

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 117
5547622

BETWEEN DAVID O'SHEA, LABOUR
INSPECTOR
Applicant

A N D W F O'SULLIVAN LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Catherin Milnes, counsel for the Applicant
Bill O'Sullivan, representative of the Respondent

Date of Investigation Meeting: 7 August 2015

Date of determination: 11 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a written determination prepared after I gave an oral indication to the parties on 7 August 2015 that I considered that a penalty should be awarded and that I was minded to award a penalty in the amount of \$1,000.

[2] Mr O'Shea visited W F O'Sullivan Limited's (O'Sullivans) farm on 17 November 2014 as part of an audit of local dairy farms carried out by the Labour Inspectorate.

[3] Mr O'Shea alleges that O'Sullivans failed to keep an adequate record of hours and days worked as part of wages and time records required under s.8A of the Minimum Wage Act 1983 (the MW Act).

[4] Mr O'Shea acknowledges that since the issuing of an Improvement Notice on 19 December 2014, O'Sullivan's has complied with the necessary provisions and is now maintaining satisfactory time recording practice.

[5] However, Mr O'Shea seeks a penalty in the amount of \$1,000 for O'Sullivan's historic failure to comply with s.8A of the MW Act; the failure to maintain wages and time records.

Was there a breach of the MW Act?

[6] The first issue to be determined is whether I am satisfied there was a breach of s.8A of the MW Act.

[7] I am satisfied from Mr O'Shea's evidence and from that of Mr O'Sullivan that O'Sullivan's recordkeeping was in breach of the MW Act requirements. The breach of the MW Act was particularly a breach of s.8A(1)(g) in that *the hours between which the worker is employed on each day, and the days of the worker's employment during each week* were not recorded.

[8] I now need to consider whether this is an appropriate case to award a penalty and if so in what amount. A penalty should only be awarded for the purpose of punishment and should not be used as an alternative way of increasing compensation to parties.¹

[9] Section 10 of the MW Act provides that every person who fails to comply with the requirements of that Act is liable to a penalty recoverable by a Labour Inspector and imposed by the Employment Relations Authority under the Employment Relations Act 2000 (the Act).

[10] Section 135 of the Act provides that the maximum penalty for an individual employer is \$10,000 and the maximum penalty for a company or corporation is \$20,000. As at 1 April 2011, the maximum penalties for a company under s.135 of the Act rose from \$10,000 to \$20,000.

[11] The following non-exhaustive list of factors is useful to consider in exercising the Authority's discretion about whether or not to impose a penalty and if it is to be imposed, what amount should be ordered to be paid:

¹ *Xu v. McIntosh* [2004] 2 ERNZ 448 (Employment Court).

- (a) The seriousness of the breach;
- (b) Whether the breach is one-off or repeated;
- (c) The impact, if any, on the employees;
- (d) The vulnerability of the employees;
- (e) The need for deterrence, both specific and general;
- (f) Remorse shown by the party in breach; and
- (g) The range of penalties imposed in other comparable cases.²

[12] Ms Milnes and Mr O'Shea submit that this is not a breach at the serious end of the scale. I agree. Mr O'Sullivan submitted that he had no intention of breaching the legislation, which I accept. Mr O'Sullivan says that he is able, for the past 10 years, to go to any page of the dairy diary and tell you who was working that day and what work was done. Once the breach was identified to Mr O'Sullivan, he changed his system straight away and it is now correctly recording time and wages for all workers. In this case I take that instant compliance as an acknowledgment of wrong-doing akin to remorse.

[13] Mr O'Shea submits it was a one-off breach. I agree.

[14] Ms Milnes submits that because of the state of the record-keeping no one could say with 100% certainty whether each employee was receiving their minimum entitlements and this was potentially a negative matter for the employees. I note too that most of Mr O'Sullivan's employees are migrant workers working under working visas in New Zealand. It is possible that they are unaware of their minimum statutory entitlements and the lack of correct record-keeping exposes them to more vulnerability. I do not for a moment suggest that this company has not provided minimum entitlements to its migrant and other workers.

[15] Dairy farming is a demanding occupation in which long hours are worked in varying patterns over the year and it is no doubt easy not to consider daily time recording a priority when there are so many competing and more urgent demands.

² *Tan v. Zhang* [2014] NZEmpC 65, at para.[32].

However, if the record-keeping is correct as required by legislation, that is a protection for the employer as well as the employees.

[16] Ms Milne and Mr O'Shea submit that the issue of correct record-keeping, especially wages and time recording, was the subject of a Labour Inspectorate campaign and extensive media coverage over the 18 months or so before the audit was carried out. Ms Milne and Mr O'Shea accept that no specific deterrence is necessary for Mr O'Sullivan's business but say that there is a need for deterrence for all employers but more specifically other dairy farmers who are not correctly keeping records.

[17] Mr O'Sullivan submitted out that although there had been at least one article in the Southland Times reminding farmers that keeping correct timesheets was crucial, he did not take much notice of the Southland Times because "*they are always gunning for the dairy farmer*".

[18] Ms Milne submits that although this is not one of the serious cases for which a high penalty should be imposed, one should be imposed nonetheless. She also says that the Authority has decided very few cases about penalty for breach of s.8A of the MW Act as the Labour Inspectorate has not previously focused on such issues.

[19] Mr O'Shea, in his written submissions, cited the case of *Eva Belley, Labour Inspector v. Ascot Travel Ltd*³ where a penalty of \$1,000 was consented to by Ascot Travel having been requested by the Labour Inspector for a breach of s.81 of the Holidays Act 2003; a failure to keep holiday and leave records. Although I can take that into account, being a consent determination, it is not a useful determination to me as it does not contain an account of any reasoning the parties undertook to reach the quantum agreed to be imposed.

[20] I do consider that this is an appropriate case to award a penalty. I have taken into account Mr O'Sullivan's submission that his company should pay less of a penalty than the \$1000.00 I indicated to him I was considering imposing.

[21] Mr O'Sullivan says that they did keep some of the detail in the records that was necessary and he was at pains to point out that his workers consider him a fair employer. Certainly, I accept from Mr O'Sullivan's evidence at the investigation

³ [2015] NZERA Christchurch 76.

meeting that he treats his staff well because he wished to retain them. I acknowledge that farming is a busy and hardworking occupation. However, the imposition of this penalty does not suggest that the company is a poor employer overall; it is solely focused on the fact that inadequate time and wages records were kept in contravention of s.8A of the MW Act.

[22] In setting the amount of penalty, I have taken account of the fact that Parliament has sent a signal that individual and company or corporate employers are to be treated differently with higher penalties imposed on companies.

[23] I remain of the view that a penalty of \$1,000 is appropriate. Therefore I order:

- A. Within 28 days of this determination, W F O'Sullivan Limited must pay the Employment Relations Authority a \$1000 penalty for breach of s.8A of the Minimum Wage Act 1983. That amount will be transferred by the Employment Relations Authority to the Crown account;**
- B. Within 28 days of this determination, W F O'Sullivan Limited must pay David O'Shea, the Labour Inspector, \$71.56 which is the filing fee paid to bring this claim.**

Christine Hickey
Member of the Employment Relations Authority