IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 93
3001811

	BETWEEN	A LABOUR INSPECTOR, MINISTRY OF BUSINESS INNOVATION & EMPLOYMENT Applicant
	A N D	KRSVP LIMITED First Respondent
	A N D	SANJHE PRASAD Second Respondent

Member of Authority:	David Appleton
Representatives:	Jessica Ellison, Counsel for the Applicant Sanjhe Prasad, Advocate for the Respondents
Investigation Meeting:	On the papers
Submissions Received:	19 May 2017, from the Applicant None from the Respondents
Date of Determination:	13 June 2017

DETERMINATION OF THE AUTHORITY

A. The first respondent is to pay a penalty in the sum of $25,000 to the Crown.

B. The claim against the second respondent for the imposition of penalties is stayed pending the provision of further evidence.

C. Costs are reserved.

Employment relationship problem

[1] The Labour Inspectorate seeks penalties against the first respondent pursuant to s.229(3) of the Employment Relations Act 2000 (the Act) for failing to supply to the Labour Inspector a copy of documents sought under s.229(1)(d) of the Act and for breaches of s.65 of the Act. The applicant also seeks a penalty against the first and the second respondents in connection with breaches of s.130 of the Act and s.81 of the Holidays Act 2003.

[2] Both respondents have failed to lodge statements in reply, either to the Labour Inspectorate's original statement of problem or its amended statement of problem. They have also failed to lodge submissions in reply to Ms Ellison's submissions dated 19 May 2017. After the deadline for the respondents to lodge and serve submissions had passed, they were given the opportunity by the Authority to confirm whether they had lodged submissions, in the event that they had gone astray. Whilst Mr Prasad spoke with the office of the Authority in response to this opportunity, he did not indicate whether the respondents had complied but promised to call the Authority back. He did not do so and the extended deadline passed without further communication from him.

[3] Given the history of the respondents' failure to take part in the Authority's process of investigation, I concluded that the respondents' had been given a fair and reasonable opportunity to take part, but had chosen not to do so. I therefore proceeded to investigate and determine the Labour Inspector's applications without any further input from them.

Background

[4] The first respondent is a company supplying contract workers to vineyards in the Blenheim area. Mr Prasad is the first respondent's sole director and 100% shareholder.

[5] On 7 July 2016, a Labour Inspector visited a vineyard in Blenheim, and was advised by the owner of the vineyard that the workers present there were employed by the first respondent. The Labour Inspector issued a notice to the first respondent on 20 July 2016 requiring the production of wage and time records and holiday and leave records, and any other documentation which recorded the remuneration of all

employees who worked for the first respondent between 1 May and 11 July 2016. This notice was issued pursuant to s.229 of the Act. The notice requested that the documents be provided within 14 days.

[6] On 23 August 2016, the Labour Inspectorate was advised by a firm of accountants who occupied the registered address for the first respondent that they had been unable to contact the second respondent as he was out of the country. The firm provided an additional address for the second respondent. The Labour Inspectorate sent the notice requiring production of the documents to that new address.

[7] On 29 August 2016, the Labour Inspectorate was advised that the second respondent did not own or reside at this new address. The Labour Inspectorate was then advised of a further address for Mr Prasad.

[8] On 2 September 2016, the Labour Inspectorate tried to call Mr Prasad and left a message on his mobile telephone. An email was also sent to him warning him that if he failed to make contact and did not have reasonable cause for doing so, he could be committing an offence under s.235 of the Act. No response was received by the Labour Inspectorate.

[9] On 8 December 2016, the Labour Inspectorate found out from the firm of accountants who occupied the first respondent's registered office that Mr Prasad had collected from the firm's offices documents sent by the Labour Inspectorate.

[10] The Labour Inspectorate lodged its first statement of problem on 20 January 2017 but no statement in reply was received from either the first or second respondent. However, Mr Prasad did take part in a telephone case management conference call on 2 March 2017 in which he agreed to send to the Labour Inspectorate copies of all time and wage records, all holiday and leave records and all employment agreements for all employees employed by the first respondent between 1 May and 11 July 2016. Mr Prasad also agreed to send to the Authority statements in reply on behalf of the first respondent and himself.

[11] Whilst no statements in reply were received by the Authority from either the first or second respondent, the applicant received a number of documents from Mr Prasad on 13 March 2017. The applicant reviewed the records provided by

Mr Prasad and alleges that the wage and time records for all 11 employees do not meet the requirements of s.130 of the Act or s.81 of the Holidays Act.

[12] The Labour Inspectorate asserts that it is unable to ascertain from the records provided whether or not the 11 employees have received minimum wage for every hour worked under the Minimum Wage Act 1983 or their public holiday entitlements under the Holidays Act.

