

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 239
5639619

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF BUSINESS
 INNOVATION AND
 EMPLOYMENT (Callum
 McMillan)
 Applicant

A N D STYLISH NAIL LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: S Blick, Counsel for Applicant
 No appearance by Respondent

Investigation Meeting: 3 August and 7 December 2017 at Auckland

Submissions Received: 20 February, 3 August and 7 December 2017 and 19
 February and 25 July 2018 from Applicant

Date of Determination: 31 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The application for penalties is dismissed.**
- B. I direct the Labour Inspector to provide a recalculation of the wage arrears owed for the four employees taking into account my determination within 28 days. A copy is to be served by courier post to 53 Harbour View Road, Te Atatu, Auckland. Costs are reserved.**

Employment relationship problem

[1] The Labour Inspector seeks penalties against Stylish Nail Limited for 78 alleged breaches of the Employment Relations Act 2000 (Act) and the Holidays Act 2003 (HA). The breaches pertain to a sample of four employees namely Thi Men

Luu, Trang Nguyen, Hong Lyunh Trinh and Kyung Wha Youn (the four employees). It also seeks to recover wage arrears under s131 of the Act allegedly owed to four employees as a result of the above breaches.

Non-attendance of respondent at hearing

[2] Stylish Nail Limited has not filed a statement in reply and took no part in the hearing. Kevin Tran, a director, attended an initial telephone conference on 7 February 2017. He confirmed the company was taking no steps in this proceeding. It simply wished to know the outcome. He advised the business had been sold and the company had limited funds. He believed it would be able to pay any wages owed but not a high level of penalties.

[3] Two hearings took place in 2017 which the respondent did not attend.

[4] The Authority is able to proceed to hearing if no good cause is shown for a party's absence.¹ Given Mr Tran's earlier indication and the lack of any reply from the respondents following service of the amended statement of problem, I have determined this matter without hearing further from the respondent.

Amended Statement of Problem

[5] The Labour Inspector filed an amended statement of problem on 24 August 2017. There were difficulties with service upon the company because it no longer owned the business. I directed personal service upon the directors occur. The Labour Inspector undertook service upon Trang Nguyen a former employee now director of the respondent. This occurred on or about 7 May 2018. The respondent has taken no steps to file any reply within the statutory timeframe.

Issues

[6] Given the amount of breaches alleged (78 in total), the two hearings in 2017, an amended statement of problem filed, the amount of and additional evidence filed as recently as 25 July 2018, this has been a highly complex matter to determine.

[7] The following issues for determination have been drawn from the amended statement of problem:

¹ Clause 12 Schedule 2 of the Act.

- a) Were there failures to provide the four employees with individual employment agreements that contained all minimum requirements under s.65(2) of the Act? (4 breaches)
- b) Were there failures to keep wages and time records in accordance with s130(1)(c) of the Act? (4 breaches)
- c) Were there failures to keep or maintain accurate holiday records in accordance with s81(2)(b)(d)(o) and (p) of HA? (14 breaches)
- d) Were there failures to calculate and pay annual holidays taken during employment in accordance with s21 of HA (Youn and Luu)? (3 breaches)
- e) Were there failures to calculate and pay annual holidays in accordance with s24 and 28A(2) of HA (Ms Luu)? (5 breaches)
- f) Has there been a failure to calculate annual leave in accordance with s16 and 25 of HA (Ms Luu)? (1 breach)
- g) Were there failures to make payment for public holidays that fall within annual leave pursuant to s40(3)(a) HA (Ms Luu)? (3 breaches)
- h) Were there failures to pay for unworked public holidays pursuant to s49 HA (Youn and Luu)? (3 breaches)
- i) Were there failures to pay time and half for work on public holidays pursuant to s50 HA (Youn, Luu and Nguyen)? (9 breaches)
- j) Were there failures to pay time and half for work on public holidays in the pay period they fell pursuant to s55 HA (Youn, Luu and Nguyen)? (9 breaches)
- k) Were there failures to provide alternative holidays for public holidays worked pursuant to s56 HA (Youn, Luu and Nguyen)? (9 breaches)
- l) Did the employer permit an employee to take an alternative day on a day that she did not usually work contravening s57(b) HA (Youn)? (1 breach)

- m) Were there failures to calculate payment for alternative holidays taken pursuant to s60 HA (Luu)? (6 breaches)
- n) Were there failures to pay an employee for alternative holidays not taken upon termination pursuant to s60HA (Nguyen)? (7 breaches)
- o) What quantum of penalties should be awarded the above breaches?
- p) What wage arrears are owed to the four employees?

