

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 51
3078713

BETWEEN A LABOUR INSPECTOR
 Applicant

A N D SHALENDRA SINGH
 Respondent

Member of Authority: Peter van Keulen

Representatives: Alistair Miller, counsel for the Applicant
 Respondent in person

Investigation Meeting: 7 September 2020

Submissions and Further
Information Received: 7 September 2020, 28 September 2020, 23 November 2020
 and 20 January 2021 from the Applicant
 No submission received from the Respondent

Date of Determination: 11 February 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This claim by the Labour Inspector was originally lodged against On Time Cleaning Limited as the first respondent with Shalendra Singh as the second respondent.

[2] Since the investigation meeting was held on 7 September 2020, On Time Cleaning has been removed from the Companies Register. The Labour Inspector accepts that as a result I cannot proceed to make a determination against On Time Cleaning. And the Labour Inspector has advised that it does not intend to apply to have On Time Cleaning reinstated to the Register and therefore its claim against On Time Cleaning cannot continue.

[3] I will treat the claim against On Time Cleaning as being withdrawn; therefore this determination deals only with the Labour Inspector's claim against Mr Singh.

[4] The Labour Inspector's claim against Mr Singh is based on an assertion that he was a person involved in breaches of employment standards by On Time Cleaning. Those breaches include that On Time Cleaning failed to:

- (a) keep wage and time records for 72 employees;
- (b) keep holiday and leave records for 72 employees;
- (c) pay minimum wage for two employees totalling \$10,557.90;
- (d) pay annual leave for two employees totalling \$1,419.07;
- (e) pay one employee for two public holidays totalling \$150.44;
- (f) pay 10 employees the correct rate for working on a public holiday, with the arrears totalling \$293.29; and
- (g) pay one employee for an alternative day holiday that was not taken, totalling \$213.18.

[5] The Labour Inspector seeks orders against Mr Singh, for payment of the wage arrears for the minimum wage defaults and payment of the holiday pay arrears for the various failings in respect of payment for annual leave and public holidays.

[6] The Labour Inspector also seeks penalties against Mr Singh for the various breaches by On Time Cleaning.

The Labour Inspector's investigation and report

[7] On Time Cleaning operated a cleaning business in Christchurch and Dunedin, cleaning at Kmart and Countdown sites.

[8] Mr Singh was the director and shareholder of On Time Cleaning, effectively the owner and operator of the cleaning business.

[9] On 24 October 2018 the Labour Inspectorate received a complaint from an ex-employee of On Time Cleaning, alleging that he did not get paid minimum wage for all of the hours that he worked and that he did not receive an employment agreement.

[10] The Labour Inspector responded to this complaint by speaking to the ex-employee and then commencing an investigation into On Time Cleaning's employment practices.

[11] In January 2019, after contacting Mr Singh, the Labour Inspector received a list of 36 past and present employees of On Time Cleaning. The Labour Inspector then spoke to a manager at one of the Kmart stores that On Time Cleaning cleaned and she also spoke to some of the employees on the list provided to her. From these enquiries the Labour Inspector established:

- (a) The list of employees provided was not accurate as additional employees were recorded in the Kmart visitor log book.
- (b) Employees had not been provided with employment agreements.
- (c) All employees spoken to, except one, stated their hours of work were not recorded.
- (d) All employees spoken to believed they had not been paid at least minimum wage for the hours they worked, they were not paid time and a half for working on a public holiday, they were not provided with an alternate day off if they worked on a public holiday and in some cases final holiday pay had not been paid.

[12] The Labour Inspector then requested wage and time records and holiday and leave records from On Time Cleaning. In response On Time Cleaning provided some timesheets, payslips and employment agreements for some employees as well as bank statements. The Labour Inspector also obtained store visitor log books for the stores On Time Cleaning cleaned.

[13] The Labour Inspector then received time records from three employees, based on their recollection of hours worked.

[14] The Labour Inspector then analysed this material and concluded:

- (a) In addition to the 36 employees on the list provided by On Time Cleaning there were an additional 36 employees that worked for On Time Cleaning.
- (b) Not all employees had been provided with employment agreements and one that was provided had been backdated and was deficient.
- (c) The wage and time records and holiday and leave records were incomplete and for some employees non-existent.
- (d) As a consequence of the inaccurate, incomplete and non-existent employee records the Labour Inspector could not ascertain if employees had been paid minimum wage.
- (e) There was evidence that at least one employee had not been paid at all for working on Labour Day 2018. Another employee had not been paid for other public holidays that she did not work. Other employees had not been paid the correct rate of time and a half for working on a public holiday.
- (f) Two employees had not been paid their final holiday pay (accrued but untaken holiday pay) at the end of their employment.

