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IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 181
5450786

	BETWEEN	TRUBET HOLDINGS LIMITED Applicant
	A N D	DOUGLAS KARL HIXON, LABOUR INSPECTOR Respondent

Member of Authority:	Helen Doyle
Representatives:	Stephen Galbreath Counsel for the Applicant Douglas Hixon, Respondent
Investigation Meeting:	26 August 2014 at Nelson
Submissions Received:	On the day Further information received 24 September 2014 Further submissions received 29 September 2014 and 3 November 2014 from applicant Further submissions received 3 October 2014 and 4 November 2014 from respondent
Date of Determination:	11 November 2014

DETERMINATION OF THE AUTHORITY

A **The Authority has confirmed the improvement notice that there was a breach of s 6 of the Minimum Wage Act 1983.**

B **The nature and extent of the failure to comply with s 6 of the Minimum Wage Act 1983 is the failure to pay the applicable minimum wage.**

C **The Authority has determined the nature and extent of any loss suffered as it is able to for the six employees. Further information about some employees will have to be obtained and provided.**

Evidence of all payments made as set out is to be provided to the Labour Inspector by the varied date of 5 December 2014. The Labour Inspector on request may extend that date for one employee.

D **The Authority has confirmed the improvement notice that there was a breach of sections 4 and 5 of the Wages Protection Act 1983.**

E **The Authority has rescinded the obligation in the improvement notice to refund deductions to the six employees. Four employees advised in letters that they had agreed verbally to the deductions at the time. Another employee has already had his fees reimbursed and the Authority heard no evidence from the sixth employee.**

F **There is no award of a penalty.**

G **There is no claim for costs.**

Objection to Improvement Notice

[1] This determination deals with an objection by Trubet Holdings Limited (Trubet) to an improvement notice under s 223D of the Employment Relations Act 2000 (the Act) issued to Trubet on 28 November 2013. Trubet asks the Authority to rescind the improvement notice.

[2] The function of the Authority under s 223E of the Act in respect of an objection to an improvement notice is to determine whether the employer is failing or has failed to comply with the specified provision of the relevant Acts, the nature and extent of the failure and the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision if applicable. The Authority may confirm, vary, or rescind the improvement notice as it thinks fit.

[3] The improvement notice states that the Labour Inspector, Douglas Hixon, reasonably believed that Trubet is failing or has failed to comply with:

- Section 6 of the Minimum Wage Act 1983 (MWA);

- Section 4 of the Wages Protection Act 1983 (WPA);
- Section 12A of the WPA 1983; and
- Section 50 of the Holidays Act 2003.

[4] Mr Hixon set out in accordance with the requirements of s 223D of the Act, the reasons in the improvement notice for his belief that there was a failure, or had been a failure to comply and the nature and extent of Trubet's failure to comply.

[5] Mr Hixon set out materially for current purposes under the nature and extent of any loss suffered by an employee as a result of Trubet's failure to comply with the provisions that Trubet had paid six apprentices it employed less than the appropriate minimum wage. He set out in the improvement notice that the extent of minimum wage arrears owed to current and former apprentices will be identified by the employer.

[6] The steps Trubet could take to comply were set out in the improvement notice as below:

(a) To ensure that all current and former employees have received not less than the appropriate minimum wage after removing the non-taxed tool allowance, with consideration of holiday pay and Kiwisaver contribution;

(b) Repayment of fees deducted in breach of the employment agreement;

(c) Removing the apprenticeship bond agreement from current employment agreements, immediately terminating any apprenticeship bond agreements currently in use, to desist from entering into such agreements that breach section 12A of the Wages Protection Act, and refund all monies including any interest accrued thorough the application of the apprenticeship bond agreement;

(d) Review payments to employees who worked on public holidays;

(e) Mr Hixon required evidence of these matters including evidence that Trubet had identified all minimum wage arrears for each employee

over the previous six years and that all money had been returned to the employee concerned.

