

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 81
5646320

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS INNOVATION &
 EMPLOYMENT (Thaaherunissa
 (Taahera) Begum)
 Applicant

AND RAW N FRESH LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Marija Urlich, Counsel for the Applicant
 Surendra Bennett, Counsel for the Respondent

Determination: 23 March 2017

DETERMINATION OF THE AUTHORITY AS TO PENALTY

Employment Relationship Problem

[1] On the 25 January 2017, the Authority issued a consent determination¹ that Raw n Fresh Limited (Raw n Fresh):

- (a) Acted in breach of s. 12A(1) of the Wages Protection Act 1983(WPA) in seeking a premium from its employee, Mr Firoj Khan (the employee); and
- (b) Raw n Fresh was liable to pay a penalty to the Labour Inspector pursuant to s.13(1)(b) of the WPA for such breach.

Investigation

[2] The parties have not reached agreement as to the level of penalty. The parties agreed to and filed a statement of facts. The parties also agreed to a timetable in which

¹ [2017] NZERA Auckland 23

to file submissions on the subject of penalties. The Labour Inspector filed submissions in accordance with the timetable agreed, but the respondent failed to do so.

[3] A date for the Authority's investigation meeting was scheduled for Monday, 13 March 2017. However, following the filing of the agreed statement of facts and upon consideration of the submissions by the Labour Inspector, the Authority was of the view the matter could be determined by it 'on the papers'. There was no objection to this approach.

[4] Accordingly, the investigation meeting date of 13 March 2017 was vacated.

Agreed Statement of Facts

[5] Counsel for each of the parties agreed to the following Statement of Facts:

- (a) On 4 April 2016 Raw n Fresh took over the management of Waiuku Fruit and Vegies Shop (the shop).
- (b) On 5 April 2016 Raw n Fresh offered the employee and he accepted employment as the shop manager.
- (c) On 8 April 2016, the employee instructed his immigration advisor to vary the conditions of his work visa to reflect his new employer.
- (d) On 12 April 2016 Raw n Fresh twice sought a premium payment from the employee in respect of his employment.
- (e) The employee refused to make the premium payment as sought and did not return to work with Raw n Fresh.
- (f) On 29 September 2016, the Labour Inspector served an audit report dated 23 September 2016 on Raw n Fresh, which sets out the facts in relation to the premiums sought and her conclusions. A copy of the audit report was attached to the agreed statement of facts.
- (g) On 4 November 2016, Raw n Fresh paid minimum wages and holiday pay totalling \$1,781.40 to the employee.

Background facts

[6] Raw n Fresh is a limited liability company which was incorporated on 7 July 2014.

[7] Mr Amardeep Singh is the sole director. Raw n Fresh trades as Drury Lane Fruit and Vegies having previously traded as Waiuku Fruit and Vegies for the period 1 April 2016 until 2 May 2016. The employee was employed by Raw n Fresh as a Shop Manager.

[8] Following a complaint from the employee regarding alleged breaches by Raw n Fresh of minimum entitlements and the request for a premium in respect of his work visa and residence visa sponsorship, the Labour Inspector conducted a workplace compliance audit.

[9] Following an investigation by the Labour Inspector, it was established that on two occasions the employee was requested to pay Raw n Fresh the sums of \$20,000 and \$18,000 respectively in return for its support for his residence application.

[10] The Labour Inspector concluded that Raw n Fresh had sought a premium from the employee and that this amounted to a breach of s12A of the WPA. This conduct was accepted by Raw n Fresh. The Labour Inspector indicated its intention to seek a penalty against Raw n Fresh in respect of the breach.

Issues for determination

[11] The issues for the Authority to determine are:

- (a) Whether a penalty should be ordered in respect of the accepted breach of section 12A of the WPA, that Raw n Fresh sought a premium from the employee in respect of his employment by it.
- (b) If so, the quantum of that penalty.

The Law

[12] Section 13(1)(a) of the WPA provides that an employer who acts in breach of s12A of the WPA is liable to a penalty. Under s13(2), the Labour Inspector has the power to recover a penalty.

[13] The conduct in this case occurred after the commencement of the Employment Relations Amendment Act 2016. Accordingly, the amendments made to that Act apply to this proceeding.²

[14] Section 133A of the Employment Relations Act 2000 (the Act) applies and sets out a number of factors the Authority must have regard to in determining an appropriate penalty.

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including-

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach took place, including the vulnerability of the employee and;
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[15] A full court of the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd and another*³ considered the factors set out in s133A of the Act. The Court stated that the factors essentially confirmed previous “judge-made” law but that the list was not exhaustive.⁴

[16] At para.[66], the Court refers to and endorses the approach in principle to penalties adopted by Judge Inglis in *Tan v Yang*⁵ and by Judge Corkill in *O’Shea v Pekanga O Te Awa Farms Ltd*⁶

² Section 254 Employment Relations Act 2000 and Schedule 1AA, c13(1)).

³ [2016] NZEmpC143

⁴ Preet at [141]-[148]

⁵ [2014] NZEmpC 65 at [32]

[17] 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:

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

Summary of Procedure

[18] The Court in *Preet* set out a four step process to be followed by the Authority or Court in determining penalties.

Step 1: Nature and number of breaches

- (a) Identify the nature of the breaches;
- (b) Identify the number of breaches;
- (c) Identify the maximum penalty available in respect of each identified breach;
- (d) Consider whether global penalties are appropriate.

Step 2: Assessment of severity of breaches

- (a) Assess the severity of the breach;
- (c) Take into account any aggravating factors;
- (d) Take into account any mitigating factors.

Step 3: Financial circumstances of the respondent

⁶ [2016] EmpC 19 at [57].

- (a) Consider the means and ability of the person to pay;
- (b) Person in breach to pay any penalty.

Step 4: Proportionality of outcome

- (a) Consider the proportionality of the penalty in relation to the harm caused.

Applying the four step approach to the current case:

Step 1: Nature and number of breaches. The agreed breach by Raw n Fresh is the seeking of a premium by it in respect of the employee's employment. This is a breach of s.12A of the WPA.

- (a) There is one breach by Raw n Fresh which attracts a maximum penalty of \$20,000 under s.135 of the Employment Relations Act 2000.
- (b) As there is one breach, it is not possible for the Authority to consider globalisation.

Step 2: Assessment of severity of breach.

- (a) It is my view that the breach by Raw n Fresh was serious. The employee concerned was a migrant worker dependent on Raw n Fresh's support for his immigration status. He was in an inherently vulnerable position. Raw n Fresh deliberately took advantage of the employee's vulnerability by seeking payment of a premium by him on two occasions.
- (b) The impact of the breach on the employee was significant. The employee varied his immigration conditions in reliance on his employment with Raw n Fresh. The employee was then pressured to pay Raw n Fresh a significant premium for its support of him. A premium of \$20,000 was initially demanded and when refused, \$18,000 was sought. The employee felt compelled to resign from his employment as a result of this pressure.

- (c) Raw n Fresh initially hindered the Labour Inspector's investigation, as set out in her audit report, by denying that the employee was employed by it or that a premium had been sought.
- (d) However, no premium was in fact paid by the employee because he resigned from his employment in response to the requests. This is a relevant factor and must be weighed against the factors above in assessing the severity of the breach by Raw n Fresh.
- (e) In my view, taking in to account these factors, Raw N Fresh's admitted breach attracts a penalty at 70% of the maximum penalty of \$20,000 as the starting point. This amounts to \$14,000.

Step 3: Financial circumstances of the respondent. Raw n Fresh was invited to make submissions in response to those made by the Labour Inspector. No submissions were made by it.

- (a) I accept the submission made by the Labour Inspector that if financial circumstances are relevant to Raw n Fresh, then it bears the onus of raising such circumstances. It did not do so.

Step 4: Proportionality of outcome.

- (a) This requires the Authority to step back and assess the proportionality of the outcome for the employee. No premium was paid by the employee to Raw n Fresh.

[19] I consider a penalty of \$12,000 is appropriate in all the circumstances. This is at a level in line with other cases that have come before the Authority in the last 5 years in which a premium has been sought. A few examples are listed below⁷.

[20] In *Lin v Zhou and Anor*⁸, the Authority awarded a penalty of \$15,000. In that case, the employee was a young immigrant who had an open work visa and sought residency. The employee was reliant on the employer for a work permit. A premium of \$6000 was sought by the employer and paid by the employee. The Authority found the breach particularly egregious because the employee was vulnerable given factors

⁷ *Lin v Zhou and Anor* [2012] NZERA Auckland 43, *Tian v South Pacific Ltd* [2012] NZERA Auckland 367, *Zhou v Harbitt International Ltd and Ors* [2012] NZERA Auckland 404

⁸ [2012] NZERA Auckland 43

such as her age, inexperience and immigration status. It was found the employer had exploited the employee's vulnerability.

[21] The average penalty in respect of the seven cases in the Authority in the last 5 years in which a penalty has been sought by an employer, amounts to \$9071.00.

[22] I order Raw n Fresh to pay a penalty of \$12,000 to the Authority, for transfer to the Crown account.

[23] \$6000 of the total amount of penalties (\$12,000) is to be paid by the Authority to the Labour Inspector for the use of the employee pursuant to s.136(2) of the Act.

Costs

[24] The Authority's investigation meeting was conducted 'on the papers'. The Labour Inspector prepared very helpful written submissions. I consider costs of \$350 appropriate.

[25] Raw n Fresh is to pay costs of \$350 together with the filing fee of \$71.56 to the Labour Inspector within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority

APPENDIX

RAW N FRESH LIMITED (One employee)		
<i>Step 1: Nature and number of breaches – potential maximum penalties (following globalisation)</i>		
WPA ⁹ (1 breach)		\$ 20,000
	Subtotal	\$ 20,000
<i>Step 2: Aggravating factors as a proportion of maxima in Step 1</i>		
WPA (70%)		\$14,000
	Subtotal	\$ 14,000
<i>Step 3: Respondent's financial circumstances</i>		
No evidence provided	Subtotal	\$ 14,000
<i>Step 4: Proportionality</i>		
Reduce modestly	Total	\$ 12,000

⁹ Wages Protection Act 1983