[13] The Labour Inspector also asserts that the individual employment agreements supplied by the first respondent do not comply with s.65 of the Act.

The issues

[14] The Authority must determine the following issues:

a. Whether the first respondent has breached ss 65, 130 and 229 of the Act and 81 of the Holidays Act;

b. If it has breached any of these legislative requirements, whether penalties should be imposed upon the first respondent in respect of each breach;

c. If penalties are to be imposed upon the first respondent, the amounts of such penalties; and

d. Whether penalties should be imposed upon the second respondent.

The applicable legislation

[15] The following provisions are relevant in relation to the Labour Inspectorate's claims for penalties against the first respondent:

> **65. Form and content of individual employment agreement**
>
> (1) The individual employment agreement of an employee—
>
> (a) must be in writing; and
> (b) may contain such terms and conditions as the employee and employer think fit.
>
> (2) However, the individual employment agreement—
>
> (a) must include—
>
> (i) the names of the employee and employer concerned; and

(ii) a description of the work to be performed by the employee; and

(iii) an indication of where the employee is to perform the work; and

(iv) any agreed hours of work specified in accordance with section 67C or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work; and

(v) the wages or salary payable to the employee; and

(vi) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and

(b) must not contain anything—

(i) contrary to law; or

(ii) inconsistent with this Act.

(3) [Repealed]

(4) An employer who fails to comply with this section is liable, in an action brought by a Labour Inspector or the employee concerned, to a penalty imposed by the Authority.

130 Wages and time record

(1) Every employer must at all times keep a record (called the **wages and time record**) showing, in the case of each employee employed by that employer,—

(a) the name of the employee:

(b) the employee's age, if under 20 years of age:

(c) the employee's postal address:

(d) the kind of work on which the employee is usually employed:

(e) whether the employee is employed under an individual employment agreement or a collective agreement:

(f) in the case of an employee employed under a collective agreement, the title and expiry date of the agreement, and the employee's classification under it:

(g) the number of hours worked each day in a pay period and the pay for those hours:

(h) the wages paid to the employee each pay period and the method of calculation:

(i) details of any employment relations education leave taken under Part 7:

(j) such other particulars as may be prescribed.

(1A) The wages and time record must be kept—

(a) in written form; or

(b) in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.

(1B) If an employee's number of hours worked each day in a pay period and the pay for those hours are agreed and the employee works those hours (the **usual hours**), it is sufficient compliance with subsection (1)(g) if those usual hours and pay are stated in—

(a) the wages and time record; or

(b) the employment agreement; or

(c) a roster or any other document or record used in the normal course of the employee's employment.

(1C) In subsection (1B), the **usual hours** of an employee who is remunerated by way of salary include any additional hours worked by the employee in accordance with the employee's employment agreement.
(1D) Despite subsection (1C), the employer must record any additional hours worked that need to be recorded to enable the employer to comply with the employer's general obligation under section 4B(1).
(2) Every employer must, upon request by an employee or by a person authorised under section 236 to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time in the preceding 6 years at which the employer was obliged to keep such a record.
(3) [Repealed]
(4) Every employer who fails to comply with any requirement of this section is liable to a penalty imposed by the Authority.
(5) An action to recover a penalty under subsection (4) may also be brought by a Labour Inspector.

135 Recovery of penalties
(1) Any action for the recovery of a penalty may be brought,—

(a) in the case of a breach of an employment agreement, at the suit of any party to the employment agreement who is affected by the breach; or

(b) in the case of a breach of this Act, at the suit of any person in relation to whom the breach is alleged to have taken place; or

(c) if permitted in the particular penalty provision, by a Labour Inspector.

(2) Every person who is liable to a penalty under this Act is liable,—

(a) in the case of an individual, to a penalty not exceeding $10,000:

(b) in the case of a company or other corporation, to a penalty not exceeding $20,000.

(3) A claim for 2 or more penalties against the same person may be joined in the same action.
(4) In any claim for a penalty the Authority or the court may give judgment for the total amount claimed, or any amount, not exceeding the maximum specified in subsection (2), or the Authority or the court may dismiss the action.
(4A) The Authority or the court may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it.
(4B) In determining whether to give judgment for a penalty, and the amount of that penalty, the Authority or the court must consider whether the person against whom the penalty is sought has previously failed to comply with an improvement notice issued under section 223D.
(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—

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

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

(6) Despite subsection (5), if a court refuses to make a pecuniary penalty order under section 142E, an action for the recovery of a penalty under this Act in relation to the same matter must be commenced within 3 months after the refusal.

