

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 160
3002373

BETWEEN SACHIN NAYAK
 Applicant

A N D URBAN TURBAN NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Nathan Santesso, Advocate for Applicant
 Bhushan Arolkar, Director of Respondent

Investigation Meeting: 21 March 2017 at Auckland

Submissions Received: 24 March 2017 from Applicant
 No submissions from Respondent

Date of Determination: 01 June 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A Urban Turban New Zealand Limited (Urban Turban) breached the Minimum Wages Act 1983 because it failed to pay Mr Nayak the minimum wage for the first year of his employment.**
- B Urban Turban breached Mr Nayak’s employment agreement by unilaterally reducing his hours of work and salary.**
- C Urban Turban is ordered to pay total penalties of \$30,000 for its breaches of Mr Nayak’s employment agreement and of minimum code legislation.**
- D Within 28 days of the date of this determination \$10,000 of the penalty is to be paid to the Crown Bank account.**

E Within 28 days of the date of this determination Urban Turban is ordered to pay Mr Nayak \$40,013.16 plus salary arrears yet to be fixed consisting of:

- (a) \$20,000 as part payment of the total penalty imposed;**
- (b) Salary arrears yet to be fixed to reimburse the minimum wage arrears paid in the first year of his employment;**
- (c) \$10,333.30 salary arrears from 22 March to 02 June 2016;**
- (d) \$7,013.20 holiday pay arrears;**
- (e) \$2,666.66 unpaid public holiday entitlements.**

Employment relationship problem

[1] *Dates of employment:* Mr Sachin Nayak started work for Urban Turban New Zealand Limited (Urban Turban) on 04 July 2014 as the Restaurant Manager for its Urban Turban restaurant in North Wharf, Auckland. His employment ended on 02 June 2016.

[2] *Employment agreement:* The parties signed an individual employment agreement dated 05 July 2014. Urban Turban claims Mr Nayak signed a second employment agreement in July 2016. Mr Nayak denies that. He says he never saw a second employment agreement. Urban Turban has been unable to produce any documentation that supports its claim the parties signed a second employment agreement.

[3] *Material terms:* The material terms in Mr Nayak's employment agreement are:

- (a) He was employed for a minimum of 45 hours per week;
- (b) His starting salary was \$40,000 per annum;
- (c) Clause 7.1 stated that his salary was inclusive of all benefits, holiday entitlements and days in lieu;

- (d) He was required to work for a minimum of 24 months and if he left before that he had to pay Urban Turban a penalty of \$5,000;
- (e) Clause 15 required any contract variations to be recorded in writing and signed by both parties;
- (f) Clause 6.2 prevented Urban Turban from reducing Mr Nayak's minimum hours of work below 40 hours per week;
- (g) Clause 6.2 permitted Urban Turban to vary Mr Nayak's hours of work if after consultation agreement about the changes could not be reached;
- (h) Clause 6.2 required Urban Turban to act reasonably and take Mr Nayak's personal circumstances and commitments into account before varying his hours of work.

[4] *Excessive hours:* Mr Nayak told the Authority that salaried staff were routinely made to work for much longer than the hours recorded in their employment agreements. Mr Nayak emailed the Labour Inspector in October 2016 alleging that Urban Turban had changed its time records so it looked like staff had worked acceptable hours after the Labour Inspector advised Urban Turban it was commencing an investigation. Mr Nayak suggested the Labour Inspector do a random sample of all employment documentation but that does not appear to have been done.

[5] *Actual hours:* Mr Nayak said he opened the restaurant six days a week and was expected to close on most days of the week which meant his working day regularly extended to over twelve hours per day. Despite that he says that he was never paid for more than 45 hours per week.

[6] *Breach of minimum wage:* Mr Nayak claims that from 04 July 2014 to 15 July 2015 he was paid less than the minimum wage of \$14.75 per hour because he received only \$12.82 for each hour worked. Mr Nayak was promoted to restaurant General Manager and his salary increased to \$52,000 per annum on 15 July 2015. Mr Nayak's minimum wage arrears claim relates to the period prior to his promotion.

