# Employment Court of New Zealand



## Borsboom v Preet PVT Limited [2016] NZEmpC 143 (4 November 2016)

Last Updated: 5 November 2016

**IN THE EMPLOYMENT COURT CHRISTCHURCH**

**[2016] NZEmpC 143**

**EMPC 95/2016**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | JEANIE MAY BORSBOOM (LABOUR INSPECTOR)<br>Plaintiff |
| AND | PREET PVT LIMITED First Defendant |
| AND | WARRINGTON DISCOUNT TOBACCO LIMITED<br>Second Defendant |

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| Hearing: | 25 July 2016<br>(Heard at Christchurch) |
| Court: | and by written memoranda filed on 8 and 15 August, 5 and 11<br>October 2016<br><br>Chief Judge GL Colgan<br>Judge BA Corkill<br>Judge KG Smith |
| Appearances: | C Milnes, counsel for plaintiff<br>FJ McMillan, counsel for defendants |
| Judgment: | 4 November 2016 |

**JUDGMENT OF THE FULL COURT**

**A The plaintiff's challenge to the determination of the Employment**

**Relations Authority is upheld.**

B. **The determination of the Employment Relations Authority is set aside and this judgment applies in its stead.**

**C The first defendant is to pay penalties totalling $40,000.**

JEANIE MAY BORSBOOM (LABOUR INSPECTOR) v PREET PVT LIMITED NZEmpC CHRISTCHURCH [2016] NZEmpC 143 [4 November 2016]

**D The second defendant is to pay penalties totalling $60,000.**

**E All penalty payments are to be made to the Wellington Registry of the**

**Employment Court to the use of the Crown.**

**F Sums of $7,500 from those penalties are to be paid to each of the five affected former employees of the defendants pursuant to s 136(2) of the Employment Relations Act 2000**

**G Costs are reserved subject to the timetable at [204] of this judgment.**

**REASONS**

**INDEX**



**Introduction**

[1] The issues for decision in this case relate to penalties to be imposed for breaches by employers of what are known colloquially as the 'minimum code' employment law statutes. The decision is not limited to, but applies particularly to, instances of multiple breaches by employers and/or in respect of multiple employees.

[2] Although the statutes particularly at issue in this case are the Minimum Wage Act 1983 and the Holidays Act 2003, pursuant in both cases to s 135 of the Employment Relations Act 2000, the principles to be examined and determined apply equally to other Acts constituting the minimum code. These others include the Wages Protection Act 1983, the Parental Leave and Employment Protection Act

1987 and, in several respects, the Employment Relations Act.

[3] There is little, including recent and authoritative, guidance about how the Employment Relations Authority should approach

penalties, particularly for multiple breaches of those minimum standards statutes, including in respect of multiple employees. The Court is taking this opportunity to sit as a full Court of three Judges to provide this guidance to the Authority and to labour inspectors who are principally, but not always, the applicants for penalties.

[4] Although referred to in the course of argument and therefore briefly in this

judgment, what is called the 'pecuniary penalties' regime included within new Part

9A of the Employment Relations Act, is not dealt with directly by this proceeding. That is because, although related to questions of penalties generally, the defendants in this case are not subject to the Part 9A provisions. Although there are clear similarities between the two different penalty regimes, future case law under s 142E and associated new sections should be the way to interpret and apply them rather than as a side-wind to other litigation such as this. No case for Part 9A pecuniary penalties has yet arisen for this new law to be examined and applied.

[5] Likewise, new s 133A, which provides for certain factors to be taken into account by the Authority and the Court when imposing penalties, is inapplicable in this case. That is because, Labour Inspector Borsboom's challenge being one

otherwise than by hearing de novo to a determination of the Authority issued before

1 April 2016 when s 133A came into effect, the new section should not be applied

retrospectively to the Authority's determination.

[6] Having determined this, however, we will make reference to new s 133A in circumstances where, in our conclusion, it appears to entrench previous judge-made law without change. This may also give practitioners in the field some guidance as to its interpretation and operation, albeit in the form of observations or commentary.

[7] We begin the judgment of this case by setting out relevant facts. These were either found by the Authority or not contested when placed before it in affidavits filed by the plaintiff. The following not only describes the breaches by the defendants of three employment statutes, but goes into sufficient detail of these as is necessary to make an assessment of the seriousness of those breaches. That is because although the defendants themselves do not deny that it was open to the Authority to award penalties against them, they say that the amounts of those penalties are manifestly excessive in light of the relevant facts. The Labour Inspector contends, however, that the penalties were manifestly inadequate in the following circumstances.

[8] The Authority's first determination, issued on 13 April 2015, deciding compensatory orders for those breaches, did not go into the detail of the breaches because it recorded orders that were made by consent between the parties.1 When the Authority came to determine the question of penalties in its second determination, issued on 16 March 2016, it did not refer to the relevant facts any more than cursorily.2 As will be seen, the exercise to be undertaken by the Authority or the Court to determine penalties will require an assessment of the seriousness of the breach or breaches, and of what might be called mitigating factors that must be considered by the Authority or the Court. Other considerations will also need to be

applied to cases such as this.

1. *Borsboom (Labour Inspector) v Preet PVT Ltd* [2015] NZERA Christchurch 47 (consent determination).
2. *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZERA Christchurch 32 (penalty determination).

**The relevant facts**

[9] The first defendant, Preet PVT Limited (Preet), operated a number of retail liquor stores around the South Island. The second defendant, Warrington Discount Tobacco Limited (Warrington), operated retail dairy outlets, also around the South Island. Both employers in these very closely associated companies breached minimum statutory employment standards in respect of two former employees (in the case of Preet) and three former employees (in the case of Warrington).

[10] The shareholders and directors of both companies were, at material times, Mr Dilbag Singh Bal and Mrs Pallavi Bal. Mr Bal managed the companies' retail operations and, from August 2013, Mrs Bal had administrative responsibilities for them, including employment, finances and other regulatory and regulated aspects of the businesses.

[11] Each of the companies engaged principally young Indian nationals in New Zealand on temporary work visas to staff these shops and outlets, which were open for business for long hours, mostly seven days a week. The staff engaged had been granted student visa permits to study in New Zealand. To satisfy Immigration New Zealand that they were employed in positions which matched their qualifications, these employees were described by the defendants as "managers" and the like. Although they were usually solely responsible for the operation of these outlets, they were, in reality, serving assistants in small shops who were responsible to the directors and owners of the companies.

[12] Features of the employment of all five former employees the subject of this case included that they were paid hourly wages substantially lower than the minimum hourly wage, in most cases (when wages were paid at all), $8.00 or $8.50. Because of the single staffing of these stores, the former staff members were not able to take meal or other breaks except, when they were on duty, on a catch-as-catch-can basis. They worked on public holidays for no additional remuneration and without compensating time off on other occasions. Their holiday pay entitlements were less than the minimum, in part because of the way in which their wages were calculated and paid.

[13] The companies kept no, or at least very inadequate, wage and time records relating to employment. The employees' immigration visas were tied to employment only with one of the defendant companies, so that the defendants wielded a significant degree of control over whether the former employees were able to remain in New Zealand lawfully. The companies' owners made it clear, both subtly and sometimes even overtly, that they held this power over their employees.

[14] The staff endured these substandard and unlawful terms and conditions of their employment largely in the hope that they would eventually move on to better employment and, with it, the prospect of permanent residence in New Zealand for themselves and perhaps also their families.

[15] Following complaints by some of the former employees, the Labour

Inspector commenced an investigation and found evidence of multiple breaches of s

6 of the Minimum Wage Act; multiple breaches of the minimum payment provisions of the Holidays Act; failure to keep wage and time records under s 130 of the Employment Relations Act; failure to keep and produce holiday and leave records under s 81 of the Holidays Act; and a failure to comply with s 65 of the Employment Relations Act to provide employees with employment agreements.

[16] The claims of failure to keep wage and time records were not pursued at the

Authority's investigation.

[17] It is clear that the breaches alleged by the Labour Inspector had undoubtedly occurred. Indeed, this was conceded, as evidenced by the consent orders originally made by the Authority.3 It categorised the breaches as "serious" in view of the amounts involved, their repetitive natures and their continuation over significant periods of time. The Authority also found that the breaches were aggravated because of attempts to conceal them.4

[18] Although, eventually, all former employees received employment agreements, this was principally to assist them with their visa applications. The

3 *Borsboom* (consent determination), above n 1.

4 *Borsboom* (penalty determination), above n 2, at [17].

hourly rates of remuneration stated in these agreements were expressly for payments at or a little above the minimum hourly wage, although some of the former employees were told that they would be paid an hourly rate significantly below the legal minimum.

[19] The Authority had uncontested evidence that the employees were required to work up to 95 hours per week and, in the case of a former employee who was in sole charge of a dairy at Ashburton, more than 100 hours per week. All former employees were paid in cash at the rate of $8.00 or $8.50 per hour and all had worked trial periods with no remuneration whatsoever. One of the former employees had not received any pay for three weeks which had caused him "extreme distress" in paying for accommodation and other expenses. One of the employees was required to work for a week in another city but received no reimbursement of his travel or accommodation costs. One of the employees, on transfer to another city, slept on the floor of the dairy when it closed for the night as there were no accommodation arrangements in place for him.

[20] Two of the former employees had their pay cut on one occasion as a unilateral disciplinary measure; all were subject to significant pressure not to take sick leave and, on occasions when they did so, they were not paid even if they qualified for this statutorily. The former employees worked on most of the public holidays but did not receive their statutory entitlements for doing so. They received no holiday pay and, because they were generally in sole charge of the retail premises, there was no time for meal or other breaks. The evidence before the Authority was that all former employees were threatened (explicitly or implicitly) by Mr Bal, using their wish for continued immigration status to stifle any expression of their legitimate concerns.

[21] There was also evidence before the Authority that Mrs Bal deliberately concealed the underpayments of wages by seeking to persuade the former employees not to disclose their actual rates of pay but, rather, to pretend to others that they were being paid the contracted-for above-minimum rates.

[22] In these circumstances, the Authority found that there was a substantial negative impact on the employees; and that the former employees were particularly vulnerable to exploitation in all the circumstances.5

[23] In connection with his operation of these businesses, Mr Bal was charged in the District Court with 17 counts of supplying false and misleading information to an immigration officer, one count of exploiting persons not legally entitled to work, and six counts of aiding and abetting a person to breach conditions of a visa or to remain in New Zealand unlawfully. Mr Bal was sentenced to nine months' home detention and ordered to pay emotional harm reparation of $2,000 to one of the complainants. The Labour Inspector submitted that the allegations to which Mr Bal pleaded guilty broadly mirror the evidence put before the Authority and not contradicted. Mr Bal's offending did, however, relate to six other employees, not those the subject of this case. We were provided with the summary of facts presented to the District Court but not the Judge's sentencing notes.

[24] In 2014 Labour Inspector Borsboom brought claims on behalf of a number of former employees of the first and second respondent companies for unpaid wages and holiday pay, and sought penalties for breaches by them of the Minimum Wage Act, the Holiday Act and the Employment Relations Act.

[25] We now summarise the particular breaches against each employee and their effects on them.

[26] Hardeep Singh was employed for about 15 months primarily in a dairy in Ashburton. He worked at least 60 hours over seven days per week. He was not paid for the first two weeks of his employment and frequently performed extra unpaid work. When Hardeep Singh was paid, it was at the rate of either $8 or $8.50 per hour. During his employment, Hardeep Singh was reassigned to work for a week in a dairy in Woolston in Christchurch. He was not provided with, or reimbursed for, food, travel costs or accommodation. He slept on the dairy floor when it was closed. He was not paid for public holiday entitlements while employed or paid any holiday

pay on termination. He was dismissed by text message in mid-August 2013.

5 *Borsboom* (penalty determination), above n 2, at [18].

