

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 383
5626754

BETWEEN A LABOUR INSPECTOR
Applicant

A N D JUST KEBAB LIMITED
Respondent

Member of Authority: Anna Fitzgibbon
Representatives: Alastair Dumbleton, Counsel for Applicant
 No appearance by or for Respondent
Investigation Meeting: 10 November 2016 at Auckland
Submissions Received: 3 and 17 November 2016 from Applicant
Date of Determination: 22 November 2016

DETERMINATION OF THE AUTHORITY

- A. Just Kebab Limited failed to pay its former employee, Mr Yusuf Corten minimum wages, holiday pay, holiday pay for alternative days in lieu and annual holiday pay upon termination of his employment.**
- B. Within 21 days of the date of this determination, Just Kebab Limited is to make the following payments totalling \$33,661.42 gross, to the Labour Inspector, for the use of Mr Yusuf Corten:**
- (a) \$28,262.50 gross, minimum wages;**
 - (b) \$1,404 gross, holiday pay at time and a half for public holidays worked;**

- (c) **\$936 gross, holiday pay for alternative days in lieu of public holidays worked;**
 - (d) **\$3,058.92 gross, annual holiday pay due on termination of employment;**
 - (e) **interest on the sum of \$33,661.42 at the rate of 5% per annum from 27 May 2015 until the date of payment.**
- C. **For breaches of its obligations under the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000 to pay its employee, Mr Yusuf Corten, wages and holiday pay and for its failure to keep accurate records of wages, time, holiday and leave entitlements, Just Kebab Limited must pay to the Authority, for transfer to the Crown account, penalties totalling \$40,000.**
- D. **\$20,000 of the total amount of penalties (\$40,000) is to be paid to the Labour Inspector for the use of Mr Yusuf pursuant to s.136(2) of the ERA.**
- E. **Just Kebab Limited must pay to the Labour Inspector \$500.00 as a contribution to her costs of representation, \$71.56 in reimbursement of the fee paid by her to lodge the application in the Authority.**
- F. **Just Kebab Limited must pay to the Labour Inspector for the use of the witnesses, witness expenses of \$906 for Mr Corten and \$47.88 for Ms Harrison.**
- G. **For clarity, all the above payments are to be made by Just Kebab to the Labour Inspector within 21 days of the date of this determination.**

Employment relationship problem

Underpayments of minimum wages and holiday pay by Just Kebab

[1] Labour Inspector Erin Spence seeks a determination from the Authority that Mr Yusuf Corten was employed by Just Kebab Limited (Just Kebab) from 9 February 2013 to late September 2013.

[2] The Labour Inspector seeks orders to recover underpayments of minimum wages and holiday pay she says are due by Just Kebab to Mr Corten.

Amounts sought

[3] Minimum wages claimed to be owing by Just Kebab to Mr Corten for the period of his employment amount to \$28,262.50 gross. This is the balance owing to Mr Corten after deducting wage payments of \$7,130 gross made to him by Just Kebab during the course of his employment.

[4] The Labour Inspector has calculated wages at time and a half for public holidays worked by Mr Corten to amount to \$1,404 gross, alternative holidays in respect of public holidays worked amount to \$936 gross and holiday pay for the period of Mr Corten's employment to be \$3,058.92 gross.

Penalties for breaches of minimum code legislation by Just Kebab

[5] Orders are sought by the Labour Inspector for penalties to be imposed on Just Kebab for multiple breaches claimed of the Minimum Wage Act 1983 (MWA), the Holidays Act 2003 (Holidays Act) and the Employment Relations Act 2000 (ERA).

Holidays Act

[6] Claimed breaches by Just Kebab of the Holidays Act include a failure to keep accurate holiday and leave records (s.81), failure to pay Mr Corten wages at a rate of time and a half for public holidays worked by him (s.50), failure to provide Mr Corten with alternative holidays to be taken in lieu of public holidays worked by him, failure to pay those alternative holidays to him at the termination of employment (s.60) and non-payment of holiday pay owing to Mr Corten at the termination of employment (s.27).

Minimum Wage Act

[7] The Labour Inspector claims a breach by Just Kebab of the MWA, being its failure to pay Mr Corten the minimum wage (s.6).

Employment Relations Act

[8] In respect of the failure by Just Kebab to keep wage and time records for Mr Corten, the Labour Inspector claims a breach of the ERA (s.130).

Penalties sought

[9] The Labour Inspector seeks penalties pursuant to s135 of the ERA, up to a maximum of \$20,000 for each breach of the MWA (1 breach), Holidays Act (4 breaches) and the ERA (1 breach). Total penalties sought by the Labour Inspector amount to \$120,000.

Statement in reply

[10] Just Kebab failed to file a statement in reply.

The Authority's investigation

[11] Just Kebab failed to file a statement in reply despite the statement of problem being served on it on 19 September 2016. It was only after the notice of investigation meeting was served on Just Kebab on 28 October 2016 that the director of Just Kebab, Mr Ziya Dayioglu, emailed the Authority seeking that the investigation meeting be dealt with by video conference. The reasons given were that Mr Dayioglu could not arrange time off from earning a living, there was insufficient time to prepare and he was unable to afford travel and accommodation costs. No evidence was provided to the Authority in support of these assertions.

[12] Mr Dayioglu was informed the investigation meeting would be proceeding in Tauranga on 10 November 2016.

[13] Just Kebab was aware of the proceedings as it had been served on 19 September 2016. It failed to file a statement in reply, failed to participate in the Authority's telephone conference held to discuss the investigation meeting or to comply with the Authority's directions.

[14] There was no application to the Authority by Just Kebab seeking leave to respond to the statement of problem. The Labour Inspector had prepared witness statements in accordance with directions made at the telephone conference and was prepared to attend the investigation meeting on 10 November. In all the circumstances, the Authority determined its investigation meeting was to proceed as scheduled.

Non-appearance by Just Kebab

[15] On the morning of 9 November 2016, the Authority received a statement from Mr Dayioglu dated 8 November 2016. The statement was extremely difficult to understand but repeated information already provided by him to the Labour Inspector.

[16] Attached to the statement, were documents from the companies office detailing the current directors of Just Kebab. Both directors, Mr Dayioglu and Mr Osman Efendi are recorded as having residential addresses in Rotorua. The Authority understands Mr Dayioglu currently lives in Christchurch.

[17] The registered office of Just Kebab is in Rotorua, which is in close proximity to Tauranga where the investigation meeting was held.

[18] No representative of Just Kebab attended the investigation meeting. It had adequate notice of it, it failed to seek the Authority's leave to respond and the reasons for non-attendance were insufficient¹.

[19] At the date of the investigation meeting and the date of this determination, Just Kebab remained a registered company. Its registered office, at an address in Rotorua, remained unchanged from when the Labour Inspector had lodged her application. As Just Kebab remained an existing legal entity, the Authority could proceed with its investigation and determine its liability in respect of minimum wages, and holidays that Mr Corten claims he is owed together with penalties.

[20] As permitted by s.174E of the ERA, this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

¹ Employment Relations Act 2000, Schedule 2, clause 12

The Labour Inspector's evidence

[21] The Labour Inspector's evidence comprised a written witness statement from her together with a witness statement from the employee, Mr Corten, and his former partner, Ms Shanlee Harrison. Each of the witnesses affirmed that their evidence was true and correct. Mr Dayioglu emailed a statement to the Authority which was received by it a day before the investigation meeting. This was read and taken into account.

Relevant Facts

[22] Just Kebab operates a Kebab shop called "Just Kebabs" in Rotorua. Mr Dayioglu and Mr Osman Efendi are directors and shareholders of Just Kebab.

Mr Corten's employment by Just Kebab

[23] Mr Corten is an immigrant from Turkey and arrived in New Zealand in 2011. In February 2013, Mr Corten settled in Rotorua. Mr Corten applied for the position of Chef at Just Kebabs restaurant and was interviewed by telephone by Mr Efendi. On his first day of work Mr Corten met both Mr Efendi and Mr Dayioglu.

[24] Mr Corten is an experienced chef, with more than 20 years' experience working in restaurants in Turkey. Mr Corten was employed by Just Kebab as a chef from 9 February 2013 until late September 2013.

[25] Mr Corten was provided with a written employment agreement which both he and Mr Dayioglu signed on 20 June 2013. The job description attached to the employment agreement specified Mr Corten's hours of work as 40 hours per week and his remuneration as \$18 per hour.

[26] On 22 July 2013, Mr Yusuf obtained a 2 year work visa allowing his employment by Just Kebab.

[27] For almost the entire period of his employment Mr Corten was in a sole charge position. Mr Corten prepared food, attended to customers and cleaned up at the end of each night. Mr Corten worked 6 days a week, starting each day at approximately 8.30am and finishing at 9.30 or 10pm. Mr Corten said he was very tired and took no holidays during the period he worked at the restaurant.

[28] Mr Corten's partner at the time, Ms Harrison, gave evidence of Mr Corten's long work hours and its impact upon him.

[29] Mr Corten was paid \$720 a week by Just Kebab which was paid to him in cash or by cheque.

Resignation

[30] Mr Corten resigned in September 2013 following some disagreements with Mr Efendi. Mr Corten says he became concerned after he had an accident at work that Just Kebab was not acting in accordance with the law. When he raised matters with Mr Efendi, he was threatened and told that his visa may be in jeopardy.

[31] A number of months after his resignation, Mr Corten made a complaint to the Labour Inspector that he had not received his minimum entitlements from Just Kebab during his employment by it.

Labour Inspector's investigation

[32] Upon receipt of the complaint, the Labour Inspector initiated an investigation which included requesting Just Kebab to provide Mr Corten's employment records. Employee records and Mr Corten's employment agreement were subsequently provided by Just Kebab to the Labour Inspector for inspection. The Labour Inspector also conducted interviews with Mr Dayioglu, Mr Corten and Ms Harrison.

[33] On 27 May 2015, the Labour Inspector provided her investigation report to Just Kebab setting out her findings. In December 2015, the Labour Inspector completed her investigation concluding that Just Kebab was in breach of the MWA, Holidays Act and ERA.

Labour Inspector's conclusions

[34] The Labour Inspector concluded that Mr Corten had worked approximately 13 hours a day, 6 days a week for Just Kebab during his employment by it. This conclusion was confirmed by the Labour Inspector and by Mr Corten and Ms Harrison at the investigation meeting. The Labour Inspector found that Mr Corten was not paid the minimum wage for the period he worked for Just Kebab, in breach of the MWA.

[35] The Labour Inspector also found that Mr Corten had not been paid wages at the rate of time and a half when he worked on public holidays, had not been provided alternative holidays when he worked on a public holiday nor payment of holiday pay for the alternative holidays in lieu. Further, that Just Kebab had not kept wage and time records or leave records for Mr Corten.

The issues

[36] The following issues require determination by the Authority:

- (a) Is Mr Corten owed minimum wages, holiday pay, public holiday pay and pay for alternative days in lieu;
- (b) Were the alleged breaches by Just Kebab of the MWA, Holidays Act and ERA established on the balance of probabilities;
- (c) Are penalties appropriate for the breaches;
- (d) Should penalties be imposed for individual breaches or on a global basis;
- (e) What level of penalty should be imposed;
- (f) Should any part of the penalties be awarded to Mr Corten;
- (g) Should a contribution to the costs of representation be awarded to the successful party.

Were the breaches established?

[37] Just Kebab failed to file a statement in reply, failed to seek leave to respond to the statement of problem and failed to appear at the investigation meeting.

[38] The evidence on behalf of the Labour Inspector established it was more likely than not that Just Kebab failed to comply with its statutory obligations when operating its Kebab shop business and failed in its statutory obligations to Mr Corten.

[39] As a result, Mr Corten is owed arrears of minimum wages and holiday pay by Just Kebab as follows:

- (a) \$28,262.50 gross being the balance of minimum wages, after deducting payments of wages totalling \$7,130 by Just Kebab;
- (b) \$1,404 gross holiday pay at time and a half for public holidays worked;
- (c) \$936 gross holiday pay for alternative days in lieu of public holidays worked;
- (d) \$3,058.92 gross annual holiday pay due on termination of employment.

[40] Just Kebab is ordered to pay the Labour Inspector (for the use of Mr Corten) the sum of \$33,661.42 gross.

Interest

[41] The Authority may, under clause 11 of the second schedule to the ERA, if it thinks fit, order the payment of interest at the rate prescribed under section 87(3) of the Judicature Act 1908. I intend to do so from the time that the Labour Inspector provided Just Kebab with her investigation report on 27 May 2015 until the date of payment.

[42] I order Just Kebab to pay interest on the sum of \$33,661.42 gross at the rate of 5% per annum from 27 May 2015 until the date of payment. The entire amount including interest is to be paid by Just Kebab within 21 days of the date of this determination.

Are penalties appropriate?

[43] The following breaches of statutory obligations were established on the balance of probabilities:

- (a) Mr Corten was not paid the applicable rate of minimum wages for all hours worked by him (s.6 MWA);
- (b) Mr Corten was not paid at time and a half for work performed on public holidays (s.50 Holidays Act), was not paid for alternative days off in lieu (s.56 Holidays Act), was not paid holiday pay for alternative

holidays on pay remaining untaken(s.60 Holidays Act) and was not paid holiday pay upon termination of employment (s.27 Holidays Act);

(c) Just Kebab failed to keep an accurate holiday and leave record for Mr Corten (s.81 Holidays Act);

(d) Just Kebab failed to keep time and wage records for Mr Corten (s130 ERA).

[44] Harm resulted from Just Kebab's failure to comply with its statutory obligations which meant that Mr Corten was not paid what he was entitled to be paid each week. This caused Mr Corten financial stress, he had very little to live on each week and he spoke of how tired he was working long hours in a sole charge position with no holidays.

[45] Mr Corten was afraid that if he raised any issues with the directors of Just Kebab, they would not support his work visa and once obtained, may take it away. This threat was confirmed by Ms Harrison who said she saw a threatening text to Mr Corten from Mr Efende.

[46] Further, the failure by Just Kebab to comply with its statutory obligation to keep wage, time and holiday records adversely affected the Labour Inspector's ability to effectively carry out her statutory role of ensuring employees are paid in accordance with the law. Just Kebab also potentially unfairly gained a competitive advantage in business by not meeting statutory compliance costs.

The Law

[47] A Full Bench of the Employment Court in *Borsboom (Labour Inspector) v Preet Pvt Ltd & Anor*² has very recently considered the approach to be taken by the Authority and the Court when considering penalties for breaches of minimum employment entitlements.

[48] The judgment in *Borsboom* is comprehensive and includes a full discussion on the penalties jurisdiction of the Court and the Authority. Reference is made to the penalty regimes in the United Kingdom, Australia, British Columbia and Ontario.

² *Borsboom (Labour Inspector) v Preet Pvt Ltd & Anor* [2016] NZEmpC 143

[49] The Court sets out the objectives of penalties in employment law generally at [61]-[63]. To summarise they are to:

- Punish those who breach statutory obligations;
- Deter deliberate breaches;
- Compensate the victim of the breach;
- Eliminate unfair competition in business

[50] At para.[66], the Court refers to and endorses the approach in principle to penalties adopted by Judge Inglis in *Tan v Yang*³ and by Judge Corkill in *O'Shea v Pekanga o Te Awa Farms Ltd*⁴.

[51] In *Tan v Yang*, Judge Inglis sets out a “non-exhaustive list of factors [that] may usefully be considered in assessing a penalty”. Factors are as follows:

- The seriousness of the breach;
- Whether the breach is one-off or repeated;
- The impact, if any on the employee/prospective employee;
- The vulnerability of the employee/prospective employee;
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

[52] At para.[68] the Court in *Borsboom* added other factors to this list which it stated:

... also need to be assessed by the Authority and the Court in determining whether a penalty should be imposed and, if so, be reflected in that penalty”:

- When assessing deterrence, to do so both in relation to the particular person to be penalised and to the wider community of employers;
- When considering the seriousness of the breach, the degree of culpability of the person in breach;
- The general desirability of consistency in decisions on penalties; and

³ [2014] NZEmpC 65 at [32]

⁴ [2016] NZEmpC 19 at [57]

- When assessing a penalty or penalties, to stand back and evaluate whether the anticipated outcome is one which is proportionate to the breach or breaches for which the penalty is imposed.

[53] At [69] of *Borsboom*, reference is made to *O’Shea v Pekanga o Te Awa Farms Ltd*, in which Judge Corkill refers to the need to assess what, if any, penalty should be imposed in respect of each class of breach and states⁵:

... However, it will also be necessary to consider the totality of any individual breaches, so as to ensure there is a proportionate outcome- an approach which has previously been described as the “totality principle”...

[54] The Court in *Boorsboom* then introduces a “four step” process for the Authority and the Court to follow when assessing penalties in order to provide “a uniform, reasonably predictable result” and states that the “four steps should also ensure that fixing the amount of a penalty, or penalties, is consistent and transparent”. At para.[151] the four step approach is summarised as follows:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived in step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

Applying the four step approach to the current case

Nature and number of breaches (Step One)

[55] The breaches have all been identified earlier in this decision. In summary, the Labour Inspector claimed and it was not disputed by Just Kebab that there was one breach of the MWA, four breaches of the Holidays Act and one breach of the ERA. Each breach has a maximum penalty of \$20,000 under s.135 of the ERA. A potential maximum total of \$120,000.

⁵ Para.[57]

Breaches of MWA

[56] The breach of the MWA is the failure by Just Kebab to pay Mr Yusuf the minimum hourly remuneration each payday. Applying the analysis in *Borsboom*, if each such breach occurred on multiple occasions during the course of employment, this would amount to hundreds of breaches by Just Kebab in relation to its obligation to pay Mr Corten minimum wages. A global penalty in relation to the repeated non-payment of the minimum wage each pay day seems appropriate and in line with the discussion in *Borsboom* at [141] and [155]. It is in effect a single course of conduct by Just Kebab and this was accepted by the Labour Inspector.

[57] The penalty in this instance would be up to a maximum of \$20,000 for the repeated breaches of s.6 of the MWA by Just Kebab in failing to pay Mr Corten the minimum wage each week of his employment.

Breaches of Holidays Act

[58] The four breaches of the Holidays Act are the failure to keep holiday and leave records (s.81), failure to pay time and a half for public holidays (s.50), failure to provide alternative holidays for working public holidays (s.60) and failure to pay holiday pay on termination of employment (s.27).

Breach of ERA

[59] Just Kebab failed to keep time and wage records in breach of s.130 of the ERA. This is one breach of the ERA.

Should global penalties apply?

[60] The breaches of s130 of the ERA and s81 of the Holidays Act both related to the keeping of employment records. The breaches are similar in my view and should be treated globally.

[61] The breaches of ss.50 and 60 of the Holidays Act relate to non-payment of time and a half for public holidays, or for alternative days for working on public holidays. These breaches in my view are similar and should be considered globally.

[62] The breach of s.27 of the Holidays Act, being failure to pay annual leave upon termination of employment is separate and attracts its own penalty.

[63] Taking this global approach, there is 1 breach under the MWA, 2 under the Holidays Act and 1 under the ERA. Just Kebab is therefore theoretically liable, following globalising of breaches, to maximum penalties totalling \$80,000 for breaches of minimum employment legislation.

Assessment of severity of breaches (step 2)

MWA

[64] Mr Corten gave evidence of having very little to live on while employed by Just Kebab. Mr Corten had rent, food, power and internet charges to pay.

[65] Mr Corten worked long hours, 6 days a week and was constantly tired and stressed. The failure to pay minimum rates occurred for a period of almost 8 months, which is a lengthy period of time. Mr Corten felt his work visa may be threatened if he complained. Mr Corten was in a vulnerable position.

[66] Just Kebab provided Mr Corten with a written employment agreement setting out usual employment conditions, including hours of work and rate of pay. It can be assumed Just Kebab, as an employer, was aware of and should have known its obligations to pay minimum rates of pay.

[67] Failing to pay Mr Corten the minimum wage each week is in my view a serious breach and should attract a penalty at the higher end of the scale. In my view this serious breach of the MWA attracts a penalty at 70% of the maximum penalty of \$20,000 as the starting point. This amounts to \$14,000.

Sections 50 and 60 of the Holidays Act

[68] Mr Corten worked on public holidays and was not paid his time and a half. Nor was Mr Corten provided alternative holidays. These too are serious breaches of minimum statutory legislation by Just Kebab for which there are no mitigating factors.

[69] I assess the overall seriousness of these Holidays Act breaches to be almost at the same level as the breach by Just Kebab of the MWA. The breaches did not have quite the same impact on Mr Corten as did the significant consequences of consistently underpaying his wages.

[70] Working on public holidays and not being properly compensated for doing so amounted to unlawful treatment of Mr Corten. This caused Mr Corten financial stress, and he was constantly tired. In my view, a penalty at 60% of the maximum is an appropriate starting point for these breaches of the Holidays Act. This amounts to \$12,000.

Section 27 of the Holidays Act

[71] Mr Corten was entitled to payment of his annual leave when his employment terminated. There are no mitigating factors. Just Kebab provided Mr Corten with an employment agreement and was in my view aware of its statutory employment obligations in my view, as stated above. I consider this also to be at the higher end of penalties that should be awarded. I consider a penalty at 60% of the maximum is an appropriate starting point for this breach of the Holidays Act. This amounts to \$12,000.

ERA/Holidays Act

[72] The failure to keep time and wage records as required by the ERA and the failure to keep leave records under the Holidays Act meant Mr Corten was unable to check his statutory entitlements. Mr Corten complained to the Labour Inspector whose investigation was hampered without them. I consider a penalty of 55% of the maximum to be an appropriate starting point. This amounts to \$11,000.

[73] Adjusted totals amount to \$49,000 in penalties out of a theoretical maximum of \$120,000 for all breaches or \$80,000 under step 2 after globalising penalties. This represents a reduction of approximately 40%.

Means and ability to pay the provisional penalty (step 3)

[74] There was no evidence as to Just Kebab's financial circumstances or means and ability to pay a penalty. There was no evidence as to the assets or liabilities of Just Kebab or of the directors provided to the Authority despite ample opportunity to do so.

Proportionality of outcome (step 4)

[75] The penalties imposed should be in proportion to the amounts of money unlawfully withheld⁶. Mr Corten is owed a total of \$33,661.42 gross plus interest. This is a significant amount of money for an employee such as Mr Corten.

[76] Adjusted totals for penalties so far amount to \$49,000.

[77] Standing back and assessing the proportionality of the outcome for Just Kebab, I conclude an appropriate global figure for all penalties under the MWA, Holidays Act and ERA to be \$40,000 in the circumstances, following the four step approach and taking in to account the Court's observations in *Boorsboom*⁷ with regard to "proportionality and totality of outcome".

[78] This represents half of the global penalties of \$80,000 that could have been awarded and one-third of the maximum penalties of \$120,000 before globalising.

[79] The penalties of \$40,000 are to be paid by Just Kebab to the Authority, for transfer to the Crown account.

[80] \$20,000 of the total amount of penalties (\$40,000) is to be paid by the Authority to the Labour Inspector for the use of Mr Yusuf pursuant to s.136(2) of the ERA. Both amounts in [79] and [80] are to be paid by Just Kebab within 21 days of the date of this determination.

[81] A table showing the amounts calculated in respect of each of the four steps, bringing the Authority to the total of penalties imposed is set out as an appendix to this determination.

Costs

[82] The Authority's general power to award costs is set out in clause 15(1) of Schedule 2 to the ERA as follows:

The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

⁶ *Boorsboom* at [190]

⁷ Paras.[190] to [194]

[83] Counsel for the Labour Inspector referred the Authority to the Employment Court judgments in *PBO Ltd v Da Cruz*⁸ and *Fagotti v Acme & Co Ltd*⁹ which set out the broad principles to be applied in determining costs in the Authority.

[84] In Counsel for the Labour Inspector's memorandum to the Authority of 17 November 2016, which was provided to Just Kebab, and not responded to, the Labour Inspector seeks cost in accordance with the Authority's daily tariff of \$3500. Evidence of the Labour Inspector's costs was provided in support of the costs claim.

[85] The Authority's investigation meeting took approximately 2 hours. Applying the notional daily tariff in respect of costs, costs would total \$875, being ¼ of an 8 hour day.

[86] However, the Labour Inspector seeks a lesser award of \$500 costs as the investigation meeting was short and undefended. The filing fee of \$71.56 is also sought.

[87] I order Just Kebab to pay to the Labour Inspector within 21 days of the date of this determination, costs of \$500 together with the filing fee of \$71.56.

Witness expenses

[88] The Labour Inspector seeks witness expenses in respect of Mr Corten and Ms Harrison both of whom attended the Authority's investigation meeting to give evidence. Neither attended the investigation meeting on a summons.

[89] Clause 6, Schedule 2 of the ERA provides for payment of witness expenses to any person giving evidence before the Authority. The applicable regulations under are the Witnesses and Interpreters Fees Regulations 1974.

[90] Mr Corten's return flight from Nelson to attend the investigation meeting amounted to \$906 and Ms Harrison's travel costs from Rotorua return by car \$47.88 (38c x63 kms). Evidence was provided in support of the claim for witness expenses. I accept both amounts to be reasonable. In the circumstances flying was Mr Corten's only real option given the distance he had to come to attend the investigation meeting.

⁸ [2005] ERNZ 808

⁹ [2015] NZEmpC 135

[91] In the circumstances of this case, I order Just Kebab to pay to the Labour Inspector for the use of Mr Corten witness expenses of \$906 and for the use of Ms Harrison \$47.88 both amounts to be paid within 21 days.

Anna Fitzgibbon
Member of the Employment Relations Authority

APPENDIX

JUST KEBAB LIMITED (1 employee)		
<i>Step 1: Nature and number of breaches – potential maximum penalties (following globalisation)</i>		
HA ¹⁰ (2 breaches, (ss50 &60 globalised and separate breach of s27)		\$ 40,000
MWA ¹¹ (1 breach)		\$20,000
ERA ¹² (1breach,s.130 globalised with 1 breach of s81,HA)		\$20,000
	Subtotal	\$ 80,000
<i>Step 2: Aggravating factors as a proportion of maxima in Step 1</i>		
HA (ss.50 and 60) (60%) HA (s.27) 60%		\$ 24,000
MWA (70%)		\$14,000
ERA and HA (55%)		\$11,000
	Subtotal	\$ 49,000
<i>Step 3: Respondent's financial circumstances</i>		
No evidence provided	Subtotal	\$ 49,000
<i>Step 4: Proportionality</i>		
Reduce modestly	Total	\$ 40,000

¹⁰ Holidays Act 2003

¹¹ Minimum Wage Act 1983

¹² Employment Relations Act 2000