Time Limitation Issue

[8] A time limitation issue in respect of all breaches has arisen. During the course of the hearing it was revealed that a Labour Inspector had completed an earlier inspection of the respondent's records in June 2014. I directed that the previous Labour Inspectors file from 2014 be filed.

[9] The Labour Inspector has filed an affidavit sworn 24 August 2017² that did not attach the file. Rather it confusingly referred to Attachment 4O that contained some of the previous Labour Inspector's correspondence and notes and Attachment 3A to an earlier sworn statement of the Labour Inspector dated 26 July 2017³ that comprised an Improvement Notice dated 28 October 2014 only.⁴ No reference was made to copies of the four employees previous wage and holiday records or employment agreements provided.

[10] It appears these documents have been removed or lost from the Labour Inspectors 2014 file in the interim. This is because the Labour Inspector required the respondent provide copies of the four employees employment agreements, wages, time and holiday records within 7 days of a letter dated 11 June 2014. It then required the respondent improve its wage and holiday records and provide these by 25 November 2015. The four employees were employed at that time.

[11] The Labour Inspector then concluded the respondent's wage and holiday records and employment agreements were compliant with the legislative requirements. Further the Labour Inspector "intends no further action and this file has

² Affidavit C McMillan dated 24 August 2017.

³ Statement C McMillan 26 July 2017 Attachment 3A sworn at hearing.

⁴ See above paragraph 53 and Annexure 4O.

now been closed.” This was set out in a letter to the respondent director, Kevin Tran on 23 December 2014:

Dear Kevin

I am writing to advise you that I have completed my assessment of the Employment Agreements and wage time and holiday records you kindly sent to me.

Thank you for your co-operation in providing employment agreements, wage and time records.

Based on my assessments of the records it is my opinion that they meet the requirements of the legislation. Accordingly, the Labour Inspector intends no further action and this file has now been closed.

[12] Sections 135(5) of the Act and s 76(5) HA require an action for a penalty to be commenced within 12 months of when the cause of action should have reasonably become known to the applicant. The current applications for breaches of the Act were filed on 25 August 2016.

[13] The current application relies upon the same records the Labour Inspector had in its possession in 2014 to prove breaches of the Act and HA. Assuming the 2014 inspection was completed with due diligence, the Labour Inspector ought to have known if there were any breaches of the Act and HA by 23 December 2014.

[14] However the Labour Inspector does not seek to defend the time limitation or withdraw any of the above penalty applications. It also did not file any evidence supporting an extension.

[15] As a consequence, I have been required to fully consider each and every application for breach in respect of the four employees and whether it is affected by the time limitation issue in whole or part or at all. There are a large number of alleged breaches affected numbering 78 in total. It has taken considerable time and effort for the Authority to deal with each of the breaches below.

Were there failures to provide the four employees with individual employment agreements that contained all minimum requirements under s.65(2) of the Act? (4 breaches)

[16] The Labour Inspector submitted the employment agreements were compliant except they did not attach a clause explaining the services available for resolution of an employment relationship problem as required by s65(2)(vi) of the Act.

[17] The Labour Inspector had copies of the four employees employment agreements because it required these be filed by its letter dated 11 June 2014. It referred to these same records being legislatively compliant in a letter dated 23 December 2014. It could have identified these breaches at that time but failed to do so. The Labour Inspector has now filed this action on 25 August 2016 – 8 months outside of the time for filing a penalty action. No basis for extending time has been evidenced. These 4 breaches are dismissed.

Were there failures to keep wages and time records in accordance with s130(1)(c) of the Act? (4 breaches)

[18] The Labour Inspector submitted the wage record did not include the four employees postal addresses as required by s130 (1)(c) of the Act.

[19] The Labour Inspector had copies of the four employees wage and holiday records because it required these be filed by its letter dated 11 June 2014 and Improvement Notice dated 28 October 2014. It referred to these same records being legislatively compliant in a letter dated 23 December 2014. It could have identified these breaches at that time but failed to do so. The Labour Inspector has now filed this action on 25 August 2016 – 8 months outside of the time for filing a penalty action. No basis for extending time has been evidenced. These 4 breaches are dismissed.

