

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 334
3026460

BETWEEN A LABOUR INSPECTOR
Applicant

AND SHALINI LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Marija Urlich & Martin Denyer, counsel for the
Applicant
Michael Keall, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further 10 May 2019 from the Applicant
Information] Received: 15 May 2019 from the Respondent

Date of Determination: 6 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] At material times Shalini Limited operated three liquor stores and a dairy in Auckland.

[2] The Labour Inspector applies to the Authority for penalties against Shalini arising from breaches of the Minimum Wages Act 1983 and the Holidays Act 2003. Shalini accepts it breached these Acts and accepts liability for penalties. The matter in dispute is the quantum of any penalty.

The process

[3] With the parties' consent this investigation was held on the papers. To assist with this process the Authority was provided with an affidavit from a Labour

Inspector, affidavits from four of the seven affected employees and an affidavit from Venu Mohan Reddy Beerapu (Mr Reddy), Shalini's sole director. In addition, the parties agreed that a statement of facts, which had been agreed as part of the settlement between the parties, applied to the Authority's determination of penalties. The parties each filed submissions.

[4] As permitted by 174E of the Employment Relations Act 2000 (the Act) this 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.

Background facts

[5] Shalini was subject to two investigations by the Labour Inspector in 2016. These investigations preceded the investigation in 2017 which forms the basis for the current application for penalties. As the 2016 investigations are relevant to my investigation I will briefly address them.

[6] The first investigation in 2016 was resolved when Shalini agreed to pay arrears to one employee. No penalty was sought by the Labour Inspector. The second investigation involved the Labour Inspector auditing Shalini's wage, time, holiday and leave records and interviewing some current and former staff. Materially the second investigation covered 6 out of 7 of the employees involved with the current matter and overlapped the time period.

[7] The second investigation resulted in the Labour Inspector issuing an Improvement Notice in November 2016 to Shalini. This advised that he considered it was failing, or had failed, to comply with various minimum employment standards. The notice required Shalini to implement and maintain fully compliant wages and time records for all employees as well as holiday and leave records. It went on to require it to provide evidence of the steps it had taken to comply with the Notice by providing full wage, time, holiday and leave records for all of its current employees. The Improvement Notice specifically included requests for evidence of time and a half payments and provision of alternative days for public holidays worked. Shalini was further required to show payment of any arrears of wages or holiday pay calculated.

[8] Mr Reddy responded to the Improvement Notice on Shalini's behalf by providing the Labour Inspector with records that, the parties agree, appeared to show compliance in all respects with the relevant law. I shall return to this response later in my determination.

[9] On 20 March 2017, following receipt of a complaint from one of Shalini's employees, the Labour Inspector commenced a third investigation into Shalini's workplace practices. This investigation again involved auditing Shalini's wage, time, holiday and leave records, and interviewing some current and former employees. These employees were each employed by Shalini as retail assistants, working between its liquor stores and dairy.

[10] On 9 May 2017 the Labour Inspector wrote to Shalini outlining arrears owed to seven employees arising from minimum wage entitlements, holiday pay on termination and public holiday pay. Shalini responded on 31 May 2017. Thereafter negotiations ensued.

[11] Following unsuccessful private negotiations, two mediations, and proceedings being filed by the Labour Inspector with the Authority and the Employment Court, the parties settled the wage arrears and holiday pay claims. Their agreement was recorded in a record of settlement dated 5 October 2018.

[12] Pursuant to the record of settlement:

- a. Shalini accepted the Labour Inspector's findings that it had breached minimum entitlement provisions by failing to pay minimum wages and holiday pay to seven employees. The agreement set out the terms of payment of arrears.
- b. The parties agreed to discontinue Employment Court proceedings that had been filed by the Labour Inspector and to file a joint memorandum with the Authority advising that the arrears had been settled and asking for a determination on penalties. They agreed this memorandum would attach an agreed statement of facts, and a copy of the record of settlement.
- c. The parties agreed on the following approach to the resolution of penalties:

The Labour Inspector will seek total penalties of up to \$50,000.00 in relation to 14 breaches; namely 7 breaches of the Minimum Wage Act, 2

breaches of the Holidays Act relating to holiday pay on termination and 5
breaches of the Holidays Act relating to working on public holidays.