[7] Although compliance with the improvement notice and provision of evidence was to be by close of business 10 January 2014 Mr Hixon granted a period of extension and Trubet obtained some legal advice. The objection was lodged outside of the 28 day period prescribed in the Act under s 223E from when it was issued to Trubet. An application was made by Trubet to enlarge the time of objection. Following that application Mr Hixon decided not to oppose the objection being determined by the Authority as it was considered that two important legal questions could be clarified in an Authority determination.

[8] The important questions of law concern when an employer may pay the minimum training rate to employees and whether the employer can rely on a general deductions clause in the employment agreement to deduct industry training fees without specific employee consent in writing.

[9] The Authority was not required to determine the application to enlarge the time of objection and set the matter down for an investigation meeting.

Compliance with aspects of the Improvement Notice

[10] Trubet has complied with some aspects of the improvement notice but says that it was entitled to pay its apprentices the minimum training rate from the commencement of the employment. It does not agree with Mr Hixon that such payment should be from the commencement date of the Industry Training Organisation agreement (the ITO agreement). Trubet does not accept that the six apprentices have not received full payment of wages.

[11] There are signed statements from four of the previous apprentices that they agreed to their ITO fees being paid by Trubet and for repayment to be by way of deduction from their wages. Deductions made from the wages of another apprentice, Matthew Dowding, for fees were refunded. The remaining employee was Shaun Harris. Trubet say that the deductions that occurred in 2009 from Mr Harris's wages for ITO fees paid by it on his behalf were consented to verbally in addition to the general deduction clause in the employment agreement. Trubet says that it was entitled under its general deductions clause in each of the six employees' employment agreements together with verbal consent from the employees to deduct the ITO fees

from the employee's wages. It says that it now has every employee sign off in writing on deductions from wages and has inserted a new clause into the employment agreement to authorise the deduction of ITO fees.

[12] Trubet has changed the public holiday clause in its employment agreements to deal with the concerns raised by the Labour Inspector and there are no actual instances of the employees having worked on public holidays.

[13] Trubet accepted that it should not have included 50c per hour non-taxable tool allowance into the employee's hourly rate and has paid the employees to correct this error to bring it up to what it says was the appropriate minimum rate.

[14] The bond agreement that five of the six apprentices entered into with Trubet required them to contribute $1.00 for every hour worked to a bond with the employer each fortnight contributing the sum of 50c for every hour worked each fortnight. The contributions were to be paid into an interest bearing account. The bond agreement provided that if the employee terminated the employment prior to the completion of the apprenticeship then any right to any portion of contributions were forfeited. If employment is terminated within two years of completion of the apprenticeship then the employee is only entitled to the employee contribution of the bond. In short therefore to get all payments and interest the employee must have completed two years of work with Trubet after qualifying as an apprentice. Trubet has refunded bond amounts to the apprentice employees together with interest. I understand it has now accepted that the bond arrangement was improper – submissions of applicant 32.3.

The issues

[15] The issues for the Authority to determine are as follows:

- Was Trubet entitled to pay the minimum training wage to its six apprentices from the start date of employment with Trubet or only from the commencement date of their ITO agreement;

- If the minimum training wage was only payable from the date of commencement of the ITO agreement then has Trubet failed to comply with s 6 of the MWA and, if so, what is the nature and extent of that failure to comply and the nature and extent of any loss suffered by the six employees;

- Did Trubet deduct fees from employee's wages in breach of ss 4 and 5 of the Wages Protection Act 1983;

- If it did then what is the nature and extent of Trubet's failure to comply with the provisions and the nature and extent of any loss suffered by the employees;

- Should there be an award of penalties under s 10 of the Minimum Wage Act 1983 and s 13 of the Wages Protection Act 1983?

Payment of Minimum Training Rate

[16] Trubet no longer trades through Trubet Holdings Limited and the business now trades through Trubet 2014 Limited. Stuart Flowerday is a director of Trubet and Beth Flowerday, his wife, is a shareholder of Trubet and was its office manager. Trubet has for many years offered apprentice carpentry employment positions usually to school leavers.

