

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 399
5620430

BETWEEN A LABOUR INSPECTOR
Applicant

AND BINDE ENTERPRISES
LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Marija Urlich, Counsel for the Applicant
Nirmal Singh, Advocate for the Respondent

Investigation Meeting: 14 September 2016 at Auckland

Determination: 7 December 2016

DETERMINATION OF THE AUTHORITY

- A. Binde Enterprises Limited (Binde) has breached various provisions of the Employment Relations Act 2000, Holidays Act 2003, Minimum Wage Act 1983 and Wages Protection Act 1983.**
- B. Within 28 days of the date of this determination, Binde must pay the Labour Inspector on behalf, and for the benefit, of the persons named in Schedule A, a total of \$208,184.16 comprising:**
- (i) \$185,974.52, as minimum wages arrears;**
 - (ii) \$13,186.76, as unpaid holiday pay; and**
 - (iii) \$9,022.88, as public holiday pay and alternative holiday pay.**
- C. Within 28 days of the date of this determination, Binde must pay the Labour Inspector on behalf, and for the benefit, of Jaskirat Singh, \$672.00 as reimbursement for unlawful wages deductions.**

- D. Within 28 days of the date of this determination, Binde must pay the Authority, for subsequent payment into a Crown bank account, a total of \$220,000 in penalties comprising:**
- (i) \$125,000 as a global penalty for breaching s 6 of the Minimum Wage Act;**
 - (ii) \$15,000 as a penalty for breaching s 27 of the Holidays Act;**
 - (iii) \$15,000 as a penalty for breaching s 49 of the Holidays Act;**
 - (iv) \$15,000 as a penalty for breaching s 50 of the Holidays Act;**
 - (v) \$15,000 as a penalty for breaching s 56 of the Holidays Act;**
 - (vi) \$10,000 as a penalty for breaching s 81 of the Holidays Act;**
 - (vii) \$15,000 as a penalty for breaching s 5 of the Wages Protection Act; and**
 - (viii) \$10,000 as a penalty for breaching s 65 of the Employment Relations Act.**
- E. Within 28 days of the date of this determination, Binde must pay the Labour Inspector the sum of \$2,859.46 comprising:**
- (i) \$1750.00 as a contribution to costs;**
 - (ii) \$754.31 for additional external administrative support to prepare the claim;**
 - (iii) \$283.59 as the costs associated with service; and**
 - (iv) \$71.56 being the Authority's filing fee.**

Employment relationship problem

[1] Binde Enterprises Limited (Binde) is a labour hire company in the agricultural sector. Binde's sole director and shareholder is Jujhar Singh. As part or all of its business, Binde provided labour to Sutherland Produce Limited (Sutherland), a large commercial agricultural operation based in Pukekohe, about 50 kilometres south of Auckland.

[2] A Labour Inspector, Mark Spencer claimed that Binde:

- (i) failed to pay the 75 employees listed in Schedule A minimum wages under the Minimum Wage Act 1983 (MW Act)

- (ii) failed to pay the 75 employees listed in Schedule A holiday pay, public holiday pay and alternative holiday pay under Holidays Act 2003 (H Act);
- (iii) failed to provide the 75 employees listed in Schedule A written employment agreements or, in the alternative, compliant employment agreements to those employees under s 65 of the Employment Relations Act 2000 (ER Act);
- (iv) failed to keep holiday and leave records for the 75 employees listed in Schedule A under s 81 of the H Act;
- (v) Act;
- (vi) made unlawful deductions from the wages of one employee in contravention of s 5 of Wages Protection Act 1983 (WP Act)

[3] In summary, the Labour Inspector alleged Binde breached s 6 of the MW Act 1983, ss 27, 49, 50, 56 and 81 of the H Act and s 65 of the ER Act in respect of 75 employees and s 5 of the WP Act in respect of one employee.

[4] The Labour Inspector sought the imposition of penalties payable to the Crown for the multiple breaches of the four Acts.

Factual background

[5] Binde and Sutherland entered into a labour supply agreement on 13 January 2014. Binde was required to provide workers for up to 50 hours a week and would be paid \$16.50 plus goods and services tax (GST) (\$18.97) a worker, an hour in return. The agreement contained a clause granting exclusive provision of labour to Binde.