[15] The Labour Inspector then interviewed Mr Singh on 11 June 2019. Mr Singh told the Labour Inspector that all of On Time Cleaning's employee records had been provided, that On Time Cleaning's accountant, Ravinendra Prasad, had been responsible for payroll and keeping the necessary records and he had supplied hours of work for employees to Mr Prasad. Mr Singh initially said the employee records were accurate but later in the interview he accepted the records were not accurate including that 36 employees were not listed in the list provided in January 2019.

[16] The Labour Inspector then interviewed Mr Prasad on 28 June 2019. Mr Prasad confirmed that he had done payroll for On Time Cleaning but he had simply paid employees on the information provided to him by Mr Singh. He also said he knew that On Time Cleaning's records were not accurate and he had tried to get Mr Singh to fix the system. In the end Mr Prasad stopped undertaking work for On Time Cleaning in June 2019.

[17] In July 2019 the Labour Inspector interviewed three employees of On Time Cleaning.

[18] After reviewing all of the material and information received from her investigation, the Labour Inspector compiled a report dated 5 September 2019 in which she concluded that On Time Cleaning had not kept adequate wage and time records and holiday and leave records, it had not paid all of its employees minimum wage for all of the hours they worked, it had failed to pay annual leave to two employees and it had failed to pay the correct rates and entitlements for various public holidays for a number of employees. The Labour Inspector also calculated the various wage and holiday pay arrears.

Findings

[19] I have reviewed the Labour Inspector's report, calculations and various documents gathered during her investigation. I have also assessed the written and oral evidence given in my investigation meeting including from the Labour Inspector, employees of On Time Cleaning and Mr Singh.

[20] Based on this analysis I am satisfied that On Time Cleaning breached employment standards¹ as follows:

- (a) It failed to keep correct wage and time records for 72 employees as required by s 130 of the Act.
- (b) It failed to keep correct holiday and leave records for 72 employees as required by s 81 of the Holidays Act 2003.
- (c) It did not pay minimum wage to two employees for some of the hours worked, totalling \$10,557.90. This is a breach of s 6 of the Minimum Wage Act 1993.
- (d) It did not pay annual leave for two employees which was payable at the end of employment, totalling \$1,419.07. This is a breach of s 27 of the Holidays Act.
- (e) It did not pay one employee for two unworked public holidays that were otherwise working days for that employee, totalling \$150.44. This is a breach of s 49 of the Holidays Act.

¹ As defined in s 5 of the Employment Relations Act 2000.

(f) It did not pay 10 employees the correct rate of time and a half for working on a public holiday, with the arrears totalling \$293.29. This is a breach of s 50 of the Holidays Act.

(g) It did not pay one employee for an alternative day holiday that was not taken, totalling \$213.18. This is a breach of s 81 of the Holidays Act.

[21] Based on these breaches of employment standards I now consider Mr Singh's liability for the penalties and payment orders sought by the Labour Inspector.

A person involved in the breach

[22] In terms of Mr Singh's personal liability for On Time Cleaning's breaches this is governed by sections 142W, 142X and 142Y of the Employment Relations Act 2000 (the Act) and the corresponding provisions under the Minimum Wage Act and the Holidays Act.

[23] Section 142W of the Act provides:

- (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.

[24] Section 142X of the Act provides:

- (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) the Act provides for a penalty for the breach.

[25] Section 142Y of the Act provides:

- (1) A Labour Inspector or an employee may recover money from a person who is not the employee's employer any wages or other money payable to the employee if –
 - (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.

[26] These sections mean that if Mr Singh is a person involved in the breach, as set out in s 142W of the Act, then he is liable to a penalty if one could otherwise be awarded for the breach and he may be liable to pay any arrears where there is a default in payment by On Time Cleaning arising from a breach of employment standards.

[27] I have already established that the breaches by On Time Cleaning are breaches of employment standards so that leaves the question of whether Mr Singh was a person involved in those breaches.

[28] Counsel for the Labour Inspector says Mr Singh was a person involved in the breaches by On Time Cleaning because he aided or abetted the breaches and/or was knowingly concerned in the breaches.²

[29] Mr Singh says he was not a person involved in the breaches as he relied on Mr Prasad to keep records and make the correct payments to employees; so he did not aid or abet the breaches nor was he knowingly concerned in the breaches.