[17] Mr Hixon undertook investigations of Trubet and issued his improvement notice after a complaint was received from Janine Dowding, the mother of previous Trubet employee Matthew Dowding on 6 June 2013. Ms Dowding advised of a number of concerns about her son's employment.

[18] The Authority heard evidence from Ms Flowerday and also heard from Ms Dowding by telephone. It did not hear evidence from any of the employees.

[19] The Authority as part of its investigation wrote to the Group Manager Support Services, Bruce Horsley at the Building and Construction Industry Training Organisation (BCITO) who answered questions from the Authority, counsel for the applicant and the Labour Inspector in writing. His assistance was appreciated. Submissions were then provided by Mr Galbreath and Mr Hixon following receipt of the answers.

[20] In determining the issue as to when the training rate was payable it is helpful to set out for each of the six employees the date they commenced employment and the date that the ITO agreement was dated and commenced.

[21] Campbell Gibson, Mr Hixon concluded, commenced employment for Trubet on 18 January 2010 aged 16. The date of commencement of the ITO agreement

corresponded with the date the employment agreement was signed. In an email from Ms Flowerday dated 8 November 2013 to Mr Hixon she does not refer to 18 January 2010 as Mr Gibson's commencement date rather when the first employment agreement was signed. In her written evidence Ms Flowerday does refer to 18 January 2010 as the commencement date of employment. Mr Gibson in a handwritten note that he was in agreement with the deduction of fees from his wages wrote that he was employed as an apprentice between 2010 and 2013. The Labour Inspector did identify that a minimum wage correction was required in relation to the amount Mr Gibson was paid by way of training rate.

[22] Kevin Freeman, Mr Hixon concluded, commenced his employment with Trubet on 5 March 2012 which is the date of his individual employment agreement. He was 17. Mr Freeman, in a hand written note confirming that he agreed to deductions from his wages for fees paid by Trubet, states that he was employed with Trubet from around 26 November 2011 but as an apprentice from 13 February 2012. Ms Flowerday in an email to Mr Hixon dated 8 November 2013 says that Mr Freeman commenced employment on 6 February 2012. The ITO agreement commenced on 13 February 2012.

[23] Bradley Goldsack was 20 when he commenced his employment on 2 May 2013. His ITO agreement commenced on 5 June 2013. He was paid $13.50 per hour and the Labour Inspector said an adjustment was required to $13.75 until the date of the ITO agreement commencing on 5 June 2013 - Minimum Wage Order (No 2) 2013.

[24] Mr Harris was 16 when he commenced employment with Trubet on 6 October 2008. His ITO agreement commenced on 13 February 2009. Mr Hixon identified the minimum new entrant rate was $9.60 and not $9.50 until 200 hours were completed on 23 November 2008. Mr Hixon said Mr Harris should have been paid $12.00 per hour from 23 November 2008 until the ITO agreement commenced on 13 February 2009.

[25] Joseph Steffert was 18 when he commenced employment at Trubet on 21 January 2008. Mr Steffert was the only one of the six employees to choose to complete his carpentry apprenticeship through the Industry Training Association Building (ITAB). In Nelson that apprenticeship programme is undertaken in partnership with the Nelson Marlborough Institute of Technology (NMIT). A signed

ITAB agreement could not be located so the Authority is unable to determine when that commenced. Mr Hixon noted a minimum wage adjustment was required from 1 April 2008 to 9 August 2008 because Mr Steffert was paid $9.50 per hour and not $9.60 per hour. Mr Steffert was offered a trial period of employment as an apprentice carpenter. More information is necessary about when the ITAB agreement commenced in light of the trial period in his employment agreement.

[26] Matthew Dowding commenced employment on 12 November 2012. He was aged 18. He signed his ITO agreement on 30 January 2013 but the commencement date on the agreement was 1 April 2013. This delayed commencement date was apparently to ensure eligibility for a government programme. Mr Hixon said that Mr Dowding was entitled to the adult minimum wage from the date of commencement of employment to the date of commencement of the ITO Agreement of $13.50 rather than $10.30 per hour.