[7] *Reduction in hours and salary:* Mr Nayak said that on 21 March 2016 Urban Turban's director Mr Arolkar told him he (Mr Nayak) would be working part time

hours starting the next day. Urban Turban then immediately reduced Mr Nayak's salary by 50%.

[8] *Mr Nayak's representations:* Mr Nayak asked Mr Arolkar if he (Mr Nayak) could be given a couple of weeks' notice before his hours and salary was reduced because it made it impossible for him to support his family so he needed some time to address that problem. Mr Nayak's request was declined.

[9] *Final pay not paid:* Mr Nayak could not support his family on the part time hours so he resigned by giving three weeks' contractual notice. However he did not receive any final pay.

[10] *Public holiday entitlement arrears:* Mr Nayak claimed to have worked 19 public holidays and to have taken three paid alternative days' holiday before his employment ended. Urban Turban says Mr Nayak took 11 paid days' alternative holiday. Urban Turban admits it did not pay Mr Nayak for any unused alternative days' holiday when his employment ended.

[11] *No holiday pay:* Urban Turban says it did not pay Mr Nayak any holiday pay on termination because it was paid as 'pay as you go holiday pay' which was included in his weekly salary. Mr Nayak had advised Urban Turban that that was unlawful and that, as a full time permanent employee, he was entitled to four weeks' paid annual holiday per year. However, he had still not been paid any holiday pay.

[12] *Underpayment of last week's salary:* Urban Turban paid Mr Nayak for 20 hours instead of the 26 hours he worked in his last week of employment because it says he worked these hours over four days and not five. Mr Nayak claims wage arrears for the hours he worked but was not paid.

[13] *Alleged threats by Urban Turban:* Mr Nayak said that on 23 June 2016 Mr Arolkar sent him a Facebook message making unspecified allegations against him. Mr Nayak saw these as a threat against proceeding with his arrears claim. However, Mr Nayak told Mr Arolkar that he would meet him to respond to any allegations after Mr Arolkar gave Mr Nayak specific details of his concerns. Mr Nayak said that Mr Arolkar failed to give him that information.

[14] *Pressure on other employees:* Mr Nayak claimed Urban Turban had pressured other employees to make untruthful statements against Mr Nayak as pay back for Mr Nayak enforcing his legal rights.

[15] *Penalties sought:* Mr Nayak sought that penalties be imposed on Urban Turban for its breaches of his employment agreement and of the minimum code legislation. He asked that some or all of the penalties be paid to him.

The issues

[16] The following issues are to be determined:

- (a) Was Mr Nayak paid less than the minimum wage for the first year of his employment?
- (b) If so, how much in minimum wage arrears is Mr Nayak owed?
- (c) Did Urban Turban unilaterally vary Mr Nayak's employment agreement by reducing his minimum hours from 45 to 20 in March 2016?
- (d) If so, what is Mr Nayak owed as a result of Urban Turban's breach of contract?
- (e) Is Mr Nayak owed holiday pay arrears?
- (f) Is Mr Nayak owed paid sick leave arrears?
- (g) Is Mr Nayak owed salary arrears from his final week of employment?
- (h) Is Mr Nayak owed unpaid public holiday entitlements?
- (i) Should penalties be imposed on Urban Turban for any breaches of Mr Nayak's employment agreement and/or the minimum code legislation?
- (j) If penalties are imposed on Urban Turban, should some or all of the penalties imposed be paid to Mr Nayak?

Was Mr Nayak paid less than the minimum wage for the first year of his employment?

[17] *Obligation to keep wage and time records:* Section 130 of the Employment Relations Act 2000 (the Act) requires employers to keep wage and time records and to produce them on request. That has not occurred. Urban Turban has not provided the record of the number of hours Mr Nayak worked each day in a pay period, in breach of s.130(1)(g) of the Act. Mr Nayak has provided some spreadsheets to support his claim about the actual hours he worked.