Applicable law

[13] The legal framework for assessing and fixing a penalty, having regard to the statutory requirements in s 133A of the Act and the full Court's judgment in *Borsboom v Preet*, was recently summarised by the Court in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.¹

[14] The Court in those cases confirmed the considerations as:

- a. The object of the Act as stated in s 3 of the Act (statutory consideration 1)
- b. The nature and extent of the breach (statutory consideration 2)
- c. Whether the breach was intentional, inadvertent, or negligent (statutory consideration 3)
- d. The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (statutory consideration 4)
- e. Whether the person or entity in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5)
- f. The circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6)
- g. Previous conduct (statutory consideration 7)
- h. Deterrence, both particular and general (*Preet* additional consideration 1)
- i. Degree of Culpability (*Preet* additional consideration 2)
- j. Consistency of penalty awards in similar cases (*Preet* additional consideration 3)

¹ *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

- k. Ability to pay (*Preet* additional consideration 4)
- l. Proportionality of outcome to breach (*Preet* additional consideration 5)

Statutory consideration 1 – the object of the Act

[15] The objects of the Act are set out in Section 3.

[16] Of relevance to the current investigation is firstly, the objective to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship. Secondly, the promotion of effective enforcement of employment standards, in particular, by conferring enforcement powers on Labour Inspectors, the Authority, and the Court.

[17] Shalini, through its actions, failed to advance these objectives.

- a. Its actions undermined any prospect of mutual obligations of trust and confidence existing in the employment relationship.
- b. There was clearly an inequality of power. Shalini was incorporated in 2010 and has operated multiple businesses since that time with numerous staff. At least for part of the period at issue, it understood its legal obligations. On the other hand the affected employees are all migrant workers. Four were dependent on visas tied to Shalini. These workers were in a particularly vulnerable position not only because their employment was linked to their work visas with Shalini but also because they were unfamiliar with New Zealand laws and regulations. In addition, two of the employees were renting accommodation from Mr Reddy that heightened their vulnerability. Affidavits filed on behalf of one of these employees deposed:

[5] Throughout my time working for Shalini Ltd I was always on work visas which only allowed me to work for Shalini Ltd. Mr Reddy assisted me to apply for these visas.

[7] ... I lived above the shop I was working at and I paid rent to Mr Reddy. I was living with Kiran Dontham who was also employed by Shalini Ltd and worked in the dairy next door to the liquor store. He also paid rent to Mr Reddy.

[8] Throughout my time working for Shalini Ltd I worked long hours, was consistently paid below the minimum wage and worked on most public holidays without being paid holiday pay properly ...

[9] I told Mr Reddy that I didn't think I was being paid properly but he refused to increase my pay or pay me any of the wages or holiday pay I was owed. I felt that I couldn't do much about this as I was only allowed to work for Shalini Ltd if I wanted to stay in New Zealand.

- c. The failures to pay minimum wage and holiday pay undermined employment standards.

Statutory consideration 2 – the nature and extent of the breach

[18] An analysis under this step involves four sub-steps – identify the number of breaches; identify the nature of each breach; identify the maximum penalty for each of the identified breaches; and consider whether global penalties should apply.²

[19] There are three types of breaches.

- a. Section 6 of the Minimum Wage Act 1983, being a failure to pay employees at not less than the minimum rate of wages for all hours worked. Breaches occurred in relation to all seven of the employees.
- b. Section 23 of the Holidays Act 2003, relating to payment of holiday pay on termination. Breaches occurred in relation to two of the employees.
- c. Section 50 of the Holidays Act 2003, relating to failure to pay time and a half for every hour worked on a public holiday. Breaches occurred in relation to five of the employees.

[20] To determine the number of breaches I have applied the approach taken by the Court in *Nicholson*, applying *Preet*, and *Daleson*.³

[23] As observed in *Nicholson v Ford*, applying *Preet*, the answer to this question will depend on whether the breaches are to be regarded as separate or indivisible for penalty purposes:

- (a) Breaches of different statutory provisions in different Acts (such as unpaid holidays entitlements, breach of the minimum wage, and the failure to provide a written employment agreement) comprise separate breaches, falling into the former (separate breaches) category.
- (b) Materially identical breaches of a regularly repeated nature against each affected employee fall into the second category (indivisible

² *Daleson*, above n 1, at [20].

³ *Nicholson*, above n 1, at [153]-[155] and [157] and *Daleson Investment Limited*, above n 1, at [23].

breaches) and may therefore give rise to a single penalty in respect of each separate employee affected.

- (c) Breaches of different provisions of one Act might fall within the indivisible breach category, depending on whether such breaches were sufficiently “interrelated” that it is appropriate to deal with them as one breach (again I would add the additional gloss identified above). Breaches of different sections of the Holidays Act relating to working on and being paid for public holidays are, following *Preet*, to be regarded as one breach.