[27] Harpal Bola was employed for about 2.5 months, working seven days per week with no days off. He was unpaid for the first week and for the last four days of his employment, and at other times was paid at the rate of $8.50 per hour. Mr Bola was refused leave to consult a doctor for an infection and his request to be paid the minimum wage was declined. Although he worked principally at a dairy in Ashburton, Mr Bola was sent briefly to work as the acting manager of a liquor store, despite his opposition to doing so and the fact that he did not hold a General Manager's Certificate or other relevant liquor-related licence. He was not paid public holiday entitlements or any holiday pay on termination and was never given an employment agreement.

[28] Harbaldeep Singh was employed for about 14 months and, having requested one, signed an employment agreement within about a fortnight of starting work. He worked at both dairies and liquor stores at the direction of the defendants, working up to seven days per week and generally between 60 and 91 hours per week without breaks during the day. He was paid at the rate of either $8 or $8.50 per hour, although he received no pay for an employment period that probably exceeded the first week of his employment. For two weeks in January 2013 Harbaldeep Singh's pay was halved when he had to take off two days due to ill-health. Having only been employed for about nine months, he was not paid sick leave. When he requested a wage increase or days off, Mr Bal threatened to have his work visa revoked. He was not paid public holiday entitlements while employed, or holiday pay on termination.

[29] Jaspal Singh was employed for about seven months after signing an employment agreement. He worked at two liquor stores, being paid $8.50 per hour, principally in cash, and generally worked 11 hours per day over six or seven days per week. Jaspal Singh was not paid for the first two weeks of his employment and, because he was principally the sole employee at the liquor stores, was habitually unable to take rest or meal breaks. When his health deteriorated and he suffered an injury which required medical treatment at a hospital, he did not receive any support from his employer. Jaspal Singh was not paid holiday entitlements while employed or any holiday pay on termination.

[30] Finally, Rakesh Kumar Nigah was employed in two dairies in the Christchurch area. He was paid, irregularly, $8.50 per hour in cash, and worked between 50 and 70 hours per week. Mr Nigah was not paid for the first four weeks of his employment and was subsequently not paid for another three weeks. When he asked to be paid the minimum wage, he was threatened and intimidated by Mr Bal as a result of which he suffered from what he described as depression following his employment. He was not paid public holiday entitlements while employed or any holiday pay on termination.

[31] The defendants kept no or substantially inadequate records of their employees' work times/days, wages, holidays and other similar minimum records required by the respective statutes.

[32] The foregoing is the context in which the Authority came (and now the Court

comes) to determine penalties for the defendants' statutory breaches.

**The Authority's first (liability and compensation) determination**

[33] As the first determination of the Employment Relations Authority records, arrears were settled between the parties and consent orders made for the payment by instalments of these unpaid or short-paid sums to the Labour Inspector to the use of the five former employees involved. The Authority then left the question of penalties (we assume whether they should be payable and, if so, their amounts) to the parties to consider. That was unsuccessful and the Labour Inspector asked the Authority to impose penalties for those breaches.

[34] Repayment of those short- or unpaid sums was agreed to personally by the now former director of the two defendant companies (although he is still described as a manager of them and is still apparently a shareholder), Mr Bal. The circumstances in which Mr Bal came to shoulder personal liability for those compensatory payments are less than clear but may be connected to relationship property issues between Mr Bal and his former wife who was also a director and shareholder in the companies and remains the sole director of them.

[35] A schedule of payments of instalments of these amounts totalling $73,345.05 was agreed to by the parties and adopted by the Authority. We were advised by memorandum filed on 15 August 2016 that Mr Bal has very largely complied with his obligations under the schedule so that about $42,825 has been paid or an average of $9,965 per affected former employee. The matter is, however, more complicated because the five former employees are owed different amounts, between $5,077.67 and $23,013.11. Calculated more precisely, more than half of each former employee's individual entitlement has now been paid by Mr Bal.

[36] We were told that all payments have been made to the Authority and held by it (presumably in an interest-bearing account) but not yet distributed, even in part, to the Labour Inspector or otherwise for the benefit of the former employees. Counsel accepted that these steps should at least be investigated. It seems to us that there is no reason why the Authority should continue to hold significant sums of unpaid remuneration and other compensation due to the former employees in the circumstances in which they probably now find themselves.

[37] If Mr Bal continues to meet his personal obligations to discharge the compensation debts of the two companies, this should be completed by about February 2017.

**The Authority's penalty determination**

[38] The Authority's second determination (on penalties) was issued on 16 March

2016.6 This judgment deals with a challenge by the Labour Inspector, other than by hearing de novo, to certain parts of the Authority's penalties' determination. Although the challenge still nominated Mr Bal as third defendant, no remedies are now sought against him personally.

[39] In general terms, the Authority awarded identical separate penalties of $5,000 each, multiplied by the number (five) of former employees of the companies

6 *Borsboom* (penalty determination), above n 2.

involved.7 Because two of those former employees had been employed by Preet, that company was required to pay penalties totalling $10,000, with the balance of

$15,000 being awarded against Warrington which had employed three of the affected employees. The Authority directed that these penalties were to be paid no later than Wednesday 13 April 2016.

[40] No payment of any part of the penalties ordered by the Authority has been made by either of the defendant companies. No application for stay of execution of those Authority orders has been made, although no step appears to have been taken by the Labour Inspector to enforce payment of those penalties to date. They, too, were payable to the Authority in the first instance.

[41] We should note, finally, on the matter of the proceedings before the Authority, that if the parties had reached any consensus about penalties, whether to award these and, if so, the amounts, could only have been determined by the Authority, even if by consent of the parties. Penalties could not have been imposed or fixed solely by the consent of the parties. The Authority would have to be satisfied of the appropriateness of any awards and the amounts of them. It will be an unusual case where the Authority will leave questions of penalty to the parties to attempt to resolve, given the penal and public law nature of such orders.

**Plaintiff's grounds of challenge**

[42] The Labour Inspector's challenge addresses three conclusions of the

Authority. The first is set out at [25] of the determination which says:

Having considered this [submission by the Labour Inspector] I conclude a more appropriate approach, especially given the attachments appended to the respondents' submissions and the argument others were not similarly affected, is to take a global approach in respect to the breaches as they pertain to each of the five affected workers. While the amounts each worker was deprived of varied there were, in all instances, multiple breaches – indeed and with one exception the number of breaches were identical. The exception was the breach of section 71 of the Holidays Act in respect to Harbaldeep Singh. In these circumstances I consider an identical penalty appropriate for each of the five workers.

7 Jaspal Singh and Harbaldeep Singh were employees of Preet; Rakesh Kumar Nigah, Harpal

Singh Bola and Hardeep Singh were employees of Warrington.

[43] Next, the Labour Inspector challenges the correctness of the following paragraph of the determination:

[26] Having considered the evidence, the submissions, multiple and significant breaches, the effect on the workers concerned, their vulnerability, the need for deterrence and the lack of persuasive evidence from the respondents I consider a penalty of $5,000 for the breaches in respect to each of the five workers appropriate.

[44] Finally, the Labour Inspector challenges the consequential orders of the Authority set out at [28]-[29] of the determination. This is really only the formal order of the Authority and stands or falls on the decision of the first two grounds of challenge:

[28] The first respondent, Preet PVT Limited, is to pay to the Crown, via the Authority, a penalty of $10,000.00 (ten thousand dollars).

[29] The second respondent, Warrington Discount Tobacco Limited, is to pay to the Crown, via the Authority, a penalty of $15,000.00 (fifteen thousand dollars).

[45] When the breaches occurred, the maximum penalties able to be awarded by the Authority in respect of such breaches had recently increased by legislation.8

Because both respondents against whom penalties were ordered are companies, the maximum penalty for each breach under the different statutes was $20,000.9 In each case, if an individual person had been liable, that maximum would have been

$10,000. So each of the penalties imposed by the Authority ($5,000) was one- quarter of the maximum available for a breach, assuming that it calculated correctly the number of breaches.

[46] The case for the Labour Inspector is that the amounts of each of the penalties imposed were "disproportionate and inadequate"

having regard to the maximum penalties available; the objects of the statutes; the facts established by the Authority; and its findings about the seriousness of the breaches, including by reference to their numbers, repetitions, durations and the attempts made by the defendants to conceal

them. In these circumstances, the Labour Inspector says that the Authority could not

8 Amended as from 1 April 2011 by the Employment Relations Amendment Act 2010 (2010 No

125), s 18(1).

9 Employment Relations Act 2000, s 135(2)(b); Holidays Act 2003, s 75(1)(b); Wages Protection

Act 1983, s 13.

reasonably have concluded that "global penalties" should have been awarded uniformly in respect of each employee without taking into account material differences (including as to the employers' culpabilities) between them. The relief sought by the Labour Inspector is that the penalties ordered by the Authority be set aside and replaced by greater penalties as may be appropriate in all the circumstances. The plaintiff also seeks costs.

**Legislative history of penalties in employment law**

[47] The relevant equivalents to current ss 133-136 of the Employment Relations Act have long provided for penalties in employment law. So, too, have the statutory predecessors of the minimum code legislative regimes, including the Holidays Act, the Minimum Wage Act and the Wages Protection Act. These predecessors date from s 13 of the Industrial Conciliation and Arbitration Amendment Act 1908 (amending, by adding to, the Industrial Conciliation and Arbitration Act 1894). Statutory successors have included s 129 of the Industrial Conciliation and Arbitration Act 1925, s 199 of the Industrial Conciliation and Arbitration Act 1954, s

148 of the Industrial Relations Act 1973, s 202 of the Labour Relations Act 1987 and s 52 of the Employment Contracts Act 1991.

[48] Penalties, therefore, are a very longstanding feature of the employment law of New Zealand that has been regulated by statute. For the majority of that time, until the enactment off the Labour Relations Act 1987, claims for penalties were brought in the Magistrates and then District Courts and dealt with by Stipendiary Magistrates/District Court Judges as part of the miscellaneous prosecutions jurisdiction of that Court.10 This historical treatment of penalties as quasi-criminal confirms their essentially penal nature. Whereas under those former regimes, claims for penalties were generally the sole proceeding before the Magistrates/District

Court in respect of particular industrial matters, penalties that are now dealt with principally by the Authority are often causes of action added to other proceedings

including personal grievances, disputes and claims for arrears of wages.

10 See the Industrial, Conciliation and Arbitration Act 1894, s 89.

**Penalties – general principles**

[49] Penalties for breaches of what are now called employment agreements, and minimum code statutes, have long been a feature of employment, labour and industrial law in New Zealand as we have identified. However, in regard to employment agreement breaches, they are still unusual in what is essentially a civil private law regime in which compensatory monetary awards may also be made to affected parties who are the subject of such breaches.

[50] Such statutory penalties are primarily penal as opposed to compensatory, although there are potential compensatory elements to them. They are prima facie payable to the Crown although the compensatory element of them may be discerned by the discretion that the Authority and the Court have to award the whole or any part of such penalties to a wronged party or, indeed, to another person.11 The exercise of that discretion does not affect the Court's costs regime so that, potentially, a breach may be met with an award of monetary compensation to the aggrieved party, a penalty payable to the Crown and/or the aggrieved party, and an

order for costs payable by the breacher.

[51] Penalties are essentially punitive in that they are intended to mark the community's disapproval of the conduct that amounts to a breach of a minimum employment standard. Although the focus of a penalty is on the conduct in the circumstances of the wrongdoer, the effect on, and material circumstances of, the

'victim' are also relevant in the overall assessment exercise. The Authority and the Court should be careful not to conflate the punitive aspects of a penalty with the compensatory assessment of a successful claim that is usually dealt with separately, even though in the same jurisdiction and even the same proceeding.

[52] There is a general, as well as a specific, deterrent element to the imposition of a penalty. In addition to dissuading a particular employer from breaching again, it is one of the rationales for a penalty that persons in similar positions will be dissuaded from breaching minimum code standards by their awareness of their liability to pay a

monetary penalty if that occurs.