[18] *Failure to keep wage and time records:* I find that Mr Nayak has met the requirements of s132(1) of the Act because he has brought a recovery of wages claim to the Authority and has established that Urban Turban did not meet its obligations under s.130 of the Act to keep accurate wage and time records for him. Mr Nayak has also established to my satisfaction that Urban Turban's failure prejudiced his ability to bring an accurate claim under s.131 of the Act.

[19] *Effect of s.132(2):* In accordance with s.132(2) of the Act I accept Mr Nayak's claims about the salary he was paid and the hours, days and times he worked as proved because I consider that Urban Turban failed to establish that Mr Nayak's claims about such matters were incorrect. Mr Nayak's evidence was supported by the fact he sent weekly timesheets recording that information to Urban Turban's Chief Financial Officer Mr Sergio Beillard to review.

[20] *Credibility:* I found Mr Beillard's evidence that he never reviewed the work hours information Mr Nayak sent him (Mr Beillard) not to be credible because Mr Nayak produced emails showing Mr Beillard did query the timesheets information. Mr Nayak's evidence about his hours of work was supported by two employees who had worked with him. Urban Turban kept a close eye on costs. It also had CCTV in the restaurant and Mr Arolkar would call the restaurant to find out where staff were if he didn't see them, if for example they were in the bathroom for more than ten minutes. These factors undermine Mr Beillard's evidence.

[21] *Corroborating evidence:* Mr Nayak's evidence about his days and hours of work also corroborated Mr Rahul Joshi, who was a friend of Mr Nayak's but who was also employed by Urban Turban as the Restaurant Duty Manager from October 2015 until October 2016. Urban Turban's own witness, Mr Sahil Bajaj (who was employed as the Assistant Restaurant Manager), told me that Mr Nayak would open the

premises and would usually be the last person to leave the premises. Mr Bajaj confirmed that Mr Nayak worked very long hours and would only have one or two hours of breaks throughout his long working day. Mr Bajaj said “*I hardly saw Mr Nayak taking breaks*”. Mr Bajaj also confirmed that although Mr Nayak had hurt his back, he still kept working his usual long hours.

[22] *Days and hours of work:* I am satisfied Mr Nayak has established on the balance of probabilities that he worked at least 60 hours per week during his first year of employment. Mr Nayak produced timesheet records he had sent to Urban Turban that supported his evidence he worked at least 10 hours a day six days a week which I consider bolstered the credibility of his evidence.

[23] *Minimum Wage Act 1983 (MWA :* The minimum wage from 01 April 2014 – 31 March 2015 was \$14.25 per hour. It increased to \$14.75 per hour on 01 April 2015. Mr Nayak therefore had to be paid at least \$14.25 for each hour he worked from 04 July 2014 to 31 March 2015 and he had to be paid not less than \$14.75 per hour worked over the period 01 April 2015 to 15 July 2015.

[24] *Outcome:* I am satisfied on the balance of probabilities from Mr Nayak’s evidence that he was paid less than the minimum wage for each hour he worked over the period 01 April 2014 to 15 July 2015, so his claim for minimum wage arrears succeeds.

How much in minimum wage arrears is Mr Nayak owed?

[25] *Calculation of minimum wage arrears:* I have accepted Mr Nayak’s evidence that he worked at least 3,210 hours in the 53.5 weeks from 04 July 2014 to 15 July 2015. I have not been provided with the relevant calculations to be able to fix the amount of his minimum wage arrears. The parties have 7 days within which to attempt to agree on the amount based on my findings.

[26] *Timetable to fix arrears:* If agreement is not reached then either party has 7 days within which to apply to the Authority to fix that amount. Any such application must identify what Mr Nayak was actually paid compared to what he should have been paid, had the minimum wage rate been applied to the 60 hours I have found under s.132(2) of the Act he worked.

Did Urban Turban unilaterally reduce Mr Nayak's minimum hours of work from 45 to 20 per week in March 2016?

[27] *Onus of proof:* I am satisfied that Mr Nayak has discharged the onus of proving on the balance of probabilities that Urban Turban unilaterally reduced his minimum hours of work in breach of the applicable variation requirements set out in his employment agreement.