[21] Applying this approach I find there were 14 breaches, namely:

- a. Seven failures of s 6 of the Minimum Wage Act - The breaches were of a regularly repeated nature and therefore I globalise these to a single penalty in respect of each employee.
- b. Two failures of s 23 of the Holidays Act. The breaches occurred once in relation to two employees.
- c. Five failures of s 50 of the Holidays Act. The breaches were of a regularly repeated nature and therefore give rise to a single globalised penalty in respect of each employee. The breaches of s 23 and s 50 were not sufficiently interrelated so as to deal with them under one head.

[22] The maximum total penalty available in respect of the seven breaches of the Minimum Wage Act is \$140,000 being \$20,000 per breach.⁴ The same maximum penalty applies in terms of the breaches of the Holidays Act.⁵ The maximum total penalties are \$280,000.

Statutory consideration 3 – Whether the breach was intentional, inadvertent, or negligent

[23] For reasons that will become apparent I conclude that Shalini deliberately and knowingly underpaid each of the seven employees.

[24] Firstly, some of the employees depose that Mr Reddy told them to write fewer hours on their timesheets than they actually worked. One employee points out that he questioned the hours that he was being paid but Mr Reddy refused to pay him for the hours he was working. While Mr Reddy denies this, he acknowledges that he was the

⁴ Minimum Wage Act 1983, s10; Employment Relations Act 2000, s 135(2)(b).

⁵ Holidays Act 2003, s 75.

person who had oversight of how the businesses operated including rostering staff and business opening hours. He therefore had the information available to correctly assess days and hours worked by employees and to calculate pay.

[25] Secondly, based on the admissions now made by Shalini, the information it provided to the Labour Inspector in relation to its second investigation was incorrect. The records provided to the Labour Inspector did not disclose the true state of affairs in relation to six of the employees currently involved in this matter. Shalini's concealment resulted in the Labour Inspector's investigation coming to an end and Shalini avoiding paying its employees their legal entitlements. Thereafter, notwithstanding the Improvement Notice served on it in November 2016, it continued to breach minimum standards until the Labour Inspector commenced its third investigation in March 2017. But for one of the employees making a complaint to the Labour Inspector at this time, the breaches may well have continued for a longer period. These matters add to the seriousness of the breaches.

Statutory consideration 4 – The nature and extent of any loss or gain

[26] The Statement of Problem pleads the total arrears owed to the seven employees as just over \$160,000. However, the settlement reached between the parties resulted in agreement that the employees were owed \$96,542.34. This was payable to the employees: \$24,691.88, \$24,269.13, \$20,219.13, \$13,900.24, \$7,627, \$3,674 and \$2,160.96.

[27] None of the employees received any payment towards these outstanding amounts until 10 December 2018, being several months after the Statement of Problem was filed and between 2-3 years after the monies became due. At this time three employees were paid in full, being those due the smallest amounts. The other four employees received a lump sum payment of \$7,500 each with the remainder being repaid on a monthly basis. The final payment is to occur on or before 10 June 2020.

[28] Each of the employees lost the use of the money they were entitled to at the time it became due. For some, this related to monies due to them in 2015. In comparison, Shalini gained financially by retaining use of these monies since that time. Through its breaches Shalini was able to reduce its expenses and therefore increase its profit. The financial statements provided to the Authority show that in the

year ended 31 March 2016 Shalini had a net profit of \$117,579. When it began paying its employees their actual entitlements, and made provision for wage arrears in its March 2017 financial accounts, its profit dropped to \$63,589.

Statutory consideration 5 – Steps to mitigate effects of the breach

[29] There are several factors that I have taken into account under this head.

[30] The first is that Shalini was co-operative in the Labour Inspector's investigation of their employment practices from the commencement of its investigation in March 2017.

[31] Second, Shalini has accepted responsibility for the breaches and is remorseful. However, this did not occur until the Labour Inspector had taken steps to enforce payment by filing a Statement of Problem in March 2018. In its Statement in Reply filed in April 2018, Shalini maintained it had paid the seven employees all monies that were owing to them.

[32] Third, Shalini fully repaid three employees on 10 December 2018 and is paying arrears to the remaining four. The evidence is that, to date, Shalini has met the instalment payments agreed with the Labour Inspector. There is nothing to suggest Shalini will now cease payments under those arrangements.

Statutory consideration 6 – Circumstances of the breach and any vulnerability

[33] I have already considered the circumstances of the breach and any vulnerability under statutory heads 1 and 2.