Were there failures to keep or maintain accurate holiday records in accordance with s81(2)(b)(d)(o) and (p) of HA? (14 breaches)

[20] The Labour Inspector submitted the holiday record did not include the date of commencement of employment of the four employees (s81(2)(b); date of termination of two employees whose employment terminated on or about 12 June 2014 (Luu and Trinh) and another employee (Nguyen) whose employment terminated on 26 September 2015 (s81(2)(o); current entitlement to annual holidays of the four employees (s81(2)(d) and the amount of holiday pay paid on termination of two employees terminated on or about 12 June 2014 (Luu and Trinh) and another

employee (Nguyen) whose employment allegedly terminated on 26 September 2015 (s81(2)(p)).

[21] All of the breaches except for those two pertaining to Ms Nuyen should have been known to the Labour Inspector in 2014 when it inspected the wage records. The wage records were deemed compliant with legislation. Therefore 12 breaches are dismissed.

[22] Ms Nguyen did not give any evidence. This may be because she was appointed a respondent director on 27 Mar 2012 and has been a shareholder in the respondent company since its incorporation in 2009.⁵ This application primarily relies upon her wage and holiday records and the wage slips that were filed on 25 July 2018.

[23] Ms Nguyen's holiday and leave record does not record termination of her employment. The wage records and payslips do not indicate Ms Nguyen's employment terminated either. The payslip refers to holiday pay she has accrued as at 30 September 2015. There is evidence Ms Nguyen remains employed despite not taking any further wages in 2015. She is receiving a shareholders salary instead.⁶ This is evidence she is now a salaried employee. I am not persuaded her employment terminated on 26 September 2015 as a consequence. All 14 breaches are dismissed.

Were there failures to calculate and pay annual holidays taken during employment in accordance with s21 of HA (Youn and Luu)? (3 breaches)

[24] The Labour Inspector submitted the miscalculation of Ms Luu's 4 days of annual leave taken from 17 December 2012 resulted in an underpayment of \$34.84 gross. It further submitted the miscalculation of Ms Luu's 4 days of annual leave taken from 24 December 2012 also resulted in an underpayment of \$145.16.

[25] The records pertaining to calculation of Ms Luu's holiday payments were available to the Labour Inspector and the calculation issue should have been known in 2014. Instead the respondent is told its records were compliant.

[26] The Labour Inspector submits Ms Youn's underpayment has arisen because she allegedly received \$488.34 on 21 March 2016. She should have received \$520.37

⁵ Companies Office https://app.companiesoffice.govt.nz/companies/app/ui/pages_/companies/2369289/directors.

⁶ Affidavit C McMillan sworn 24 August 2017 Attachment 4L.

based upon her ordinary weekly pay for the week of 21 March 2016. This resulted in an underpayment of \$56.06.⁷

[27] The wage record for Ms Youn shows she in fact received \$616.46 on 22 March 2016. This shows she has been overpaid by \$96.09. In the circumstances while the calculation may not have been correct, an overpayment of her entitlements does not give rise to any breach of s21 HA. All 3 breaches are dismissed.

Were there failures to calculate and pay annual holidays in accordance with s24 and 28A(2) of HA (Ms Luu)? (5 breaches)

[28] The Labour Inspector alleges Ms Luu received four weeks of cashed up holidays on 22 May and 28 August 2012, 9 July 2013 and 21 January 2014 that she had requested but did not provide this in writing as required by s28A HA. Similarly Ms Nguyen's holiday leave record showed she had been paid out 8% holiday pay on 31 March 2014 of \$4,031.41 in breach of s28A HA.

[29] The respondent director Mr Tran alleged none of the employees had had their holidays cashed out stating "I may have used the wrong word "cash out" but to mean that the employee was not working on that particular week [and] was on paid annual leave."⁸ He also refers to the dates in the wage records being the end date of the week the employee worked.

[30] Ms Luu's wage record states she was paid "01 week annual leave cash out" on 20 May 2012.⁹ She had also worked during the week for which she was also paid. However she did not return to work the following week. In fact she did not return to work from 21 May until 29 September 2012 (in the week ending 4 October). If the date 20 May 2012 indicates the end of the week as stated by Mr Tran then she is being paid in advance of her holiday being taken the following week. The respondent is required to make the annual leave holiday payment "before the holiday is taken" as required by s27(1) HA. Ms Luu's holiday and leave record also shows the holiday was "taken" not sold and there was payment of \$384 at that time.¹⁰ The records

⁷ Statement of Problem dated 25 August 2016 Appendix M Audit Report Stylish Nail Limited Labour Inspectorate Appendix 1 Holiday & Leave Entitlements KW Youn.