[28] *Urban Turban's explanation:* I do not accept Urban Turban's evidence that Mr Nayak agreed to the reduced hours. Mr Nayak was unable to support his family on the reduced salary which caused them a considerable stress and which meant he had to seek a second job. Mr Nayak advised Urban Turban of that in an email on the same day he was told of the reduction, which Urban Turban had applied immediately. Mr Nayak's request for some notice before his salary was reduced was rejected.

[29] *Breach of contract claim:* Clause 6.2 of the employment agreement sets out the process to be adopted if Mr Nayak's contractual hours were to be varied. Paragraph [3] sets out the material contractual terms.

[30] *Conflicting explanations:* Urban Turban changed its story about why it reduced Mr Nayak's minimum hours of work. First it said it was because he couldn't perform his job due to his back injury in October 2015. Then it suggested he had sought the reduction. Urban Turban has also suggested that it could not afford to pay his salary so the decision was taken for financial purposes.

[31] *Back injury:* Mr Nayak says that although he suffered a back injury on 13 October 2015 he only took six days' sick leave and continued to work at least 45 hours per week. However Mr Nayak says that he could not do heavy lifting and his doctor told him to work reduced hours. He therefore reduced his actual hours from in excess of 60 to approximately 50 per week which was still in excess of his 45 minimum contractual hours.

[32] *Effect of penalty clause:* Mr Nayak said he did not agree to his hours being reduced but felt he could not say anything because he was worried about the \$5,000 penalty clause in his employment agreement. Mr Nayak was concerned that if he protested about the reduction in his hours then he may be required by Urban Turban to resign before he had worked for 24 months. In that case he expected Urban Turban

would seek to enforce the penalty clause. Mr Nayak was very concerned about that because he did not have the money to pay the penalty.

[33] *Effect of reduction in hours:* There was no good reason why Mr Nayak would have agreed to an immediate substantial cut in his salary. Mr Nayak could not support his family on a salary of \$26,000 per annum so he says he had to resign on 02 April 2016 so he could find an alternative full time job.

[34] *Outcome:* I find Urban Turban unilaterally varied Mr Nayak's contractual entitlements. This was a breach of its contractual obligations for the following reasons:

- (a) It did not consult with Mr Nayak about the reduction in his hours;
- (b) It did not attempt to obtain his agreement;
- (c) It reduced his hours below the stated minimum reduction to 40 hours per week;
- (d) It failed to act reasonably;
- (e) It failed to take Mr Nayak's personal circumstances and commitments into account before reducing his hours;
- (f) It ignored Mr Nayak's personal circumstances when he brought the hardship his family was going to suffer to Mr Arolkar's attention;
- (g) It did not obtain his written consent to the variation.

What is Mr Nayak owed as a result of Urban Turban's breach of contract?

[35] *Salary arrears:* Urban Turban was not legally entitled to unilaterally reduce Mr Nayak's hours of work. I find that Mr Nayak is entitled to be paid as per his contractual hours of work.

[36] *Outcome:* Within 28 days of the date of this determination Urban Turban is ordered to pay Mr Nayak \$10,333.30 salary arrears for the period 22 March to 02 June 2016 being \$1,000 per week (\$52,000 gross per week) for ten weeks plus \$333.30 being two days' salary (15 hours x \$22.22 per hour).

Is Mr Nayak owed holiday pay arrears?

[37] *Pay as you go holiday pay:* I do not accept Urban Turban's submission that it did not have to pay Mr Nayak any holiday pay because it had already paid him pay-as-you-go holiday pay while he was employed. Section 28 of the Holidays Act 2003 (HA03) restricts 'pay-as-you-go-holiday-pay' to be paid to casual or fixed term employees only in the limited circumstances set out in that section. Section 28 does not apply to Mr Nayak.

[38] *Holiday pay entitlement:* As a permanent full time employee Mr Nayak, after 12 months service, was entitled to four weeks' paid annual holiday per annum. Because he worked six days a week Mr Nayak's annual holiday entitlement on his leave anniversary date of 04 July 2015 was 24 days. Any paid annual holiday taken must be deducted from that entitlement.