Statutory consideration 7 – Previous conduct

[34] I have already addressed the fact that Shalini came to the attention of the Labour Inspector twice in 2016. Its provision of incorrect records to the Labour Inspector in relation to the second of these investigations is a matter that adds to the seriousness of the breaches. It resulted in Shalini avoiding repayment of monies owed to 6 of the 7 employees and enabled it to continue breaching minimum entitlements for several more months before the Labour Inspector commenced his third investigation.

Preet additional consideration 1 - Deterrence

[35] The breaches in this case are minimum standards. As such it is important that a penalty is set at a level where it deters employers from delaying payment of minimum entitlements to a time that suits the employer or when they are put under pressure by the Labour Inspector. However, it would not be appropriate to penalise Shalini so heavily that it goes out of business. Not only would that be a disproportionate effect, but it would adversely impact other employees, and may prevent the four remaining unpaid complainants from receiving the arrears owed to them.

Preet additional consideration 2 – Degree of culpability

[36] This consideration involves a consideration of the severity of the breach to establish a provisional starting point for the penalty. This includes an adjustment for aggravating and mitigating factors in relation to the breaches.

Aggravating factors

[37] It is clear from my analysis of the statutory considerations that there are a number of factors that increase Shalini's culpability. For example, the duration of the breaches, the number of workers affected, the intentional nature of the breaches, the worker's loss of use of the money they were entitled to at the time it became due, Shalini's financial gain by retaining the funds, Shalini's history with the Inspectorate and the employees' vulnerability.

[38] These aggravating features, while serious, are not the most serious conceivable breaches so that the starting point for deductions or credits should not be the maximum penalty.⁶ I consider this case to be on a similar level to that of *Preet* and therefore adopt the same provisional starting point of 80% of the maximum for breaches of the Minimum Wage Act for each of the seven breaches identified. This comes to a figure of \$112,000.

[39] I assess the overall seriousness of the Holidays Act breaches to be less than for the breaches of the Minimum Wage Act. This is because the arrears not paid to the employees for working on public holidays, and at the end of their employment, were not as consistent and significant as the substantial underpayments of regular wages. For the Holidays Act breaches I take a starting provisional point of 60% of the

⁶ Preet at [167].

maximum for breaches of the Holidays Act for each of the seven breaches identified. This comes to a figure of \$84,000.

[40] The combined provisional starting point total is \$196,000.

Ameliorating factors

[41] From this sum I must consider any ameliorating factors. A discussion of these matters is set out at statutory consideration 5.

[42] I have also considered the comments made by Chief Judge Inglis in *Daleson*.⁷

[33] While mitigating actions are relevant to the penalty-setting exercise, care needs to be taken not to create perverse incentives, encouraging employers to sit on their hands until forced, by virtue of a determination of the Authority, to pay what was previously due. The Australian Fair Work Commission put it in the following way in *Fair Work Ombudsman v Australian Sales & Promotion Pty Ltd*:

“I do not agree that payment of sums owed is evidence of contrition ... Belatedly doing what the law required to be done at an earlier time amounts to no more than the late performance of a duty.”

[34] It goes without saying that the Labour Inspector does not have the resources to pursue every underpayment claim on behalf of affected employees. Employers, who might otherwise be minded to seek to avoid their obligations, need to be encouraged to comply without waiting for the Labour Inspector to intervene. I see strength in the observation in *Fair Work Ombudsman v AIMG BQ Pty Ltd* that:

“In the absence of ... any evidence of genuine contrition or corrective action, the only inference the Court can draw is that rectification of the underpayment appears more a matter of expediency, a ‘cost of doing business’, than an acceptance of wrongdoing.”

[43] Taking heed of these comments, and noting that full payment of the arrears has not yet been made, I allow the same discount as was applied by the Court in *Daleson*, namely 20%.⁸ This discount applies to both the Minimum Wage Act breaches and the Holidays Act breaches and takes into account the ongoing need for deterrence.

[44] The foregoing calculations lead to a potential penalty of \$156,800.

⁷ At [33]-[34].

⁸ Preet, above n 1, at [35].

Preet additional consideration 3 – Consistency

[45] A review of Court and Authority imposed penalties show a number of significant orders where breaches of minimum wage and holiday pay have occurred.

[46] *Preet* involved two breaches of the Minimum Wage Act, four breaches of the Holidays Act and two other breaches. The Court ordered the employers of the five employees to pay a combined penalty of \$100,000.