⁸ Statement of Problem dated 25 August 2016 Appendix C Correspondence between LI and K Tran.

⁹ Affidavit C McMillan 4 November 2016 Appendix 2A.

¹⁰ Affidavit C McMillan 4 November 2016 Appendix 2C.

support Mr Tran's assertion there was a mistake in the notation about the holidays being cashed up.

[31] While away from work Ms Luu was paid a further week of annual leave on 30 August 2012 with the notation "01 week annual leave cash out 47.5 hrs + 8 hrs extra annual leave" of \$945.48.¹¹ Given she is not at work when that occurred it appears more likely to be payment for annual leave as opposed to cashing up leave. It is also recorded as having been leave taken not sold in her holiday and leave record.¹² The records (again) support Mr Tran's assertion there was a mistake in the notation about the holidays being cashed up and this was leave taken.

[32] Her wage record shows payment on 5 July 2013 of "1 week holiday paid". This is not described as cashing up. The same week Ms Luu is recorded as not being at work. The last time she worked was 25 June 2013. She returns to work on 1 July 2013. There is a six day period where there is no record of her working. There is no breach of an annual leave payment because she was not at work at the time.

[33] Her wage record records a payment on 20 January 2014 of "01 week holiday paid". This is not described as cashing up. The same week Ms Luu is recorded as not being at work. The last date she worked was 15 January 2014 during which she had taken two days in lieu. She returned to work on 17 January 2014. There appears to have been an overpayment of holiday leave as opposed to a "cashed up" holiday. The respondent has not sought to recover the amounts from Ms Luu. These breaches have not been proven.

[34] Ms Nguyen did not give any evidence. This application relies upon her holiday leave record only. This record is the only notation of any payment of 8% holiday leave. Mr Tran disputes Ms Nguyen was paid out \$4,031.41 because she had "decided to leave the holiday pay amount as per her capital fund introduced back to the company."¹³ Ms Nguyen is a shareholder and director of the respondent.

[35] There is a holiday leave record showing the payment of \$4,031.41 on 31 March 2014. Mr Tran advised the date was supposed to be March 2015 because "she

¹¹ Affidavit C McMillan 4 November 2016 Appendix 2A.

¹² Affidavit C McMillan 4 November 2016 Appendix 2C.

¹³ Statement of Problem dated 25 August 2016 Appendix C Correspondence between LI and K Tran.

just stops to take a break and receive holiday pay and then restart again later.”¹⁴ The wage record shows she continues to work until 24 June 2016 without break. Any payment was not recorded in her wages record or the payslip. Despite these assertions, no funds appear to have been withdrawn and paid in the wage record or the payslips. I do not have a copy of the respondent’s balance sheet to confirm any capital investment by Ms Nguyen. There is no evidence Ms Nguyen received the benefit of this payment at all. It does appear to be an incorrect notation in her holiday record as opposed to any cashing up occurring. This breach is not proven.

[36] In the circumstances all 5 breaches are dismissed.

Has there been a failure to calculate annual leave in accordance with s16 and 25 of HA (Ms Luu)? (1 breach)

[37] The Labour Inspector submits the respondent has incorrectly calculated Ms Luu’s annual leave at termination due to the effect of s16(2)(a)(vi) of the HA. Ms Luu’s commencement date is alleged to have been 8 June 2011 and Ms Luu took one week unpaid leave in the week beginning 6 September. It is alleged that Ms Luu took several periods of unpaid leave in excess of one week and this altered her anniversary date for annual leave. Two weeks unpaid leave from 23 April 2012 “changed” her anniversary date from 8 June to 22 June. Further, Ms Luu took 18 weeks unpaid leave from 28 May 2012. This again “changed” her anniversary date from 22 June to 26 October.

[38] Section 16 of the HA is set out below:

16 Entitlement to annual holidays

- (1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than [4 weeks] paid annual holidays.
- (2) For the purposes of subsection (1), the 12 months of continuous employment—
 - (a) includes any period during which the employee was—
 - (i) on paid holidays or leave under this Act; or
 - (ii) on parental leave under the Parental Leave and Employment Protection Act 1987; or
 - [(iii) on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; or]
 - (iv) receiving weekly compensation under the [Accident Compensation Act 2001] or former Act as well as, or instead of, payment from the employer; or
 - (v) on unpaid sick leave or unpaid bereavement leave; or
 - (vi) on unpaid leave for any other reason for a period of no more than 1 week; but

¹⁴ Statement of Problem dated 25 August 2016 Appendix C Correspondence between LI and K Tran.

