

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 338
3042014

BETWEEN APOSTLE RADEV
 Applicant

AND MG FOODS LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mike Harrison, Advocate for the Applicant
 Joseph Harrop, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Other 7 May 2019 from Respondent
Information Received: 14 May 2019 from the Applicant
 17 May 2019 from the Applicant
 14 May 2019 from the Respondent
 15 May 2019 from the Applicant
 15 May 2019 from the Respondent
 6 June 2019 from Respondent

Date of Determination: 7 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination determines Mr Radev's penalty claim under s 75 of the Holidays Act 2003 (HA03) against MG Foods Limited (MG Foods) for its breach of s 27(2) of the HA03.

[2] The Authority in its substantive determination held that MG Foods had breached:

- (a) Section 81 of the HA03 by failing to keep and produce holiday and leave records for Mr Radev; and

(b) Section 27 of the HA03 by failing to pay Mr Radev his holiday entitlements upon termination of his employment.

[3] Mr Radev sought penalties of \$19,661.54, being 30 per cent of the total maximum penalty for three breaches of the HA03.

[4] However, the Authority may only impose a penalty for the one penalty claim Mr Radev identified in his Statement of Problem. It cannot impose penalties for new penalty claims that Mr Radev raised for the first time in his penalty submissions.

[5] MG Foods said that no penalty should be imposed because Mr Radev and Mr Milen Ganchev, MG Foods' director, were friends and the breaches arose out of their friendship. That argument was not accepted by the Authority.

[6] Regardless of whether or not the director of MG Foods had a friendship with Mr Radev, as an employer MG Foods was subject to the same employment law obligations towards all of its employees that every other employer in New Zealand has.

[7] The Authority records that if MG Foods had kept correct annual holiday and leave records for Mr Radev, as required by s 81 of the HA03, the issue of failing to pay him his annual holiday pay upon termination of his employment should not have occurred.

[8] Alternatively, MG Foods said that if a penalty was to be imposed on it, then the penalty should not be more than \$500.

Penalty jurisdiction

[9] This matter involves one potential penalty for a breach of s 27 HA03 arising from MG Foods' failure to pay Mr Radev his holiday pay entitlements upon termination.

[10] The breach consisted of MG Foods incorrectly believing that Mr Radev had used all of his holiday pay while employed, which was why it said it had failed to pay him any annual holiday entitlements upon termination.

[11] Mr Radev successfully claimed that he had not taken any paid annual holiday while employed because of MG Foods' failure to provide his annual holiday and leave records.

[12] In the Authority's substantive determination MG Foods was ordered to pay Mr Radev total unpaid annual holiday pay of \$9,830.77. Mr Radev should have been paid that amount in his final pay after his employment ended on 13 July 2018, as required by s 27(2) of the HA03.

[13] However MG Foods did not pay Mr Radev his annual holiday pay until 28 May 2019, being more than ten months late.

Relevant legislation

[14] Section 75(1)(b) of the HA03 provides that a company may be liable to a penalty of up to a maximum of \$20,000 for a breach of s 27 of HA03. There is one breach in this case so the maximum potential penalty is \$20,000, not \$60,000 as Mr Radev submitted.

[15] Section 76(5) of the HA03 requires a penalty claim to be commenced within 12 months of the cause of action becoming known or should have reasonably been known, whichever is earlier. That has occurred here.

[16] Section 75(2)(a) of the HA03 provides that the Authority may impose a penalty on an employer who fails to comply with (among other provisions of HA03) s 27. That is the case here.

[17] The Authority may order under s 76(6) of the HA03 for some or all of any penalty to be paid to any person the Authority specifies (s 76(6)(a) of HA03).

[18] Section 76A of the HA03 sets out the matters that the Authority must have regard to in determining the amount of any penalty being imposed. This includes the purpose and object stated in s 3 of the Employment Relations Act 2000 (the Act) and the matters referred to in s 133A(b) to (g) of the Act.

[19] Section 133A of the Act sets out the matters the employment institutions must have regard to when determining penalties. It states:

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and

- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

Preet - 4 step penalty process

[20] The full Employment Court in *Borsboom v Preet Pvt Limited* set out a four step process to be adopted by the employment institutions to ensure a uniform, reasonably predictable, consistent and transparent process was applied by the employment institutions when assessing penalties.¹

[21] The four step process set out in *Preet* is summarised as follows:

- Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
- Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
- Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
- Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

Assessment of penalty in this matter

[22] Applying the 4 step process to this matter:

¹ [2016] NZEmpC 143.

- (a) Step 1 – There was one breach that attracted a penalty so the maximum potential penalty was \$20,000;
- (b) Step 2 – in terms of assessing the severity of the breach, Mr Radev was deprived of the use of his annual holiday pay for more than ten months.
 - (i) Mr Radev and his wife both provided affidavit evidence of the adverse effects that MG Foods’ breach had on them. Mr Radev set out the emotional and financial distress it caused because he was the only income earner in the family and he had bills and a mortgage to pay. Mr Radev described having to borrow money from friends and family and having to put the family home on the market to cover bills. Mr Radev’s wife talked about the “*great suffering*” their family went through because of MG Foods’ breach of s 27(2) of the HA03.
 - (ii) Mrs Radev said she believed Mr Ganchev knew that by not paying holiday pay upon termination it would place them in serious financial distress, which was very serious given the parties were involved in other civil litigation at the time. Ms Radev asked that a penalty be set at a level that deters MG Foods and other employers from doing this to other families in future.
 - (iii) The Authority did not consider there were any mitigating elements in this case, so \$2,000 was an appropriate provisional penalty.
- (c) Step 3, MG Foods’ financial position was relevant to an assessment of whether a penalty should be imposed and, in particular, the amount of any penalty. However, there was no evidence about that presented to the Authority. It was therefore a neutral factor when assessing penalties in this matter.
- (d) Step 4, required an assessment of whether the provisional penalty amount, arrived at by reference to all of the relevant circumstances together, was proportionate to the seriousness of the breach and the harm done by it.
 - (i) The Authority did not consider that the provisional penalty of \$2,000 was disproportionate to the almost \$10,000 withheld from Mr Radev.

- (ii) Nor was a penalty of \$2,000 likely to give MG Foods an incentive to avoid paying it, or likely to be beyond its ability to pay as it is a currently trading business.

Assessment of other penalty factors

[23] In terms of other penalty considerations, it was also important for the Authority to assess the optimum deterrent effect of the level of penalty imposed, not only as a specific deterrent to MG Foods, but also as a general deterrent for other employers who may be inclined to avoid paying their employees their annual holiday pay upon termination.

[24] One of the s 3 objects of the Act is to promote the enforcement of employment standards and the payment of annual holiday entitlements falls within that.

[25] Section 3 of the Act also recognises the inherent inequality of power in employment relationships. That was evident in this case where MG Foods' failure to pay Mr Radev his annual holiday pay entitlements has placed his family under severe financial pressure.

[26] One of the objects of s 3 of the HA03 is to provide employees with minimum entitlements. MG Foods' breach was contrary to that object because it deprived Mr Radev of his minimum holiday entitlements for more than ten months.

[27] Applying the factors set out in s 133A of the Act to this matter, the Authority finds:

- (a) This breach involved minimum code entitlements;
- (b) This breach continued for an excess of ten months;
- (c) This breach involved negligence by MG Foods as to whether or not it met its obligations under the HA03 to Mr Radev;
- (d) This breach had a seriously adverse effect on Mr Radev and his family who suffered emotionally and financially;
- (e) It took more than ten months for MG Foods to remedy its breach;
- (f) Although Mr Radev was not a vulnerable employee, the parties were involved in litigation and MG Foods should have known, or ought to have known, that withholding Mr Radev's final holiday pay would have been very serious because it was likely to have put him under additional financial pressure;

- (g) MG Foods was to be treated as a ‘first offender’ in terms of breaches of HA03 because it had not previously had penalties imposed on it by the employment institutions.

Penalty order

[28] The Authority considers it appropriate to impose a penalty of \$2,000 on MG Foods for failing to pay Mr Radev his annual holiday entitlements upon termination. It is also appropriate for half of the penalty imposed to be paid to Mr Radev personally to recognise the suffering that MG Foods’ breach has caused him.

[29] Accordingly, within 28 days of the date of this determination, MG Foods is ordered to pay a penalty for its breach of s 27(2) of the HA03 of:

- (a) \$1,000 directly to Mr Radev; and
- (b) \$1,000 into the Crown bank account.

Costs

[30] Mr Radev as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to resolve costs by agreement.

[31] However if that does not occur, Mr Radev has 14 days from the date of this determination to file costs submissions. MG Foods has 7 days from service of Mr Radev’s submissions to file its costs submissions, with Mr Radev having a further three working days within which to file any reply submissions.

[32] Costs will be assessed in accordance with the Authority’s notional daily tariff based approach to costs. The parties are therefore invited to identify any factors they say should result in the notional daily tariff, which is \$4,500 for the first day and \$3,500 for subsequent days, being adjusted.

Rachel Larmer
Member of the Employment Relations Authority