229 Powers of Labour Inspectors

(1) For the purpose of performing his or her functions and duties under any Act specified in section 223(1), every Labour Inspector has, subject to sections 230 to 233, the following powers:

(a) the power to enter, at any reasonable hour, any premises where any person is employed or where the Labour Inspector has reasonable cause to believe that any person is employed, accompanied, if the Labour Inspector thinks fit, by any other employee of the department qualified to assist or by a constable:

(b) the power to interview any person at any premises of the kind described in paragraph (a) and the power to interview any employer or any employee:

(c) the power to require the production of, and to inspect and take copies from,—

(i) any wages and time record or any holiday and leave record whether kept under this Act or any other Act:

(ii) any other document held which records the remuneration of any employees:

(iii) any other document that the Labour Inspector reasonably believes may assist in determining whether the requirements of the Acts referred to in section 223(1) have been complied with:

(d) the power to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both of any employee of that employer:

(e) the power to inspect, and take copies of, any record kept under section 98 of strikes and lockouts:

(f) the power to question any employer about compliance with any of the Acts referred to in section 223(1).

(2) Where any Labour Inspector makes any requirement of an employer under subsection (1)(c) or subsection (1)(d), that employer must forthwith comply with that requirement.

(3) Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subsection (1)(c) or subsection (1)(d) is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.

(4) Where a Labour Inspector alleges that any person has not observed or not complied with any provision of section 130(1) or of subsection (2) of this section or of any of the Acts referred to in section 223(1), that Labour Inspector may commence proceedings against that other person in respect of the non-observance or non-compliance by applying to the Authority under section 137 for an order of the kind described in subsection (1) of that section, and the provisions of that section apply accordingly with all necessary modifications.

(5) No person is, on examination or inquiry under this section, required to give to any question any answer tending to incriminate that person.

> (5A) A person is not excused from answering a Labour Inspector's questions under subsection (1) on the grounds that doing so might expose the person to a pecuniary penalty under Part 9A, but any answers given are not admissible in criminal proceedings or in proceedings under that Part for pecuniary penalties.
> (6) Despite subsection (1), the power of a Labour Inspector to enter any defence area within the meaning of the Defence Act 1990 is subject to any regulations made under section 93 of that Act.
> (7) A Labour Inspector may recover a penalty under this Act in the Authority for a breach of any provision that provides for the imposition of a penalty and is a provision of any of the Acts referred to in section 223(1).

[16] The following provisions of the Holidays Act are relied on by the Labour Inspector:

> **75 Penalty for non-compliance**
> (1) An employer who fails to comply with any of the provisions listed in subsection (2), and every person who is involved in the failure to comply, is liable,—
> (a) if the employer is an individual, to a penalty not exceeding $10,000:
> (b) if the employer is a company or other body corporate, to a penalty not exceeding $20,000.
> (2) The provisions are—
> ….
> (e) section 81 (which relates to an employer's obligation to keep a holiday and leave record):
> (f) section 82 (which relates to requests for access to a holiday and leave record).
> (3) For the purposes of subsection (1), a person is **involved in a failure to comply** if the person would be treated as a person involved in a breach within the meaning of section 142W of the Employment Relations Act 2000.
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> **81 Holiday and leave record**
> (1) [Repealed]
> (2) An employer must at all times keep a holiday and leave record showing, in the case of each employee employed by the employer, the following information:
> (a) the name of the employee:
> (b) the date on which the employee's employment commenced:
> (c) the number of hours worked each day in a pay period and the pay for those hours:
> (d) the employee's current entitlement to annual holidays:
> (e) the date on which the employee last became entitled to annual holidays:
> (f) the employee's current entitlement to sick leave:
> (g) the dates on which any annual holiday, sick leave, or bereavement leave has been taken:
> (h) the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken:
> (ha) the portion of any annual holidays that have been paid out in each entitlement year (if applicable):

(hb) the date and amount of payment, in each entitlement year, for any annual holidays paid out under section 28B (if applicable):
(i) the dates of, and payments for, any public holiday on which the employee worked:
(j) the number of hours that the employee worked on any public holiday:
(ja) the day or part of any public holiday specified in section 44(1) agreed to be transferred under section 44A or 44B and the calendar day or period of 24 hours to which it has been transferred (if applicable):
(k) the date on which the employee became entitled to any alternative holiday:
(l) the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:
(m) the cash value of any board or lodgings, as agreed or determined under section 10:
(n) the details of any payment to which the employee is entitled under section 61(3) (which relates to payment in exchange for an alternative holiday):
(o) the date of the termination of the employee's employment (if applicable):
(p) the amount paid to the employee as holiday pay upon the termination of the employee's employment (if applicable):
(q) any other particulars that may be prescribed.
(3) The holiday and leave record must be kept—
(a) in written form; or
(b) in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.
(3A) If an employee's number of hours worked each day in a pay period and the pay for those hours are agreed and the employee works those hours (the **usual hours**), it is sufficient compliance with subsection (2)(c) if those usual hours and pay are stated in—
(a) the employee's wages and time record kept under section 130 of the Employment Relations Act 2000; or
(b) the employee's employment agreement; or
(c) a roster or any other document or record used in the normal course of the employee's employment.
(3B) In subsection (3A), the **usual hours** of an employee who is remunerated by way of salary include any additional hours worked by the employee in accordance with the employee's employment agreement.
(3C) Despite subsection (3B), the employer must record any additional hours worked that need to be recorded to enable the employer to comply with the employer's general obligation under section 4B(1) of the Employment Relations Act 2000.
(4) Information entered in the holiday and leave record must be kept for not less than 6 years after the date on which the information is entered.
(5) The holiday and leave record may be kept so as to form part of the wages and time record required to be kept under section 130 of the Employment Relations Act 2000.

