

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 32
3020772

BETWEEN A LABOUR INSPECTOR
 Applicant

AND SHAMIANA LIMITED
 First Respondent

AND SHAMIANA ENTERPRISES
 LIMITED
 Second Respondent

Member of Authority: Andrew Dallas

Representatives: Jodi Ongley, Counsel for the Applicant
 Satish Shetty, Director of the Respondents

Investigation Meeting: On the papers

Submissions 14 November 2017 and 6 December 2017 for the
 Applicant
 24 November 2017 for the Respondent

Determination: 6 March 2018

DETERMINATION OF THE AUTHORITY

- A. Shamiana Limited must pay the Authority, for subsequent payment into the Crown bank account, penalties of \$33,000.**

- B. Shamiana Enterprises Limited must pay the Authority, for subsequent payment into the Crown bank account, penalties of \$18,000.**

- C. Costs are reserved.**

Employment relationship problem

[1] By lodgement of a statement of problem on 4 October 2017, a Labour Inspector, Sacha Hodgson sought penalties from Shamiana Limited (Shamiana) and Shamiana Enterprises Limited (Shamiana Enterprises). The sole director and shareholder of both companies is Satish Shetty.

[2] Shamiana and Shamiana Enterprises are the vehicles by which Mr Shetty employs approximately 120 employees in 22 restaurants across New Zealand. A further eight restaurants are franchised to separate legal entities unrelated to these proceedings.

[3] The Labour Inspectorate first investigated Shamiana in August 2015 after receiving a complaint. Corrective action was taken including payment of arrears of wages and an improvement notice was issued.

[4] In October 2016, a further complaint was received in respect of an employee of both Shamiana and Shamiana Enterprises in Christchurch. The complaint included allegations of an unpaid work trial and payment of less than the minimum wage. After investigation, Mr Shetty paid arrears of minimum wages to the complainant in the amount of \$2,415.98 and also discontinued unpaid work trials.

[5] In July 2017, the Labour Inspector received two further complaints from two employees of Shamiana who said they had not been paid holiday pay upon cessation of their employment. Following an investigation, Shamiana paid the former employees \$20,500 and \$1189.25 respectively as unpaid holiday pay.

[6] The Labour Inspector alleged Shamiana breached s 64 of the Holidays Act 2003 by failing to pay two employees holiday pay upon cessation of their employment.

[7] The Labour Inspector further alleged Shamiana and Shamiana Enterprises failed to pay an employee employed by both entities minimum wages in contravention of s 6 of the Minimum Wage Act 1983. The Labour Inspector also alleged Shamiana and Shamiana Enterprises breached s 64(1) of the Employment Relations Act (the Act) in respect of the same employee by failing to retain a signed copy of their individual employment agreement.

[8] Neither Shamiana nor Shamiana Enterprises contested the breaches of minimum standards as alleged by the Labour Inspector. Further, Shamiana and Shamiana Enterprises both accept they are liable for penalties for the breaches.

[9] The Labour Inspector says while Shamiana and Shamiana Enterprises have made good on the arrears owing, the breaches are serious and some have occurred since the Labour Inspectorate's initial investigation in August 2015, which resulted in issuance of an improvement notice.

The Authority's investigation

[10] During a case management conference with the parties, it became apparent there was no factual dispute between them and no contest over the alleged breaches of minimum standards. Shamiana and Shamiana Enterprises also accepted the likelihood of the imposition of penalties for such breaches.

[11] By agreement with the parties, the Authority heard this matter "on the papers". An exchange of submissions was agreed upon, and Shamiana and Shamiana Enterprises were encouraged to provide information about their respective abilities to pay any penalties imposed by the Authority.

Issues

[12] This issues for determination are:

- (i) Whether penalties should be imposed on Shamiana for breaches of s 64 of the Holidays Act 2003 and if so, in what amount?;
- (ii) Whether penalties should be imposed on Shamiana and Shamiana Enterprises for breaching s 6 of the Minimum Wage Act 1983 in respect of an employee employed by both entities and if so, in what amount?;
- (iii) Whether penalties should be imposed on Shamiana and Shamiana Enterprises for breaching s 64(1) of the Employment Relations Act in respect of the same employee and if so, in what amount?; and
- (iv) Whether either party should contribute to the costs of representation of the other?

The Labour Inspector's claim for penalties

[13] Having reviewed the Labour Inspector's investigation report, the submissions of the parties and taken account of the concessions made by Shamiana and Shamiana Enterprises about their respective liability for the imposition of penalties, I find it is appropriate in the all the circumstances to impose penalties on Shamiana and Shamiana Enterprises for breaches of minimum standards.