11 Employment Relations Act 2000, s 136(2).

[53] Although frequently not recognised or acknowledged as such, the penalties regime in employment legislation is a longstanding,

perhaps even the original, example of what are now known as civil pecuniary penalties, especially in the modern law of commerce. The Law Commission has written extensively and recently on the subject of such pecuniary penalties12 and Parliament has enacted a number of pecuniary penalty regimes in the sphere of commercial and consumer law. Recourse to at least the principles enunciated by the Law Commission and underlying these other civil penal regimes is useful to inform how the Authority and the Court should now deal with penalties in employment law.

**Increased penalties from 1 April 2011 and the reasons for them**

[54] Penalties under s 135 of the Employment Relations Act were increased by

Parliament in the Employment Relations Amendment Act 2010 with effect from 1

April 2011.13 The previous maxima were doubled to $10,000 and $20,000 for individuals and corporate entities respectively.14 For completeness, we note that with effect from 1 April 2016 (but not in issue in this case) there are now greater maximum penalties for breaches of the new Part 9A provisions of the Act which

relate to pecuniary penalties under ss 142E(1) and 142G. In the case of an individual, the maximum pecuniary penalty is $50,000 and, in the case of a body corporate, either $100,000 or three times the amount of unlawful financial gain made by the body corporate from a breach.

[55] To properly interpret and apply the legislative intention in increasing the penalties with effect from 2011, which may in turn affect the amounts of penalties, we have undertaken research into the relevant legislative process. This confirms that in a 2015 case, the Court concluded correctly that Parliament intended the Authority

and this Court to increase significantly penalties for breaches.15

12 Law Commission *Pecuniary Penalties*: *Guidance for Legislative Design* (NZLCR133, 2014).

We address this further at [131] and following.

13 Employment Relations Amendment Act 2010, s 2.

14 Section 18(1).

15 *Denyer, Labour Inspector v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC 41 at [26]. (Though this judgment was reversed on appeal, the Judge's remarks on the statutory purpose of increased penalties were not affected).

[56] We explain why this approach in the *Reynolds* case in this Court is correct. Between the years 2000 (when the maximum penalties of $5,000 and $10,000 were set) and 2011 (when these were doubled), an increase which took account only of inflation would have added amounts of $1,609 and $3,217 respectively to each of those penalties.16 Even if these inflation-adjusted increases had been rounded up to, say, $2,000 and $3,500 respectively, that would still have left a substantial increase not accounted for solely by inflation. The increases applied by Parliament in 2010 were more than three times the inflationary decrease in the value of money over that

10-year period. It is safe, in our conclusion, to assume that those increases in penalties are not, at least substantially, attributable to keeping abreast of inflation. Our research confirms that there was another legislative intention in increasing significantly the maximum penalties for breaches for enforcement policy reasons.

[57] The Explanatory note to the Bill stated, in relation to "Increasing maximum

penalty for non-compliance":17

The Bill provides that maximum penalties for non-compliance with the principal Act are increased from $5,000 to a maximum of $10,000 for individuals and from $10,000 to a maximum of $20,000 for companies and other bodies corporate. ***The intention of increasing the penalties is to signal to the courts that breaches are significant and warrant a higher penalty. The current penalty provisions are not adequately deterring non- compliance.*** Increasing penalties provides an incentive for employers to comply and conveys a public message that breaches of minimum entitlements are not conducive to good commercial practice. This change is intended to promote compliance with employment legislation and not put employers who meet or exceed their employment obligations at a competitive disadvantage. (emphasis added)

[58] The Explanatory note also stated:18

Current enforcement levers, in particular, penalties and demand notices, are insufficient and inefficient ways to incentivise compliance with employment legislation by employers. They do not support appropriate responses for low- level non-compliance, nor do they adequately deter severe or long-standing non-compliance. The current system of enforcement does not effectively target non-compliant practices in workplaces.

16 Inflation-adjusted values generated by the Reserve Bank of New Zealand Inflation Calculator

<http://www.rbnz.govt.nz/monetary-policy/inflation-calculator> .

17 Employment Relations Amendment Bill (No 2) (196-1) (explanatory note at 11).

18 At 10.

[59] Hansard records the speech of the Minister of Labour during the first reading of the Bill, saying:19

The bill also increases the maximum penalty to $10,000 for individuals and

$20,000 for companies and other bodies corporate. This will send the strong message that ***deliberate or persistent non-compliance will not be tolerated.***

(emphasis added)

[60] For the foregoing reasons, we conclude that the increased penalties to which the defendants in this case are subject, were enacted to mark stronger parliamentary disapproval of the sort of conduct engaged in by the defendants.

**Objectives of penalties in employment law generally**

[61] As already noted, we consider that three (or possibly four) objectives may be discerned. The first is punishment of those who breach statutory minimum standards or breach employment agreements or collective agreements. The second is deterrence, both specific and general; that is, that persons will be deterred from deliberate breaches by the knowledge that they will or may be punished.

[62] Although not generally a reason for the imposition of a penalty, as already noted briefly, the third objective of compensation of a victim of a breach cannot be discounted, if only because of the statutory discretion to award the whole or any part of a penalty to another person who may, in practice, be a victim of the breach.

[63] Fourth, and although not the principal objective of the law imposing penalties for breaches of minimum standards, there is another identifiable reason for this regime. It attempts to eliminate unfair competition in business by dissuading employers from undercutting their competitors' wage costs by both paying less than those competitors and seeking to extract more productive work from employees by, for example, reducing or eliminating annual or statutory holidays, rest and meal breaks and similar statutory minimum entitlements. In this sense the statutory minimum employment code may be seen to be an attempt to create a level employers' playing field, even if the earliest examples of the statutory minima may

have been enacted overwhelmingly to prevent unjust exploitation of vulnerable

19 (19 August 2010) 665 NZPD 13305.

workers. Law-abiding employers should not have to operate at a substantial disadvantage or even be driven out of business because their unscrupulous competitors can make substantial savings in overheads and productivity gains by unlawfully exploiting employees, especially in fields in which wage costs and productivity are very significant elements of a business. This was noted by Parliament when it identified one of its objectives in increasing penalties as being "not [to] put employers who meet or exceed their employment obligations at a

competitive disadvantage."20

**Means of attaining these penalty objectives**

[64] We have already determined that the new statutory considerations under s

133A cannot apply retrospectively to this case. Nevertheless, we consider that they confirm largely, but not completely, the previous judge-made law which is applicable to this case. To that extent, therefore, and because the new s 133A list is not exhaustive, our following observations will apply to future cases in addition to this one from the pre-section 133A days.

[65] Section 133A provides:

**133A Matters Authority and court to have regard to in determining amount of penalty**

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

20 Above, n 19.

(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.

[66] In our view, there are some additional factors have been, and/or should in future be, taken into account in determining whether a penalty or penalties should be imposed. We propose to follow and endorse the approach in principle to penalties adopted by two Judges of this Court in recent times which identify those additional factors, and will add only a few further factors to complete the picture.

[67] The first judgment is that of Judge Inglis in *Tan v Yang.*21 That, too, was a case involving migrant employees whom the Judge described as "vulnerable to exploitation". Although it involved principally the payment of an unlawful premium for employment, which is not a feature of this case, the Judge dealt with penalties including for breaches of the Wages Protection Act which is another of the minimum code statutes. At [32] the Judge set out what she described as a "non-exhaustive list of factors [that] may usefully be considered" in assessing a penalty, as follows:

• the seriousness of the breach;

• whether the breach is one-off or repeated;

• the impact, if any, on the employee/prospective employee;

• the vulnerability of the employee/prospective employee;

• the need for deterrence;

• remorse shown by the party in breach; and

• the range of penalties imposed in other comparable cases.

[68] Many of the factors bullet-pointed by Judge Inglis in *Tan* are now reflected in the matters to which the Authority and Court are to have regard in determining a penalty under s 133A. We would add that the following factors also need to be assessed by the Authority and the Court in determining whether a penalty should be

imposed and, if so, be reflected in that penalty:

21 *Tan v Yang* [2014] NZEmpC 65, [2014] ERNZ 733.

- when assessing deterrence, to do so both in relation to the particular person to be penalised and to the wider community of employers;
- when considering the seriousness of the breach, the degree of culpability of the person in breach;

• the general desirability of consistency in decisions on penalties; and

- when assessing a penalty or penalties, to stand back and evaluate whether the anticipated outcome is one which is proportionate to the breach or breaches for which the penalty is imposed.

[69] Next is the judgment of Judge Corkill in *O'Shea v Pekanga O Te Awa Farms Ltd.*22 In that case a company had breached three minimum standard obligations and the Judge calculated a penalty in relation to each breach. Having taken into account mitigating factors and the resulting amount, the Judge considered that amount from a global perspective and wrote:23

Since penalties are sought under more than one statute and for multiple breaches, I consider it appropriate in this case to assess what, if any, penalty should be imposed in respect of each class of breach. However, it will also be necessary to consider the totality of any individual breaches, so as to ensure there is a proportionate outcome – an approach which has previously been described as the "totality principle"; (footnote omitted) and accepted for the purposes of the imposition of penalties in this jurisdiction in *Otago Hotel etc IUOW v Pacific Park Motor Inn Limited (t/a Pacific Park Dunedin).*24

**How to address cases of multiple breaches – the plaintiff's submissions**

[70] The Labour Inspector submitted that cases of multiple breaches can and should be distinguished from those to be categorised as ones of "continuous breach". The plaintiff says, for example, that a failure to pay an employee at or above the minimum wage over the course of a year, but by weekly pay cycles, amounts to what

counsel describes as "one continuous breach". Further, counsel submitted that an

22 *O'Shea v Pekanga O Te Awa Farms Ltd* [2016] NZEmpC 19.

23 At [57].

24 *Otago Hotel etc IUOW v Pacific Park Motor Inn Ltd (t/a Pacific Park Dunedin)* [1989] 1

NZILR 175 (LC) at 181.

employer of five employees who are likewise underpaid, should be dealt with as an employer facing five continuous breaches. That is despite the fact that, in law, there is arguably a separate breach on each occasion when there is an underpayment (in the example relied on) 52 times per year or (taking account of holidays) 48 times per year. The Labour Inspector submitted that a case of below-minimum wage payments to multiple employees continuously over one year should result in penalties being ordered effectively for five breaches: that is on an employee-by-employee basis. Ms Milnes, counsel for the Labour Inspector, submitted that s 135 of the Employment Relations Act contemplates specifically multiple penalties being able to be imposed in this fashion. Subsection (3) allows the bringing of a "claim for 2 or more penalties against the same [employer]" being joined in the same action.

[71] We conclude that subs (4) does not require an applicant to specify the amount of a penalty or, even if an inspector does, that the Authority or the Court must be bound to award no more than that amount. That is because subs (4) provides:

In any claim for a penalty the Authority or the court may give judgment for the total amount claimed, or any amount, not exceeding the maximum specified in subsection (2), or the Authority or the court may dismiss the action.

**Penalties for breach of minimum code standards/employment agreements**

[72] The Labour Inspector submitted that the Authority and the Court should distinguish between these two classes of penalties so that, in effect, breaches of statutory employment minima should be treated more seriously and reflected in higher penalties than breaches of employment agreements including collective agreements. The Act does not, however, distinguish between these classes of breach; extra-statutory authority or other grounds for this proposition need to be established by the Labour Inspector.

[73] The Labour Inspector says that whereas a breach of minimum legislative standards is a failure to adhere to the law prescribed by Parliament that it has "deemed absolute", breach of an employment agreement relates "to the bargaining between the parties". By a 'deemed absoluteness', we understand the plaintiff to mean that the statutory standards are minima below which no employer is entitled to

fall in that employer's obligations to employees. In contrast, we understand "the bargaining" referred to by Ms Milnes to be the (often) bargained-for contents of an employment agreement that bind either only one employer and one employee or, in the case of collective agreements, potentially multiple employers, multiple unions and multiple employees.