[30] Based on the evidence in my investigation meeting I do not accept Mr Singh's explanation for his involvement in the breaches by On Time Cleaning. Mr Singh operated the cleaning business, employing people on behalf of On Time Cleaning, setting the work for the employees, collating and recording the hours worked, and passing the hours and wage rate information on to Mr Prasad. Mr Prasad did nothing more than calculate the wages payable to employees based on the advice from Mr Singh; Mr Prasad was not responsible for

² Sections 142W(a) and 142W(c) of the Employment Relations Act 2000.

collecting and keeping wage and time records or holiday and leave records nor was he responsible for compliance issues in terms of wages and holiday pay.

[31] Mr Prasad did however note that On Time Cleaning's record keeping was deficient and he raised concerns with Mr Singh, advising him that On Time Cleaning needed to do more. In the end Mr Prasad stopped undertaking payroll for On Time Cleaning as it would not change the way it operated and he did not want to be part of that.

[32] So, Mr Singh's explanation for his involvement in the breaches by On Time Cleaning is not credible and I must consider if his actions amount to aiding and abetting and/or being concerned in the breaches i.e. whether his involvement amounts to being "a person involved in a breach" under s 142W of the Act.

[33] Judge Corkill discussed "a person involved in a breach" in *Southern Taxis Limited and Others v A Labour Inspector*³ and concluded that for the purposes of sections 142W(a) – 142W(c) proof of intentional purposeful actions on the part of the person accused of being involved in the breach is required.⁴ In that case Judge Corkill decided that the directors were not persons involved in the breaches as they did not know the taxi drivers (whom were subject to the various breaches) were employees; i.e. they did not know their actions were facilitating or causing breaches of employment standards.

[34] So, the question is whether on the evidence in my investigation meeting I can conclude that Mr Singh undertook deliberate acts knowing his actions were assisting or causing⁵ breaches of employment standards by On Time Cleaning or knowing that his actions were involved in or were part of⁶ breaches of employment standards by On Time Cleaning

[35] The answer to that question is yes. I am satisfied on the evidence I heard that Mr Singh acted deliberately in relation to the employment records he kept for On Time Cleaning, and then in relation to the hours of work and wage rates for employees of On Time Cleaning that he gave to Mr Prasad for payment purposes including in relation to normal wage payments, public holidays and holiday pay at the end of employment. And I am satisfied that

³ *Southern Taxis Limited and Others v A Labour Inspector* [2020] NZEmpC 63.

⁴ At [187].

⁵ I take aiding and abetting to mean assisting or causing.

⁶ I take "concerned in" to mean being involved in or part of.

he knew these actions were assisting or causing, or were involved in or part of, breaches of employment standards by On Time Cleaning.

Orders for payment of wage and holiday pay entitlements

[36] Pursuant to s 142Y of the Act as I am satisfied that Mr Singh was a person involved in the breaches of employment standards by On Time Cleaning and that these breaches caused a default in money payable to employees, I can order payment of those arrears by Mr Singh. Specifically I order Mr Singh to pay:

- (a) \$10,557.90 for minimum wage arrears;
- (b) \$1,419.07 for annual holiday pay arrears;
- (c) \$150.44 for an unworked public holiday;
- (d) \$293.29 for time worked on public holidays; and
- (e) \$213.18 for an alternative holiday not paid.

[37] The total amount of arrears as recorded above is to be paid to the Labour Inspectorate and the Inspectorate is to pay to the arrears to relevant On Time Cleaning employees in the amounts calculated by the Labour Inspector.

Penalties

[38] There are two key aspects that inform the exercise of quantifying penalties; section 133A of the Act, which sets out relevant considerations and *Borsboom v Preet PVT Limited*,⁷ where the Employment Court set out a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards.

[39] In *A Labour Inspector v Matangi Berry Farm Limited*⁸ Judge Corkill applied an approach to penalty setting which assessed the factors in section 133A of the Act and then applied those and other considerations using the four step process in *Preet* to quantify the penalty. This is the approach I will use; first I will consider the statutory requirements and then I will use that information to assess quantum based on the four steps in *Preet*.

⁷ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

⁸ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

The object stated in s 3 of the Act

[40] The objects of the Act include building productive employment relationships through the promotion of good faith and promoting effective enforcement of employment standards by Labour Inspectors.

The nature and extent of the breaches

[41] Mr Singh was a person involved in the following breaches:

- (a) 72 breaches of s 130 of the Act. On Time Cleaning failed to keep wage and time records.
- (b) 72 breaches of s 81 of the Holidays Act 2003. On Time Cleaning failed to keep correct holiday and leave records
- (c) Two breaches of s 6 of the Minimum Wage Act 1993. On Time Cleaning did not pay minimum wage for some of the hours worked by employees, totalling \$10,557.90.
- (d) Two breaches of s 27 of the Holidays Act. On Time Cleaning did not pay annual leave which was payable at the end of employment, totalling \$1,419.07.
- (e) One breach of s 49 of the Holidays Act. On Time Cleaning did not pay one employee for two unworked public holidays that were otherwise working days for that employee, totalling \$150.44.
- (f) Ten breaches of s 50 of the Holidays Act. On Time Cleaning did not pay employees the correct rate of time and a half for working on a public holiday, with the arrears totalling \$293.29
- (g) One breach of s 81 of the Holidays Act. On Time Cleaning did not pay one employee for an alternative day holiday that was not taken, totalling \$213.18.