(b) unless otherwise agreed, does not include any other unpaid leave, being leave other than that referred to in paragraph (a)(v) and (vi).

(3) If, for the purposes of subsection (2)(b), an employer and employee agree that any period of unpaid leave of more than 1 week is to be included in the employee's 12 months of continuous employment, the divisor of 52 to be used for the purposes of calculating the employee's average weekly earnings must be reduced by the number of whole or part weeks greater than 1 week that the employee was on the unpaid leave.

[(4) An employee's entitlement to annual holidays remains in force until the employee has—

(a) taken all of the entitlement as paid holidays; or

(b) been paid out under section 28B for the entitlement in the entitlement year.]

[39] Section 16(2) allows employees to take unpaid leave of up to 1 week without affecting their entitlement to 4 weeks holidays at the end of 12 months employment. If they take greater than 1 weeks unpaid leave within their 12 months, they are not entitled to receive the next 4 weeks paid leave until they have worked the period of leave taken in excess of the 1 week upon their return to work. The parties can also agree to incorporate any unpaid leave into their 12 months continuous employment but the divisor of 52 is reduced by the amount of weeks or part thereof of unpaid leave taken in excess of 1 week in calculating the average wage.

[40] Ms Luu did not give any evidence about periods of unpaid leave. The allegation of unpaid leave has been drawn from Ms Luu's wage record. I have considered this record below.

[41] From my perusal of the wage records Ms Luu:

- Started work on 1 June 2011
- Was not at work from 30 August to 4 September 2011 a 5 day period for which she was not paid.
- Was not at work from 20 to 30 April 2012 – a period of 11 days for which she was not paid.
- Was not at work from 21 May to 29 September 2012 – a period of 131 days.

[42] As at 1 June 2012 Ms Luu had taken 16 days unpaid leave. She was entitled to take one week of unpaid leave without it affecting the date she would accrue her annual leave entitlement of 4 weeks (entitlement date). Therefore her entitlement date moved forward by 9 days only to 10 June 2012.

[43] During the period 10 June 2012 to 10 June 2013 Ms Luu took 131 days of unpaid leave. She was entitled to take one week of unpaid leave without it affecting her entitlement date. As noted above in paragraphs [30] and [31] she received payment for two weeks holidays during this period. Those three weeks of unpaid and paid leave shall be deducted from the 131 days leaving 110 days of unpaid leave. The 110 days of unpaid leave moved her entitlement date forward from 10 June to 28 September 2013.

[44] The wage records show Ms Luu had taken 8 weeks and 4 days annual leave up until her last day of work on 12 June 2014. Given Ms Luu had a changing anniversary date, her entitlement to holidays upon termination was 4 weeks (less any holidays taken) and 8 % of her gross wage for the period 28 September 2013 to 12 June 2014. Given she has taken 4 weeks annual leave and 4 weeks 4 days annual leave in advance, it is likely she may have been overpaid holiday leave.

[45] Given the complexity of this calculation and the high degree of possible error, it is unsurprising the respondent has miscalculated this sum. The Labour Inspector has also committed the same error in its audit report that forms the basis for this action.

[46] In the circumstances, there cannot be any breach regarding payment of annual leave upon termination. Even if there was a breach the Labour Inspector should have known this in 2014 when it received Ms Luu's wage and holiday record. In the circumstances this breach is dismissed.

Were there failures to make payment for public holidays that fall within annual leave pursuant to s40(3)(a) HA (Ms Luu)? (3 breaches)

[47] The Labour Inspector alleges Ms Luu was not paid for public holidays of Christmas Day and Boxing Day 25 and 26 December 2012 and Queens Birthday 3 June 2013. It alleges Ms Luu was had annual leave deducted instead of 3 days public holiday paid.

[48] Section 40 states:

40 Relationship between annual holidays and public holidays

(1) A public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual holidays.