[74] The Labour Inspector says that, on the one hand (by legislation), Parliament has deemed that all employees must have sufficient income on which to live, sufficient rest time and so forth, rights deemed beneficial for society generally. She says that a failure to meet these standards "undermines the very fabric of society and deserves condemnation". This is said by the plaintiff to contrast with a breach of contract which, by its nature, is a bargain between parties and may concern above- minimum standards. Whilst the Labour Inspector concedes that a "flagrant and deliberate" breach of an employment agreement may require condemnation and punishment, she says that in most cases it will be sufficient that the party receives compensation for any breach as allowed for by law.

[75] We are unconvinced by this argument that Parliament has intended to regulate more strictly and, thereby, requires the courts to treat more seriously, breaches of minimum code legislation than breaches of contracts. That is, first, because Parliament has not distinguished between those two classes of case as the Labour Inspector urges upon us. Next, it is conceivable, not only theoretically but in practice known to the specialist employment institutions, that there can be more egregious breaches of employment agreements and especially collective agreements, than of minimum standards, particularly when it comes to deliberateness and to the consequences to an employee or employees of such a breach.

[76] It follows therefore, that the principles espoused by this judgment will apply equally to the Authority or the Court when considering whether to penalise for breach of an employment agreement or a collective agreement.

**Financial circumstances of defendants**

[77] The Labour Inspector submitted that, in assessing whether to impose not only a penalty but also its amount, the Authority and the Court should not have regard to the employer's financial position but, indeed, that the institutions are required not to do so. That submission is based on an arguable interpretation of s 133A of the Act. The Labour Inspector submitted that because a defendant's financial circumstances are not listed as one of the "relevant matters" under s 133A, this cannot and should not be a relevant consideration as to whether a penalty should be imposed and, if so, the amount. As we have already noted, s 133A is not applicable to this case, but we would venture the following conclusion of the argument to assist for the future.

[78] In our view, that interpretation and application of s 133A is not correct. The "relevant matters" set out at (a)-(g) are subject to the phrase "must have regard to all relevant matters, including ...".

[79] The list is not exhaustive: the reference to "including" highlights some relevant considerations, but not all. Whilst the Authority or the Court "must" have regard to all relevant factors, those are not limited only to the ones enumerated at (a)-(g). While a matter must be relevant, that is the only restriction upon that class.

[80] A defendant's ability to pay a penalty will not dictate absolutely whether one is imposed or its amount but, in our view, must be a relevant consideration among others in the circumstances of any particular case. That is because the logical conclusion of the plaintiff's argument is that Parliament must have intended that, following the expressed requirements of s 133A, the same penalty should be imposed on any defendant irrespective of its financial capacity to pay, so that the Court or the Authority might well find itself imposing

a penalty for which there is no realistic prospect of recovery.

[81] The position is no different for pre-1 April 2016 cases as this is. That is because, first, financial circumstances have been considered by the Court in many

instances over the years.25 Second, Parliament has not ever seen it as necessary to legislate away such a consideration: for example, when it took the opportunity to amend penalty provisions in 2010. Finally, this is because the Law Commission, by including it in a list of factors to be taken into account, did not seem to regard it as a controversial factor;26 and its reference to the submission of the New Zealand Bar

Association without adverse comment by the Commission.27 As already noted, we

address the Commission's Report subsequently at [130] and following.

**A "reasonable employer" starting point to penalties?**

[82] Counsel for the Labour Inspector submitted that, in assessing whether to award penalties, the Authority or the Court should start with the assumption that a defendant employer:

... will have accepted the social licence to operate a business and employ staff in New Zealand, having obtained advice as to their professional and legal obligations as an employer and having exercised appropriate due diligence.

[83] We have to say that, admirable as it is in an aspirational sense, that starting point does not always reflect the reality of the situation in which many employers face the prospect of a penalty. The absence of advice (or at least taking whatever advice may have been sought) and an absence of diligence to ascertain obligations, are more common hallmarks of such employers in our experience.

[84] The Labour Inspector submitted that this "reasonable employer" (as previously defined) approach should be taken to "... prevent claims of inadvertence which should be more properly characterised as ignorance of the law". Counsel submitted that inadvertence characterises the acts of a reasonable employer respondent demonstrating "something minor" such as a computational error or a failure of an unconnected third party (such as an accountant) engaged to carry out

payroll functions where accurate source information was provided. Ms Milnes

25 We note, also, that it has been included in the 2014 amendment to the UK Employment

Tribunals Act 1996 at s 12A(2).

26 Law Commission *Civil Pecuniary Penalties* (NZLCIP33, 2012) at [7.56].

27 Law Commission *Pecuniary Penalties: Guidance for Legislative Design*, above n 12, at [16.48].

submitted that this approach accords with the statutory defence provisions now contained in s 142ZC of the Act.

[85] So, the plaintiff submitted, an employer which claims that it was unaware of its obligation under legislation or how such obligations were to be carried out in practice resulting in non-compliance, should not be permitted to meet the "reasonable employer" standard presumption; and accordingly such a defence should not be accepted by the Authority or the Court.

[86] We consider that a combination of two factors will now make it at least very difficult for persons employing others to assert ignorance of minimum code statutes. Even if established in evidence, such ignorance will not provide a defence to such employers in respect of their liabilities both to meet those minimum requirements and when faced with a claim for penalties for their breach. Even where an employer advances ignorance of these laws in mitigation of penalty, it will be difficult to accept such an assertion, although we will not go so far as to say that it would be impossible.

[87] Those two factors are, first, the now very common knowledge within the community generally, and the commercial and small business community in particular, of the existence of minimum wages, minimum holiday requirements and the other statutory minima applicable to all employment. Second, such are now the sources of advice and assistance (including online) provided to persons establishing businesses and/or employing others, that few people would now embark on the journey of establishing even a very small business employing few employees, without recourse to these freely-available resources. Although it might be argued that, for example, the intricacies of calculating holiday pay are difficult to grasp, the fact that employees are entitled to minimum holidays and to additional payments when work is undertaken on them, is very clear. This is, of course, not a case about the intricacies of calculating holiday pay; rather, the defendants simply allowed their employees no, or at least very inadequate, holidays.

[88] In these circumstances, we are not assisted by the plaintiff's proposal of what we understand to be meant by a "reasonable employer" presumption as a starting point in the assessment of penalties

**Global penalties?**

[89] Counsel for the Labour Inspector submitted that these are a recognised and long-accepted means of imposing penalties in appropriate cases. She submitted that the most significant factors to consider in deciding whether a "global penalty" should be imposed include the numbers of breaches; the seriousness of those breaches; and whether those breaches are related. Ms Milnes submitted that the Authority and the Court should not penalise globally when, so analysed, the breaches are many, are serious and are not related to each other.

[90] Repeated weekly underpayments of remuneration (ie at less the minimum wage) are related to each other when assessing penalties. However, breaches of the Holidays Act, committed repeatedly by the same employer in respect of the same employees, are not, or at least insufficiently, related to the minimum wage breaches for penalty purposes.

[91] In her submissions on global penalties, Ms Milnes relied on the judgment of this Court in *Xu v McIntosh* where the Judge wrote:28

I agree with the practice of imposing a global penalty, particularly where one of the breaches is not especially serious or where all the breaches arise out of a single transaction or if they consist of a repetition of the same breach. However, such an approach risks confusion and a doubling of remedies.

[92] The Labour Inspector invited the Court to adopt one of four proposed approaches to globalising penalties in the given facts of this case. Counsel used the following hypothetical example to illustrate the methodologies in practice. A company has five employees, none of whom had been provided with employment agreements, none of whom had been paid the minimum wage, and in respect of each

there had been underpayments of holiday pay entitlements, failure to allow minimum

28 *Xu v McIntosh* [2004] NZEmpC 125; [2004] 2 ERNZ 448 at [44].

holidays and to compensate for holidays worked by the provision of alternative holidays.

[93] The first suggested approach was that each breach be considered separately and a separate penalty imposed in respect of each. In this instance, there would be a total of 15 breaches so that, the Labour Inspector submitted, global penalties would not be awarded. Under this approach, the plaintiff submitted that the maximum penalties to be imposed on the company would be $300,000 (three breaches x five employees x $20,000).

[94] The second approach identified by the plaintiff is to adopt a global assessment for breaches that arise out of one course of conduct per employee so that the failure to pay minimum wages, and the subsequent Holidays Act breaches, would be considered as one course of employer conduct per employee. Breaches not connected to the same course of conduct would attract a separate penalty. Under this scenario, the maximum penalties able to be levied would be $200,000 (five employees = five breaches x $20,000).

[95] The plaintiff's third postulated approach is to adopt a global assessment for breaches that arise out of one course of conduct by the employer irrespective of the number of employees. A cumulative penalty could be imposed for additional courses of unlawful conduct. In this case the maximum penalty available under the scenario would be $40,000 (two breaches in total, one for failure to pay minimum wages and one for failure to meet Holidays Act obligations).

[96] Finally, the plaintiff's fourth theoretical approach is to treat all breaches as one and penalise for them "in the round". This would apply irrespective of the course of conduct so that the seriousness of the failure to provide employment agreements would equate with the repeated failure to pay minimum wages and holidays, so that effectively there would be one breach. A maximum penalty of

$20,000 would be available to the Authority or the Court in these circumstances.

[97] So, depending on which track of the proposed four formulae the Court might adopt, maximum penalties would range from $20,000 to $300,000, by the

Inspector's calculations. We reiterate that these are hypothetical examples to illustrate the significantly different final results depending on which methodology is used. Nevertheless, they illustrate the wide range of maxima produced by these different calculation methodologies.

[98] The plaintiff submitted that in this case the Authority Member made a global assessment of breaches that arose out of one course of conduct by the employer towards each employee. That would have yielded a potential maximum global penalty of $200,000 whereas, globally, penalties imposed by the Authority amounted to $25,000, or one-eighth, or 12.5 per cent of the maximum available to the Authority if this was the correct approach to assessing penalties.

[99] So, the Labour Inspector submitted, not only does the range of potential methodologies to be adopted illustrate substantial discrepancies in the potential final result, but inadequate or insufficient penalties were imposed by the Authority in this particular case.

[100] We agree that the Authority and the Court may impose 'global penalties' in appropriate cases. That means that where there are multiple breaches of several statutory provisions in respect of multiple employees, it may be appropriate for the Authority or the Court to assess an ultimately single penalty in respect of those. In other cases, especially where there are not such close associations between the circumstances in which breaches have occurred, it may be appropriate for the Authority or the Court to impose separately assessed penalties so expressed. But in all cases, including those where global penalties may be imposed, the Authority or the Court must identify justifiably the constituent elements of a global penalty. The methodology of doing so is set out at the conclusion of this case and, as will be seen, leads to the imposition of a partially global penalty sum against each of the two defendants.

**Comparable jurisdictions**

[101] We are grateful to counsel for the Labour Inspector for having provided an overview of the comparable positions in four other jurisdictions: the United Kingdom, Australia and the Canadian provinces of British Columbia and Ontario.

[102] An equivalent penalties regime in the United Kingdom was only enacted in

2014,29 so that settled and authoritative case law is yet to emerge. It is notable, however, that penalties may be awarded where an employer has breached an employee's rights in an aggravated fashion. What is 'aggravated' is not defined and penalties include minima of £100 and maxima of £5,000.

[103] In Australia, there is the same dual pecuniary penalty regime as has been in place since 1 April 2016 in New Zealand. This provides for different levels of penalty depending on the breach.30 The High Court of Australia has said that the purpose of civil penalty proceedings is deterrence and a promotion of compliance in the public interest.31 The Federal Circuit Court has summarised the principles that the Court should take into account in imposing penalties for multiple breaches as follows:32

• Identify the separate contraventions;

• consider whether the contraventions are a single course of conduct;

- determine whether there are any common elements in the breaches so as to avoid double jeopardy;
- consider the appropriate penalty for each breach and, if relevant, each group of contraventions; and

29 Employment Tribunals Act 1996 (UK), s 12A(3) (inserted by the Enterprise and Regulatory

Reform Act 2013, s 16).

30 Fair Work Act 2009 (Cth), ss 546(2) and 539(2).

31 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA

46 at [55]-[59].

32 *Fairwork Ombudsman v EA Fuller & Sons Pty Ltd* [2013] FCCA 5 at [22]- [27].

- apply the totality principle or what is described as 'instinctive synthesis' on the overall penalties imposed.

[104] Also relevant is the fact that the Australian legislation provides for a principle of a single course of unlawful conduct that may lead to penalty for breach.33 It is also open to the relevant authorities in Australia to discount a penalty where an employer has accepted its wrongdoings, is remorseful and has facilitated the course of justice.34

[105] In British Columbia, penalties are so regulated that there is no discretion in their imposition; a penalty must be awarded for every breach found.35 Courts have expressly rejected a global penalties approach or one taking a 'totality principle' approach and the employer's financial position is not a factor for consideration in setting the amount of a penalty. The relevant legislation does, however, deem that an act or omission of an employer which constitutes a breach is a single contravention regardless of the number of employees.36 There is also what appears to be a criminal penalties regime available in such cases.

[106] In Ontario, while a penalty (administratively imposed) is mandatory, any amendment to it is widely discretionary37 Employment standards officers may issue penalties for each breach set out in regulations38 but an employer can appeal to the Labour Relations Board. In deciding whether to amend the penalties imposed in multiple breaches situations, the Board will take into account the need for deterrence

in order to uphold the purposes of the Employment Standards Act and to promote fair competition within industries. The Board will also assess whether there may be a double jeopardy situation, whether breaches were deliberate, whether there was a history of prior breaches, and situations of financial hardship and proportionality.39

Specific and general deterrence are regarded as important factors in imposing

33 Fair Work Act 2009, s 557(1).

34 See for example *Fair Work Ombudsman v Mai Pty Ltd* [2016] FCCA 1481 at [146].

35 Employment Standards Act [RSBC 1996] Ch 113, s 98. *Marana Management Services Inc (Re)*

2004 CarswellBC 4274 at [23]-[28].

36 Employment Standards Regulation BC Reg 189/2016, reg 29(1.1).

37 Employment Standards Act SO 2000 Ch 41, s 113(6).

38 Employment Standards Act 2000, Ontario Regulation 289/01 Enforcement, reg 1.

39 *Ontario Inc v Ontario (Director of Employment Standards)* 2006 CarswellOnt 11306 at [5].

penalties.40 Ontario, too, provides for criminal penalties for the same subject matter.41 When the commission of an offence is established, a court will undertake a sentencing exercise but has commented that the levels of fines need to be substantial to serve as a deterrent to others and to reflect the gravity of the offence. Included

also are such elements as actual and potential harm and express disapproval of the act to reflect the expectations of the community.42

[107] Taking account of these comparators, the Labour Inspector invited the Court to adopt a position for New Zealand in line with overseas models although reflecting the need to approach multiple infringements in respect of multiple employees in particular. Ms Milnes accepted that New Zealand not having legislated for a "single course of conduct assessment", it could not have been Parliament's intention for the Authority or the Court to embark on such an exercise in any case, and this will be a significant factor in favour of imposing separate penalties for each separate individual breach.

[108] Although it is useful to know of, and reflect on, the regimes in other jurisdictions to similar issues, the approach in New Zealand must be fashioned by reference principally to local circumstances including the historical background of penalties in employment law, the longstanding practice of courts and, of course, primarily the particular directions given by Parliament. We are satisfied that the approach that we adopt in this case, and for future guidance, is not substantially out of step with similar jurisdictions.

[109] We are attracted particularly by the approach to this matter by the Federal Circuit Court in *Fairwork Ombudsman v EA Fuller & Sons Pty Ltd*, summarised in [104] above. This approach, although not followed precisely if only because of jurisdictional differences, has influenced significantly our consideration of the

methodology of penalty imposition in New Zealand.

40. *Ontario Inc v Ontario (Director of Employment Standards)* 2005 CarswellOnt 6421, [2005] OLRB Rep 717 at [19].

41 Employment Standards Act SO 2000 Ch 41, s 132.

42 *R v Blondin* 2012 CarswellOnt 17153, 2012 ONCJ 826, at [16]-[19].

**International instruments**

[110] Although not addressed by either party, we have undertaken research into relevant international instruments (particularly ILO Conventions and Covenants to which New Zealand may be bound, or under which New Zealand law should be interpreted and applied) affecting questions of penalties in employment law.

[111] A number of ILO Conventions which deal with fundamental employment rights and prohibitions require Member states to provide real, adequate and enforced penalties for breach of statutory provisions underpinning these rights and obligations. These include, for example, the Forced Labour Convention 1930 (No

29).43

[112] The Labour Inspection Convention 1947 (No 81) provides:44

Adequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced.

[113] There are also several relevant ILO Conventions not (yet at least) ratified by New Zealand that refer to penalties. As to their application, see the judgment of the full Court in *Hixon (Labour Inspector) v Campbell*.45 There the Court held that an ILO Convention not ratified by New Zealand should nevertheless be acknowledged in interpreting relevant employment legislation. In *Hixon* the Court dealt with an issue under the Wages Protection Act and invoked the ILO's Protection of Wages Convention 1949 (No 95).46 The Court noted:47

Although New Zealand has not subscribed to this Convention expressly, its membership of the International Labour Organisation means nevertheless that the Organisation's Conventions, if relevant, should be acknowledged in interpreting relevant legislation.

43 Convention concerning Forced or Compulsory Labour C29 (entered into force 1 May 1932), art

25.

44 Convention concerning Labour Inspection in Industry and Commerce C81 (entered into force 7

April 1950), art 18.

45 *Hixon (Labour Inspector) v Campbell* [2014] NZEmpC 213.

46. Convention concerning the Protection of Wages C095 (entered into force 24 September 1952) (currently unratified by NZ).

47 *Hixon*, above n 45, at [76].

[114] The Protection of Wages Convention, although currently unratified by New Zealand, calls on Member states to "prescribe adequate penalties or other appropriate remedies for any violation thereof".48

[115] In relation to adequate rest from work entitlements, the Weekly Rest

(Commerce and Offices) Convention 1957 (No 106) provides:49

1. Appropriate measures shall be taken to ensure the proper administration of regulations or provisions concerning the weekly rest, by means of adequate inspection or otherwise.

2. Where it is appropriate to the manner in which effect is given to the provisions of this Convention, the necessary measures in the form of penalties shall be taken to ensure the enforcement of its provisions.

[116] Although relating principally to the activities of private employment agencies recruiting and placing migrant workers, the Private Employment Agencies Convention 1997 (No 181) provides that Member states shall:50

... provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses.

[117] Article 14(3) of the Convention requires the enactment of adequate remedies including penalties where appropriate.

[118] Without lengthening further this judgment, there are a number of other similar Conventions providing not only for the enactment by states of legislation to protect vulnerable employees against breaches of minimum employment rights, but also calling for the enforcement mechanisms to include adequate penalties which are enforced.

[119] These references to the place of adequate penalties that are enforceable and enforced confirms that, in respect of the minimum employment code legislation at

48 Article 15(c).

49 Convention concerning Weekly Rest in Commerce and Offices C106 (entered into force 4 March

1959), art 10 (currently unratified by NZ).

50. Convention concerning Private Employment Agencies C181 (entered into force 10 May 2000), art 8 (currently unratified by NZ).

issue in this case, penalties are to be imposed and enforced for reasons of both punishment and deterrence.

**Consequences of Court of Appeal's judgment in Reynolds**

[120] As we were on the point of issuing this judgment in September, the Court of

Appeal delivered its decision in *Peter Reynolds Mechanical Ltd v Denyer*.51

Although what we will call the *Reynolds* case addresses fines for disobedience of compliance orders made by the Authority or the Court, the judgment appeared to us on its face to contain some observations that might be applicable to the formulation and imposition of statutory penalties for breach of minimum code statutes. In these circumstances, we offered the parties a brief opportunity to make further submissions by memoranda and this was taken up by them. We refer to the *Reynolds* judgment in light of those submissions in this judgment.

[121] As the Court of Appeal's judgment in *Reynolds* reiterates, that was a case to do with ensuring compliance with a Court or Authority-imposed compliance order by statutory fine as an alternative to the more draconian sanctions of sequestration of assets and imprisonment. In contrast to *Reynolds*, this case deals with statutory penalties for breaches by employers of minimum standards for wages, holidays and other fundamental terms and conditions of employment. Particularly significant for the Court of Appeal in the *Reynolds* case was that by the time that a fine came to be imposed by the Court, the party liable had made good completely its default which was an underpayment of some holiday pay due to one former employee. At [77] of the Court of Appeal's judgment Ellen France P wrote:

The wording of s 140(6) does not prevent a fine being imposed even where compliance has been achieved. The need to deter non-compliance, either by the party involved or more generally, is not to be overlooked. So, for example, some recognition may need to be given in setting the level of the fine in a case where the defendant has deliberately delayed payment over a long period until the last moment. [Counsel] on behalf of the appellant expressed concern that the Judge had taken into account events prior to the making of the non-compliance order. We do not consider these matters were determinative in the Judge's decision as to the level of the fine in the present

51 *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer, Labour Inspector*

[2016] NZCA 464.

case. But, in any event, such material may form part of the relevant background, for example, in determining the nature of the default.

[122] In this penalty case now before us, an arguably parallel situation has arisen in which, belatedly and personally in the sense of not being liable in law for the default of his company, Mr Bal has put in place arrangements to pay the monetary arrears to the former employees entitled to them, albeit by instalments over time.

[123] Addressing strictly the limited scope of submissions that we allowed relating to the effect, if any, of the Court of Appeal's judgment in *Reynolds* to this case, we agree with counsel for the Labour Inspector that the imposition and amounts of penalties for breaches of minimum code statutes fall into a very different category to the imposition of fines for breaches of compliance orders made by the Authority or the Court. There are, however, some observations of the Court of Appeal that we consider relevant to the penalties debate in this case.

[124] Ms Milnes submitted that the judgment in *Reynolds* reinforces the submission which she made originally at the hearing that the

imposition of civil penalties as in this case under a minimum standards regime should be what she described as "agnostic". Counsel submitted that the purpose of such penalties is to hold persons to account in the interests of a regulatory regime and so such penalties will not take into account criminal law principles or, in particular, competing aggravating and mitigating factors in each case. Ms Milnes submitted that: "A penalty should be imposed to reflect the mere fact that a breach has occurred, its level however will depend on the factors in s133A [of the Act]." We have, however, already determined that this is not the correct approach to the calculation of penalties and, at least in this case, s 133A cannot affect this question because it was enacted after this case arose. Further, there is nothing in the *Reynolds* judgment of the Court of Appeal which would now persuade us otherwise.

[125] Nor do we accept Ms Milnes's argument that the submissions for the defendants "blurred the lines" between the penalties at issue in this case and, on the other hand, newly-enacted pecuniary penalties. She submits that the latter are not only potentially much greater financially but allow for a wider range of relevant

factors in assessing their amounts, thereby bringing into play criminal sentencing factors.

[126] In summary, we do not accept the Labour Inspector's concluding supplementary submissions that the penalties at issue in this case for breaches of minimum code standards "are not required to be accompanied by all of the same safeguards that apply to [the new] pecuniary penalties in recognition of their lower penalty level." Nor do we accept Ms Milnes's submission that: "They remain the main tool for deterring and punishing non-"serious" breaches of minimum standards." As the facts of this case illustrate, the defendants' breaches were serious breaches and the penalties to be imposed for them must take that seriousness into account, albeit in a discerning and balanced way.

[127] Turning to the defendants' supplementary submissions filed by Ms McMillan, counsel for the defendants, these highlight the emphasis placed by the Court of Appeal on the compliance (albeit belated) by the liable party with legal obligations. As counsel emphasised, this has been done by Mr Bal on their behalf in this case. Similarly, counsel emphasised the consideration identified by the Court of Appeal in *Reynolds* that the defendants have not previously come to notice for the commission of similar breaches so that they should be treated with a degree of leniency consistent with their being "first time offenders/breachers". Counsel also submitted that the deterrent element to any fine should not be so great as to dissuade persons from entering into business (including employment arrangements) because of the risk of very substantial fines being imposed for even single breaches. We agree generally with these considerations but have so concluded without recourse to *Reynolds.*

[128] We consider that it is important, also, to emphasise that remuneration and other minimum entitlements must be paid or otherwise credited to employees as these become due. The defendants' numerous breaches involved depriving vulnerable employees of that legal and very practical entitlement. It is of some, but not great, solace if these entitlements are drip-fed very belatedly to the employees. Low-paid and other vulnerable employees such as are those in this case need each week's wages and other minimum entitlements as they fall due. It is trite to say, of

course, that such employees must buy food and pay rent and transport costs on a regular basis and are not able to do so months or even years later when their employers' defaults are ultimately compensated for, especially where this is by instalments as in this case. So, while an acknowledgement of liability and the putting in place of a payments regime, even belatedly, must be to the credit of a defendant, this will not exonerate a breach but will rather be a mitigating factor in the Court's or the Authority's analysis in determining whether to award a penalty and, if so, how much. Further, it is apparent that the Court of Appeal in *Reynolds* regarded the Employment Court's fine for breach of a compliance order as being in the nature of a sanction for contempt of court, which is quite different from a penalty for breach of the minimum code statutes. For example, at [79] the Court of Appeal in *Reynolds* compared the result in the case to the sanctions imposed by the High Court in two recent contempt cases where fines of $5,000 were imposed in each for

deliberate and calculated breaches.52 Parliament has mandated more significant

penal sanctions in cases such as this.

[129] We consider that although containing helpful guidance about the credit to be allowed to the defendant for belatedly paying compensation, even by instalments, the judgment of the Court of Appeal in *Reynolds* does not bind us in respect of this case which deals with statutory penalties for breaches of minimum standards that were egregious.

**The Law Commission's analysis**

[130] In 2014 the Law Commission reported on the state of the law in relation to pecuniary penalties, because of the "widespread resort to pecuniary penalties" in New Zealand statutes.53 The Commission's Issues paper and the subsequent Report are extensive and only general, albeit helpful, guidance can be drawn from them.54

[131] At paras 7.50-7.56 of the Issues paper, the Commission includes a passage

entitled "Guidance as to the Level of Penalty". "Financial circumstances of the

52. *Solicitor-General v Miss Alice* [2007] NZHC 48; [2007] 2 NZLR 783 (HC); *Solicitor-General v Krieger* [2014] NZHC 172.

53 Law Commission *Pecuniary Penalties: Guidance for Legislative Design*, above n 12, at iv.

54 *Civil Pecuniary Penalties* (issues paper), above n 26; *Pecuniary Penalties: Guidance for*

*Legislative Design* (report), above n 12.

defendant" was not in the Commission's list of relevant matters. It was raised as a question, as to whether it should become one of the "other" matters that are taken into consideration at 7.56. Setting out what it describes as examples of "relevant matters" common to penalty statutes, it considered that the financial circumstances of a defendant may be one of these.55 This consideration is reiterated in the

Commission's final report at Chapter 16.56

[132] We comment briefly on the relevant section of the Report entitled "Court

Imposition of Penalties"57 as follows.

[133] The Commission noted that the High Court had then adopted, both implicitly and explicitly, elements of criminal sentencing methodology in its penalty judgments under the Commerce Act 1986 to be more transparent and predictable than previously when it had listed factors relevant to its discretion and then imposed a global penalty. The Commission agreed with the need for a transparent and predictable approach to imposing pecuniary penalties and supported the direction taken by the courts under the Commerce Act, including that care should be taken with adopting criminal sentencing analogies. The Commission agreed, also, that a single set of factors should be relevant both to issues of whether a penalty should be imposed and, if so, its level.

[134] The Commission originally identified what it described as a number of "core"

factors to guide courts as to levels of penalties. These included:58

. the nature and extent of the breach;

. the nature and extent of any loss or damage caused by the breach;

. the nature and extent of any financial gain made from the breach;

. whether the breach was intentional, inadvertent or negligent;

. the level of pecuniary penalties that have been imposed in previous similar situations; and

. the circumstances in which the breach took place.

55 Issues paper at [7.56].

56 At [16.48].

57 Report at [16.44]-[15.55].

58 At [16.47].

[135] The Commission agreed that such guidelines should be both non-mandatory and non-exhaustive. It also recommended that where a particular statutory regime provides for compensatory orders, a court should have regard to whether these have been imposed for the same event and, if so, the amount and effect of what it described as "the first civil liability remedy".59

[136] The foregoing parts of the Commission's Issues Paper and Report act as both a useful guide in our task of settling principles or guidelines and a cross-check to ensure that the approach we specify is generally in line with other penalty regimes.

**Decisions whether to penalise and how to fix penalties**

[137] We will set out a summary of the multi-step approach which we adopt. As with the Law Commission in its recommendations (for example at para 16.44 and following), our purpose is to adopt a framework which will be transparent and predictable but still also allow to be taken into account relevant case-specific factors. This may allow decision-makers to arrive at global penalty figures in appropriate cases. Although there may be similarities to a criminal law sentencing approach, any analogy should not be taken too far. That is not only in cases such as the present where there is a very complex array of breaches asserted, but also because these are civil penalties in a specialised field. This was illustrated, as much as anything else, by the difficulties we encountered from the original statement of claim, in knowing how many penalties the Labour Inspector was actually seeking.

[138] The following is our summary of the methodology in principle that the Authority and the Court should follow in claims for penalties. After doing this, we will illustrate the application of that methodology in practice, by determining the Labour Inspector's claims in this case. We have adopted a four-step process to attempt to provide a uniform, reasonably predictable result. These four steps should also ensure that fixing the amount of a penalty, or penalties, is consistent and

transparent.

59 At [16.51].

[139] Step 1 in the process is to identify the nature and number of breaches for statutory penalty purposes. These may be breaches of different sections of different minimum code statutes. These must be separately identified. Where there are materially similar or even identical multiple breaches committed by a defendant, these may be treated as making that defendant liable for a single penalty in respect of each separate affected employee. We are attracted by the Australian legislation's phrase "single course of conduct" to

describe such situations. This approach counts as a single contravention, one that is committed by the same person and the

contravention "arose out of a course of conduct by the person."60 That single course

of conduct would not, however, encompass breaches of other Acts, for example breaches of both the Minimum Wage Act and the Holidays Act in respect of the same employee.

[140] Having classified the nature and number of breaches, as part of this step the Authority or the Court should identify the maximum penalty available in respect of each penalisable breach that has been identified. Unlike in this case where an absence of sufficient detail made it difficult to work out the number and nature of breaches for which penalties were sought, this information must be included by applicants/plaintiffs in their pleadings, statements of problem/claim.

[141] Still under Step 1, once the nature and number of breaches have been identified, the Court or the Authority should give consideration to whether global penalties may be appropriate in the particular case. If, for example, there are multiple and very similar breaches such as the repeated non-payment or below- minimum payment of wages to an employee, it may be an appropriate case for the imposition of a global penalty for these. This may include cases where the breaches are part of a consistent pattern of breach of a particular statutory requirement. The Authority or the Court should be careful to ensure that the globalisation of a penalty does not diminish the significance of a repeated and/or long-running series of breaches. Ultimately, this global penalty assessment will be subject to cross- checking and confirmation or potential reconsideration when the Authority or the

Court applies what we call the proportionality test under Step 4.

60 Fair Work Act 2009, s 557(1).

[142] Next, under Step 2, the Authority and the Court should then assess the severity of the breach in each case. This will establish what we call a provisional starting point for each penalty (potentially up to the maximum) and will include an adjustment for aggravating and mitigating factors in relation to each breach. The seriousness of the breaches will not necessarily be the same in each case although, in some cases, seriousness may not be able to be justly distinguishable as between, for example, individual employees.

[143] Without attempting to list everything that might be regarded as aggravating factors, it is likely that the Authority or the Court will take into account whether the breach or breaches were committed knowingly and/or calculatedly, the duration of the breach or breaches, the number of persons affected adversely and the extent of any departure from the statutory requirements. Any history of previous breaches may be relevant also in assessing the starting point in a particular case.

[144] Examples of mitigation may be co-operation with an investigating Labour Inspector and actions taken to rectify or compensate for the breach or breaches and the point or points at which these may be undertaken before the hearing.

[145] We emphasise that these are only examples of relevant aggravating or mitigating factors which may or may not arise in any particular case; there may be other relevant aggravating or mitigating factors which the Authority and the Court should take into account. The result of this step (setting the provisional penalty) may be expressed as a dollar amount and/or as a percentage of the maximum penalty in each case.

[146] Step 3 is for the Authority or the Court to consider the means and ability of the person in breach to pay the penalty reached under Step 2. This may result in a downwards adjustment to that penalty if evidence establishes real financial or other hardship in doing so. The consequences for the business and for the continued employment of other employees may also be a relevant consideration if these are established to the Court/Authority's satisfaction.

[147] Finally, Step 4 is what has been described previously in the *O'Shea* case61 as a proportionality or totality test. This step involves considering whether the provisional penalty reached after the first three steps is proportionate to the seriousness of the breach(es) and harm occasioned by it/them. This step is a check that adopting this staged process does not overshadow the need to ensure that the imposition of a penalty and the amount of any penalty is just in all the circumstances.

[148] The proportionality test will also require the Authority or the Court to assess other relevant cases, themselves decided by application of these tests, to ensure that the result in any particular case is not inconsistent with others, at least without an explanation for any significant inconsistency.

[149] We should take this opportunity, also, to address briefly the general principles applicable to the decision of an application under s 136(2) of the Act. That is a claim that the whole or some part of a penalty or penalties should be payable not to the Crown, as is the presumed or default position, but rather to another person.

[150] A decision under s 136(2) will be based on the particular facts of the particular case. Where victims of breaches can be properly compensated and the party bringing proceedings can be reimbursed in costs for doing so, there will not be a strong case for payment of any of the penalties to the victim or anyone other than the Crown. In other cases where a breach has resulted in a non-compensable loss (for example an employer has failed to provide an employee with a written employment agreement but where there is otherwise no disadvantage to the employee), the Authority or the Court may consider directing that a proportion of the penalty be paid to the party bringing the proceedings, especially if and to the extent that costs may not adequately compensate for performing this public duty.

[151] In summary, the steps are:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available

61 *O'Shea*, above n 22, at [57].

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.

**Application of principles – decision of penalties in this case**

*Nature and number of breaches (Step 1)*

[152] Such is the very close association of the defendants, their cross-employment of employees and the similarities between, individual breaches, that we will not differentiate between them in relation to some parts of the four steps. Such an approach will, however, not be applicable necessarily to other cases where the Authority or Court needs to consider defendant employers separately from the outset, for example where there is not this level of commonality and interchangeability.

[153] First, we identify the nature and number of breaches by the defendants for statutory penalty purposes. In this case the Labour Inspector claimed, and it was not disputed by the defendants, that there were breaches of a number of different sections of three different Acts: the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000.

