

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 160
3026373

BETWEEN A LABOUR INSPECTOR
Applicant

AND JASWINDER PAUL
First Respondent

AND R.K.K. ENTERPRISES LIMITED
Second Respondent

Member of Authority: Christine Hickey

Representatives: Ella Tait, Counsel for the Applicant
No appearance for the respondents

Investigation meeting: 5 July 2018

Submissions received: From the Applicant at the investigation meeting and costs
submissions on 11 October 2018. There were no submissions
from the Respondents.

Determination: 9 November 2018

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination, Jaswinder Paul must pay the Labour Inspector \$4,413.85 for the benefit of the employees as set out in the table at paragraph [39] of this determination. These amounts must have 5% interest added to them as at the date of payment whether within 28 days of this determination or later, as set out in paragraph [41] of this determination.**
- B. Within 28 days of the date of this determination, Jaswinder Paul must pay the Labour Inspector, for transfer to a Crown bank account, a penalty of**

\$15,000 for seven breaches of s 6 of the Minimum Wage Act 1983; and a penalty of \$2,000 for a failure to supply wages and time records and employment agreements when requested.

- C. Within 28 days of the date of this determination, Jaswinder Paul must pay the Labour Inspector legal costs of \$1,196.56, which includes reimbursement of the filing fee.**

Employment relationship problem

[1] In June 2017, the Labour Inspectorate received a complaint from Sumire Yamaji alleging that she had not received the minimum wage for each hour she worked when she worked for SP Contracting, undertaking vineyard work.

[2] The Labour Inspector, Vanessa Dobber, investigated Ms Yamaji's complaint. On 20 June 2017, other employees working for, or who had worked for, SP Contracting's business were uncovered as part of a Labour Inspectorate operation into the viticulture industry in Marlborough.

[3] As a result, Ms Dobber now makes claims for minimum wages, holiday pay and interest for seven former casual employees, including Ms Yamaji. All the employees were backpackers on working holiday visas.

[4] Ms Dobber also claims penalties for a failure to supply time and wage and holiday and leave records and for the failure to pay the minimum wage for every hour worked.

[5] Ms Dobber asks me to determine who employed the seven workers; that is, whether it was Mr Paul personally or R.K.K. Enterprises Limited (the company). Mr Paul is the sole shareholder and director of the company. SP Contracting is not a registered company. Ms Dobber says Mr Paul was the employer.

The Authority's investigation

[6] Ms Dobber lodged this application in the Authority on 16 March 2018. The Authority officer sent the application and the standard letter asking for a statement in reply to Mr Paul at his residential address, and to the company's address for service.

[7] There were problems with effecting service at the company's address for service. When the courier went to deliver the application there was a different business at that address which appeared to have no connection with Mr Paul or the company. Therefore, the Authority officer served the application via email as well and attempted to speak to Mr Paul on his mobile phone. Mr Paul did not respond.

[8] Neither Mr Paul nor the company lodged a statement in reply.

[9] The Authority officer organised a telephone case management conference. He invited Mr Paul and the company to be present. He did so by email and by telephone to Mr Paul's mobile phone number, on which he left messages.

[10] Ms Dobber and Ella Tait, counsel for the Labour Inspector, took part in the case management conference. The Authority officer attempted to contact Mr Paul to connect him with the call, but was not successful.

[11] Before the case management conference, Ms Tait told the Authority officer that Mr Paul had emailed her to say that he had the records the Labour Inspector sought and would provide them.

[12] I set the date of 5 July 2018 for the investigation meeting to be held in Blenheim. The Authority officer sent the Notice of Direction and Notice of Investigation Meeting to Mr Paul and to the company by email. I am satisfied that both respondents were adequately informed of the investigation meeting and the possible outcome if they did not attend.

[13] I delayed the start of the investigation meeting by 15 minutes and telephoned the Authority officer to check whether Mr Paul or a representative of the company had been in touch with him. He had not heard from either respondent.

[14] I consider that Mr Paul is aware of this application and has elected not to participate in the Authority's proceedings on his own behalf or that of the company.

[15] At the investigation meeting I heard evidence from Ms Dobber and submissions from Ms Tait. I am empowered to issue a determination in favour of the applicant despite the absence of the respondents.

Employment records

[16] The Labour Inspectorate engaged with Mr Paul and his business a number of times to obtain copies of records employers are required to keep to prove their adherence to minimum employment standards.

[17] On 20 June 2017, a Labour Inspector asked a man who identified himself as a supervisor for Mr Paul's business, SP Contracting, for records of all the employees.

[18] On 6 July 2017, another Labour Inspector delivered a notice from Ms Dobber to Mr Paul's home address asking that SP Contracting provide copies of all individual employment agreements, wage and time records and holiday and leave records for all employees from 1 February 2017 until 2 July 2017.

[19] On 23 August 2017, Ms Dobber spoke to Mr Paul who said he had couriered the requested records to the Labour Inspectorate. However, the records did not arrive.

[20] On 31 August 2017, Ms Dobber couriered a notice to the company requesting records for all employees who had worked between 1 May and 27 August 2017.

[21] The respondents had 14 days to comply with each notice. However, the Labour Inspectorate has not received any records.

Who employed the seven employees?

[22] The company's address for service and registered address on the Companies Register remain the same as in March 2018. However, its annual return is overdue and the Registrar of Companies has initiated action to remove it from the register.

[23] SP Contracting is an unincorporated entity. Pauline Guyon, Marie-Laure Petit, Emil Ballau, Joeri Hald and Sumire Yamaji either had written employment agreements with SP Contracting or told the Labour Inspectorate that they were employed by SP Contracting.

[24] Bjorn Hartkopf-Jetti and Emil Ballau say that they were employed by and worked for a man they knew as Paul.

[25] Jamie Aspden says he was employed by Mr Paul.

[26] Payments of wages to all employees were from either SP Contracting or the company.

[27] None of the employees interviewed, including a person who identified himself as the supervisor, had heard of or mentioned the company as their employer. The supervisor said that he worked for Mr Paul.

[28] Ms Dobber gave affirmed evidence that on 28 February 2018 she spoke to Mr Paul at a barbershop in Blenheim. Mr Paul told her that he had the employment agreements and time sheet records for SP Contracting but had not sent them to her. He agreed to send them to her by the following Wednesday. However, no records arrived.

[29] Mr Paul told Ms Dobber he ran the business as SP Contracting and that was his trading name. He told her it was not a registered company.

[30] Mr Paul told Ms Dobber he no longer ran a vineyard services contracting business and was concentrating on his barbershop.

[31] The evidence of the employees is the most relevant evidence to establish who employed them. They understood that Mr Paul or SP Contracting employed them. When Mr Paul provided written employment agreements, he did so under SP Contracting's name. Mr Paul told Ms Dobber that SP Contracting was his trading name.

[32] Therefore, I consider it is more likely that Jaswinder Paul was the employer in his personal capacity.

Wage arrears

[33] Section 132 of the Employment Relations Act 2000 (the Act) states that in wage arrears claims, in certain circumstances, the Authority may accept as proved an employee's claims of hours, days and time worked and wages paid as proved. That is the case if the employee can prove the employer failed to produce a wages and time record and that failure prejudiced the employee's ability to bring an accurate claim.

[34] In this case, the employees have provided evidence about the times and days they worked and the amounts they were paid. The Labour Inspector has calculated the amount of wage arrears owed.

[35] I am satisfied that the failure of the respondents to supply time and wage, and holiday and leave records to the Labour Inspector has prejudiced the Labour Inspector's ability to make accurate claims for wages arrears on behalf of the former employees.

[36] In addition, I accept the claim that none of the employees received holiday pay on those amounts.

[37] The employees received no pay slips and Ms Dobber's inquiries have revealed that Mr Paul did not pay PAYE on their behalf. Therefore, I have ordered their wages and holiday pay to be paid to them without deduction. The employees will be responsible for any tax owed to the IRD on these amounts.

[38] I accept the claims by Ms Dobber at the investigation meeting, which she made based on the evidence that the employees provided to her. The amounts claimed at the investigation meeting were lower than the claims made previously and were reached through the method of calculation most favourable to Mr Paul.

[39] The wage arrears have been calculated by using the number of hours worked multiplied by the applicable minimum wage of \$15.75 per hour less the amount paid to each employee. Therefore, Jaswinder Paul must pay the following amounts to the Labour Inspector for the benefit of the employees:

Name	Wage arrears	Holiday pay at 8% of arrears	Total
Joeri Hald	\$580.00	\$46.41	\$626.41 gross
Jamie Aspden	\$595.88	\$47.67	\$643.55 gross
Bjorn Hartkopf-Jettli	\$516.63	\$41.33	\$557.96 gross
Sumire Yamaji	\$939.75	\$75.18	\$1,014.93 gross
Emil Ballau	\$454.43	\$36.35	\$490.78 gross
Marie-Laure Petit	\$468.06	\$37.44	\$505.50 gross
Pauline Guyon	\$532.15	\$42.57	\$574.72 gross
		Total:	\$4,413.85

Interest

[40] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed in Schedule 2 of the Interest on Money Claims Act 2016, which is currently 5% per annum.

[41] Mr Paul has benefitted from the work done by the employees and they have been disadvantaged by his failure to pay them what they are owed on time. Mr Paul must pay interest on the wages and holiday pay owed for each employee from the last day each employee worked for him until the money owed to that employee is paid in full. Mr Paul and the Labour Inspector should use the internet calculator found at the following link to calculate the interest payable: <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

Penalties

[42] Ms Dobber seeks penalties for the following:

- (i) one breach of s 229 of the Act by failing to supply records when requested by a Labour Inspector; and
- (ii) seven breaches of s 6 of the Minimum Wage Act 1983, by failing to pay the employees at no less than the minimum wage for all hours worked.

[43] Under s 133 of the Act, the Authority has jurisdiction to deal with all actions for the recovery of penalties for breaches of the Act and for breaches of the Minimum Wage Act.

[44] Section 133A of the Act sets out a number of matters the Authority needs to have regard to in determining the amount of a penalty. The Employment Court case of *Borsboom (Labour Inspector) v Preet Pty Ltd & Ors*¹ sets out a number of steps to follow when considering imposing penalties.

[45] Section 135(2)(a) of the Act makes an individual liable for a penalty not exceeding \$10,000 for each breach leading to a penalty.

Step 1: Nature and Number of Breaches

[46] In total, there are eight breaches. The Labour Inspector claims one penalty should be imposed a breach of s 229 of the Act. Mr Paul is liable to a maximum penalty of \$10,000 for this breach.

¹ [2016] NZEmpC 143

[47] There are seven separate breaches of the Minimum Wage Act, affecting each of the seven employees. That makes Mr Paul liable for seven separate penalties of a maximum of \$10,000 each, totalling \$70,000.

[48] This is not an appropriate case in which to consider imposing a global penalty for all the breaches. That is because there are two different kinds of breaches, one being for the obligation to supply records when requested and the others being for breaches of a different enactment which negatively affected seven different employees. It is appropriate that the starting point for my consideration of penalties is \$80,000.

Step 2: Assessment of Severity of Breaches

[49] In relation to the breaches of the Minimum Wage Act, the affected employees received, on average, less than half of the minimum wage for the hours they worked. The practice of underpayment was widespread. The employees had complained to Mr Paul about not being paid in full and although he promised he would pay them he has failed to do so.

[50] The failures to pay were deliberate, not inadvertent. The employees were vulnerable in that they were transient workers on temporary visas, some of whom spoke English as an additional language. They all lacked familiarity with their rights under New Zealand employment law and knowledge of how to enforce those rights.

[51] The failure to supply the requested records was a serious breach. The Labour Inspectorate gave Mr Paul several opportunities to supply the records. He offered to do so on at least two occasions, but ultimately failed to.

[52] Mr Paul is an experienced businessman. The failure to supply the records impeded the Labour Inspector's investigation. In particular, she has been unable to assess whether other employees have been affected by Mr Paul's failure to pay them correctly.

[53] There are no mitigating factors.

[54] Ms Tait for the Labour Inspector assesses the correct level of penalties to be 60% for the minimum wage breaches, on the basis that the amounts owed are small. That gives a penalty of \$42,000.

[55] Ms Tait also submits that the correct level of penalty for the failure to supply records is 75%, being \$7,500.

[56] I accept her submissions. The total provisional penalties at this stage are \$49,500.

Step 3: Financial Circumstances of the Respondent

[57] I have no information on Mr Paul's finances. Therefore, I make no deduction in the level of penalties under this step.

Step 4: Proportionality of Outcome

[58] There is no record of Mr Paul previously engaging in such conduct and being held to account in the Authority or the Employment Court.

[59] This step requires some downward adjustment. The level of arrears due, although it may not represent all the arrears owed to other unknown employees, does not require such a high level of penalty. Taking into account penalties imposed in a number of other cases, I consider a penalty of \$15,000 is sufficient as a public sanction for the minimum wage breaches, and a penalty of \$2,000 is sufficient for the failure to supply records.

[60] The total penalty combined penalty of \$17,000 should be sufficient to alert the viticulture industry to the importance of complying with employment standards.

Costs

[61] The Labour Inspectorate claims legal costs of 25% of the Authority's usual daily rate of \$4,500, being \$1,125. That reflects that the Authority's investigation meeting took about quarter of a day. Ms Tait made those submissions on 11 October 2018.

[62] The Authority has discretion to order an unsuccessful party to make a reasonable contribution to the costs of representation of the successful party.

[63] Despite Mr Paul's lack of co-operation with or involvement in this investigation, I asked the Authority officer to send him Ms Tait's costs submissions, giving him until the end of October to respond to them. The Authority officer emailed a copy of the submissions and a copy of the Authority's practice note on costs to Mr Paul's personal email address. He also couriered the same documents to the company's address for service, in case Mr Paul could receive them through that avenue. The couriered documents were delivered and signed for at that address.

[64] Mr Paul has made no submissions on costs.

[65] I consider this \$1,125 to be a reasonable contribution for Mr Paul to make towards the costs of the Labour Inspectorate bringing this case.

[66] Ms Tait's submissions also claim her return airfare of \$262.36 from Wellington to Blenheim for the investigation meeting. I do not order Mr Paul to pay this as, except in unusual circumstances, the Authority does not award travel costs.

[67] Also, Mr Paul must reimburse the Labour Inspector the filing fee of \$71.56.

Christine Hickey
Member of the Employment Relations Authority