[14] The Authority has jurisdiction under s 161(1)(m) of the Employment Relations Act to hear and determine an application by a Labour Inspector for recovery of penalties under the Act, Holidays Act and Minimum Wage Act.

[15] In determining the amount of any penalty to be imposed, guidance is found in s 133A of the Employment Relations Act and in decisions of the Court in *Borsboom v Preet PVT Limited*¹ and *Lumsden v SkyCity Management Limited*.²

[16] In *Preet* the Court set out a "four step" process to be followed when assessing penalties so as to provide a consistent and reasonably predictable result.³

[17] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.⁴ The maximum penalty for a company found liable for a penalty is \$20,000.⁵

Nature and number of breaches

[18] The Labour Inspector submitted partial globalisation was appropriate because while the breaches of these Acts were effectively continuing breaches, Shamiana and Shamiana Enterprises complied with their obligations to the employees once the Labour Inspector became involved.

[19] So then, in accepting that submission, and within the framework provided by *Preet*, Shamiana would be liable for a maximum penalty of \$80,000 for two breaches of the Holidays Act, one breach of the Minimum Wage Act and one breach of the Act.

¹[2016] NZEmpC 143 at [67] and [68].

²[2017] NZEmpC 30

³*Borsboom* at [151].

⁴*Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁵ Employment Relations Act, s 135(2)(b)

[20] Similarly, Shamiana Enterprises would be liable for a maximum penalty of \$40,000 for one breach of the Minimum Wage Act and one breach of the Act.

Seriousness of the breaches

[21] The Labour Inspector submitted the breaches of the Minimum Wage Act and Holidays Act were serious and deliberate. The Labour Inspector also identified Shamiana and Shamiana Enterprises' previous non-compliance with minimum standards. However, in doing so, the Labour Inspector acknowledged once default was identified in the present circumstances, corrective action was taken by both companies.

[22] Shamiana and Shamiana Enterprises also submitted they had cooperated with the Labour Inspector and paid the arrears said to be outstanding.

[23] Balancing these factors, the Labour Inspector submitted the penalties for breaches of the Minimum Wage Act by Shamiana and Shamiana Enterprises should be \$8000 each. The Labour Inspector further submitted the penalty for breach of the Holidays Act by Shamiana should be \$15,000. I accept these submissions.

[24] As to the penalty for failure to provide an employment agreement to one jointly employed employee, the Labour Inspector submitted the penalties for breaches of the Act by Shamiana and Shamiana Enterprises should be \$10,000 each. The requirement to provide an employment agreement to an employee is an important one because it enables the parties to, in most cases, readily discern the scope of their employment relationship. I find a penalty of \$10,000 each is appropriate.

[25] At this point, the proposed penalties for Shamiana are \$33,000. The proposed penalties for Shamiana Enterprises are \$18,000.

Financial circumstances of Shamiana and Shamiana Enterprises

[26] As stated above, Shamiana and Shamiana Enterprises were encouraged to provide information about their respective abilities to pay any penalties imposed by the Authority. In submissions subsequently filed, the companies, through director Mr Shetty, advised they were not able to provide financial information.

[27] Mr Shetty said Shamiana and Shamiana Enterprises could pay a total penalty of \$30,000. No basis, beyond mere assertion, was provided for this.

[28] Due to the lack of particularised financial information about Shamiana and Shamiana Enterprises, the respective financial circumstances of these companies cannot be reliably assessed. Consequently, there is no proper basis to discount penalties based on an ability to pay.

Proportionality of outcome

[29] In *Preet* the Court said the penalties imposed should be proportionate to the amount of money unlawfully withheld. In other words, penalties should be proportionate to the level of wrongdoing or mischief by the party found in default.

[30] However, an additional mischief, for which a financial value cannot be easily ascribed, was the failure by Shamiana and Shamiana Enterprises to provide an employment agreement to a jointly employed employee.

[31] Taking this into account, together with the arrears of holiday pay and minimum wages withheld, I find the proposed penalties of \$33,000 for Shamiana and \$18,000 for Shamiana Enterprises are proportionate.

Result

[32] In all the circumstances of the case, it is appropriate to impose significant, but proportionate, penalties. Shamiana must pay the Authority, for subsequent payment into a Crown bank account, penalties of \$33,000. Shamiana Enterprises must pay the Authority, for subsequent payment into a Crown bank account, penalties of \$18,000.

Costs

[33] Costs are reserved.

Andrew Dallas
Member of the Employment Relations Authority