[39] *Paid annual holiday taken:* I accept Mr Nayak's evidence that although he applied for two weeks' annual leave in February of 2015, he did not actually take any paid annual holiday at that time. I do not accept Urban Turban's evidence that Mr Nayak took paid annual holiday without reporting it because that allegation was not established on the evidence available to me.

[40] *Application of s.132(1) of the Act:* In accordance with s.132(2) I accept Mr Nayak's evidence that the only paid annual holiday he took while employed was four days in 2015. That meant he had an accrued but unused annual holiday entitlement of 20 days when his employment ended.

[41] *Calculation of holiday pay arrears:* In accordance with s.24 HA03, Urban Turban is ordered to pay Mr Nayak \$3,333.20 for the 20 days' accrued but unused annual holiday he had earned as at the date his employment ended. I have based that figure on the daily salary rate provided by Mr Santesso.

[42] *Calculation of entitlement subsequent to last anniversary date:* Section 25 of HA03 requires Urban Turban to pay Mr Nayak 8% of his total gross earnings from 04 July 2015 (being his last leave anniversary date) until 02 June 2016 (being the date his employment ended). This is 46 weeks x \$1,000 = \$46,000 (being calculated based on his contractual salary of \$52,000 gross per annum).

[43] *Outcome:* Within 28 days of the date of this determination Urban Turban is ordered to pay Mr Nayak holiday pay arrears of \$7,013.20 (being \$3,333.20 under s.24 HA03 plus \$3,680 (being \$46,000 x 8%) under s.25 HA03).

Is Mr Nayak owed paid sick leave arrears?

[44] *Sick leave entitlement:* After six months' employment Mr Nayak was entitled to five days' paid sick leave. I accept in accordance with s.132(2) of the Act Mr Nayak's evidence that he took a total of seven days' paid sick leave while employed – 27-29 July 2015, 16 October 2015, 21 October 2015, and 23 and 24 October 2015. He did not use any paid sick leave in 2016.

[45] *Leave without pay:* I accept Mr Nayak's evidence under s.132(2) of the Act that he took two days' sick leave on 13 and 14 November 2015 which was marked down by Urban Turban as Leave Without Pay. Mr Nayak says he should have received paid sick leave for those two days off work.

[46] *Sick leave arrears:* Mr Nayak's sick leave arrears claim does not succeed. He received five days' paid sick leave entitlement on 04 January 2015 (16 months after he started) plus another five days' paid sick leave entitlement on 04 January 2016.

[47] *Outcome:* Mr Nayak's claim for sick pay arrears does not succeed. By the time Mr Nayak took sick leave in November 2015 he had already exhausted his first five days of paid sick leave entitlement. It was therefore correct for Urban Turban to give him leave without pay because he was not entitled to more paid sick leave until after his next sick leave anniversary date of 04 January 2016.

Is Mr Nayak owed salary arrears from his final week of employment?

[48] *Contractual salary:* Urban Turban had to pay Mr Nayak his contractual salary of \$52,000 per annum for all of the weeks he worked including his last week of employment.

[49] *Salary arrears:* Mr Beillard admitted that did not occur. Clause 6.1 of the employment agreement specified the minimum number of hours that Mr Nayak was to work per week. It made no reference to the number of days Mr Nayak was required to work per week.

[50] *Outcome:* Mr Nayak's overall salary arrears claim from the unilateral reduction in his hours of work should already include the shortfall from his last week because it is to be calculated based on what he should have received less what he actually received. There is therefore no need to do a separate award for the arrears arising from his last week of employment.

Is Mr Nayak owed unpaid public holiday entitlements?

[51] *Public holidays:* Mr Nayak says he worked on 18 public holidays during his employment. This was all of the public holidays except Christmas Day when the restaurant was closed, 2 days in 2014, 10 days in 2015 and 7 days in 2016. Mr Nayak was also entitled to be paid for the Queen's Birthday public holiday on 06 June 2016 because it was captured by his accrued but unused annual holiday in accordance with s.40(3) HA03.