(2) Subsection (3) applies if—

(a) the employment of an employee comes to an end; and

- (b) the employee is entitled to annual holidays; and
 - (c) the employee has not taken the annual holidays or has taken only some of them.
- (3) The employee is entitled to be paid for a public holiday if the holiday would have—
- (a) otherwise been a working day for the employee; and
 - (b) occurred during the employee's annual holidays had the employee taken his or her remaining annual holidays entitlement immediately after the date on which the employee's employment came to an end.

[49] The wage and holiday leave record show Ms Luu did not receive payment for 3 public holidays that fell during a period she had taken paid annual leave. This was a breach of s40(3) HA and is liable to a penalty under 75(2)(b) HA.

[50] The wage and holiday records showing payment for Ms Luu's public holidays worked were available to the Labour Inspector in 2014. Any issue regarding non-payment for public holidays should have been known at that time. These claims for penalties are out of time. These breaches are dismissed.

Were there failures to pay for unworked public holidays pursuant to s49 HA (Youn and Luu)? (3 breaches)

[51] The Labour Inspector submits the respondent failed to pay Ms Youn for unworked public holidays taken on Christmas Day Thursday 25 December 2014 and New Year's Day Thursday 1 January 2015 and Ms Luu on New Years Day 1 January 2013.

[52] There is little doubt Ms Youn's wage and holiday record is confusing. It shows on 25 December 2014 the business was closed. However she was paid for taking a public holiday and paid for working on a public holiday at the rate of time and a half in the week ending 24 December 2014 when there were no public holidays. Further there is a notation next to this entry "(PH time and a half) Boxing Day". This suggests the payment for public holiday taken in this week and the payment for public holiday worked pertains to Christmas Day and Boxing Day 2014. Similarly she was paid for taking a public holiday and paid for working on a public holiday at the rate of time and a half in the week ended 30 December 2014. Given the previous record, this suggests she was paid for taking New Years Day 2015 and worked the day after New Years Day 2015.

[53] If she was paid as set out above, she has received payment for four public holidays during the relevant statutory timeframe. I have no evidence to show she did not receive payment for four public holidays albeit the wage record records payment

on dates before the public holidays fell. I am not convinced there has been a failure to pay in the circumstances.

[54] Ms Luu's wage record shows she was not paid for taking New Years Day 2013. There is no record of her being paid in the Holiday and Leave record either. This is a breach of s49 of the HA. However this breach should have been known to the Labour Inspector in 2014 when she inspected Ms Luu's wage and holiday records. These claims for penalties are out of time. In the circumstances these breaches are dismissed.

Were there failures to pay time and half for work on public holidays pursuant to s50 HA (Youn, Luu and Nguyen)? (9 breaches)

[55] The Labour Inspector alleges the respondent failed to pay time and half to Ms Youn for working Anzac Day 2015 and Waitangi day 2016; Ms Luu for working Boxing Day 2011; Auckland Anniversary 2012 and 2014; Waitangi Day 2012 and 2013; and Ms Nguyen for working Waitangi day 2015 and ANZAC Day 2015.

Ms Youn

[56] Ms Youn's wage record does not record her working on ANZAC Day Monday 27 April 2015. She last worked in the week ended 22 April 2015. Although in her statement she believed she may have worked on ANZAC Day 2015 she did not confirm this at hearing. Instead her evidence at hearing was that she did not usually work Monday's due to personal obligations and ANZAC Day 2015 fell on a Monday. I am not convinced she worked ANZAC day 2015 in the circumstances.

[57] Ms Youn has given sworn evidence she did not work Waitangi Day 2016. It also fell on Monday 8 February 2016. The wage record notes a public holiday that she did not work with the notation "Px" for this period of time. Given she did not usually work Mondays, there was no obligation to pay for that public holiday. These breaches are not proven.

Ms Luu

[58] Ms Luu could not confirm under oath the days she worked on public holidays alleged by the Labour Inspector. The evidence for the unpaid public holidays has

largely been drawn from the wage record. I have considered Ms Luu's wage record made the following findings:

- **Boxing day 2011:** For the week ended 29 December 2011 a public holiday was noted as not worked "Px". This appears to refer to Christmas Day that would have fallen in this week. The wage record notes Ms Luu working on Boxing Day 2011. There is no record of payment of time and half. This is a breach of s50 of the HA.
- **Auckland Anniversary 2012 and 2014:** The relevant dates were Monday 30 January 2012 and 24 January 2014. From the wage record for the week ended 1 February 2012 Ms Luu appears to have worked on 30 January 2012 but was not paid time and half. This is a breach of s50 of the HA.