[6] Binde commenced providing labour to Sutherland under the agreement in January 2014.

[7] In December 2014, Jujhar Singh's accountant wrote to Sutherland advising the minimum rate Binde could charge Sutherland per worker, an hour was \$18.05. This figure comprised a minimum wage component of \$14.25 an hour, 15% GST and 10% for "overheads". Jujhar Singh's accountant then explained to Sutherland that after 15% withholding tax was deducted and remitted to the Department of Inland

Revenue, this left Jujhar Singh with \$15.32 to pay his employees, GST and other associated costs “such as ACC”.

[8] In January 2015, Sutherland and Binde entered into a further labour supply contract. The rate for process workers was agreed as \$17.50 an hour plus GST (\$20.12) and \$20.00 an hour plus GST (\$23.00) for “drivers”. The agreement again contained an exclusivity of labour provision clause in favour of Binde.

[9] On 1 April 2015, the Minimum Wage Order 2015 issued under the MW Act increased the adult minimum wage to \$14.75 an hour.

[10] Sutherland required Binde employees to enter their name and signature on a daily time sheet. The time sheets were then completed by the planting or harvesting manager who noted down the start and finish times for each employee.

[11] Sutherland then double-checked these start and finish times against invoices issued weekly by Binde. Anomalies between the time sheets and invoices were resolved through discussion with the planting or harvesting manager and/or Binde.

[12] The ordinary working day for Binde employees was between 8.00am to 5.00pm with a 30-minute lunch break. Inclement weather or production demands sometimes necessitated changes to these hours but Sutherland also recorded this.

[13] Binde appeared to provide transport to and from the worksite for its employees but they were required to pay for this service.

[14] On 16 April 2015, a team of Labour Inspectors entered the premises of Sutherland under authority given in s 229(1)(a) of the ER Act to inspect compliance with minimum standards.

[15] During the visit, the Labour Inspectors interviewed several employees of Binde. In response to those interviews, the Labour Inspectorate commenced an investigation into Binde’s compliance with minimum standards.

[16] Further interviews were conducted with employees of Binde at Sutherland's premises on 22 May 2016. The employees were all migrant workers.

[17] The Labour Inspectorate's investigation concluded that Binde had failed to provide employees with employment agreements (or compliant employment agreements), failed to keep accurate wage, time, holiday and leave records, including failure to keep an accurate record of the number of employees and failed to pay minimum wages, holiday pay, public holiday pay and alternative holiday pay.

[18] These conclusions were derived from an analysis undertaken by a Labour Inspector of records provided to the Labour Inspectorate by Sutherland. Jujhar Singh had previously conceded to the Labour Inspector in an interview conducted on 28 September 2015 that the records held by Sutherland were likely to be more accurate than those which it held.

[19] The records provided by Sutherland, which dated from April 2014 until May 2015, covered 75 Binde employees. Of the 75, Binde only held records for 16 employees. From the records provided by Sutherland, the Labour Inspectorate calculated the arrears of wages and holiday pay owing to the 75 employees. This totalled \$208,184.16.

[20] On 28 January 2016, the Labour Inspectorate provided a copy of its finding to Binde and asked for any response by 9 February 2016.

[21] The Labour Inspectorate attempted to engage with Binde, primarily through its accountant, with whom the Labour Inspectorate had been authorised by Jujhar Singh to deal with, seeking a response to the findings of the investigation. However, no response – other than a request for more time – was forthcoming from Binde.

[22] At the time of lodging a statement of problem with the Authority on 12 April 2016, the Labour Inspectorate had received no substantive response from Binde to its investigation.

[23] Following the Labour Inspectorate's investigation, Sutherland sent Binde correspondence detailing its obligation under immigration and health and safety legislation and the labour supply contract.

[24] Sutherland was prosecuted under the Immigration Act 2009 for allowing persons not entitled to work in its service, to work. On 21 October 2015, Sutherland entered guilty pleas to four representative charges under that Act in the District Court at Pukekohe.

[25] Sutherland has now entered into a labour supply contract with another company, Binde Recruit Limited. Jujhar Singh is the sole director and shareholder of Binde Recruit Limited, which was incorporated on 3 March 2016.