[52] *Public holiday entitlement:* Mr Nayak was entitled to be paid time and a half for the hours worked on public holidays plus he was to receive a paid alternative days' holiday for each public holiday he worked. He was entitled to be paid not less than his relevant daily pay or average weekly pay for the Queen's Birthday public holiday in June 2016 in accordance with s.49 HA03.

[53] *Urban Turban's evidence:* I do not accept Urban Turban's evidence that Mr Nayak took 11 paid alternative holiday days while employed. It was unable to provide any supporting evidence (such as leave application or request) by Mr Nayak to take an alternative day holiday on the days that Mr Beillard said he did. I also consider it significant that there were no wage and time records produced to support Urban Turban's evidence in this regard.

[54] *Alternative day holidays used:* In accordance with s.132(2) of the Act I accept Mr Nayak's evidence that he only used three of his alternative days' holiday while employed – 16 August 2015, 12 October 2015 and 09 January 2016.

[55] *Public holiday entitlement arrears:* Mr Nayak had 15 alternative days' holiday owing at the time his employment ended. These were to be paid out at the rate of his relevant daily pay or average daily pay in his final pay in accordance with s.60 HA03. That did not occur. Nor was Mr Nayak paid for the Queens' Birthday public holiday that was captured by s.49 HA03.

[56] *Calculation of public holiday pay arrears:* Mr Nayak is owed public holiday pay arrears of \$2,666.66 being \$2499.90 (15 days at the rate of \$166.66 per day arising from \$1,000 salary per week being divided by 6 days) plus \$166.66 being the one extra public holiday which was captured by his accrued but unused annual holiday upon termination.

[57] *Outcome:* Within 28 days of the date of this determination Urban Turban is ordered to pay Mr Nayak \$2,666.66 for public holiday pay arrears.

Should penalties be imposed on Urban Turban?

[58] *Penalties for breaches:* I find that Urban Turban engaged in multiple breaches of Mr Nayak's employment agreement and of minimum code statutory protections which potentially attract penalties.

[59] *Breaches of employment agreement:* I find that Urban Turban breached Mr Nayak's employment agreement by:

- (a) Unilaterally reducing his hours of work to 20 hours per week which was far below the minimum 40 hours the contract stated was the lowest Mr Nayak's hours could be reduced to;
- (b) Unilaterally halving Mr Nayak's salary without consultation;
- (c) Failing to comply with clause 6.2 regarding changes to hours of work;
- (d) Failing to pay him his final full week's salary (this is also a breach of the WPA);
- (e) Clause 8.3 of his employment agreement breached s.68(1A) HA03 because it attempted to contract out of the HA03 minimum protections by requiring Mr Nayak to provide proof of sick leave entitlement for two or more days off work at his own expense.

[60] *Breaches of minimum code legislation:* I find that Urban Turban breached the minimum code legislation by breaching its obligations under the Act (one continuing breach), the HA03 (three continuing breaches), the MWA (one continuing breach) and the WPA (two breaches). These breaches involved Urban Turban:

- (a) Failing to pay Mr Nayak the minimum wage for the first year and ten days of his employment in breach of the MWA;
- (b) Failing to pay Mr Nayak his full salary for the last day of his employment contrary to WPA (this is also a breach of his employment agreement);
- (c) Failing to pay Mr Nayak his holiday pay entitlements upon termination contrary to HA03;
- (d) Failing to pay Mr Nayak his public holiday entitlements upon termination contrary to the HA03;
- (e) Failing to provide wage and time records contrary to s.130 of the Act;
- (f) Requiring Mr Nayak to pay a \$5,000 penalty in breach of s.12A of the Wages Protection Act 1983 (WPA) if he resigned before he had worked for Urban Turban for two years because I consider the penalty to be an unlawful employment “premium”;
- (g) By requiring Mr Nayak to provide and pay for (at his own expense) a medical certificate after two days of sick leave contrary to s.68 HA03. This has also been noted as a breach of his employment agreement.