However for the week ended 29 January 2014 it appears she did not work 24 January 2014. This breach is dismissed.

- **Waitangi Day 2012 and 2013:** The relevant dates were Monday 6 February 2012 and Wednesday 6 February 2013. From the wage record Ms Luu does not appear to have worked from the week ended 5 February until 9 February 2012 the following week. Similarly for 2013. She does not appear to have worked from 5 February until 9 February 2013 the following week. These 2 breaches are dismissed.

[59] The two breaches of s50 of the HA pertaining to Ms Luu should have been known to the Labour Inspector in 2014 when her wage and holiday records were provided. Therefore this breach action has been filed outside of the time limitation period and is dismissed.

Ms Nguyen

[60] Ms Nguyen has given no evidence in support of these claims. As noted above she was appointed a respondent director on 27 Mar 2012 and has been a shareholder in the respondent company since its incorporation in 2009. Given she did not appear at hearing, her wage and holiday leave records were required to establish these claims. Ms Nguyen's wage records were only filed on 25 July 2018.

[61] Waitangi Day 2015 fell on Friday 6 February 2015. ANZAC Day 2015 fell on Monday 27 April 2015. The wage records show for the week ended 11 February 2015 Ms Nguyen worked Waitangi Day 2015 in the preceding 7 day period. In the week ended 29 April 2015 she appears to have worked ANZAC Day 2015 in the preceding 7 day period. Her wage and holiday record does not record her being paid for Waitangi Day or ANZAC Day 2015 at the rate of time and a half. These are 2 breaches of s50 of the HA.

[62] The breaches in 2015 pertaining to Ms Nguyen would not have been known to the Labour Inspector in 2014. Therefore the two breaches of s50 of the HA pertaining to Ms Nguyen shall proceed to a determination about quantum of penalty. The remaining breaches are dismissed.

Were there failures to pay time and half for work on public holidays in the pay period they fell pursuant to s55 HA (Youn, Luu and Nguyen)? (9 breaches)

[63] Given the above findings, all of the breaches pertaining to Ms Youn are dismissed. Ms Luu worked Boxing Day 2011 and Auckland Anniversary 2012. She did not receive time and a half in the correct pay period. However the Labour Inspector should have been aware of this in 2014 when she received Ms Luu's records. The two breaches pertaining to Ms Nguyen are not affected by time limitations.

[64] Therefore all of the breaches are dismissed except for two breaches pertaining to Ms Nguyen for failure to pay time and a half for public holidays in the pay period within which they fell because that would have occurred in 2015.

Were there failures to provide alternative holidays for public holidays worked (Youn, Luu and Nguyen) pursuant to s56 HA? (9 breaches)

[65] The Labour Inspector alleges the above breaches also give rise to a failure to provide an alternative holiday under s56 HA. However s56 must be read in conjunction with s57 regarding how an alternative holiday is to be provided as set out below:

56 Alternative holiday must be provided if employee works on public holiday

(1) An employee is entitled to another day's holiday (an alternative holiday) instead of a public holiday if—

(a) the public holiday falls on a day that would otherwise be a working day for an employee; and

- (b) the employee works (in accordance with his or her employment agreement) on any part of that day.
- (2) If subsection (1) applies, an employer must—
 - (a) provide the employee with an alternative holiday; and
 - (b) pay the employee for working on the public holiday in accordance with section 50.
- (3) The entitlement to an alternative holiday remains in force until—
 - (a) the employee has taken the holiday; or
 - (b) the employee has been paid for the holiday in accordance with section 60(2) or section 61.
- (4) An employee is not entitled to an alternative holiday under this section if the employee works for the employer only on public holidays.

57 Requirements of alternative holiday

- (1) An alternative holiday provided under section 56 must—
 - (a) be taken by the employee on a day that is agreed between the employer and employee; and
 - (b) be a day that would otherwise be a working day for the employee; and
 - (c) be a whole working day off work for the employee, regardless of the amount of time the employee actually worked on the public holiday [; and]
 - (d) not be taken on a public holiday.]
- [2] If an employer and employee cannot agree under subsection (1)(a) on when an alternative holiday is to be taken, the day must be taken on a date determined, on a reasonable basis, by the employer.]
- [3] If subsection (2) applies, the employer must give the employee at least 14 days' notice of the requirement to take the alternative holiday.]

[66] Given the above findings, all of the breaches pertaining to Ms Youn are dismissed. Both Ms Luu and Ms Nguyen worked two public holidays and were each entitled to take two alternative days. There is also no evidence of any request or agreement or requirement for these employees to be provided with an alternative holiday for the above public holidays worked during their employment as required by s57(1) HA. Therefore there cannot have been any failure to provide an alternative holiday under s56 HA. These breaches are dismissed.

Did the employer permit an employee to take an alternative day on a day that she did not usually work contravening s57(b) HA (Youn)? (1 breach)

[67] The Labour Inspector alleges Ms Youn was paid to take an alternative day on Tuesday 29 December 2015. This was a day she did not allegedly work. This contravened s57(1)(b) HA (see above).

[68] Ms Youn's employment agreement does not specify her usual days of work. From her evidence at hearing the only day she did not work with any certainty was Mondays. There is evidence in the wage records that Ms Youn occasionally worked Tuesdays. In the circumstances I am not convinced Ms Youn alternative day taken on a Tuesday breached s57(1)(b) HA. This breach is dismissed.

Were there failures to calculate payment for alternative holiday taken (Luu) s60 HA? (6 breaches)

[69] The Labour Inspector alleges the respondent has failed to properly calculate and pay the correct amount to Ms Luu for alternative holidays taken in 2014 on 16 and 17 January; 11 February, 9 and 13 May; and 10 June.

[70] All of these breaches should have been known to the Labour Inspector when it viewed the wage and holiday records in 2014. These breaches are dismissed.

Were there failures to pay employee for alternative holidays not taken upon termination pursuant to s60HA (Nguyen)? (7 breaches)

[71] The Labour Inspector alleges Ms Nguyen's employment terminated on 26 September 2015 and she has not been paid for alternative holidays earned from Easter Monday 21 April 2014, ANZAC Day 25 April 2014, Queens Birthday 2 June 2014, Boxing Day 26 December 2014, 2 January 2015, ANZAC Day 27 April 2015 and ANZAC Day 25 April 2016.

[72] Ms Nguyen did not give evidence at hearing. As noted above she is a respondent director and shareholder. This relies upon her wage and holiday records and the wages slips. These records were only filed on 25 July 2018.

[73] Ms Nguyen's holiday and leave record does not record termination of her employment. The Labour Inspector refers to spreadsheets and payslips he relied upon to determine the final pay for their final day of work. The payslip does not state this was Ms Nguyen's final pay. The payslip refers to holiday pay she has accrued as at 30 September 2015.

[74] Ms Nguyen's wages holiday and leave record and payslips do not indicate Ms Nguyen's employment terminated either. The payslip refers to holiday pay she has accrued as at 30 September 2015. There is evidence Ms Nguyen remained employed and is receiving a shareholders salary instead.¹⁵ I am not persuaded her employment terminated on 26 September 2015 as a consequence. No breaches can therefore arise. These breaches are dismissed.

¹⁵ Affidavit C McMillan sworn 24 August 2017 Attachment 4L.

Quantum of Penalty

[75] There are four proven breaches - two of s50 HA and two of s55HA pertaining to Ms Nguyen only. I have taken into account the decision of *Preet*¹⁶ and have had particular regard to s133A of the Act in terms of quantum.

[76] The Labour Inspector's letter dated 23 December 2014 stating the respondents' records were legislatively compliant leads to the conclusion that the above breaches may be termed inadvertent under s133A of the Act. This letter created a false belief the respondent's wage and holiday record keeping was compliant with legislation when it was clearly not in some instances. The respondent may have had a basis to allege estoppel in these circumstances.

[77] Further the "employee" involved is in fact a respondent director and shareholder. She continues to receive a shareholders salary. The losses for ANZAC Day and Waitangi Day 2015 are \$180. Ms Nguyen has control of the respondent company as its director. She is able to ensure she is appropriately compensated. I also take the view as an owner and director of the respondent, Ms Nguyen is not a vulnerable employee.

[78] The above factors in these circumstances will result in no penalty being awarded. The application for penalties in respect of the four breaches is dismissed.

Wage arrears

[79] The wage arrears owed need to be adjusted to reflect the above findings. Therefore I direct the Labour Inspector to provide a recalculation of the wage arrears owed for the four employees taking into account my determination within 28 days. A copy is to be served by courier post to 53 Harbour View Road, Te Atatu, Auckland. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

¹⁶ *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.