Minimum Wage Act 1983

[27] The fundamental nature of the MWA in prescribing the minimum rate of wages was recognised by the Employment Court in *Maori Hill and Balmacewan Pharmacy Limited v Labour Inspector* [2013] NZEmpC 28. It was stated at [59] in *Maori Hill* that s 6 of the MWA reinforces its underlying purpose and provides that:

> *Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages is being prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.*

[28] Sections 7 to 9 do not have relevance to this matter. Mr Galbreath correctly submits that s 9(a) has only ever excluded from the scope of the MWA apprenticeship contracts within the meaning of s 2 of the Industry Training Act 1992. The training agreements the Authority are considering were entered into outside of this meaning.

[29] The Governor-General has each year prescribed the minimum rate of wages payable to workers by Order in Council. The six employees were employed at different times from in or about early 2008 until 2 May 2013. The Minimum Wage Orders coming into force from 1 April 2007 are relevant. Mr Goldsack was employed

from 2 May 2013 after an amendment to the MWA and the insertion from 1 May 2013 of ss 4A and 4B. I shall refer separately to the effect of those amendments.

[30] The Authority is concerned with the definition of the class of workers required by their employment agreements to undergo training. Clause 3 of the Minimum Wage Orders between 2007 and the first Minimum Wage Order in 2013 defined such workers *aged 16 years or more to whom the Act applies* and *who is required by his or her contract of service to undertake at least 60 credits a year of an industry training programme for the purposes of becoming qualified for the occupation to which the contract of service relates.*

[31] The Minimum Wage Order (No 2) 2013 re-categorised workers from 1 May 2013 into starting-out workers aged 16, 17, 18 or 19 years and trainees who were aged 20 or above. From 1 May 2013 trainees aged between 16 and 19 are called starting-out workers and must additionally not be involved in supervising or training other workers. They only have to undertake a minimum of 40 credits per year of an industry training programme. A trainee aged 20 or over must also not be involved in supervising or training other workers.

[32] An industrial training programme is defined in clause 3 of the Minimum Wage Orders from 2007 to 2013 as meaning:

> *An industrial training programme that leads to a qualification that is registered on the National Qualifications Framework developed by the New Zealand Qualifications Authority pursuant to its functions under section 253 of the Education Act 1989.*

[33] This definition changed but not in a substantive way from the Minimum Wage Order 2013 to a qualification *maintained by* rather than *developed by* the New Zealand Qualifications Authority and the section of the Education Act 1989 changed to s 246A rather than s 253.

Conclusions on payment of the training rate

[34] The six apprentices employed by Trubet were all aged 16 years or older. They signed training agreements with either BCITO or ITAB for the national certificate in carpentry programme. A national certificate in carpentry is an industry training programme and is registered on the national qualifications framework maintained by the New Zealand Qualifications Authority.

[35] The minimum training rate is less than the minimum adult rate. From 1 April 2012 as an example the minimum adult rate was $13.50 and the minimum training rate is $10.80. The answer to whether Trubet was entitled to pay the minimum training rate before the ITO agreement commenced comes down to whether each employee falls within the definition of a trainee at the time the minimum trainee rate was paid.

[36] Mr Galbreath in support of Trubet's view that the minimum training rate is payable from the commencement of employment rather than the commencement of the ITO agreement submits that the focus in the MWA and the Minimum Wage Orders is on the employment agreement and there is no mention of an ITO agreement. He submits that an employee being required by his or her contract of service to undertake at least 60 credits of an ITO programme does not require current and active engagement in the programme and the definition allows for the possibility of intended future study.

[37] The employment agreements are silent as to the requirement to undertake at least 60 credits a year of an industry training programme. A relevant matter is that the terms and conditions of the ITO agreements that the Authority has been provided with state that the training agreement forms part of the employment agreement between the parties after it has commenced.