[42] The failures to keep wage and time records and holiday and leave records covered 72 employees giving rise to 72 breaches, however the failings in respect of record keeping were repeated for each employee over the time each employee was employed.

[43] There are sixteen failures to pay correct amounts of entitlements in connection with arrears relating to minimum wage and holiday pay totalling \$12,633.88. These are the known breaches and may well be significantly short of the actual number of breaches and the quantum of arrears. The inherent problem is that the failure to keep accurate employee records means many employees may have been underpaid because the records were wrong and then there is no evidence, in terms of accurate records, that shows the true extent of the breaches.

The nature and extent of any loss or damage suffered

[44] The loss or damage suffered by the employees in respect of the minimum wage payments and holiday pay requirements is quantified as \$12,633.88.

[45] The loss for the 72 employees subject to the record keeping breaches is not quantified but it is significant – as I have set out above, the failure to accurately record hours, including hours worked on public holidays, means that it is likely that many employees were underpaid their holiday pay and/or not paid minimum wage.

Were the breaches intentional, inadvertent or negligent?

[46] Given my findings in respect of Mr Singh's knowledge and involvement in the breaches I conclude that all of the breaches were intentional.

What steps have been taken in mitigation?

[47] On Time Cleaning has not paid the wage arrears sought by the Labour Inspector and it has now been liquidated and removed from the Companies register. The Liquidator's report shows there were no assets to disperse amongst creditors.

[48] Mr Singh did not cooperate fully with the Labour Inspector and continued to deny any personal responsibility for the breaches, blaming Mr Prasad – an explanation I have ruled out.

[49] Mr Singh indicated in the investigation meeting that he has limited means and would have to pay anything owing by way of arrears and/or penalties over time.

The circumstances of the breach and any vulnerability

[50] It appears that Mr Singh operated the On Time Cleaning business on low margins so he needed to keep employment costs down. He did this by not paying employees for extra non-rostered hours they worked, not paying for public holidays correctly and not recording hours of work correctly. To this end he exploited minimum wage workers.

Previous conduct

[51] Neither On Time Cleaning nor Mr Singh have been involved in breaches of employment standards previously.

Preet step 1 – Nature and number of breaches

[52] The first step in *Preet* requires me to consider whether any of the breaches should be globalised so that a single breach may reflect two or more of the breaches forming the Labour Inspector's claim. Globalisation is about reducing the number of breaches for penalty purposes so that the actionable breaches are representative of the overall conduct and the starting point for penalties is realistic.⁹

[53] In *Preet* the Employment Court contemplated that globalisation could apply where there were multiple breaches of statutory provisions in respect of multiple employees, reducing the number of breaches down to one single penalty.¹⁰ However in that case the Court only globalised the multiple and repeated breaches in respect of each employee for a single statute, such that the repeated failure to pay minimum wage was dealt with as one breach per employee. The Labour Inspector advocates that approach in this case so that, for example, there are 72 breaches of s 130 of the Act relating to the failure to keep wage and time records.

[54] I do not believe this goes far enough in terms of the globalised breaches reflecting the conduct and providing a realistic starting point for quantifying penalties.

[55] I believe the approach adopted by Judge Corkill in *A Labour Inspector v Matangi Berry Farm Limited*,¹¹ is appropriate. In this case Judge Corkill globalised failures across 207

⁹ *A Labour Inspector v Parihar* [2019] NZEmpC 145.

¹⁰ *Borsboom v Preet PVT Limited*, above n7 at [100].

¹¹ *A Labour Inspector v Matangi Berry Farm Limited*, above n8.

employees and 118 employees down to a single breach for each type of default; failure to retain employment agreements, failure to keep holiday and leave records and failure to pay annual holiday pay. This meant globalisation reduced 532 breaches (based on a count per employee affected) down to just three.

[56] In this case it is appropriate to globalise the breaches as one breach per statute, or in the case of the Holidays Act one for each type of breach distinguishing between holiday pay and entitlements for public holidays. This means there is:

- (a) One breach of s 130 of the Act for failing to keep wage and time records.
- (b) One breach of s 81 of the Holidays Act 2003 for failing to keep correct holiday and leave records.
- (c) One breach of s 6 of the Minimum Wage Act 1993 for not paying minimum wage for some of the hours worked by two employees.
- (d) One breach of s 27 of the Holidays Act for not paying annual leave for two employees which was payable at the end of employment.
- (e) One breach of the Holidays Act relating to not paying entitlements for public holidays correctly, which covers not paying one employee for two unworked public holidays that were otherwise working days for that employee, not paying ten employees the correct rate of time and a half for working on a public holiday, and not paying one employee for an alternative day holiday that was not taken.

[57] Based on this globalisation the starting point for assessing quantum of penalties to be imposed against Mr Singh is \$50,000.00.

Preet step 2 – Severity of breaches

[58] In addition to weighing up my consideration of the statutory considerations I must also consider the additional factors referred to in *Preet* of deterrence and culpability.

[59] Considering the aim of the Act, assessing the nature and extent of the breaches and losses suffered, reflecting on the fact that Mr Singh acted intentionally and that his culpability

is high and then adding in the need for deterrence, I conclude that the breaches are significant and consider 80% of maximum is an appropriate starting point.

[60] Neither On Time Cleaning nor Mr Singh have taken any steps in mitigation so there is no reduction for this.

[61] So after considering the severity of the breaches and the lack of mitigation my penalty assessment stands at 80% of the maximum amount being \$40,000.00.

Preet step 3 – Means and ability of the respondent to pay

[62] Whilst Mr Singh did not lead any substantial evidence about his means I do accept his statement that he will need time to pay any arrears or penalty. So I am prepared to allow a small reduction for the ability to pay, of a further 10%. This leaves my penalty assessment at 70% of the maximum being \$35,000.00.

Preet step 4 – Proportionality

[63] This step is about ensuring that the final amount of any penalty is proportional to the breaches and in line with other penalty amounts for multiple breaches of similar seriousness.

[64] In this regard I turn to consider an assessment of various determinations of the Authority that I have done before in which I analysed Authority determinations where the starting point has been multiple breaches before globalisation (in excess of 10 and up to 1075).¹² The penalties imposed ranged from \$4,000.00 up to \$160,000.00. The amounts awarded in recent Employment Court cases,¹³ are also relevant.

[65] The end result of the comparisons, particularly to those that involve similar scope and severity of breaches, and my reflection on proportionality is that I am satisfied that a further reduction to \$30,000.00 is appropriate.

¹² *A Labour Inspector v Raj Kiwi Limited* [2020] NZERA 493; *A Labour Inspector v H4M Corporation Limited* [2020] NZERA 406; *A Labour Inspector v Sail City Venture Limited* [2020] NZERA 268; *A Labour Inspector v Hawkes Bay Seafoods Limited* [2020] NZERA 133; *A Labour Inspector v Chait & Bish Hospitality Limited* [2020] NZERA 105; *A Labour Inspector v Indian Heaven Limited* [2019] NZERA 597; *A Labour Inspector v New Zealand Mountain Hunting Limited* [2019] NZERA 568; *A Labour Inspector v Mittal & Sons Limited* [2019] NZERA 406; *A Labour Inspector v Shalini Limited* [2019] NZERA 334; *A Labour Inspector v Dhanoa Transport Ltd* [2018] NZERA Wellington 32; *A Labour Inspector v Double Seven Services Limited* [2018] NZERA Christchurch 195; and *A Labour Inspector v Alps Travel Company Ltd* [2018] NZERA Christchurch 22.

¹³ *A Labour Inspector v Parihar*, above n9; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12; and *A Labour Inspector v Matangi Berry Farm Limited*, above n8.

Orders

[66] Mr Singh was a person involved in breaches of employment standards by On Time Cleaning.

[67] Mr Singh must pay to the Labour Inspectorate, for the Inspectorate to then pay to the relevant employees in the amounts assessed by the Labour Inspector the following:

- (a) \$10,557.90 for minimum wage arrears;
- (b) \$1,419.07 for annual holiday pay arrears;
- (c) \$150.44 for an unworked public holiday;
- (d) \$293.29 for time worked on public holidays; and
- (e) \$213.18 for an alternative holiday not paid.

[68] Mr Singh must pay to the Labour Inspector for transfer to a Crown Bank account penalties in the sum of \$30,000.00.

[69] I have noted in my determination that Mr Singh has advised that he will need time to pay any arrears or penalty imposed on him, however, at this stage I order the payments and the penalty amount to be paid to the Labour Inspector within 28 days of this determination and I leave it to the parties to negotiate any variation to that by way of an agreed payment plan.

Costs

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

[71] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority