IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 293
3023573

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	VISHNU HOSPITALITY LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Marija Urlich, Counsel for the Applicant Gary Tayler, Advocate for the Respondent
Investigation Meeting:	13 August 2018 in Rotorua
Determination:	18 September 2018

DETERMINATION OF THE AUTHORITY

A. Vishnu Hospitality Limited (VHL) breached its statutory obligation to provide the Labour Inspector with requested records and breached an employment standard by failing to keep holiday and leave records for two employees.

B. Within 28 days of the date of this determination VHL must pay the following penalties to the Inspector:

(i) $5000, under s 229(3) of the Employment Relations Act 2000; and

(ii) $5000, under s 75 of the Holidays Act 2003 for breaches under s 81 of that Act.

C. From the sum paid the Inspector must transfer $500 to each of the two workers who were the subject of her claim under the Holidays Act and transfer the remainder to the Crown Account.

D. VHL must also pay the Inspector $2250 as a contribution to her

costs of representation and to reimburse her for the Authority filing fee of $71.56.

Employment Relationship Problem

[1] Labour Inspector Clare Lyons-Montgomery lodged a statement of problem identifying nine ways in which Vishnu Hospitality Limited was said to have failed to meet statutory requirements relating to its employment of workers in the Rotorua restaurant VHL operates. Those failures included shortfalls in minimum entitlements for wages and holiday pay as well as not promptly providing pay and holiday records that the Inspector had asked to see.

[2] VHL blamed its restaurant manager, Lovelesh Nanda, for any shortcomings in its records and payments. It said Mr Nanda, and not VHL's director Nilin Patel and fellow shareholder Narulal Taili, had been responsible for the tasks of providing the restaurant's employees with written agreements and for keeping records of their wages and leave entitlements. Mr Nanda's employment by VHL ended on 26 October 2016. He then made a complaint to the Inspector that led to her investigating the business. VHL said Mr Nanda has complained about, and sought to benefit from, a situation he had created.

[3] The parties twice attended mediation about the Inspector's application. This resulted in wage arrears concerns for three employees being resolved. This included Mr Nanda's wage arrears claim. VHL accepted he was owed $28,273. It arranged to pay that amount in instalments.

[4] The number of workers covered by the Inspector's application was further narrowed by VHL making separate, private agreements with two former employees about wage arrears the Inspector had identified were due to them. From limited information available she had calculated one of those two was owed arrears totalling $43,274 and the other $9,138. VHL then arranged for those privately-concluded agreements to be certified by a Ministry of Business employment mediator under s 149 of the Employment Relations Act 2000 (the ERA). This certification triggers the statutory provision making the terms of those agreements final, binding, not able to be cancelled and not open to appeal or review.[1] Such agreements often include a term

[1] Employment Relations Act 2000, s 149(3).

regarding confidentiality so the other terms may not be disclosed, unless both parties agreed to waive confidentiality or the law otherwise required disclosure. In this case the agreements VHL made with those two workers included a confidentiality term. VHL declined an Authority invitation to waive its confidentiality regarding whatever terms were agreed, including on what the two former employees were paid in remedy of the arrears identified by the Inspector's inquiries.

The Authority's investigation

[5] As a result of mediation and the agreements made before the Authority investigation meeting was held, the issues remaining for determination had narrowed to the following:

(i) Did VHL fail to supply the Inspector with a wage and time record and a holiday and leave record for seven identified employees in the timely manner required by s 229(2) of the ERA?

(ii) Did VHL fail to keep a holiday and leave record for Gagandeep Singh and Madan Lal Kakaraliya in accordance with s 81(2) of the Holidays Act 2000 (HA)?

(iii) If VHL did fail to meet requirements to supply records requested under s 229, should VHL be ordered to a penalty under s 229(3) of the ERA?

(iv) If VHL did fail to meet requirements to keep records under s 81(2) of the HA, should VHL be ordered to pay a penalty under s 75 of the HA?

(v) Should VHL be ordered to reimburse the Inspector $71.56 for the Authority fee paid to lodge her application?

(vi) Should either party be ordered to contribute to the costs of representation of the other party?

[6] The Inspector and Mr Patel each provided a written witness statement and attended the investigation meeting. Under affirmation they confirmed the content of those statements and answered questions asked by me and the parties' representatives. The representatives also made closing submissions on the issues for resolution. As permitted by s 174E of the ERA this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Failure to supply records in a timely manner

[7] The functions of a Labour Inspector include taking all reasonable steps to ensure the various Acts that set employment standards are complied with.[2] For the purpose of carrying out those functions s 229(1)(d) of the Act empowers the Inspector "to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both of any employee of that employer".[3]

[8] Two other provisions apply to that power:

> (2) Where any Labour Inspector makes any requirement of an employer under … subsection (1)(d), that employer must forthwith comply with that requirement.
>
> (3) Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under … subsection (1)(d) is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.

[9] Those provisions required two points of evidence to be resolved. Firstly, did VHL comply "forthwith" with the Inspector's requirement to provide records? Secondly, if not, was VHL's failure without reasonable cause?

[10] Forthwith means without delay.[4] For employment law purposes "forthwith" has been defined in the following way:[5]

> Must be given its reasonable and proper meaning, allowing for some small delay to comply on stipulated date; usually means immediately for final payments in redundancy situation: *Wellington etc Clerical Administrative IUOW v Royal NZ Plunket Society Inc* [1986] ACJ 146. In *Scott v Ministry of Transport* [1983] NZLR 234 (CA) (a transport case), the Court of Appeal accepted that the word has substantially the same meaning in different branches of the law, and means "as soon as reasonably practicable" (at 236). It is not synonymous with "instantly"; it imports that there must be no significant delay, but it does "allow a little elasticity".

[11] In October 2016 the Inspector had received a complaint and interviewed three VHL employees about their concerns. In early February 2017 she visited the restaurant and issued a notice to supply records for seven employees. She had not

---

[2] Employment Relations Act 2000, s 223A(b) and (c).
[3] Employment Relations Act 2000, s 229(1)(d).
[4] Concise Oxford English Dictionary (11th ed, 2004).
[5] See Words, Phrases and Concepts in Employment Law (*Employment Law* online looseleaf ed, Brookers) retrieved September 2018.

kept a copy of that notice. To remedy that procedural error the Inspector issued a second notice on 27 February. The second notice required the requested records be provided by 6 March. Mr Patel arranged for some records to be provided on 15 March but they proved to be incomplete.

[12] Mr Patel's evidence was that VHL had done its best to respond to the Inspector's request but was unable to do so because Mr Nanda had let the company down by either not keeping proper records or by removing records made.

[13] Through their company VHL Mr Patel and his business partner Mr Taili had owned and operated the restaurant for four years before the Inspector's visit and request. Mr Nanda had worked as restaurant for three of those years. Mr Patel, who is based in Taupo, said he only visited the restaurant around four times a year. He said that Mr Taili, who was a chef by profession, relied on Mr Nanda to deal with such business matters at the restaurant. On his occasional visits to the restaurant Mr Patel said he would have "a general chat" with Mr Nanda about the business, ask him if "everything was all right" and was told it was. Mr Patel said he had no reason not to believe the records were being kept as he said Mr Nanda had been instructed to do. In answer to a question at the Authority investigation meeting Mr Patel said he had neither seen nor asked to see any of those records in the three years Mr Nanda was restaurant manager.

[14] Mr Patel also said he believed Mr Nanda had kept some records while working for the business but had removed them from the restaurant premises. This speculation derived from handwritten notes Mr Nanda had made of payments due to other employees. Those notes included details Mr Patel considered must have been drawn from such records.

[15] However Mr Patel accepted it was the company, where such a corporate entity was the identified employer, which was liable for any failure to keep the records required by statute. Even if the task was delegated to a manager who had not carried out those instructions, that failure was not a reasonable cause for the company to be excused from its legal obligation to keep and, when asked, to produce such records. If Parliament had intended otherwise the relevant legislation would have expressly

imposed those duties on the directors or managers of the company personally rather than on the corporate entity of the company itself.

[16] Even if Mr Patel was correct in trying to place the blame on Mr Nanda for not being able to provide records sought by the Inspector, VHL was liable to a penalty for that failure.

Failure to keep a holiday and leave record for two employees

[17] Under s 81(2) of the HA an employer must at all times keep a holiday and leave record that identifies up to 20 specified items of information for each employee. The information includes the employee's name, when the employment started and entitlements to annual leave, sick leave and for work on public holidays. That information must be kept in written form or in a manner that allows it to be easily accessed and converted into written form.[6]

[18] An employer that fails to comply with the requirement to keep such records in a readily accessible form is liable to a penalty. For a company such a penalty may be up to $20,000.[7]

[19] The Inspector's claim regarding failure to keep a holiday and leave record related to only two employees. This was not because records for other employees were satisfactory. It was because delays in carrying out and completing her investigation, in part caused by delays in VHL's responses, had meant the 12-month period allowed for seeking penalties had elapsed.[8] Information about the failures in relation to keeping holiday records for Gagandeep Singh and Madan Lal Kakaraliya came to the Inspector's attention later in her investigation. She was in time to seek a penalty for those breaches.

[20] Mr Patel's excuse for the failure was the same as that given in response to the Inspector's other claim about records. He said it was Mr Nanda's fault. The answer to that excuse is also the same – the company, as the employing entity, was liable to a penalty for the failure, even if it had resulted from some shortcoming in how a trusted

[6] Holidays Act 2003, s 81(3).
[7] Holidays Act 2003, s 75.
[8] Employment Relations Act 2000, s 135(5).

manager or a director carried out his or her duties. Such a shortcoming was not a 'reasonable cause' for the failure.

[21] Neither was liability excused by VHL's evidence that not having a leave record for Mr Singh was of little consequence. It said he had only been employed for three months at the time, so the omission was simply not recording an entitlement to four alternative holidays he had accumulated during that period. The riposte to that excuse is found in the circumstances of the other worker. He had been employed for several years but no holiday and leave records for him were kept over those years, or at least that could be proved to have been kept.

Penalties – delay in providing records and no leave records for two employees

[22] The Inspector's evidence established VHL was liable for penalties under s 229(3) of the ERA and s 75 of the HA. Applying a four-step methodology recommended by the Employment Court I concluded the appropriate penalties in this matter were $5,000 under s 229(3) of the ERA and $5,000 under s 75 of the HA.[9]

[23] Those sums were reached from assessing the scale of the breaches and the severity of their effects, globalising similar offences, accounting for any aggravating or ameliorating factors, considering the financial circumstances of the liable party and, finally, checking the overall proportionality of the outcome. This assessment included having regard to the matters identified in s 133A of the ERA as relevant when determining the amount of a penalty. The steps are summarised in this table:

Step 1: Nature and number of breaches – potential maximum penalties		
	HA s 81	ERA s 229(2)
Total individual breaches	2	1
(up to $20,000 per breach)	$40,000	$20,000
Globalised	1	1
	$20,000	$20,000
Step 2: Aggravating factors		
Relative seriousness – 60% reduction	$8000	$8000
Step 2: Ameliorating factors		
No reduction	$8000	$8000
Step 3: Respondent's financial circumstances		
25% reduction	$6000	$6000
Step 4: Proportionality of outcome		
	$5000	$5000
Total penalties		**$10,000**

[9] See *Borsboom v Preet PVT Limited*, [2016] NZEmpC 143 at [137] – [151].

[24] Firstly, as a registered company, VHL faced a potential penalty liability of up to $20,000 for each of the three identified breaches.[10] The maximum total for those penalties therefore totalled $60,000. A globalised penalty for some of the breaches was appropriate for multiple and similar breaches of an act.[11]

[25] In this case the two breaches of the Holiday Act could be globalised as a single breach of omission to keep records. As a result the provisional penalties at this stage totalled $40,000 – being $20,000 for one breach of the ERA and $20,000 for the HA breaches.

[26] The statutory provisions VHL had breached are intended to provide the means by which a Labour Inspector can check that statutory entitlements, and particularly employment standards, are upheld. Failures to keep those records seriously compromise the ability of an inspector to carry out that statutory role. In this case the failure related to the entitlements of workers who were all migrants with some, if not all, on visas tying them to working for the one employer. In those circumstances they were inherently more susceptible to exploitation.

[27] The identified failures was not a single deliberate act but highlighted a systemic shortcoming in how VHL either kept or checked it had kept records that complied with the statutory requirements. Its failure also amounted to anti-competitive behaviour because VHL thereby did not incur the costs that law-abiding employers had met in keeping clear, complete records that they could produce promptly when asked. Neither was the company's failure explicable as commercial naivety by directors new to business. Mr Patel was an experienced businessman who also operated a grocery store and a motel. He could be expected to have a sound knowledge of compliance requirements and the need to check necessary records were kept for that purpose. And, even if he did not, ignorance is no defence.[12]

[28] The specific failures for which the Inspector sought penalties also occurred in the known and admitted context of other workers being short paid. This was clear from the agreements made, before the Authority's investigation meeting, for several workers to be paid arrears of wages and holiday pay. Resolving the amounts due was

[10] Employment Relations Act 2000, s 135(2)(b).
[11] *Borsboom*, above n 9, at [141].
[12] *Borsboom*, above n 9, at [86].

difficult for all parties because required records were not available. The consequence of the failure was not notional. It had a real effect, both on the workers who had been short paid and on the ability to readily resolve the extent of that shortfall.

[29] In assessing the relative seriousness of those breaches (in terms of quantity, length of time and effect) I considered a reduction to 40 per cent of the maximum amount was appropriate. No greater reduction could be applied because of the following aggravating factors. More than the two identified workers were actually affected by the breaches. More likely than not the failure to keep adequate records occurred over a period of three years. The effect on all workers has already been noted. No real remorse was demonstrated for the breaches. Mr Patel's evidence was to the effect that he eventually arranged settlements of the wage arrears identified by the Inspector because that was a less costly option than contesting them. Rather than demonstrating any real contrition for VHL's failures, Mr Patel's evidence and VHL's position in closing submissions made unwarranted attacks on the Inspector for carrying out her statutory duties.

[30] Mr Patel did confirm that he now personally oversaw the keeping of records to ensure future compliance. While an employer's acceptance of culpability and an indication of a real intention to rectify the effects of prior shortcomings may warrant consideration of a further discount from the provisional penalty, this factor has been accounted for sufficiently in the reduction already applied.[13]

[31] No other ameliorating factors supported further reduction. Mr Patel's co-operation with the Inspector's inquiry, overall, was grudging and partial.

[32] The next step of the assessment of the provisional penalty considered VHL's financial circumstances. VHL offered two pieces of information to support its submission that, if any penalties were imposed, they should be set at "the low end of the scale" and provision should also be made for payment by instalments.

[33] Firstly, VHL provided bank statements for its current account for the previous two months. These showed payments of wages to staff and purchases of supplies for the restaurant. Wages were paid to as many as eight restaurant staff, including the

[13] *Borsboom*, above n 9, at [179].

chef and VHL shareholder Mr Taili. The monthly balance in each case was a small overdraft, the largest being $2,034.

[34] Secondly VHL had agreed to pay Mr Nanda more than $28,000 in wage arrears. The arrangement for it to do so allowed for the payments to be made in instalments. Mr Patel said those instalments were a significant commitment and VHL had no other assets, apart from its cash flow from the restaurant.

[35] While that information indicated VHL might face some difficulty paying a penalty, too little evidence was offered too late to support any liability being erased entirely. A further 25 per cent reduction of the provisional penalties, to $6000 each, was sufficient to allow for the financial burden of meeting them. There was not however enough to warrant any payment being permitted to be by instalment only. VHL's evidence did not establish that its financial position was so difficult that the situation required such an order. It had not established that it would be unable to meet the cost of a penalty by calling on other resources, including by taking out a bank loan to be paid off over time from the restaurant's cash flow. There was no reason the Crown should stand as VHL's banker while the company gradually met its liability to penalties.

[36] The last step of the assessment applied a proportionality or totality test to consider if the provisional penalties reached after the first three steps was proportionate to the seriousness of the breaches and harm occasioned by them. The following relevant cases were considered to ensure the result for VHL was not inconsistent with the range of penalties for the same or similar breaches.

[37] In *Labour Inspector v Dreamz Global Limited* a similar single breach of s 229(1)(c) was described as striking at the heart of the Inspector's ability to carry out the investigation and enforcement functions of the role. The Authority imposed a penalty, after adjustment for various factors (including proportionality), of $3000.[14]

[38] In *Labour Inspector v L P Joyce Limited* the Authority set a penalty of $4200 for this breach.[15]

[14] [2017] NZERA Auckland 13.
[15] [2017] NZERA Auckland 88.

[39] In *Labour Inspector v Jes Construction Limited* the Authority ordered a penalty of $6000 where the employer had not engaged in any way with the Inspector following the request for records.[16] Failure to co-operate warranted a higher penalty than the other two determinations referred to.

[40] Penalties imposed in *Labour Inspector v New Lucky Star Restaurant Limited* included $10,000 for failure to keep holiday records for ten employees.[17] In *Labour Inspector v Bevan* the employer agreed to pay a penalty of $18,000 for breaches of his statutory obligations to keep wage and time and holiday and leave records for 18 employees – with half of that penalty, that is $9000, appearing to apply to the holiday record failures.[18]

[41] In *Labour Inspector v Marx* the Authority imposed a penalty of $10,000 for failure to keep proper wage and time and holiday records.[19]

[42] In *Labour Inspector v Sun 2 Moon Limited* the Authority imposed a penalty of $7000 for failure to keep wage and time records.[20]

[43] In *Labour Inspector v Discount Food Warehouse Limited* the Authority imposed a penalty of $3500 for failures to keep wage and holiday records and described $5000 as being at the 'high end' of the range of penalties for such breaches.[21]

[44] In *Labour Inspector v MD Dara Miah Horticulture Limited* the Authority imposed a penalty of $6000 for failure to keep wage and holiday records and to provide written employment agreements. The employer had been operating a horticultural business for around 20 months, employing around 15 workers seasonally. It had co-operated with the Labour Inspector's investigation and had taken steps to rectify its failure to provide written employment agreements but the Authority found the breaches were serious and sustained and warranted a penalty. The Authority noted the Labour Inspector's evidence that the company's failure to

[16] [2017] NZERA Auckland 320.
[17] [2017] NZERA Auckland 386.
[18] [2017] NZERA Wellington 111.
[19] [2016] NZERA Wellington 100.
[20] [2016] NZERA Wellington 92.
[21] [2016] NZERA Christchurch 104.

maintain these records made it impossible to know whether the employees got at least their minimum statutory entitlements to wages and holiday pay.[22]

[45] Considered against the range of circumstances and penalties imposed in those cases, a reduction of the provisional penalty to $5000 for each category of breach was a proportionate amount to impose in VHL's case.

[46] There was one further factor that VHL submitted should be considered and applied to impose a lower level of penalty. This concerned the effect that a penalty for a breach of an employment standard could have on VHL's ability to get work visas of existing restaurant staff renewed or work visas for new staff approved. The Immigration Service's operational manual includes "rules for non-compliant employers".[23] The Rules refer to a list of such employers maintained by the Labour Inspectorate. One category of such non-compliance is where an employer has been ordered to pay a penalty for a breach of employment standards. The ERA's definition of those standards include the HA s 81 requirement to keep holiday and leave records.

[47] VHL's failure to show it had kept required holiday records therefore breached those standards. The Immigration Service rules provide for a "12 month stand-down" when a company is ordered to pay a penalty of more than $1,000 but less than $20,000 for a breach of employment standards.

[48] Mr Patel wanted the amount of any penalty ordered to be sufficiently low to avoid such a 12-month stand-down being imposed on VHL. He said the Immigration Service had already declined one worker's application for a renewed visa and he feared it would do so for another worker whose renewal was due for consideration soon. He suggested this adjustment was necessary to enable that worker to keep his present job in the restaurant.

[49] However the Immigration Service's potential application of a stand-down was not relevant to the Authority's assessment of a proportionate penalty. Neither would such a stand-down be a double penalty. Rather it would be a consequence of a failure to meet employment standards that Parliament has declared must be met. The

[22] [2016] NZERA Wellington 78.
[23] www.immigration.govt.nz/opsmanual/#64502.htm (retrieved September 2018).

Authority cannot reasonably curtail its own obligation to enforce those standards to enable a non-compliant employer avoid further commercial consequence.

Orders

[50] For the reasons given, and within 28 days of the date of this determination, VHL must pay to the Inspector a penalty of $5000 for breach of s 229(2) of the ERA and a further penalty of $5000 for breach of s 81 of the HA. On payment the penalties are to be transferred to the Crown account, with the following exception.

[51] The Inspector sought an order for some of any penalties awarded to be paid to the two workers whose records VHL was not able to provide. That request has been granted under s 136(2) of the ERA. The Inspector must, once VHL had paid the penalties ordered, pay the sum of $500 to each of those two workers. If the Inspector makes reasonable endeavours to contact and pay those workers but is unable to do so within 12 months of the date of issue of this determination, those amounts are to instead be transferred to the Crown Account.

Costs and expenses

[52] In the event of the success of her application the Inspector sought an order for costs and reimbursement of the Authority filing fee. Applying the Authority's usual daily tariff the starting point for an assessment of costs was $2250 for the half day that the investigation meeting required. No factors requiring an upward or downward adjustment of that starting point were identified or apparent. Accordingly VHL is ordered to pay, also within 28 days of the date of this determination, $2250 as a contribution to the Inspector's cost of legal representation in bringing her application and a further $71.56 to reimburse the fee paid for lodging that application.

Robin Arthur
Member of the Employment Relations Authority