[17] With respect to the claim for penalties against Mr Prasad personally, the Labour Inspector relies upon the following sections of the Act:

142W Involvement in breaches
(1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
(a) has aided, abetted, counselled, or procured the breach; or
(b) has induced, whether by threats or promises or otherwise, the breach; or
(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
(d) has conspired with others to effect the breach.
(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
(a) a person occupying the position of a director of a company if the entity is a company:
(b) a partner if the entity is a partnership:
(c) a general partner if the entity is a limited partnership:
(d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:
(e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.
(4) This section does not apply to proceedings for offences.

142X Person involved in breach liable to penalty
(1) A person involved in a breach is liable to a penalty under this Act if—
(a) the person is involved in the breach within the meaning of section 142W; and
(b) this Act provides a penalty for the breach.
(2) An application for a penalty against a person involved in a breach may be made only by a Labour Inspector.

The Labour Inspectorate's case

Section 65 of the Act

[18] The Labour Inspectorate argues that there have been 10 breaches of s.65 of the Act. This is because each of the 10 employment agreements provided by the first respondent failed to contain:

a. A description of the work to be performed by the employee;

b. An indication of where the employee is to perform the work;

c. Any agreed hours of work; and

d. A plain language explanation of the services available for the resolution of employment relationship problems including a reference to the 90 days in which a personal grievance must be raised.

[19] In examining the copy "casual employment agreements" annexed to the amended statement of problem, which I understand had been provided to the Labour Inspectorate by Mr Prasad, I note that the agreements all state the following:

> 1. **DESCRIPTION OF WORK**
> Engaging in casual duties as requested by the employer's representative.
> 2. **LOCATION**
> This agreement covers your employment in vineyard. Or any other location as requested from time to time.
> 3. **HOURS OF WORK**
> As required by the Employer.
> 7. **PROBLEM RESOLUTION**
> The schedule attached to the Agreement outlines the procedures to be followed should any employment problems arise.

[20] I agree with the Labour Inspectorate that the casual employment agreements do not give any meaningful description of the work to be carried out, nor of the location of the work. Similarly, the hours of work are not sufficiently specific to satisfy the requirements of s.67C of the Act which states the following:

> **67C Agreed hours of work**
> (1) Hours of work agreed by an employer and employee must be specified as follows:
> (a) in the case of an employee covered by a collective agreement,—
> (i) in the collective agreement; and
> (ii) if section 61 applies, in the employee's additional terms and conditions of employment included under that section; or
> (b) in the case of an employee covered by an individual employment agreement, in the employee's individual employment agreement.
> (2) In subsection (1), **hours of work** includes any or all of the following:
> (a) the number of guaranteed hours of work:
> (b) the days of the week on which work is to be performed:
> (c) the start and finish times of work:
> (d) any flexibility in the matters referred to in paragraph (b) or (c).

[21] With respect to 'problem resolution', I infer that the schedule referred to in the agreement was not provided to the Labour Inspectorate. It is possible that the schedules were provided to the employees, in which case the requirement in s.65(2)(a)(vi) would not have been breached. I am prepared to give the first respondent the benefit of the doubt in this respect.

[22] Section 65(4) of the Act provides that an employer who fails to comply with s.65 is liable to a penalty imposed by the Authority. I shall examine below the appropriate level of penalty to be imposed in respect of these breaches of s.65.

Section 130 of the Act

[23] Annexed to the amended statement of problem were copies of printed records annotated in handwriting headed up *"Time, Pay and Wages Record"* and *"Annual Holidays"*. In reviewing these documents, it is clear that the first respondent failed to record the number of hours worked each day in a pay period for each employee and the pay for those hours, as required by s.130(1)(g) of the Act. What they show is the total pay for the week together with a multiplying factor of 1.11 under the "overtime" column. It is impossible to ascertain from these records how many hours were worked each day, or indeed each week, by each employee. This means, as asserted by the Labour Inspector, that it is impossible to ensure that each worker was paid the minimum wage entitlements for every hour worked as required by the Minimum Wage Act.