[61] *Duplicate breaches:* I treat the duplicate breaches under the employment agreement and HA03 and under the employment agreement and WPA as one breach each (so two breaches in total) when assessing penalties to avoid the risk of imposing a duplicate penalty under different minimum code legislation for what is essentially the same set of facts.

[62] *Number of breaches for purposes of assessing penalties:* I therefore proceed on the basis that Urban Turban engaged in four discrete breaches of Mr Nayak’s employment agreement (two of the six total breaches are addressed under breaches of the minimum code legislation) and seven breaches in total of four different statutes.

[63] *Relevant legislation:* Section 133A of the Act sets out the matters the Authority must have regard to when determining penalties. I do not set these out in order to save space but confirm the exercise of my discretion is in accordance with these factors. I further note that each of the minimum code statutes give the

Authority a discretion to impose penalties for the breaches that I have found to have been proven on the balance of probabilities.

[64] *Leading case on penalties:* The full Employment Court decision in *Borsboom v Preet*¹ provides guidance to the Authority the methodology it should follow when considering penalties. This advocates a four step process which I adopt below.

[65] *Step 1 – identify nature and number of breaches:* I am satisfied that there are at least 12 breaches which each involve a deliberate course of conduct which give rise to potential penalties being imposed on Urban Turban. These involve at least five breaches of the employment agreement and at least seven breaches of four different minimum code statutes, the Act, the MWA, the HA03 and the WPA.

[66] *Maximum penalty:* The maximum penalty available in respect of each breach is \$20,000 in accordance with s.135(2)(a) of the Act, s.75(1)(b) of HA03, s.13(1)(b) of WPA and s.10(1) of MWA. The total maximum possible penalties for the ten discrete breaches (some of which were continuing breaches which have been treated as only one breach) is therefore \$200,000.

[67] *Globalising penalties:* I consider this an appropriate case in which to impose a globalise penalties. There were three breaches of the employment agreement and three breaches of the HA03. I treat these as one breach for the purposes of assessing penalties. Globalisation reduces the total maximum penalties to \$160,000 (being 8 breaches x \$20,000 maximum penalty). I cross-check in Step 4 that globalisation results in an appropriate level of penalties being imposed.

[68] *Step 2 – Severity of the breach:* Assessing the severity of the breach in each case establishes a provisional starting point for each potential penalty. The Authority can then assess whether the notional starting point should be adjusted to reflect aggravating conduct or mitigating factors in respect of each breach.

[69] *Factors to be considered:* Factors to be considered include whether or not the breaches were committed knowingly and/or calculatedly, the duration of the breaches, the number of persons adversely affected by the breaches, the extent of any departure from the statutory requirements and the history of any previous breaches.

¹ [2016] NZEmpC 143.

[70] *Deliberate breaches:* I accept Mr Santesso's submission that Urban Turban committed the holiday pay breaches knowingly and deliberately and repeatedly because it's owner, Mr John Hyde, had stated in an email the correct annual leave information prior to the parties entering into the employment relationship. Mr Nayak had also advised Urban Turban of his right to paid annual holiday.

[71] *Ongoing breaches:* I further consider it significant that although the employment ended on 02 June 2016 Mr Nayak has still not been paid his HA03 entitlements.

[72] *Aggravating factors:* I consider it an aggravating factor that the breaches continued for the duration of the employment and have continued through to the present date because Mr Nayak has still not received his legal entitlements, either under his employment agreement or under the minimum code legislation.

[73] *Urban Turban's response:* It is also of concern Urban Turban has when faced with Mr Nayak's attempts to recover the money he is owed, instead of properly investigating or addressing his concerns, it made allegations against him about matters which it did not raise while he was employed.

[74] *Number of employees affected:* Mr Nayak is the only employee adversely affected in respect of these breaches.

[75] *Vulnerable employee:* I accept Mr Santesso's submission that these are not accidental or trivial breaches. Mr Nayak is a migrant worker who was on a work permit so he can reasonably be considered to be a potentially more vulnerable employee than a New Zealander who has the legal right to work without restriction in New Zealand.

[76] *Mitigating factors:* I am not satisfied that there are any mitigating circumstances in this case. Although it was open to Urban Turban to have addressed its failures to comply with minimum code legislation and with Mr Nayak's employment agreement, it failed to do so.

[77] *Failure to produce second signed employment agreement* –Mr Arolkar has repeatedly told the Authority that he would provide a copy of Mr Nayak's second signed employment agreement but he has still failed to do so, without adequately explaining that omission.

[78] *Penalty clause:* I also consider that the existence of the early resignation \$5,000 penalty clause acted as a significant deterrent which made Mr Nayak believe he was unable to pursue his legal rights while employed without putting himself at risk of being required to pay a significant penalty to Urban Turban in circumstances where he had no financial ability to do so. That is another highly aggravating factor that needs to be reflected in the level of penalties imposed meaning a penalty at the low or lower end of the scale would be inappropriate in this case.

[79] *Step 3 – Ability to pay:* Urban Turban failed to provide any information about its means to pay a penalty. Although Mr Arolkar mentioned during the Authority’s investigation meeting that the business had been sold and had no assets there was no documentary evidence produced to support that. The Authority is therefore unable to fully assess what if any ability Urban Turban has to pay any penalty imposed.

[80] *Benefit to Urban Turban:* It relevant to recognise that Urban Turban has obtained an unfair advantage over its competitors by paying Mr Nayak less than the minimum wage for the first year of his employment. This sort of behaviour needs to be strongly discouraged to ensure there is a level playing field in terms of the requirement on all employers to pay at least the minimum wage.

[81] *Step 4 – Proportionality or totality test:* The Authority is required to assess whether the proportionality or totality test has resulted in an acceptable level of penalty being imposed relative to the amount of money unlawfully withheld from Mr Nayak. The purpose of this fourth step is to act as a cross-check to ensure that the level of penalty to be imposed is just in all of the circumstances.

[82] *Other relevant cases:* This involves an assessment of other relevant cases to ensure that there is sufficient consistency with others or if there is a significant inconsistency to be able to explain the reasons for that. I acknowledge that the level of penalties imposed for breaches of the type involved in this matter range from a low of \$500 up to a high of \$10,000. There is therefore a considerable range given that penalties are discretionary.

[83] *My assessment:* When assessing the level of penalty to be imposed, I consider that this case is serious because it involves ongoing and repeated breaches of an employment agreement and of minimum code legislation involving a migrant worker. These appear to be deliberate breaches because, after having been brought to Urban

Turban's attention, no attempt was made to address them. I also consider it very concerning Urban Turban also appears to have taken inappropriate steps to influence Mr Nayak against pursuing his legal rights.

[84] *Deterrent effect:* The penalty imposed must be sufficiently high to act as a deterrent on Urban Turban and on other employers generally.

[85] *Cross check:* As a cross check, the total maximum potential penalties in this case were at least \$240,000 if penalties had not been globalised. However because I decided to globalise penalties, the total maximum penalties were \$160,000.

[86] *Penalty order:* I order Urban Turban to pay a total overall penalty of \$30,000 which is less than 19% of total maximum globalised penalties. I consider a penalty at this level is required to punish Urban Turban and to signal strong disapproval of its unlawful actions.

[87] *Payment of penalty:* I consider it appropriate that \$20,000 of this penalty be paid directly to Mr Nayak to reflect the harm, stress and distress he has suffered as a result of these serious breaches. That also goes some small way to acknowledging the significant legal expenses Mr Nayak has incurred which cannot be recovered under the Authority's usual notional daily tariff based approach to costs. The remaining \$10,000 is to be paid to the Crown bank account.

Costs

[88] Mr Nayak as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Nayak has seven days within which to file a costs application with Urban Turban having seven days within which to respond.

[89] The Authority will adopt its usual notional daily tariff-based approach to costs. This matter involved a one day investigation meeting so the starting point for assessing costs is \$4,500. The parties are therefore invited to identify any factors which they say should warrant an adjustment being made to the notional daily tariff of \$4,500.

Rachel Larmer
Member of the Employment Relations Authority