[38] For three employees Mr Freeman, Mr Goldsack and Mr Dowding the fourth clause of the terms and conditions of the ITO agreement provide *Training under this Training Agreement is intended to lead or relate to the achievement of at least 20 New Zealand Qualifications Framework credits per year*. This was not a clause my attention was directed to during the investigation meeting or in submissions. I asked for the view of Mr Galbreath and Mr Hixon about this clause and the definition of a trainee in the Minimum Wage Order requiring 60 credits to be undertaken a year and from 1 May 2013 for those employees aged 16, 17, 18 and 19 years 40 credits.

[39] Mr Galbreath maintained that the employment agreements satisfy the requirements of the definition of a trainee at the commencement of employment and not the commencement of the ITO training agreement. He refers to the advice received by the Authority in writing from Mr Horsley, that on average the carpentry apprentices would complete over 70 credits per year.

[40] Mr Hixon did not identify any concerns after being alerted to the above term in the ITO agreement. I have taken from his response that he had no concerns about the number of credits the employees were undertaking measured against the definition of trainee from the point the ITO agreement commenced. The Authority did not hear evidence from anyone from BCITO or from the three employees, two of whom did not complete their apprenticeships. The evidence that the Authority did hear supports that as the carpentry qualification is competency based fewer credits are completed in the first two years and the majority in the third and fourth years of the apprenticeship with on the job training and skills The qualification requires between 280 and 320 credits and generally takes four years.

[41] It could be argued because of the clause in the ITO agreement referring to 20 credits three of the six previous apprentice employees did not come at any time within the definition of a trainee in the relevant Minimum Wage Orders because there was no requirement to undertake at least 60 credits per year. The consequences of such a finding are far reaching and could not be reached without evidence.

[42] I have therefore in this determination focussed on when the training rate was payable and not whether it was payable at all. I strongly suggest that the Labour Inspectorate legal advisors consider the wording in the BCITO agreements and the definition of trainee in the Minimum Wage Orders and communicate as required with BCITO.

[43] Mr Galbreath submits that with each apprentice Trubet discussed the apprenticeship and how it works and provided training, supervision and experience from the date of the commencement of employment. Five of the six apprentices were described in their employment agreements as apprentice carpenters. Mr Dowding was described as workshop based trainee/apprentice carpenter. There is reference as part of a six monthly performance review to a review of apprenticeship progress in unit standards and educational development. Mr Galbreath submits that it is implicit that the employees would enrol in and undertake the apprentice qualification through an ITO.

[44] In the absence of an express term about a requirement to undertake at least 60 credits the issue is whether one can be implied. Mr Galbreath distinguishes the findings in *Maori Hill* where Judge Inglis found that a term to undertake at least 60 credits a year could not be read into the employment agreement by necessary

implication. He submits that *Maori Hill* concerned a different industry and the building industry is largely manual. The statutory context considered in *Maori Hill* he submits is different and required active involvement, enrolment and working towards the completion of an approved course of study of a student. Finally Mr Galbreath submits that the employees were receiving the training from the start of their employment and keeping work records towards achieving their credits and that nothing changed after the commencement of their ITO agreements.

[45] The Privy Council in *BP Refinery (Westernport) PTY Ltd v Shire of Hasting* (1977) 16 ALR 363 at 376 set out a five point test for the implication of terms. I do not find that the implication of a requirement to undertake at least 60 credits a year of an industry training programme is necessary to give business efficacy to the employment agreement. The employment agreement is effective without the term and it is not so obvious either that it goes without saying. The terms of the ITO agreement requiring credits to be undertaken is between the employer and the apprentice/trainee and forms part of the employment when it commences so implication of terms is unnecessary.

[46] The word *required* in the definition of trainee is important. The New Zealand Oxford Dictionary includes in the definition of require *lay down as an imperative, command instruct, order; insist on (an action or measure), demand (of or from a person) as a right…..* The definition of a worker required by his or her employment agreement to undertake credits does not when the definition is read as a whole easily sit with some future obligation to undertake credits.

[47] Implication of such a requirement could not be reasonable or obvious where there was a trial period such as with Mr Steffert. In relation to Mr Dowding there is a conflict in the evidence as to whether it was initially intended to take Mr Dowding on as an apprentice at all for the first 12 months. The letter of offer of employment to Mr Dowding dated 26 November 2012 is confusing. Mr Dowding's parents requested a meeting to discuss the situation and Ms Dowding says that it was not until about 20 December 2012 that it was clear an apprenticeship was intended. Although I do not find I need to resolve the conflict I note that Ms Flowerday in a letter to Mr Dowding dated 20 December advised that the employment agreement has been corrected to say that he [Mr Dowding] is now an apprentice carpenter who will be mainly yard based but more likely to spend considerable time on site also.

[48] Ms Flowerday said in a letter dated 6 May 2013 to Mr Dowding that the reason he was not signed *into BCITO* immediately is that there would have been fees payable for 2012 and 2013. That does not support that Mr Dowding was required by his employment agreement to undertake at least 60 credits a year of the ITO from the time he commenced.

[49] Mr Horsley in his letter to the Authority wrote that the formal apprenticeship starts once the training agreement has been registered with the Tertiary Education Commission and the agreed commencement date has been reached. He noted the commencement date was primarily about when the government funding begins. Credit achievement can take place after registration of the ITO agreement and when competency is displayed.

[50] The six apprentice employees would have prior to signing their ITO agreements received some training and gained some competency in relevant areas. In order to sign up with the ITO the apprentice/trainee must be in employment. Receiving some form of training on the basis that it is intended that the parties will enter into a formal apprenticeship I find is not enough for an employee to be paid a training rate. The definition is clear that an employee must be required by their employment agreements to undertake at least 60 credits a year of an industry training programme for the purpose of becoming qualified. On the job training often takes place on commencing employment so an employee can become competent and efficient at their role. The definition of trainee requires more than simply the provision of training and development of competency. I do not find that the requirement to undertake 60 credits a year of an industry training programme is a term that can be implied in the employment agreements for the six apprentice employees. The requirement to do so does not arise until the commencement of an ITO agreement.

[51] Mr Galbreath has in his submissions carefully advanced all argument to persuade me that Trubet's objection to the breach of s 6 of the MWA should be upheld. I have been assisted by his submissions. I conclude however that it was not until the ITO agreements commenced that the six employees were required by their employment agreements to undertake at least 60 credits a year of an industry training programme. It was not until that time that they were trainees within the definition of

the material Minimum Wage Order so as to entitle Trubet to pay them the minimum training rate.

[52] There is therefore for Trubet a short period for the apprentice employees before an ITO agreement commences during which the adult minimum wage and not the training rate is payable.

Has Trubet failed to comply with s6 of the Minimum Wage Act 1983 and what is the nature and extent of any failure and the nature and extent of any loss suffered by the six employees

[53] I conclude in terms of the objection to the improvement notice that Trubet has failed to comply with s 6 of the MWA. I confirm the improvement notice in this respect.

[54] The nature and extent of the failing is a failure to ensure payment of the applicable minimum wage before the commencement of the ITO agreement.

[55] The nature and extent of loss will depend on the individual circumstances of the six employees. The improvement notice required evidence that Trubet has identified all minimum wage arrears for each employee over the previous six years. That was not provided and the objection was lodged.

[56] There are two aspects for correct payment of minimum wages for the six employees. The first is that the Labour Inspector identified a shortfall in the training rate actually paid and the second is the adult minimum wage rate that is payable before the commencement of the ITO agreement. I understand from Ms Flowerday that she attended to payment of any shortfall in the minimum training rate for each of the employees however I do not have the details of what was paid and that needs to be supplied to the Labour Inspector. The Labour Inspector should also be supplied with confirmation that the correct minimum wage before the commencement of the ITO agreement has been paid in light of this determination.

Campbell Gibson and Kevin Freeman

[57] The dates employment commenced for Mr Gibson and Mr Freeman rather than the date of the employment agreement need to be confirmed and provided to the Labour Inspector in order to comply with the improvement notice. I vary the time in

the improvement notice to provide evidence of commencement of employment for the two employees to Mr Hixon five days after the date of this determination.

[58] Details of payments for any shortfall in minimum wages made after the Labour Inspector's involvement to Mr Gibson and Mr Freeman are to be provided together with confirmation that the correct minimum wage between commencement of employment and the date the ITO agreement commenced has been paid. Evidence of all payments as set out above including any holiday pay and Kiwi saver component is to be provided to the Labour Inspector by the varied date of 5 December 2014.

Bradley Goldsack

[59] Details of any payments made by Trubet after the Labour Inspector's involvement to Mr Goldsack are to be provided to the Labour Inspector together with confirmation that the correct minimum wage between commencement of employment and commencement of the ITO agreement has been paid. The minimum adult wage of $13.75 applies to Mr Goldsack between 2 May and 5 June 2013. Evidence of all payments as set out above including any holiday pay and Kiwi saver component is to be provided to the Labour Inspector by the varied date of 5 December 2014.

Shaun Harris

[60] Details of any payments made by Trubet after the Labour Inspector's involvement to Mr Harris are to be provided to the Labour Inspector together with confirmation that the correct minimum wage between commencement of employment and commencement of the ITO agreement has been paid. The minimum adult wage of $12 per hour applies from 23 November 2008 until the ITO agreement commenced on 13 February 2009. Evidence of all payments as set out above including any holiday pay and Kiwi saver component is to be provided to the Labour Inspector by the varied date of 5 December 2014.

Joseph Steffert

[61] Mr Steffert will need to be approached to provide the start date of his industry training agreement particularly in light of his trial period. Details of payments made by Trubet to Mr Steffert after the Labour Inspector's involvement are to be provided to the Labour Inspector together with confirmation that the correct minimum wage between commencement of employment and commencement of the ITO agreement

has been paid. Evidence of all payments as set out above including any holiday pay and Kiwi saver component is to be provided to the Labour Inspector by the varied date of 5 December 2014. If there are delays in getting the information from Mr Steffert then the Labour Inspector should be advised and he may extend the date accordingly in the circumstances.

Matthew Dowding

[62] Details of any payments made by Trubet to Mr Dowding since either Ms Dowding or the Labour Inspector raised issues are to be provided to the Labour Inspector together with confirmation that the correct minimum wage between commencement of employment and the registration of the ITO agreement has been paid of $13.50 per hour. Commencement of the ITO agreement was delayed for Mr Dowding so some additional government funding could be received. This is somewhat unusual. I am satisfied that Mr Dowding was a trainee within the definition of the Minimum Wage Order when the ITO agreement was registered on 26 February 2013 and became binding. He is therefore entitled to the minimum adult wage from the date of commencement of employment on 12 November 2012 until 26 February 2013. Evidence of all payments as set out above including any holiday pay and Kiwi saver component is to be provided to the Labour Inspector by the varied date of 5 December 2014.

Did Trubet deduct fees from employees' wages in breach of ss 4 and 5 of the Wages Protection Act 1983

[63] Trubet paid the ITO fees for their employees. This meant that the apprentice could receive books and there was a discount for full payment. Trubet then provided the employee with a copy of the invoice. It says that the apprentice would agree to an amount to be deducted from their fortnightly wage.

[64] There was no written consent from the employees to the deductions. The relevant provisions of the WPA provides:

> ***4 No deductions from wages except in accordance with Act***
>
> *Subject to sections 5(1) and 6(2) an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

5 Deductions with worker's consent

(1) An employer may, for any lawful purpose,-

(a) with the written consent of a worker;

(b) on the written request of a worker

-make deductions from wages payable to that worker.

[65] There was a general deductions clause in the employment agreements although it did not specifically refer to ITO fees. Mr Galbreath referred the Authority to the Employment Court judgment in *Jonas v Menefy* [2013] NZEmpC 2013. That case concerned a deduction made for damage Mr Jonas caused to a gate and a general deductions clause in the employment agreement was relied on. Judge Ford stated at [62] that the provisions of the Wages Protection Act 1983 are mandatory and an employer must pay the entire amount of wage to a worker without deduction unless the worker consents or in certain circumstances there is an overpayment. It was also stated that the employer consistent with good faith obligations under the Act must, as a minimum, consult with the worker before making any deductions. Judge Ford stated that it may be no deduction can be on the basis of a general clause without the worker's express consent but that was not the way the matter in front of him was argued.

[66] The general deductions clause in each of the employment agreements provided that the employer may make deductions from the employees' wages for the following reasons:

Un-authorised absence from work.

Lack of an appropriate leave entitlement.

Overpayment of monies.

Where you owe Trubet Building Ltd money, e.g. goods purchased under staff account.

Where materials or equipment cannot be reasonably accounted for and/or where you have been negligent or reckless in caring for Trubet's property.

Where, on ending your employment you have taken more annual leave than the amount due to you.

[67] Mr Hixon says that written consent was required for the deduction of the fees. I agree. I find that deductions from an employee's wages may only be made with their written consent. There is no written consent or request from the six employees for the deductions to be made. The general deductions clause does not specifically provide written consent for the deduction of ITO fees.

[68] Trubet made deductions from its employees' wages for ITO fees without written consent and in doing so failed to comply with ss 4 and 5 of the Wages Protection Act 1983. I confirm the improvement notice in that respect.

What is the nature and extent of Trubet's failure to comply with the provisions and the nature and extent of any loss suffered by the employees?

[69] The nature and extent of Trubet's failure was that it did not obtain written consent to the deductions of fees from employee wages. Letters from four employees confirm that they were in agreement with the deductions and the amount to be deducted each fortnight.

[70] Mr Dowding has been reimbursed for the limited deductions made from his wages for fees before he resigned.

[71] There was no evidence from Mr Harris. I cannot determine therefore what the nature and extent of his loss was and whether as with the other employees he agreed to the deductions. There is no evidence to support that he raised any concerns about the deductions.

[72] It would not be appropriate in those circumstances to require that he be repaid his fees. I confirm that there had been a breach of the WPA but rescind the requirement in the improvement notice that the fees be repaid.

Penalties

[73] An employer who fails to comply with an improvement notice issued under s 223D is liable to a penalty under s 223F of the Act. In those circumstances I note that a Labour Inspector may not also bring an action seeking a penalty in respect of the same matter under any relevant Acts.

[74] Mr Hixon does not seek penalties for the failure to comply with the improvement notice but penalties are sought under s 10 of the MWA and s 13 of the

WPA. Penalties were sought because the Labour Inspector said he had recognised recalcitrance in the attitude of Trubet to compliance with minimum employment standards. I was not addressed on whether there were any difficulties about the fact penalties were claimed on a basis other than a failure to comply with an improvement notice when the matter was before the Authority by way of an objection to the improvement notice.

[75] I do note firstly that there was compliance with aspects of the improvement notice. Mr Hixon placed reliance on Trubet's responses to Ms Dowding. I agree Trubet was advised earlier than Mr Hixon's involvement of the correct situation regarding minimum entitlements by Ms Dowding.

[76] I also accept that these were vulnerable young employees keen to undertake an apprenticeship and although their parents were usually involved in the employment process they would not necessarily have known about the minimum entitlements. They were entitled to conclude that Trubet would not be paying below the minimum rate.

[77] Trubet though, felt strongly that it could pay apprentice employees the minimum training rate from the commencement of employment rather than the commencement of the ITO agreement. *Maori Hill* provided guidance at least from May 2013 but there did not seem to be any authority in which it has been determined when the training rate is payable for an apprentice. As Mr Galbreath submits the employer in *Maori Hill* paid the training rate but never enrolled the employees in the appropriate course. The breach was more flagrant. Notwithstanding that no penalty was awarded because it was recognised that there were strong views held about whether the training rate was payable.

[78] The deduction of fees was in breach of the WPA but I find such a breach inadvertent rather than deliberate.

[79] I do not find in all the circumstances a penalty for breach of the MWA is appropriate.

Costs

[80] There is no issue as to costs.

Helen Doyle
Member of the Employment Relations Authority