Section 81 of the Holidays Act

[24] Furthermore, these records do not enable the Labour Inspector to ascertain whether the public holiday of Queen's Birthday was worked by employees even though some employees were recorded as having worked in the week in which Queen's Birthday fell in 2016. Therefore, these records do not comply with the requirements of s.81 of the Holidays Act.

[25] These failings in respect of the wages and time records and holiday and leave records give rise to liability for penalties under s.130(4) of the Act and s.75 of the Holidays Act respectively. Again, I shall consider the appropriate level of penalties below.

Section 229 of the Act

[26] The Labour Inspector also seeks an imposition of a penalty with respect to the first respondent's failure to produce wages and time records, holiday and leave records and employment agreements as required by the Labour Inspector's notice dated 20 July 2016. Whilst it is the case that the notice did not come to the attention

of the first or second respondent for some time, it appears that Mr Prasad became aware of the Labour Inspector's requirements by 8 December 2016 at the very latest.

[27] Even if Mr Prasad did not become aware of the requirement of the Labour Inspector to produce these documents until 8 December 2016, they were still not provided until 13 March 2017. Therefore, the first respondent is in breach of s.229(2) of the Act which requires that, where any Labour Inspector makes any requirement of an employer under subsection (1)(c) or subsection (1)(d), that employer must 'forthwith comply with the requirement'.

What penalties should be imposed upon the first respondent?

[28] The Employment Court set down a multi-step approach for determining the amount of penalties to be imposed when there has been a breach of minimum standards in *Jeanie May Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd*[1]. This guidance, which requires a four step approach, can be summarised as follows.

Step 1[2]

[29] The Authority must first identify the nature and number of applicable breaches for statutory penalty purposes. Different sections of different minimum code statutes must be identified.

[30] If there are materially similar or identical multiple breaches committed by a respondent, these may be treated as making that respondent liable for a single penalty in respect of each separate affected employee. This approach does not encompass breaches of different enactments however.

[31] It is also necessary to identify the maximum penalty available in respect of each penalisable breach that has been identified.

[32] Finally, it is necessary to consider whether global penalties may be appropriate. If multiple and very similar breaches, such as repeated non- or under-payment of an employee, have been identified, globalisation may be appropriate,

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1 [2016] NZEmpC 143

2 *Preet* Paragraphs [139] et seq.

although it should not diminish the significance of a repeated and/or long running series of breaches.

Step 2[3]

[33] The severity of the breach should then be assessed in each case. This establishes the provisional starting point for each penalty, potentially up to the maximum, and will include a separate adjustment for aggravating and mitigating factors respectively in relation to each breach. Each penalty may be expressed as a dollar amount or a percentage of the maximum.

[34] In assessing severity, the Authority must take into account whether the breaches were committed knowingly and/or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. Any history of previous breaches may be relevant in assessing the starting point.

[35] Examples of mitigation may be co-operation with a Labour Inspector, actions taken to rectify or compensate for the breaches, and the points at which these may be undertaken before the hearing.

[36] These are only some examples of aggravating or mitigating factors.

Step 3[4]

[37] The Authority is now to consider the means and ability of the person in breach to pay the penalty reached under step 2. There may be downward adjustment if evidence establishes real financial or other hardship. The consequences for the business and for continued employment of other employees may be a relevant consideration if these are established to the Authority's satisfaction.

Step 4[5]

[38] This final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached after the first 3 steps is proportionate to the seriousness of the breaches, and harm occasioned by it/them.

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3 *Preet* Paragraphs [142] et seq.
4 *Preet* paragraph [146]
5 *Preet* paragraphs [147] et seq.

This step is to ensure that the imposition of a penalty and the amount of it is just in all the circumstances.

[39] This step also requires the Authority to assess other relevant cases decided by application of these tests, to ensure that the result is not inconsistent with others, at least without an explanation of any significant inconsistency.

[40] Other considerations to address include whether the penalties are capable of being paid, whether the employer has an incentive to avoid paying them and the optimum deterrent effect of the penalties imposed.

[41] Finally it is necessary to decide whether, and to what extent a penalty should be paid to the Crown, the victim(s) or anyone else. Where victims can be properly compensated and the party bringing proceedings can be reimbursed in costs, there will not be a strong case for payment of any penalty to the victim or anyone other than the Crown. Where the breach has resulted in non-compensable loss, the Authority may consider directing a proportion of the penalty be paid to the party bringing the proceedings, especially if and to the extent that costs may not adequately compensate.

Application of the four step test in the current matter

[42] The Labour Inspectorate submits that, after having applied the principles of *Preet*, a penalty against the first respondent should be imposed in the sum of $63,000. This is based on a total of 31 separate breaches, each with a maximum of $20,000 penalty.

[43] Applying the four-stage process of *Preet*, my analysis is as follows.

Breach of s.65 of the Act - Step 1

[44] Applying the first step, there were 10 employment agreements with these failings which, theoretically, attracts a maximum penalty against the first respondent of $200,000.

[45] In considering whether it is appropriate to globalise this sum, I note that in *Preet*, the Employment Court did not globalise across affected employees in respect of a particular breach. I do not believe that *Preet* prohibits globalisation with respect to the same breach across a number of employees and I note that the Employment

Court states, at paragraph [100], that the Authority may impose global penalties in appropriate cases. It goes on to state that:

> Where there are multiple breaches of several statutory provisions in respect of multiple employees, it may be appropriate for the Authority … to assess an ultimately single penalty in respect of those.

[46] It goes on to say:

> In other cases, especially where there are not such close association between the circumstances in which breaches have occurred, it may be appropriate for the Authority … to impose separately assessed penalties so expressed.

[47] I believe that it would be artificial to treat these breaches of s.65 of the Act as warranting 10 separate penalties given that the breaches are repeated in identical terms in all 10 agreements put before the Authority. In other words, I believe that there is a "close association" between the circumstances in which the breaches have occurred.

[48] I therefore consider that it is appropriate to globalise the penalty to be imposed in respect of the breaches of s.65 of the Act and therefore reduce the maximum theoretical penalty in respect of this breach to $20,000.

Breach of s.65 of the Act - Step 2

[49] Assessing the severity of the breaches, the three findings that I make above with respect to s.65 are, on the face of it, reasonably serious. However, within the context of the nature of the employment for which these casual employees were employed, I do not believe that they would have been significantly prejudiced by the written agreements not specifying the work to be performed or the location. This is because the nature of the work was likely to have varied from day to day or week to week within the context of vineyard work, as would the location. The employees would, clearly, have known which vineyards they were obliged to work in from day to day, and would have known each day the nature of the work they would have been required to carry out. I do not consider, therefore, that these two breaches are particularly significant.

[50] With respect to the failure to specify the hours of work, this is potentially more serious as employees are entitled to know how long they are to be committed on a daily and weekly basis. It is always possible that they did know this in practice but, as

no evidence has been given by the first respondent, it choosing not to comply with the Authority's directions to provide a statement in reply or submissions, I must take the failing at face value. Therefore, I do regard this as a significant failing.

[51] I believe that it is appropriate to set the penalty at 50% of the maximum; namely, $10,000.

[52] With respect to whether there are any mitigating or ameliorating factors, I have already factored those in whilst assessing the severity of the breach (namely, that the employees were likely to know their location of work and work description). A further potential mitigating factor is that these agreements were entered into on a short term basis only. However, I do not believe that that is a sufficient mitigating factor to reduce the penalty.

[53] I will apply steps 3 and 4 of *Preet* to the total of the penalties reached with respect to each breach.

Breach of s.130 of the Act – step 1

[54] The Labour Inspector claims that there are 11 breaches (as there are 11 employees affected) which gives a theoretical total of $220,000 in penalties.

[55] In practice, there were actually far more breaches than this as there was a failing to comply with s.130 with respect to each day worked by each employee, as it requires the records to show the number of hours worked each day in a pay period. However, I accept that it would be appropriate, and within the principles of *Preet*, to globalise those multiple breaches in respect of each employee.

[56] Is it appropriate to globalise across employees? Unlike with the case of the breach of s.65 of the Act, I can see less compelling arguments for globalising across employees with respect of the breach of s.130. The breach of s.65 was due to the way the employment agreements were drafted and completed. It was a one-off decision at the time the master employment agreement was drafted and was not repeated day after day and week after week.

[57] However, with respect to the failure to record hours worked, this failure was repeated for every employee every day and week that they worked. This had the effect of preventing the first respondent from ensuring that each employee was paid at

least a minimum wage for each hour worked. Therefore, each employee was potentially affected in his or her own way by this failing to record their hours.

[58] Therefore, for this reason, I do not believe it is appropriate to globalise the penalty across the employees. At this stage, therefore, the potential penalty is $220,000 with respect to these breaches.

Breach of s.130 of the Act – step 2

[59] Turning to the second step, in which the severity of the breach is assessed, as I have indicated above, this failure had the effect of preventing the Labour Inspector from ascertaining whether or not the employees were paid at least a minimum wage for each hour worked. Failure to pay the minimum wage is one of the most serious breaches of minimum employment standards in New Zealand and is therefore a serious breach. It is scarcely any less serious to conduct a business in such a way that prevents the Labour Inspectorate from ensuring that minimum wage legislation is being adhered to.

[60] There are further factors to take into account in assessing the severity of this breach. One is whether the breach was committed wilfully and/or calculatedly. Given that the first respondent was using a pre-printed pro forma which allowed for the recording of hours worked during each morning and each afternoon shift of each day, the first respondent cannot plead ignorance. It simply ignored the pro forma and recorded nothing under those columns.

[61] Another factor is how long the breach lasted. It appears that the breach lasted throughout the period which the records covered. It is possible that the breaches lasted for longer than this but, in any event, it is clear that the failure to record hours worked was not a one-off.

[62] Furthermore, the breaches were repeated, occurring from day to day and week to week and, as I have stated above, had at least the potential of having a significant impact on the affected employees.

[63] Finally, I take into account the prolonged failure of the first respondent to cooperate with the Labour Inspector in providing the wage and time records until after the Authority's case management telephone conference.

[64] Ms Ellison, on behalf of the Labour Inspectorate, submits that the starting point under step 2 with respect to this breach of s.130 of the Act, should be 50%. However, I believe that that is too low in respect of this particular breach and I rely on the comment of the Employment Court in *Preet* at paragraph [71] in which it held that the Authority is not bound by any amount suggested by a Labour Inspector.

[65] I believe that it is appropriate to fix the potential penalty, taking into account the severity of the breaches, at 70% of the maximum. This results in a maximum of $154,000.

[66] As the respondents have not taken part in this process, they have not made known any mitigating circumstances which may reduce this penalty at this stage. Similarly, I am unable to discern any mitigating circumstances from the papers justifying a reduction of the penalty sum reached so far.

[67] As before, I shall apply steps 3 and 4 to the aggregate of the penalties.

Breach of s.81 of the Holidays Act – step 1

[68] The Labour Inspector seeks penalties in respect of nine breaches of s.81 of the Holidays Act. This gives a potential total of $180,000.

[69] Turning to the issue of globalisation, I again do not believe there is a close association between the breaches relating to the nine employees. This is because they do not stem from one originating error or failing. The first respondent had to record each day worked by the employees, including any statutory holidays worked. It is impossible to know, because of the failing to record days worked, whether the employees worked on Queen's Birthday of 2016 or not and, therefore, were paid correctly under the Holidays Act. The failure to record days, therefore, resulted in potential prejudice to each employee separately. For this reason, it is not appropriate to globalise the penalty across each employee.

Breach of s.81 of the Holidays Act – step 2

[70] Turning to the issue of severity, whilst some of the same considerations apply as applied with respect to the breach of s.130 of the Act, I do not believe, overall, the failure to record statutory holidays worked is as severe as the failings in respect of s.130 of the Act. This is because only one statutory holiday occurred in the period in

question and it is quite possible that the employees did not even work on that day. The reason one does not know that is because the days of work are not recorded which, arguably, is an extension of the breach of s.130.

[71] Overall, I believe it is appropriate to set the penalty by reference to its severity at 25%. This gives a penalty of $45,000. Again, I can discern no separate mitigating circumstances justifying a reduction of this sum.

[72] As before, I shall apply steps 3 and 4 to the aggregate sum of these penalties.

Breach of s.229 of the Act – step 1

[73] There was a single breach of s.229, although it was a continuing breach. This gives a maximum potential penalty in the sum of $20,000. Clearly, when there is only one breach, globalisation is not relevant.

Breach of s.229 of the Act – step 2

[74] With respect to the severity of this breach, I regard it as reasonably severe given that the prolonged failure of the first respondent to provide the documents sought by the Labour Inspector prevented her from assessing the first respondent's compliance with its obligations under the relevant employment legislation. This prolonged failure potentially affected every employee.

[75] Furthermore, this is not the first time that the first respondent has been found to be in breach of its statutory requirements under s.229 of the Act. I refer to the determination of the Authority dated 18 November 2015[6] in which a penalty of $7,500 was imposed on the first respondent. Having had a penalty imposed upon the first respondent in the past for breach of the same legislative requirement, I regard this breach as more significant. I therefore believe that a penalty in the sum of $10,000 is appropriate to be imposed upon the first respondent in respect of a breach of s.229 of the Act.

The aggregate penalty so far

[76] Totalling up the four penalties so far gives a total of $219,000.

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Step 3

[77] The first respondent has provided no evidence with respect to its ability to pay any penalty although Mr Prasad did say during the Authority's case management conference that it was *"*broke*"*. It is not known whether the company is still trading although it is still registered as an entity on the Companies Office register of companies and it would appear that it is up-to-date with its filing requirements.

[78] The Authority is not in a position to take into account the first respondent's financial position as no evidence of any substance has been provided.

Stage 4

[79] The fourth step involves the Authority considering whether the provisional penalty reached after the first three steps is proportionate to the seriousness of the breaches and the harm occasioned by them. This step is to ensure that the imposition of a penalty and the amount of it is just in all the circumstances.

[80] It is clear that a penalty of $219,000 is significantly too high given the overall nature and effects of the breaches.

[81] Under *Preet* the Authority is required to assess other relevant cases decided by application of the *Preet* tests to ensure that the result is not inconsistent with them. One decision of the Authority is similar in nature, in that there were 33 breaches involving ss.65 and 130 of the Act and s.81 of the Holidays Act. This is the case of *Labour Inspector for the Ministry of Business, Innovation and Employment v Bahn Thai Restaurant Ltd*[7]. After stage 2, the penalty stood at $187,000 although there was a 50% reduction taken into account for the ability of the respondent to pay that sum. The resulting sum of $93,500 was then reduced to $25,000 on the basis that there was little prospect of compliance if the penalty stood at $93,500, and that such a sum would give the employer an incentive to rearrange or close down his company.

[82] I believe that a similar approach should be taken with this respondent. A sum significantly in excess of $25,000 is unlikely to be paid by the first respondent. Any sum significantly below this, however, would ignore the significance of the breaches

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and their potential effects on the employees in question. I believe that $25,000 is a sum that is just in all the circumstances.

[83] As no evidence has been given about the financial position of the first respondent, there is also no evidence to justify the ordering of this payment by instalments under s.135(4)(a) of the Act.

Should this penalty be paid to the Crown or any other person?

[84] There is no evidence before the Authority that any of the employees affected by the breaches have been adversely affected in any specifically material way. Therefore, there is no reason to direct that the penalty be paid to any other person. It is to be paid to the Crown in its entirety.

The claim against Mr Prasad

[85] In order to determine whether Mr Prasad should be liable for a penalty, it is necessary to examine whether the requirements of s.142W of the Act are satisfied.

[86] This entails ensuring that he is a person *"*involved in the breach, if the breach is a breach of employment standards*"*. Employment standards is defined in s.5 of the Act as follows:

> **employment standards** means any of the following:
> (a) the requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130:
> (b) the provisions of the Equal Pay Act 1972:
> (c) the minimum entitlements and payment for those under the Holidays Act 2003:
> (d) the requirements of sections 81 and 82 of the Holidays Act 2003:
> (e) the minimum entitlements under the Minimum Wage Act 1983:
> (f) the provisions of the Wages Protection Act 1983

[87] I have found that s.130 of the Act and s.81 of the Holidays Act have been breached and, therefore, there have been breaches of 'employment standards'.

[88] It is next necessary to determine whether Mr Prasad was *"*involved in*"* that breach. This entails examining whether Mr Prasad has *"*aided, abetted, counselled, or procured the breach*"* or has been *"*in any way, directly or indirectly, knowingly concerned in or a party to the breach*"*.

[89] The Authority is in the unfortunate position of not having had any evidence upon which to reach any conclusions in respect of these possibilities. Whilst one might infer that, being the sole shareholder and director of the first respondent, Mr Prasad must have aided, abetted, counselled, procured, or been directly or indirectly, knowingly concerned in or party to the breaches, in light of the fact that the Labour Inspector is seeking the imposition of a penalty against Mr Prasad, mere inference is not sufficient. I note, for example, that it would appear that Mr Prasad is frequently away from the Blenheim area and it is quite possible that he was not aware of the breaches of s.130 of the Act and s.81 of the Holidays Act in respect of the employees in question.

[90] Whilst it is not satisfactory that an individual may avoid liability under ss.142W and 142X of the Act by refusing or failing to take part in the Authority's processes, I am not satisfied that it would be safe or just to impose any penalty on Mr Prasad in the absence of further evidence against him.

[91] I therefore do not dismiss the penalty claim against Mr Prasad but stay it pending further evidence that the Labour Inspector may wish to adduce. This may involve the service of a witness summons upon Mr Prasad. A telephone conference call will be arranged to discuss this matter in due course.

Orders

[92] I order that the first respondent pay to the Crown a penalty in the sum of $25,000, such penalty to be paid within 21 days of the date of this determination. This sum is to be paid into the Authority and will then be paid by the Authority into a Crown bank account.

Costs

[93] Costs are reserved. If the Labour Inspectorate seeks costs against the first respondent then it has 14 days from the date of this determination within which to lodge and serve a memorandum of counsel. The first respondent shall then have a further 21 days within which to lodge and serve a reply.

David Appleton
Member of the Employment Relations Authority