

- (f) Lisa Schlegal;
- (g) Charlotte Cooneman;
- (h) Yentl Van Parys;
- (i) Lisa Greiner.

[2] The Labour Inspector initially sought to recover unpaid holiday pay under s.77 of the Holidays Act 2003 (HA03) for all of the above named employees. That claim has been withdraw after Ms Toki paid the amounts owing subsequent to the Authority's substantive investigation meeting in October.

[3] The Labour Inspector now seeks penalties against Ms Toki for:

- (a) Breaching s.65 of the Employment Relations Act 2000 (the Act) by failing to provide the named employees with written employment agreements;
- (b) Breaching s.81 of HA03 by failing to keep holiday and leave records for the named employees;
- (c) Breaching s.23 of HA03 by failing to pay the named employees their final pay upon termination of their employment;
- (d) Breaching s.6 of MWA by failing to pay the named employees the minimum wage; and
- (e) Breaching s.5 of the Wages Protection Act (WPA) by making unlawful deductions to the named employees' wages without written consent.

[4] Ms Toki admits she employed the nine named employees to carry out strip picking of kiwifruit flowers. Seven of the workers worked one day on either 26 or 27 November 2014 and two of the named employees worked 26 and 27 November 2014.

[5] During the week commencing 05 December 2014 the Labour Inspector received complaints from the named employees and when investigated assessed that breaches of employment legislation had occurred.

[6] None of the named employees were provided with written employment agreements, contrary to the requirements of s.65 of the Act. Nor were any of the named employees informed of their rates of pay by Ms Toki before they started work for her. The named employees had been paid a piece rate for the flowers they picked. Bags of flowers that they had picked were weighed and the workers were paid at the rate of \$5.9 per kilogram of flowers picked.

[7] Ms Toki provided the named employees with payslips when their wages were delivered to their accommodation in Kerikeri. The payslips show that some of the named employees were penalised by deductions being made from their wages for alleged "*improper*" (ie below standard) picking.

[8] The payslips reviewed by the Labour Inspector show that the named employees were paid less than the minimum wage after Ms Toki made deductions from their wages for "*improper picking*". Ms Toki says this meant that the flowers picked could not be used so she (Ms Toki) was not paid for them by her principle.

[9] Ms Toki admits that none of the employees were paid holiday pay, contrary to the requirements of s.75(2)(a) of HA03 which requires holiday pay to be paid upon termination. Ms Toki admits she did not keep wage and time records or holiday and leave records because she was unaware of her obligations under the relevant legislation.

[10] Ms Toki says she had never employed anyone before and just engaged the named employees to help her for a few days because she had too much work on to meet her contractual obligations to her principle. Ms Toki says it was a casual short term arrangement so she did not view herself as an employer.

[11] Ms Toki told the Labour Inspector that she (Ms Toki) did not believe she was required to pay the named employees because they were "*in training*" and their performance was "*below standard*". Ms Toki is well aware of her mistake about that now and vows never to repeat it.

[12] The Labour Inspector seeks the following orders and penalties:

- (a) Pursuant to s.66 HA03 and s.11 MWA as identified in the Statement of Problem for each of the named employees;

- (b) Pursuant to s.65(4) of the Act for failure to provide employees with written employment agreements;
- (c) Pursuant to s.10 of the MWA for failure to provide the minimum wage for all hours worked;
- (d) Pursuant to s.75 of the HA03 for:
 - (i) breach of s.75(2)(a) of HA03 arising from the failure to pay holiday pay upon termination of employment; and
 - (ii) under s.75(2)(e) of HA03 for failing to maintain holiday and leave records for employees;
- (e) Pursuant to s.13 WPA for unlawful deductions from the named employees' wages.

Issues

[13] Given Ms Toki has accepted she breached the relevant legislation and has subsequently paid the wage arrears originally claimed by the Labour Inspector the only remaining matter to be determined is what if any penalty should be imposed on Ms Toki.

What if any penalty should be imposed on Ms Toki?

What breaches have occurred?

[14] I am satisfied that Ms Toki has breached:

- (a) Section 65 of the Act by failing to provide the nine named employees with written employment agreements;
- (b) Section 81 of HA03 by failing to keep holiday and leave records for the nine named employees;
- (c) Section 23 of HA03 by failing to pay the nine named employees their full final pay upon termination of their employment;

- (d) Section 6 of MWA by failing to pay the nine named employees the minimum wage for the hours they actually worked (because of the deductions made for substandard flowers);
- (e) Section 5 of WPA for making unlawful deductions from the nine named employees' wages without their written consent.

[15] I find that Ms Toki has engaged in 45 separate breaches of employment legislation. Because Ms Toki is an individual, the maximum penalty per breach is \$10,000¹ so the maximum possible penalties for all of the breaches identified above is \$450,000. This is a serious matter.

Authority's approach to penalties

[16] Penalties are discretionary with the discretion to be exercised on a principled basis. The purpose of penalties is to punish wrongdoing, to express disapproval and to act as a deterrent to the party in question and to others.

[17] The Employment Court in *Xu v. McIntosh*² identified that the following questions may assist when determining the appropriate level of penalties to be imposed:

- a. How much harm has the breach occasioned?
- b. How important is it to bring home to the party in default that behaviour is unacceptable or to deter others from it?
- c. Was the breach technical or inadvertent or was it flagrant and deliberate?

[18] The Employment Court in *Tan v. Yang and Zhang*³ set out the following, non-exhaustive, list of factors that might be usefully considered by the Authority when dealing with penalty applications:

- (a) seriousness of the breach;
- (b) whether breach is one-off or repeated;

¹ Section 135(2)(a) of the Act and s.75(1)(a) HAO3.

² [2004] 2 ERNZ 488.

³ [2014] NZEmpC 65.

- (c) the impact, if any, on the employee;
- (d) the vulnerability of the employee;
- (e) the need for deterrents;
- (f) remorse shown by the party;
- (g) the range of penalties imposed in other comparable cases.

Application of relevant factors

[19] It is appropriate to award penalties to signal strong disapproval and to punish Ms Toki's decision to conduct her business in disregard of minimum statutory protections and obligations.

[20] Ms Toki was involved in multiple breaches of multiple minimum statutory obligations and protections. However it is to Ms Toki's credit that she has expressed genuine remorse and has taken steps to pay the arrears.

[21] Another mitigating factor is Ms Toki's full co-operation with the Labour Inspector and for the decision Ms Toki has made to educate herself and others in her family about the various employment law obligations on an employer. Ms Toki appears as a first offender in respect of the matters for which a penalty is sought and I consider the likelihood of her reoffending in this same way is miniscule.

[22] I accept Ms Toki's evidence that this is the first time she has employed others and was not aware of her statutory obligations as an employer. Whilst that is not an excuse Ms Toki is not in the same category as some other temporary employers in the kiwifruit industry who each season ignore their statutory obligations in order to obtain an unfair labour market advantage for themselves.

[23] Ms Toki was in a situation where she contracted her services to a principle. There was too much contracted work for her and her family to do themselves so she looked elsewhere for temporary support.

[24] The low standard of work done by the named employees cost Ms Toki in terms of the amount she earned as a contractor from her principle so she attempted to pass those losses (which she incurred under her contracting arrangement) to the named individuals who had caused them in the first place. Whilst she was not legally

entitled to do that it is clear that the entire situation has obviously been detrimental and very stressful for Ms Toki. Ms Toki was quite distressed during the investigation meeting.

[25] Ms Toki is a long term sickness beneficiary with limited prospects of being able to supplement her benefit. Her ill health is also such that she is unlikely to be able to move into the workforce on a more ongoing or permanent basis in the immediate future.

[26] There is a need for a penalties to be set at a level that act as a strong deterrent but that must also be balanced by Ms Toki's personal circumstances.

Outcome

[27] I adopt a global approach to penalties so order Ms Toki to pay a total penalty of \$2,000 for her breaches of s.65 of the Act, s.81 and 23 HAO3, s.6 of MWA and s.5 of WPA. This amount is to be paid at the rate of \$45 per week.

What if any costs should be awarded?

[28] The Labour Inspector did not seek legal costs. Ms Toki is ordered to pay the Labour Inspector \$71.56 to reimburse the filing fee.

Rachel Larmer
Member of the Employment Relations Authority