[47] In *A Labour Inspector v Prabt Limited & Anor* – Prabt was ordered to pay \$100,000 for, inter alia, two breaches of minimum entitlement provisions contained in the Minimum Wage Act and the Holidays Act relating to its three employees.⁹

[48] In *Daleson* combined penalties of \$40,000 were awarded in circumstances where there were two breaches under the Minimum Wage Act, four under the Holidays Act and one breach for the failure to provide a written employment agreement. However, the Court noted that a “penalty in excess of this figure would not be inappropriate and \$40,000 might be regarded as generous”.

[49] In two recent Authority decisions, each involving 2 migrant works, the Authority awarded \$120,000 in penalties in one instance involving breaches of the Minimum Wage Act, Holidays Act and Wages Protection Act.¹⁰ In another case it awarded \$30,000 where the employer was a sole trader and therefore only liable for half the maximum amount compared to a company.¹¹

[50] Taking into account these cases I reduce the potential penalty under this head to \$100,000.

Preet additional consideration 4 – Ability to pay

[51] Shalini provided financial accounts for the years ended 31 March 2017 and 31 March 2018. Having reviewed these statements carefully I find they do not support an inability to pay a premium.

[52] In the year ended 31 March 2018 Shalini achieved a profit of \$50,816 which sum was paid to its shareholders. The Statement of Financial Position for that year

⁹ *A Labour Inspector & v Prabh Limited & Anor*[2018] NZEmpC 110.

¹⁰ *A Labour Inspector & Ors v Pegasus Energy Limited & Anor* [2018] NZERA Wellington 26.

¹¹ *A Labour Inspector v Xu t/a Golden Spring Takeaway* [2019] NZERA Wellington 22.

shows that the Company repaid term liabilities, being intercompany loans and a bank term loan, of just over \$200,000.

[53] It is also noteworthy that one of Shalini's liquor stores was sold on 1 March 2019. Mr Reddy deposes that vendor finance was provided to the purchaser.

[54] The foregoing factors would suggest the company is in position to pay a penalty. I therefore make no reduction under this head.

Preet additional consideration 5 – Proportionality of outcome

[55] This final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached is proportionate to the seriousness of the breaches, and 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.

[56] Standing back, and assessing the figure proposed to be imposed on Shalini, I conclude that no further discount is warranted. In doing so I have considered the two factors that the Court has suggested are of particular relevance in the proportionality exercise, namely the proportionality of the final penalty to the amount originally at issue and whether there is any real prospect that the final amount will be repaid.¹² I have also considered the need for deterrence.

[57] While I acknowledge that the Labour Inspector agreed not to apply for more than \$50,000, the Authority is not bound by the settlement agreement between the parties. A penalty at the level agreed by the Labour Inspector is out of proportion with the serious nature of the breaches in this case. It is also inconsistent with the cases that have come before the Court and the Authority in recent times. Based on the financial accounts provided by Shalini, the money owed to it from the sale of one of its businesses, and it continuing to trade its other businesses, there is no reason to doubt that a penalty of \$100,000 will be unable to be paid.

[58] I order Shalini to pay a sum of \$100,000 by way of penalty for its 7 breaches of the Minimum Wage Act and 7 breaches of the Holidays Act. Payment of this sum must be made within 28 days of the date of this determination.

¹² *Preet*, above at n1, at [190] and *Daleson*, above at n 1, at [60].

Conclusion on quantum

[59] Shalini is ordered to pay \$100,000 by way of penalty for breaches of the Minimum Wage Act and Holidays Act. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[60] Payment of the penalty is to be paid within 28 days of the date of this determination.

[61] I consider it appropriate that part of the penalty be paid to the seven employees as they have suffered the impact of the breach. For this reason, upon receipt of the penalty, the Crown is directed to pay 50% of the penalty equally to the seven employees identified in the record of settlement dated 5 October 2018.

Costs

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] If they are not able to do so, and an Authority determination on costs is required, the Labour Inspector may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Shalini will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹³

Outcome

[65] The overall outcome that I have reached is:

- a. Shalini Limited breached the Minimum Wage Act 1983 seven times and the Holidays Act 2003 seven times.

¹³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

- b. Shalini Limited is ordered to pay \$100,000 by way of penalty for breaches of the Minimum Wage Act 1983 and the Holidays Act 2003. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.
- c. Payment of the penalty is to be paid within 28 days of the date of this determination.
- d. The Crown is directed to pay 50% of the penalty it receives from Shalini Limited equally to the seven employees identified in the record of settlement dated 5 October 2018.
- e. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority