

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 141
3021072

BETWEEN A LABOUR INSPECTOR
Applicant

AND AULACK ENTERPRISES
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Sarah Blick, Counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 3 May 2018

Determination: 4 May 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Labour Inspector Clare Lyons-Montgomery sought orders for arrears and penalties against Aulack Enterprises Limited arising out of various breaches of statutory employment standards.

[2] Aulack operated a kiwifruit picking contract business. Visits by Labour Inspectors to kiwifruit orchards in the Bay of Plenty in May 2016 identified Aulack as needing further inquiry about its adherence to employment standards. The Inspector's subsequent inquiries included interviews with Hardeep Singh, Aulack's sole director and shareholder, and eight workers. Attempts continued through to mid-2017 to establish what records were held by the business and what they showed about the extent to which Aulack had or had not met those standards. During this process the Inspector also identified shortfalls in wage or holiday pay entitlements of three workers for whom she has pursued payment of arrears.

[3] The penalties sought relate to breaches of the Employment Relations Act 2000 (ER Act), the Minimum Wage Act 1983 (MWA), the Wages Protection Act 1983 (WPA), and the Holidays Act 2003 (HA).

[4] Aulack did not lodge a statement in reply. By affidavit the Inspector confirmed her statement of problem was served on Aulack's registered office, an accounting firm, and Mr Singh had subsequently told her that he had received it.

The Authority's investigation

[5] Arrangements for the Authority's investigation meeting were made in a case management conference held by telephone on 21 March 2018. Mr Singh attended part of the call. He said he was involved in a serious motor accident three days earlier and was not fit to participate in all of the call. Before he left the call arrangements were made for the investigation meeting to be held in Auckland, as that was a more convenient location for him, and I advised Mr Singh that decisions could be made at the meeting whether or not he attended.¹

[6] Mr Singh was subsequently sent a Minute setting out timetable directions made by me that day. One direction gave Mr Singh an opportunity to lodge a written witness statement before the meeting but he did not use it. He had earlier provided the Authority with information concerning his personal health problems arising from alcohol dependency. These had resulted in extensions of time being granted for him to lodge a statement in reply. He had been admitted to hospital in March and December 2017 with a diagnosis of pancreatitis. He had also travelled to India in early 2018 and provided documentation about attending a drug counselling and rehabilitation centre there.

[7] On the afternoon before the investigation meeting Sanjay Sharma, a West Auckland lawyer, lodged a memorandum on Mr Singh's behalf. On Mr Singh's instructions, Mr Sharma's memorandum said Mr Singh was unwell but did not want to delay the investigation meeting. Mr Singh consented to the Inspector's application being determined on the papers in his absence. The memorandum said Mr Singh acknowledged, on Aulack's behalf, that statutory breaches had occurred and therefore he did not dispute the orders sought by the Inspector. It also stated, on his

¹ Employment Relations Act 2000, s 173(2) and (3).

instructions, that the company's business was no longer active and had stopped operating. He provided copies of what were said to be Aulack's bank statements for the last four months and a copy of its asset schedule. The bank statements showed an overdraft of \$20,247. The schedule showed assets with a book value of \$12,401, mostly for a forklift valued at \$10,015.

[8] In light of that memorandum I arranged for the Inspector, who was based in Hamilton, to attend the investigation meeting by telephone conference only. Under affirmation she confirmed and answered some questions about it. Counsel for the Inspector also made brief submissions on aspects relevant to the determination of penalties.

[9] As permitted by s 174E of the ER Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[10] For the purposes of this determination it was not necessary to use the whole names of the workers referred to in the Inspector's evidence. Instead it was sufficient to use their initials as that adequately identified them for the purposes of the parties. However no order is made prohibiting publication of the workers' names. If use of their full names is needed for any subsequent certificate of determination or enforcement proceedings, their names should be used in those documents.

Breaches of employment standards

[11] Relying on the Inspector's evidence, accepted in its entirety, the following findings are made:

- (i) Aulack failed to include the mandatory clauses about wages and dispute resolution procedures in the employment agreements of five workers. It was liable to a penalty for five breaches of s65(2)(a)(v) and (vi) of the ER Act.
- (ii) Aulack failed to keep adequate wage and time records for six employees. It was liable for a penalty for six breaches of s 130 of the ER Act.
- (iii) Aulack failed to comply with the Inspector's requirement to produce for inspection its wage, time, holiday and leave records. It was liable for a

penalty for one breach of s 229(1)(c) and (1)(d) and s 229(2) of the ER Act.

- (iv) Aulack failed to pay the adult minimum wage at all times to two workers. It was liable for a penalty for two breaches of s 6 and s 10 of the MWA.
- (v) Aulack unlawfully deducted money from the wages of one worker. It was liable for a penalty for one breach of s 4 of the WPA.
- (vi) Aulack failed to correctly calculate payment for an alternative holiday due to one worker. It was liable for a penalty for one breach of s 60 of the HA.
- (vii) Aulack was liable to pay wage and holiday pay arrears of \$288.14 to GS, a former employee.
- (viii) Aulack was liable to pay wage and holiday pay arrears of \$99.51 to AA, a former employee.
- (ix) Aulack was liable to pay wage arrears of \$100 to EC, a former employee.

Assessment of penalties

[12] The appropriate level of penalties in this matter totalled \$30,000. This sum was reached from assessing the scale of the breaches and the severity of their effects, globalising similar offences, accounting for any aggravating or ameliorating factors, and considering the overall proportionality of the outcome. The following has summarised the four-step methodology applied to do so.²

[13] Firstly, as a registered company. Aulack faced a potential penalty liability of up to \$20,000 for each of the identified 16 breaches.³ The maximum total for those penalties therefore totalled \$320,000. A globalised penalty for some of the breaches was appropriate for multiple and similar breaches.⁴ The following table summarises the nature of the breaches:

² See *Borsboom v Preet PVT Limited*, [2016] NZEmpC 143 at [137] – [151].

³ Employment Relations Act 2000, s 135(2)(b).

⁴ *Borsboom*, above n 1, at [141].

Deficient administration				
	ERAct s 65(2)	ER Act s 130(1)	ER Act s 229(1) and s 229(2)	Total breaches
	5	6	1	12
Deficient payments				
Worker by initial	MWA s 6	WPA s 4	HA s 60(1)	Total breaches per worker
HH	-	-	1	1
EC	-	1	-	1
AA	1	-	-	1
GS	1	-	-	1
Total per Act	2	1	1	4

[14] Aulack's failure to provide compliant employment agreements, keep compliant records of wage and holiday entitlements and then its inability to produce records when required to do so by the Inspector were part of a single course of conduct of deficient administration. The 12 specific identified breaches could be globalised as comprising two breaches – one relating to the employment agreements and one relating to keeping and producing the records. The provisional penalty for those two globalised breaches was \$40,000.

[15] The breaches identified in respect of four individual workers comprised a failure to pay the adult minimum wages at all times (two breaches), an unauthorised deduction from wages (one breach) and a failure to pay holiday pay for an alternative holiday (one breach). The provisional penalty for those four breaches was \$80,000.

[16] Secondly, the breaches, taken as a whole, were serious. Aulack's failure to keep and provide adequate records impeded the Labour Inspector's investigation. Arrears were sought for three workers who were left without some of the payments they were due, albeit of a low overall total value of \$487.65.

[17] An aggravating factor of seriousness was that fact that Aulack had been the subject of an improvement notice issued by an Inspector in 2014. That notice was resolved when Mr Singh provided a month's worth of timesheets and talked with an Inspector about its minimum wage obligations. Aulack's subsequent failure to meet those requirements, as discovered by the Inspector's inquiries in 2016, strongly suggested its deficient administration was deliberate rather than inadvertent or careless. It was a repeat offender.

[18] Another aggravating factor concerned the nature of the workforce. From her review of records the Inspector understood more than 250 people had worked for the business in the 12 months previous to her inquiries. Most were backpackers on working holiday visas and locals who were transient or casual. They were employees vulnerable to exploitation because they were less able to identify and pursue the correction of failures to observe the employment standards by which they were entitled to be treated and paid. The Inspector's inquiry had begun with a request for a sample of records for five workers. What she discovered from that exercise and from complaints then made by some workers suggested the identified breaches were only the tip of the iceberg. A statement taken from a senior employee, who was in charge of payroll and involved in other administration, disclosed systematic underpaying of backpackers, consistent with what the sample analysed by the Inspector showed.

[19] Due to those two factors, the reduction of the maximum penalties to reflect the overall relative seriousness of the breaches is limited to 50 per cent in this second step of the analysis. Applying that reduction reduced the two categories of penalty to a provisional level of \$20,000 and \$40,000 respectively.

[20] There were no mitigating factors that would have warranted a larger reduction at this stage. There was no evidence of remorse expressed on behalf of the company or steps taken to redress the shortfalls. In answer to a question at the investigation meeting the Inspector described Mr Singh as having been not difficult rather than co-operative with her inquiry. While he answered phone calls, he delayed providing requested information for as long as he could.

[21] Thirdly, the information contained in Aulack's belatedly lodged bank statements and asset schedule suggested it had limited funds to pay penalties. However that information was untested and, in respect of the bank accounts, covered only the last four months. There might, for example, in earlier months have been more funds that could be traced. Its assets included a forklift with a book value of more than \$10,000 and other equipment which would have a cash value greater than its depreciated value, including a car, two quad bikes and three orchard trailers. While there might well prove to be competition with other creditors for the value of Aulack's assets, the company remained registered. The Inspector could pursue payment of the penalties, through a liquidation process if necessary.

[22] Aulack’s ability to pay penalties did not dictate absolutely what amounts may be imposed but was a relevant consideration among others.⁵ Applying a further 25 per cent reduction to take account of Aulack’s limited financial circumstances, the two provisional penalties could be reduced to \$15,000 for deficient administration and \$30,000 for deficient payments.

[23] Fourthly, the assessment of proportionality or totality of penalties to be imposed required some further adjustment, even after applying reductions referred to in the earlier steps. The value of the arrears due, although most likely only a sample of the true level of shortfall to many other employees, did not warrant an order for penalties at the provisional level reached. Taking account of the range of penalties awarded across a variety of other cases, a penalty of \$20,000 was a sufficiently strong public sanction for the deficient payments. A penalty of \$10,000 was sufficient to punish the deficient administration. It was an amount that would also deter other employers from acting in that way.

[24] The steps and adjustments made to reach this outcome are summarised as follows:

Step 1: Nature and number of breaches – potential maximum penalties			
Deficient administration		Deficient payments	
ER Act s 65(2)	5	MWA s 6	2
ER Act s 130(1)	6	WPA s 4	1
ERA Act s 229(1) and (2)	1	HA s 60(1)	1
	1		
Total individual breaches	12	Total individual breaches	4
	\$240,000		\$80,000
Globalised	2	No globalisation	
	\$40,000		\$80,000
Step 2: Aggravating factors			
Relative seriousness – 50 % reduction	\$20,000		\$40,000
Step 2: Ameliorating factors			
Nil	\$20,000		\$40,000
Step 3: Respondents’ financial circumstances			
Reduction – 25 per cent	\$15,000		\$30,000
Step 4: Proportionality of outcome			
Reduction – one third	\$10,000		\$20,000
Total penalties			\$30,000

⁵ *Borsboom*, above n 1, at [80].

Orders

[25] Within 28 days of the date of this determination, Aulack must pay to the Inspector for transfer to the Crown Bank Account:

- (i) A penalty of \$10,000 for breaches of its statutory duties to provide complete employment agreements for each worker, keep proper pay records and to be able to produce those records when required to by an Inspector; and
- (ii) A penalty of \$20,000 for breaches of statutory duties to pay wages and holiday pay in full when due.

[26] Within 28 days of the date of this determination, Aulack must also pay \$487.65 to the Inspector, for the benefit of the three workers identified at subparagraphs (vii), (viii) and (ix) of paragraph 11 of this determination.

Costs

[27] Although the time required for the investigation meeting was reduced by Mr Singh's advice that he would not attend and that he accepted a determination on Aulack's liabilities being made in his absence, the Inspector's representative was still put to the time and cost of preparation and providing closing submissions. Applying the usual daily tariff and allowing a margin for some wasted effort of preparation, Aulack must pay the Inspector \$1500 as a contribution to her costs of representation and a further \$71.56 in reimbursement of the fee paid to lodge her application in the Authority.

Robin Arthur
Member of the Employment Relations Authority