[154] Within each of those Acts there were breaches of different sections committed by the defendants. Some of the breaches were of an identical but

regularly repeated nature, for example, the failure to pay minimum hourly remuneration. Theoretically, there was a breach each payday (in this case weekly) when each affected employee was short-paid. Multiplying each such breach by the number of weeks over which it was committed, and multiplying that by the number of employees (two and three) discloses, potentially, hundreds of breaches by the two companies of their obligations to pay at least minimum wages.

[155] Although each such breach incurs, theoretically, liability for a penalty of up to $20,000, that is not the way in which we consider the defendants' breaches of s 6 of the Minimum Wage Act should be determined for penalty purposes. These breaches were materially identical on each occasion on which they were committed by the defendants. Each employee was paid an hourly rate of $8.50 and, in some cases and for some periods, less than that or not at all. In these circumstances, we consider that the defendants' breaches of s 6 of the Minimum Wage Act should be treated as making them liable for a single penalty in respect of each separate employee affected.

[156] So, in respect of the first defendant, Preet is liable to a maximum penalty under the Minimum Wage Act of $40,000 (having underpaid two employees), and the second defendant Warrington is liable to a maximum penalty of $60,000, having underpaid three employees.

[157] Next are the defendants' breaches of the Holidays Act. Although there were breaches of three separate sections of that Act, two of those types of breaches (working on, and being paid for, public holidays) were so closely interrelated that we consider it appropriate to deal with these as one breach (in each case) for penalty purposes. So it follows that the maximum penalties available for imposition against the first defendant under the Holidays Act amount to $80,000 (two employees x two breaches x $20,000) and, in respect of the second defendant, $120,000 (three employees x two breaches x $20,000).

[158] Turning to available maximum penalties for breaches of the Employment Relations Act for the defendants' failures to maintain wage and time records, we conclude that these ongoing breaches in respect of five employees make the

defendants liable to one penalty per employee. In the case of Preet, the first defendant, the maximum penalties available for breach of the Employment Relations Act is $40,000 (two employees x $20,000) and, in the case of Warrington, the second defendant, $60,000 (three employees x $20,000).

[159] The foregoing includes our consideration of whether global penalties are appropriate in this case.62 We have concluded that, partial globalisation is the most just way of dealing with the Labour Inspector's application in this particular case involving two associated employers, multiple employees and breaches of several minimum code statutes. So, in practice, the respective liabilities of the two defendant companies have been kept separate and not globalised. So, too, the

different statutory provisions for which they are liable have been kept separate and not globalised for penalty purposes. Likewise, we have not globalised the penalties in respect of breaches on an employee-by-employee basis. Thereafter, however, we have considered it to be appropriate to impose global penalties in respect of the multiple breaches by the defendants of each statutory requirement and in respect of each former employee. So, in the circumstances of this case, there are elements of the penalty-setting exercise that have been globalised but others that have not.

[160] To summarise to this point, the first and second defendants are liable theoretically to maximum penalties of $160,000 and $240,000 respectively.

*Assessment of severity of breach (Step 2)*

[161] We begin this step 2 assessment by considering the Minimum Wage Act breaches. We conclude that all five employees were

underpaid deliberately and knowingly. That is illustrated by two factors. The first is that false employment agreements were created for the purpose of confirming to Immigration New Zealand that the former employees would have so-called 'managerial' positions with the defendant companies, which sham agreements included payments of at least

minimum wages. That illustrates both an awareness of the requirement to pay at

62 "Global" means "embracing a number of items or categories", Bryan A Garner *Garner's*

*Dictionary of Legal Usage* (3rd ed, Oxford University Press, New York, 2011).

least minimum wages and the deliberateness of paying all five employees consistently an hourly rate of $8.50 or less, and sometimes nothing.

[162] Second, we were told by Ms McMillan, for the defendants, that of about 25 staff employed by them in their various operations, only the five former staff subject to these proceedings were found to have been paid less than the minimum wage. The Labour Inspector's thorough investigation of the companies would no doubt have produced proceedings in respect of any other employees if there had been others so underpaid. If the defendants paid the majority of their employees at least minimum wages, this is a strong indication that they knew that they were obliged to do likewise in respect of the five identified in this case who appear not to have been working differently to their other 20 or so colleagues. This, too, illustrates the deliberate breaches by the defendants of known legal obligations on them.

[163] Adding to the seriousness of these breaches of the Minimum Wage Act were the defendants' attempts to conceal these breaches. When concerns were expressed by some of the employees about underpayment of wages, they were told not to disclose to others that they were being paid (at most) $8.50 per hour, but to say that they were being paid at above minimum rates. So, too, was the defendants' conduct deceptive in preparing false employment agreements for immigration purposes. Also going to the seriousness of the breaches was the explicit and implicit threat of adverse immigration consequences if the employees insisted on being paid minimum wages.

[164] Finally, the economic and non-monetary consequences for the five affected former employees of these prolonged periods of underpayment, also make the breaches of the Minimum Wage Act particularly serious. We have already summarised these in relation to each employee.

[165] Finally, the Employment Relations Act breaches were essentially record- keeping breaches by the defendants. They failed, deliberately, to maintain time, wage and holiday records as the law has long required all employers to do. That is conduct consistent with the defendants' knowledge that they were breaching the other minimum statutory entitlements and an attempt to mislead or deceive their

employees and anyone such as a Labour Inspector who might have sought to check up on these records. These were serious breaches because they were undertaken for ulterior and unlawful motives. They were not an inadvertent failure to perform an essential part of all the record-keeping of businesses that employ people. That said, however, such breaches are usually inherently less serious in their consequences to vulnerable employees. Despite the defendants' intentions to avoid being discovered to be acting illegally, these breaches did not defeat investigations but made the task of the Labour Inspector more difficult in establishing the other minimum code breaches. They did not affect directly the vulnerable former employees except, possibly, that consequential delays in the Labour Inspector's investigation meant a delay in issuing proceedings in the Authority and recovering the arrears. Such record-keeping breaches are not uncommon even by employers who do not engage in the unconscionable conduct that the defendants did in this case. In relation to these breaches, therefore, we conclude also that there is nothing to distinguish them either as between the defendants or as between the employees of each.

[166] There is nothing to differentiate between either the defendants or the relevant mitigation factors when considered on an Act-by-Act basis. The factors which both aggravate and attract a discount for the defendants apply across all breaches under all Acts and equally to each of the former employees.

[167] First, the aggravating factors mean that whilst the defendants' breaches of the Minimum Wage Act are not, theoretically, the most serious conceivable breaches so that the starting point for deductions or credits should not be the maximum penalty in each case. We assess this starting point (taking into account aggravating factors) should be set at 80 per cent of the maximum for breaches of the Minimum Wage Act in each of the five breaches identified. We regard the degree of seriousness, looked at on an employee-by-employee basis, as being largely indistinguishable.

[168] So it follows that the starting point (before deductions or credits) in respect of the Minimum Wage Act breaches is $32,000 in the case of the first defendant Preet (two employees x 80 per cent of $20,000). The provisional starting point in respect of the second defendant Warrington is $48,000 for Minimum Wage Act breaches (three employees x 80 per cent of $20,000).

[169] Moving to the Holidays Act breaches, we again assess the starting points by reference to the seriousness of those breaches as follows. First, we conclude that there is nothing to distinguish, at least more than very minimally, the situations of the five former employees who were deprived of holiday pay and who were required to work on public holidays without adequate compensation, either in pay or by the provision of other days off.

[170] We assess the overall seriousness of the Holidays Act breaches to be a little, but not significantly, less than the Minimum Wage Act breaches. The arrears not paid to the employees for holidays were not as significant as the consistent and substantial underpayments of regular wages. Working on public holidays, and not being properly compensated for doing so, amounted to unlawful treatment of those employees but did not have the significant and constant consequences, set out earlier in this judgment, of

underpaying their wages consistently.

[171] For Holidays Act breaches we would assess, therefore, that a starting point for penalties (before taking into account credit factors) is 70 per cent of the maximum penalties available. In the case of the Holidays Act breaches by the first defendant Preet, we set the adjusted provisional penalty at $56,000 (two employees x two breaches at 70 per cent of $20,000). In the case of the second defendant Warrington, this figure is $84,000 (three employees x two breaches at 70 per cent of

$20,000).

[172] Moving to the next provisional assessment of penalties for Employment Relations Act breaches, we consider these to be, although still significant, the least serious of the three classes of breach. Without minimising or discounting the longstanding and clear obligation on employers to maintain compliant time and wage records and employment agreement documentation for relevant employees, the defendants' failures to do so made more difficult, but not impossible, the Labour Inspector's task of calculating what was due. As in all cases, also, this failure by the employers meant that the Authority was, or would have been, entitled, and indeed required, to have accepted the Labour Inspector's calculations of time worked and wages paid.

[173] In these circumstances, we would set provisionally a penalty in respect of these breaches as 50 per cent of the maximum. So, in the case of the first defendant Preet, the penalty starting point is $20,000 (two employees x one breach x $10,000) and in the case of the second defendant Warrington, $30,000 (three employees x one breach x $10,000).

[174] The result of applying the first part of Step 2 has been to set different percentages of the maximum available penalties to reflect the aggravating features of the defendants' breaches. As already noted, these percentages are the same in respect of each defendant but different as between the three Acts breached. In respect of the Minimum Wage Act, the aggravating features of the breaches cause us to set the provisional penalties at 80 per cent of the maximum arrived at under Step

1. The percentage for the Holidays Act breaches is set at 70 and for those breaches of the Employment Relations Act, 50 per cent. This leads to a provisional sub-total of penalties against Preet of $108,000 and against Warrington of $162,000 before ameliorating or mitigating factors are to be taken into account in potential reduction of those sums.

[175] As against those aggravating factors outlined above, there are mitigating elements in this case which warrant a reduction, in all cases, but in potentially differing amounts, from the provisional penalties identified above.

[176] The first of these is a factor which, although having made the breaches more serious in one sense, might also be seen as ameliorating them. As we have already noted, the defendants, between them, employed some 25 employees in similar roles. Following a thorough Labour Inspectorate investigation, only five of those 25 employees were identified as having been the subject of breaches. No prosecutions for breaches against the defendants in relation to their minimum employment standards of the other 20 or so employees appear to have been brought. So, to put it in its best light for the defendants, they have not been shown to have treated all their employees in the same egregious ways as they did the five the subject of this proceeding.

[177] Next, the defendants were apparently co-operative in the Labour Inspector's investigation of their employment practices, or at least they were not uncooperative to the extent that this might have attracted adverse comment by the Labour Inspector.

[178] Third, the Labour Inspector having issued proceedings for penalties and compensation, the defendants acknowledged their wrongdoing and set about ameliorating that. Mr Bal, formerly a director of both companies, committed himself to compensating the former employees for their losses in their not inconsiderable total sum of more than $73,000. To date, Mr Bal has largely met the instalment payments agreed with the Labour Inspector and sanctioned by the Authority. There is now a not insignificant sum potentially payable to each of the five former employees and there is nothing to suggest that Mr Bal will now cease payments under those arrangements.

[179] The defendants acted reasonably promptly in acknowledging their failures to adhere to standards and in taking steps to attempt to deal with their failures. Such an acceptance of culpability, and an indication of a real intention to rectify their behaviour, are significant factors warranting consideration by way of a discount from the provisional penalty.

[180] We consider that a 50 per cent reduction from the provisional penalties arrived at reflecting the seriousness and aggravating features of the breaches, is warranted in this case. That 50 per cent reduction applies to both defendants and to each of the breaches committed under the three Acts. In the case of Preet, the final figure for Step 2 provisional penalties is, therefore, $54,000 and, for Warrington,

$81,000.

*Financial circumstances of the defendants (Step 3)*

[181] We have determined, earlier in this judgment, that the financial position of a defendant is relevant to the assessment of whether penalties should be imposed and, in particular, the amounts of those penalties. We now move, therefore, to the evidence presented to us of the defendants' current financial circumstances.

[182] The Authority had, as part of the materials before it and considered by it in the determination on penalties, the annual accounts of both defendant companies for the financial year 2014-2015. A matter of days before the hearing before us, counsel for the defendants sought to put before the Court the draft annual accounts of the companies for the 2015-2016 financial year. This was opposed by counsel for the Labour Inspector. For reasons set out in a ruling given at the start of the hearing, we admitted these accounts but indicated that consideration of them would be subject to our decision of the relevance and credibility of their contents.

That was because Ms Milnes argued that the financial circumstances of a defendant to a penalties claim are not a relevant consideration. We have found against that submission. We also determined that, although admitting the documents, their otherwise unexplained contents would go to the weight to be given to the arguments advanced by the defendants that these accounts establish such impecuniosity of the companies that penalties should not be increased.

[183] Although what Ms McMillan proposed to introduce were draft accounts, Mrs Bal, the remaining director of both companies who was in court for the hearing, signed the accounts attesting to their correctness, immediately before they were handed up to us.

[184] Ms Milnes made a number of serious and, in our view, valid submissions about the completeness and accuracy of the accounts which were unsupported by any explanations from the chartered accountants who had prepared them on advice from the companies. For example, these accounts covering the period in which the Authority directed the defendants to pay both compensation and penalties for the breaches, did not include those as current or even (in the cases of the penalties) contingent liabilities of the companies as we would have expected. The accounts purported to show significant trading losses by both companies attributable to the relatively small differences between their costs of sales and their incomes from sales. Further, Ms McMillan advised the Court that her instructions were that the companies had "sub-let" all but one of their several South Island outlets (dairies and liquor stores) but counsel was unable to clarify for the Court the nature of those leases or any other information about them. There was, for example, no information put before the Court as to what may have happened to the companies' stocks-in-

trade, which were of not insignificant value at the close of the last financial year only a few months ago, as we would have expected if the retail outlets had been sub-let to others. There is no information about any income from these sub-leases, presumably of the premises. There were other entries and omissions on which we would have expected to have had explanation or clarification but which was not provided by the defendants.

[185] In these circumstances, and while a defendant's ability to pay a penalty is a relevant consideration in determining the amount of such a penalty, such is the unsatisfactory and incomplete state of this information in the present case that we have concluded that it should carry no weight.

[186] Despite this decision about the absence of weight on the companies' financial accounts provided to us by counsel for the defendants, there is evidence on which the Court can draw, that the defendants are not in strong financial positions. For example, Mr Bal, a former director of the defendant companies, has assumed personal liability for paying arrears compensation to the affected employees. Taking into account these reliably known, albeit very general, financial circumstances of the defendants, we have made an allowance in the defendants' favour for their financial circumstances. We have expressed this as a 20 per cent reduction for each defendant from the provisional penalties assessed under Step 3. In future, however, any defendant facing a claim for penalty before the Authority or the Court will be expected to provide adequate information of any financial circumstances that are to be relied on and taken into account if there is to be such a reduction made. These re- adjusted totals come to $43,200 for Preet and $64,800 for Warrington representing a

20% reduction to the Step 2 provisional totals.

*Proportionality of outcome (Step 4)*

[187] Because this is the case in which tests or guidelines for determining penalties are established, it is not possible to assess it in the light of other cases so decided. Nor were we referred to any similar cases by counsel. As a database of case law grows from now on, the proportionality test will be able to refer to that database.

Here, however, we must assess proportionality against other relevant elements of cases generally of which the Court is aware as a specialist institution.

[188] Applying the proportionality or totality test to the figures arrived at, this involves assessing the final provisional penalties by reference to all of the relevant circumstances together, to determine whether they are justly proportionate to the seriousness of the breaches and the harm done by them.63 Potentially, this discretionary final consideration may result in an increase to that provisional figure, a decrease to it or an affirmation of its appropriateness in all the circumstances.

[189] In this case we have concluded that it is just to reduce somewhat the penalties arrived at in respect of both defendants after application of the first three steps.

[190] First, the penalties imposed should be in proportion to the amounts of money unlawfully withheld from the five former employees of the companies as a result of the defendants' breaches. Those amounts were agreed between the parties, and accepted by the Authority, as being a little more than $73,000. The provisional penalties assessed to this point are, in our view, disproportionately larger than those sums which have been or will be compensated for.

[191] Our second consideration in assessing the proportionality of the outcome is that the final penalties which are set should not be at such a substantial level, at least in relation to the breaches committed, that the liable employer has an incentive to avoid paying them or, alternatively, simply cannot pay them. As a matter of principle, the Court should not award penalties (or indeed make other orders) in respect of which there is little real prospect of compliance through genuine impecuniosity.

[192] Next, the Court must assess the optimum deterrent effect of penalties imposed, not only as a specific deterrent but, where a case is more widely known, its general deterrent effect. Another element of this final discretionary step is to bear in

mind that if penalties are set at an unrealistically high level, defendants may not pay

63 For a description of the proportionality test, see *Otago Hotel etc IUOW v Pacific Park Motor Inn*

*Ltd (t/a Pacific Park Dunedin)* [1989] 1 NZILR 175 (LC) at 181.

them at all and attempt to rearrange their corporate structures and financial affairs accordingly.

[193] Stepping back from the provisional penalties referred to at [186], and assessing the proportionality of the outcome for both of the defendants, we have concluded that the appropriate global figure for penalties is, in the case of the first defendant Preet, $40,000 and in the case of the second defendant Warrington,

$60,000. Those sums meet the requirements of justice in the circumstances. This outcome is a substantial step down from the first potential provisional penalties arrived at after Step 1, but this is justified by the application of the subsequent steps.

[194] These assessments are obviously significantly greater than those arrived at by the Authority which were, respectively, $10,000 and $15,000. The penalties that we would award, applying this methodology, are four times greater than those granted by the Authority. That is a substantial difference that does require allowing the Labour Inspector's challenge, setting aside the Authority's awards for penalties and requiring the defendants to pay those assessed by the Court, in substitution.

[195] The penalties must be paid by the defendants to the Registrar of the Employment Court at Wellington whose contact details can be found on the Court's website.64

[196] Although the affected former employees have received compensatory awards for underpayments due to them, they have not been compensated for the non- economic but significant consequences to them of their maltreatment by the defendants. The Labour Inspector brought proceedings for recovery of underpayments and for penalties. She could not have brought personal grievance claims on behalf of those former employees and they have not done so themselves. The manner in which they were treated, however, even if it did not constitute, formally, unjustified disadvantages to those employees, is certainly analogous to that class of personal grievance and, in our assessment, would have been compensated

for by the Authority if personal grievances had been brought.

64 <www.employmentcourt.govt.nz/contact-us>.

[197] In these circumstances, we consider it appropriate that a portion of the penalties to be paid by the defendants should be payable, once collected by the Labour Inspector, to the former employees. Apart from accepting that they were treated egregiously by their employers, there is no further evidence of their particular circumstances which might warrant differential awards. In these circumstances, therefore, and pursuant to s 136(2), we direct that each former employee is entitled to $7,500 as a compensatory payment from the penalties payable by his employer. So, in the case of Preet, the sum of $15,000 out of the total penalties of $40,000 is to be paid equally to its two former employees. In the case of Warrington, the sum of

$22,500 out of the total penalties of $60,000 is to be paid equally to its former employees.

[198] We wish to add that had Mr Bal not assumed personal responsibility to discharge the compensatory awards made to the former employees rather than, as the Authority's determination required formally, the company, we may have exercised a further discretion that is open to the Authority and the Court in such cases. This arises by application of s 135(4A) and allows penalties to be paid by instalments. This may have been a case for the postponement of the date for payment of penalties and/or for payment of these by instalment to enable priority to be given to payment of compensation to the employees in the amounts due to them. Although not in this case, that will be an additional instrument in the Authority's or the Court's tool box when dealing with penalty cases such as this.

**Summary of penalties**

[199] The first defendant (Preet PVT Ltd) is ordered to pay penalties totalling

$40,000 and the second defendant (Warrington Discount Tobacco Ltd) is ordered to pay penalties totalling $60,000. These penalties are payable to the Registrar of the Employment Court at Wellington to the use of the Crown. From those penalties, sums of $7,500 are to be paid to each of the affected former employees of the defendant.

[200] For convenience, we set out, as an appendix to this judgment, a table showing the amounts calculated in respect of each of the four steps, bringing us to the total

penalties imposed against each defendant set out above. Our reasoning for reaching each of these figures in the schedule is explained in the body of this judgment.

**Using the four-step analysis in practice – an observation**

[201] We are conscious that the adoption of this staged process of calculating penalties for breaches of minimum code statutes (and of employment agreements also) will require some further work, principally by the Authority, but also by the Court, in determining penalties in individual cases. The Authority, especially, is a very busy institution which is charged by statute with prompt and non-technical disposal of the business before it, irrespective of the difficulty or complexity of that business. However, we consider that once understood, the four-step process described above is relatively simple and expeditious both to apply and record. Labour Inspectors and other applicants for penalties, as well as respondents to them, may be expected to build their submissions to the Authority around this framework.

[202] The need for consistency, transparency and the application of known principles to particular facts is a necessary concomitant of a regime which may impose significant penalties on employers, sometimes in addition to a requirement to make good, through compensation for losses, breaches that have been committed. Such a regime should also assist employers and their advisers to assess more accurately how penal liability may be dealt with by the Authority. This should assist in dealings with Labour Inspectors about both future compliance with minimum requirements and what may be the consequence in penal proceedings of not righting past wrongs and avoiding them in future. Those are important elements of the overall statutory purpose of employment law, creating and maintaining productive employment relationships characterised by good faith and legally compliant dealings.

[203] In that regard, we reiterate the compliments that we paid to both counsel at the hearing for the quality of their submissions to us on these important issues.

**Costs**

[204] Costs are reserved at the request of the parties. If they cannot be settled directly between them, a party seeking an order for costs may apply by memorandum filed within one month of the date of this judgment, with the respondent to that application having the period of one further month to file submissions. In this regard, we note that this has been a test case brought by a Labour Inspector largely for the benefit of Labour Inspectors and the Authority but in which the Labour Inspectorate of the Ministry of Business, Innovation and Employment has sought a clear public statement by the Court of the penal consequences of breaching these minimum standards.

GL Colgan

Chief Judge

for the full Court

Judgment signed at 2 pm on 4 November 2016

**Appendix**

| | **Preet PVT Ltd (2 employees)** | | **Warrington Discount Tobacco Ltd (3 employees)** | |
|---|---|---|---|---|
| **Step 1: Nature and number of breaches – potential maximum penalties** | | | | |
| MWA65<br>HA66<br>ERA67 | | $40,000<br>$80,000<br>$40,000 | | $60,000<br>$120,000<br>$60,000 |
| | **Subtotal** | **$160,000** | **Subtotal** | **$240,000** |
| ***Step 2: Aggravating factors as a proportion of maxima in Step 1*** | | | | |
| MWA (80%)<br>HA (70%)<br>ERA (50%) | | $32,000<br>$56,000<br>$20,000 | | $48,000<br>$84,000<br>$30,000 |
| | **Subtotal** | **$108,000** | **Subtotal** | **$162,000** |
| ***Step 2: Ameliorating factors (reducing aggravating factors subtotal)*** | | | | |
| Less 50% of above subtotals | **Subtotal** | **$54,000** | **Subtotal** | **$81,000** |
| ***Step 3: Defendants' financial circumstances*** | | | | |
| Less 20% of above subtotals | **Subtotal** | **$43,200** | **Subtotal** | **$64,800** |
| ***Step 4: Proportionality*** | | | | |
| Reduce modestly | **TOTAL** | **$40,000** | **TOTAL** | **$60,000** |

65 Minimum Wage Act 1983.

66 Holidays Act 2003.

67 Employment Relations Act 2000.