.

[129] Freemind Enterprize Limited is ordered to pay a penalty of \$15,000 into the Authority within 28 days of the date of this determination which will then be paid to the Crown.

Failure to pay holiday pay

[130] The Labour Inspector seeks the imposition of a penalty for Freemind's failure to pay holiday pay to its employees.

[131] For all of the reasons set out in the above paragraphs relating to other breaches by Freemind, I have concluded that the failure to pay holiday pay is a serious and sustained breach which has had a significant impact on a significant number of vulnerable employees. I have formed the view that an appropriate penalty is \$15,000.

[132] Freemind Enterprize Limited is ordered to pay a penalty of \$15,000 into the Authority within 28 days of the date of this determination which will then be paid to the Crown.

Failure to pay public holiday pay

[133] The Labour Inspector seeks the imposition of a penalty for Freemind's failure to pay public holidays at the rate of time and a half for 15 of its employees.

[134] For all of the reasons set out earlier in the determination relating to the imposition of penalties for other breaches by Freemind, I have concluded that the failure to pay holiday pay is a serious and sustained breach which has had a significant impact on a number of vulnerable employees. I have formed the view that an appropriate penalty is \$10,000. While a smaller number of employees have been affected the breach is no less serious.

[135] Freemind Enterprize Limited is ordered to pay a penalty of \$10,000 into the Authority within 28 days of the date of this determination which will then be paid to the Crown.

Failure to pay minimum wages

[136] The Labour Inspector seeks the imposition of a penalty for Freemind's failure to minimum wages and holiday pay to Mr Pannu.

[137] I have concluded that the failure to pay minimum wages and holiday pay is a serious and sustained breach which has had a significant impact on Mr Pannu. I have formed the view that an appropriate penalty is \$10,000.

[138] Freemind Enterprize Limited is ordered to pay a penalty of \$10,000 into the Authority within 28 days of the date of this determination which will then be paid to the Crown.

Costs

[139] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Labour Inspector shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Freemind, Mr Lally and Mr Singh shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[140] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell

Member of the Employment Relations Authority

SCHEDULE

Name of Employee	Total Arrears Owed
1 AMANDEEP SINGH	\$ 1,317.25
2 AMANDIP SINGH	\$ 5,496.55
3 AMRITAL SOHAL SINGH	\$ 252.00
4 ARJUN SINGH	\$ 1,660.51
5 BAHADER JUNG	\$ 1,668.40
6 BALBIR SINGH	\$ 335.50
7 BALDEET SINGH	\$ 252.00
8 BALHAR SINGH	\$ 5,048.13
9 CHANCHAL SINGH	\$ 442.56
10 CHAND SHAEHER	\$ 2,744.69
11 CHANPREET KANG	\$ 381.12
12 CHARNJIT ATHWAL	\$ 5,297.93
13 CHARNJIT SINGH	\$ 450.88
14 CHUHAR SINGH	\$ 1,835.76
15 DANIEL FIBIGER	\$ 167.20
16 DILAWAR SINGH	\$ 1,259.52
17 EDWARD TAKUITOGA	\$ 252.00
18 GAJANDEEP ATHWAP	\$ 876.19
19 GAURAV ARORA	\$ 2,974.31
20 GREWAL SINGH	\$ 814.00
21 GURBHEJ SINGH	\$ 778.80
22 GURDARSHAN SINGH	\$ 632.00
23 GURDEL SINGH	\$ 273.90
24 GURDEV SINGH (1)	\$ 81.60
25 GURDEV SINGH (2)	\$ 418.00
26 GURDIAL SINGH	\$ 367.04
27 GURINDER SAMRA	\$ 81.60
28 GURMEET SANDHU	\$ 164.80
29 GURPRIT SINGH	\$ 4,072.21
30 GURUPRIT SINGH	\$ 3,125.68
31 GURVINDER PAL SINGH	\$ 1,161.23
32 GURWINDER SINGH (1)	\$ 228.44
33 GURWINDER SINGH (2)	\$ 431.75
34 HARDEEP SINGH PANNU	\$ 7,821.40
35 HARDEEP SINGH (1)	\$ 179.20
36 HARDEEP SINGH (2)	\$ 591.80
37 HARJINDER SINGH (1)	\$ 410.49
38 HARJINDER SINGH (2)	\$ 1,162.02
39 HARKEWAL SINGH	\$ 5,773.02
40 HARMANJIT SINGH	\$ 4,844.77

Name of Employee	Total Arrears Owed
41 HARPREET SINGH (1)	\$ 683.52
42 HARPREET SINGH (2)	\$ 250.80
43 HARSIMARAN SINGH	\$ 367.82
44 HARSIMRANJIT SIDHAR	\$ 3,189.43
45 HEMANT VERMA	\$ 81.60
46 INDERJIT SINGH	\$ 248.80
47 JADI MAGHSOUD	\$ 659.36
48 JAGDEEP SINGH	\$ 528.00
49 JAGDEEP UPPAL	\$ 278.08
50 JAGJEET SINGH	\$ 389.76
51 JAGMITTAR HUNDAL	\$ 264.00
52 JARNAIL SINGH	\$ 1,248.64
53 JASKIRAT SINGH	\$ 332.40
54 JASMAIL SINGH	\$ 383.90
55 JASPAL SINGH	\$ 1,165.65
56 JASPREET DANG	\$ 1,225.40
57 JATINDER SINGH	\$ 503.76
58 JITENDER SINGH	\$ 471.04
59 JOGINDER SINGH	\$ 2,582.44
60 JUNG BAHADER	\$ 2,830.02
61 KAMALVEER SINGH	\$ 528.00
62 KASANJOT SOHAF	\$ 1,443.27
63 KEWEL KUMAR	\$ 1,447.22
64 KISHOR NANAD	\$ 2,967.80
65 KULBIR SANDHU	\$ 264.00
66 KULDEEP KAUR	\$ 117.44
67 LAKHWINDER SINGH	\$ 265.65
68 LAKPREET SINGH	\$ 408.00
69 LEPANI RADU	\$ 252.00
70 MAJOR SINGH	\$ 4,164.48
71 MALKIT SINGH (1)	\$ 4,129.08
72 MALKIT SINGH (2)	\$ 342.40
73 MANDEEP KAUR	\$ 777.69
74 MANDEEP SINGH	\$ 326.40
75 MANPREET SINGH (1)	\$ 501.60
76 MANPREET SINGH (2)	\$ 334.40
77 MANI SINGH	\$ 349.80
78 MANINDER SINGH	\$ 1,551.63
79 MANJIT SINGH	\$ 80.00
80 MAVHEET SINGH	\$ 620.84
81 MOHINDER SINGH	\$ 5,828.12
82 MONA TAKUITOGA	\$ 252.00

Name of Employee	Total Arrears Owed
83 NAND KISHOR	\$ 2,718.16
84 NARINDER SINGH (1)	\$ 934.08
85 NARINDER SINGH (2)	\$ 5,920.20
86 NASINDER SINGH	\$ 392.15
87 NIRANKAR SINGH	\$ 747.52
88 OM PARKASH	\$ 1,247.04
89 PAPINDER SINGH	\$ 5,993.67
90 PARAMDEEP SINGH	\$ 864.60
91 PARAMVEER SINGH	\$ 828.85
92 RAJESH KUMAR	\$ 750.40
93 RAJINDER SINGH	\$ 325.04
94 RAJWINDER KAUR	\$ 955.96
95 RASANDEEP SINGH	\$ 760.00
96 RAVI KUMAR	\$ 665.14
97 RAVI RAI	\$ 804.10
98 RAVINDERBIR SINGH	\$ 678.80
99 REHMAT ALI	\$ 226.04
100 RESHAM KAUR	\$ 335.50
101 ROBERT TE HUIA	\$ 277.75
102 SAKI ROUNDS	\$ 183.20
103 SAMLA SINGH	\$ 752.40
104 SANDEEP KAUR	\$ 688.96
105 SANDHU GUUMEET	\$ 86.60
106 SHAEMER CHAND	\$ 3,040.24
107 SHAMSHER SINGH	\$ 1,922.41
108 SITI NABETE	\$ 252.00
109 SUKHBIR SINGH	\$ 832.56
110 SUKHPREET SINGH	\$ 1,038.08
111 SUKHWINDER SINGH	\$ 1,466.17
112 SUNIL KUMAR	\$ 3,872.20
113 SURJIT SINGH	\$ 5,463.18
114 SUVDIP SINGH	\$ 1,632.64
115 TARVINDER CHAHAL	\$ 408.00
116 TALJINDER SINGH	\$ 428.40
117 TANMEET SINGH	\$ 477.40
118 VALESI SEVAD	\$ 1,267.50
119 VATAUDEEP SIDHU	\$ 586.24
120 VERMA HEMANT	\$ 506.00
121 WAISAKE NAIVALULUA	\$ 252.00
	\$ 161,343.67