The Authority's investigation

[26] The Labour Inspector was directed to personally serve the statement of problem on Binde. Having reviewed the Authority's file and an affidavit of service, I am satisfied that Binde was properly served on 6 July 2016.

[27] Binde did not lodge a statement in reply or seek leave of the Authority to lodge one out of time.

[28] Despite being specifically notified by registered courier of a case management conference (CMC) on 29 July 2016, neither Jujhar Singh nor another authorised representative of Binde made themselves available to participate. The Authority did receive a telephone message from a "Nevin from Binde Enterprises Limited" about 9.15am on 29 July 2016. The caller appeared to suggest due to "illness" he was unable to attend the CMC. However, no adjournment was sought and no further explanation was given. In the absence of both, the CMC proceeded as scheduled.

[29] In a Member's Minute issued after the CMC, Jujhar Singh was advised that if he or another authorised representative of Binde attended the investigation meeting, that person would have the opportunity to comment on the Labour Inspector's claims.

[30] The Minute also stated that the Authority had the power to proceed with an investigation and a determination in the absence of another party: s 173 and sch 2, cl 12 of the Act and that a determination of the Authority was enforceable by a compliance order or under s 141 of the Act in the District Court.

[31] Jujhar Singh attended the investigation meeting and was represented by his new accountant, Nirmal Singh. Nirmal Singh made submissions on behalf of Binde.

[32] During the investigation meeting, I heard evidence from the Labour Inspector, Sutherland compliance manager Kylie Faulkner, former Binde employee Jaskirat Singh, and Binde director and shareholder, Jujhar Singh.

[33] As permitted by s 174E of the Act this determination has not recorded all the evidence received during the investigation meeting but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[34] This issue for determination are:

- (i) Whether Binde failed to meet minimum employment standards as identified in the Labour Inspector's investigation;
- (ii) If minimum employment standards were breached, should penalties be imposed on Binde and in what amount; and
- (iii) Whether either party should contribute to the costs of representation of the other?

Has Binde failed to meet minimum employment standards as identified in the Labour Inspector's investigation?

[35] A Labour Inspector has the power to bring an action on behalf of an employee under s 228(1) of the Act for recovery of any wages or holiday pay. The ambit of s 228(1) includes a class or representative action by a Labour Inspector.¹

[36] In the circumstances of this case, as with arrears claims brought on behalf of workers under s 131 of the ER Act, s 228 of that Act allows the Labour Inspector to seek to rely on s 132 of the ER Act. Section 132 relevantly provides:

132 Failure to keep or produce records

- (1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—

¹ Words in the singular include the plural: Interpretation Act 1999, s 33.

- (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
 - (b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.
- (2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—
- (a) the wages actually paid to the employee;
 - (b) the hours, days, and time worked by the employee.

[37] The Labour Inspector lodged a voluminous witness statement containing a large number of annexures. During the investigation meeting the Labour Inspector gave forthright, and largely unchallenged, oral evidence. His evidence was supported by written and oral evidence from Ms Faulkner and, to the extent it related to unlawful wage deductions, that of Jaskirat Singh.

[38] Given the extent and gravity of the Labour Inspector's allegations against Binde, it was appropriate that Jujhar Singh be granted an opportunity to comment on the Labour Inspector's evidence. He was also provided with an opportunity to provide any information, particularly in mitigation, which he believed was relevant and would assist the Authority.

[39] Jujhar Singh could not properly explain why Binde had not engaged with the Labour Inspectorate's repeated requests for comment on its investigation. Jujhar Singh could also not properly explain why Binde had not engaged with the Authority's processes prior to the investigation meeting. He appeared to blame his previous accountant.

[40] The extent to which responsibility for not engaging with the Authority, in particular, can be attributed to Jujhar Singh's former accountant is unclear given Jujhar Singh was personally served with the Labour Inspector's statement of problem.

[41] Jujhar Singh, who did not seriously contest the Labour Inspector's evidence, had three explanations for Binde's failure to comply with minimum employment standards.

[42] First, Jujhar Singh said it was all a "mistake" and that Binde had not intended to breach the law or harm any of its employees. Second, Jujhar Singh said he was relying on administrative staff and on the professional advice of his former accountant to ensure he complied with the law. Interestingly, the accountant who Jujhar Singh

attempted to suggest was responsible for Binde's failures to comply with minimum employment standards now provides the registered offices for Binde Recruit Limited. Third, Jujhar Singh said "eight to ten" of the 75 employees were actually sub-contractors to Binde.

[43] When pressed by the Authority to identify the "eight to ten" in the documentation provided by the Labour Inspector, Jujhar Singh could only identify three names. The Labour Inspector said the first time it was suggested that some of Binde's employees were, in fact, sub-contractors was during the investigation meeting. Ms Faulkner said that Sutherland did not allow sub-contracting arrangements and they were expressly precluded by the terms of the labour supply contract between it and Binde. When asked to comment on this, Jujhar Singh was unable to do so in any satisfactory way.

[44] Ultimately, I prefer the evidence of the Labour Inspector to that of Jujhar Singh in totality. The evidence provided by the Labour Inspector about Binde's breaches of minimum employment standards was overwhelming. It is appropriate to record the Labour Inspector presented a compelling case of migrant labour exploitation.

[45] I find that the Labour Inspector has demonstrated on the balance of probabilities that between, at the very least, April 2014 and May 2015, Binde breached s 6 of the MW Act 1983, ss 27, 49, 50, 56 and 81 of the H Act and s 65 of the ER Act in respect of 75 employees.

[46] The Labour Inspector sought arrears of wages, holiday pay, public holiday pay and alternative holiday pay from Binde on behalf of the employees listed in Schedule A to this determination. The Labour Inspector calculated the total amount of arrears as \$208,184.16. This comprised minimum wages arrears of \$185,974.52, unpaid holiday pay of \$13,186.76 and unpaid public and alternative holiday pay of \$9,022.88.

[47] The Labour Inspector said the calculations were based on records provided by Sutherland. Ms Faulkner's evidence to the Authority was that Sutherland's records were accurate and could be relied on. I accept this evidence. I also accept that the Labour Inspector had to resort to reliance on Sutherland's records because of the

failure by Binde to keep and maintain wage, time and leave records under the ER Act and the H Act.

[48] To the extent that Binde kept records for 16 employees, I accept Ms Faulkner's evidence that Sutherland records were more accurate. Consequently, I find the Labour Inspector is entitled to invoke and rely on s 132(2) of the ER Act.

[49] In any event, Binde did not directly take issue with the Labour Inspector's calculations nor did it provide alternative calculations.

[50] It is appropriate in all the circumstances of this matter to order Binde to pay the arrears as calculated by the Labour Inspector under s 131 of the Act.

[51] Within 28 days of the date of this determination, Binde must pay the Labour Inspector on behalf, and for the benefit, of the persons named in Schedule A, a total of \$208,184.16 comprising:

- (i) \$185,974.52, as minimum wages arrears;
- (ii) \$13,186.76, as unpaid holiday pay; and
- (iii) \$9,022.88, as public holiday pay and alternative holiday pay.

[52] While the Authority may order payment of arrears in instalments under s 131(1)(1A) of the Act, it may do so only if the employer's financial positions requires it. Binde provided no evidence or otherwise advanced submissions as to why this section should be invoked. Consequently, it is not appropriate to do so.

[53] An assessment of Binde's liability for penalties for breaches of MW Act, H Act and ER Act is set out below.

Unlawful wage deduction – Jaskirat Singh

[54] Binde employed Jaskirat Singh between December 2014 and July 2015. Like the 74 other Binde employees named in Schedule A, he was not provided with an employment agreement (or a compliant employment agreement).

[55] Jaskirat Singh worked in Sutherland's operation between 8.00 or 8.30am and 5.00pm, Monday to Thursday. He said he was paid \$290 in cash every Friday regardless of the hours he worked. Jaskirat Singh said this equated to about \$9.00 an hour.

[56] Jaskirat Singh said he was required to pay Binde \$7.00 a day for transport to and from his rental accommodation in Manurewa. Jujhar Singh said Binde did not employ the drivers and any transport arrangement was an informal agreement of the workforce. Curiously, the most recent labour supply contract between Sutherland and Binde provided for the deployment and payment of “drivers”.

[57] Jaskirat Singh was adamant in his oral evidence that Binde deducted \$7.00 an day from his wages for transport. I accept this evidence. I find that Jaskirat Singh had \$28.00 a week unlawfully deducted by Binde from his wages for a period of 24 weeks in breach of s 5 of the WP Act. The total amount of unlawful wage deduction by Binde during this period was \$672.00.

[58] Within 28 days of the date of this determination, Binde must pay the Labour Inspector on behalf, and for the benefit, of Jaskirat Singh, \$672.00 as reimbursement for unlawful wages deductions

[59] An assessment of Binde’s liability for penalty or penalties for breach of WPA Act is set out below.

Penalties – principles to be applied

[60] The Authority has jurisdiction under s 161(1)(m)(iii) of the ER Act to hear and determine an application by a Labour Inspector for recovery of a penalty under ER Act, s 76 of the H Act, s 10 of the MW Act and s 13 of the WP Act.

[61] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.²

[62] In *Borsboom v Preet PVT Limited* a full court of the Employment Court identified the factors for imposing a penalty for breach of minimum employment standards under the Act.³ In doing so, it considered the previous approaches taken by that Court and its predecessor, the Labour Court.

² *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

³ [2016] NZEmpC 143.

[63] Deriving from earlier decisions and its own consideration, the Court identified the relevant factors for imposing a penalty which are summarised here as:⁴

- (i) the seriousness of the breach;
- (ii) the degree of culpability of the party in breach;
- (iii) whether the breach is one-off or repeated;
- (iv) the impact, if any, on the employee/prospective employee;
- (v) the vulnerability of the employee/prospective employee;
- (vi) the need for deterrence in relation to the particular party to be penalised and to the wider community of employers;
- (vii) remorse, if any, shown by the party in breach;
- (viii) the general desirability of consistency in decisions on penalties; and
- (ix) whether the penalty imposed is proportionate to the breach (or breaches).

[64] The Court then set out “four step” process for the Authority (and the Court) to follow when assessing penalties in order to provide a consistent and reasonably predictable result.

[65] The four step process set out by the Court, in summary, was:⁵

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or 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 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.

⁴ Ibid at [67] and [68]. See also, *Xu v McIntosh* [2004] 2 ERNZ 448; *Tan v Yang and Zhang* [2014] NZEmpC 65, *O’Shea v Pekanga o Te Awa Farms Limited* [2016] NZEmpC 19 and *Otago Hotel, Hospital, Restaurant and Otago and Southland Laundry and Related Trades Industrial Union of Workers v Pacific Park Motor Inn Limited trading as Pacific Park, Dunedin and Ors* [1989] 1 NZILR 175.

⁵ *Borsboom*, above n3, at [151]

Penalties - application of the principles

Step One: nature and number of breaches

[66] As outlined in paragraph [2] above, the Labour Inspector alleged Binde breached s 6 of the MW Act 1983, ss 27, 49, 50, 56 and 81 of the H Act and s 65 of the ER Act in respect of 75 employees and s 5 of the WP Act in respect of one employee.

[67] There are 375 breaches of the H Act. There are 75 breaches of the ER Act. There is one breach of the WP Act.

[68] For each breach, Binde is liable for a maximum penalty of \$20,000 under ER Act. For 375 separate breaches of the H Act, Binde is liable for a total maximum penalty of \$7,500,000. For 75 separate breaches of the ER Act, Binde is liable for a total maximum penalty of \$1,500,000.

[69] The situation with the MW Act is more complicated because, at least theoretically, 75 separate breaches of the Act occurred for each employee on each day they worked. However, the Court in *Borsboom* expressed support for an approach derived, primarily, from Australia's Fair Work Act 2009 (Cth) that allows such breaches to be treated as a "single course of conduct".⁶ In which case, Binde's breaches of the MW Act would be 75 single course of conduct breaches. For those breaches, Binde is liable for a total maximum penalty of \$1,500,000.

[70] The situation is also more complex for Binde's breaches of the WP Act. Based on Jaskirat Singh's evidence, Binde breached s 5 of the WP Act on 24 separate occasions during the course of his employment. Again adopting the "single course of conduct" approved in *Borsboom*, Binde is liable for a maximum penalty of \$20,000 for one breach of the WP Act.

Summary

[71] At the end of step one, the maximum amount of penalties that could be imposed on Binde by the Authority for breaches of the four Acts is \$10,520,000.

⁶Tbid at [141].

[72] Given the significance of the amount of total potential penalties, it is appropriate to consider whether, and to what extent, “global” penalties should be imposed on Binde. This process will be undertaken at step two.

Step Two: severity of the breaches

Breach of the MW Act

[73] The failure to pay minimum wages is particularly serious.⁷ Binde’s level of default is very concerning. The number of employees affected (75) and the amount of arrears involved (\$185,974.52) is significant. Binde demonstrated no remorse and no attempts were made to ameliorate the effect of the breaches. Binde failed to respond to the Labour Inspector’s investigation report or engage in the early stages of the Authority’s investigation. Given the potential liability for penalties for breaches of s 6 of the MW Act has already been reduced by the application of the single course of conduct approach, it is appropriate to continue to view these as 75 separate breaches of that Act. These breaches warrant a starting point of 75 per cent of the maximum penalty of \$20,000, which is \$15,000 for each breach.

Breaches of the H Act

[74] The failure to pay holiday pay on termination under s 27 of the H Act is also particularly serious. Binde demonstrated no remorse and made no attempts to ameliorate the effect of breaches. However, it is important to be mindful of the need to arrive at a proportionate and just outcome. In the circumstances of these breaches, globalisation of penalties is more likely to achieve this relative to the amount holiday pay arrears owed by Binde (\$13,186.76). These breaches are similar and should be globalised, so that they are treated as one breach of s 27 of the H Act. While globalised, this breach remains of significant concern. This breach warrants 75 per cent of the maximum penalty of \$20,000, which is \$15,000.

[75] The breaches of ss 49, 50 and 56 of the H Act relate to the failure by Binde to pay its employees public holiday pay and alternative holiday pay. Binde demonstrated no remorse and made no attempts to ameliorate the effect of breaches. However, compared to the amount of minimum wages arrears owed by Binde, the amounts of arrears in respect of these breaches are not large. These breaches are similar and

⁷The seriousness of breaching the MW Act was observed by the Court: *Borsboom*, above n3, at [164].

should be globalised, so that they are treated as one breach of each section of the H Act. While globalised, these breaches also remain of significant concern. These three breaches warrant 75 per cent of the maximum penalty of \$20,000, which is \$15,000 for each breach.

[76] The breaches of s 81 of the H Act relates to the failure to keep holiday and leave records. These breaches should be treated globally, so that they are treated as one breach of that Act. While this breach hampered the calculation of arrears, it did not directly result in Binde's employees being deprived of income. This breach warrants 50 per cent of the maximum penalty of \$20,000, which is \$10,000.

Breach of the ER Act

[77] The breaches of s 65 of the ER Act relate to the failure to provide employment agreements (or compliant employment agreements). These breaches are similar and should also be globalised, so that they are treated as one breach of the ER Act. Of some significance, and unlike the other minimum standards breaches, Binde did make a modest attempt to comply with s 65 of the ER Act by providing a small number of employees with employment agreements, albeit non-compliant employment agreements. Also the breach did not directly result in Binde's employees being deprived income. This breach warrants 50 per cent of the maximum penalty of \$20,000, which is \$10,000.

Breach of the WP Act

[78] Binde unlawfully deducted \$28.00 a week for Jaskirit Singh's wages for a period of 24 weeks. As a consequence a modestly paid, migrant employee has been deprived of \$672.00 for a significant period of time. Binde demonstrated no remorse and made no attempts to ameliorate the effect of breaches. The breach by Binde of s 5 of the WP Act in respect of Jaskirit Singh is serious and it has had sustained consequences. This breach warrants 75 per cent of the maximum penalty of \$20,000, which is \$15,000.

Summary

[79] At the end of step two, there are 75 breaches of the WPA, five breaches of the H Act, one breach of the ER Act and one breach of the WP Act. The total maximum amount of penalties that could be imposed on Binde at this point of the process by the

Authority for breaches of the four Acts is: \$1,620,000. However, based on an assessment of the severity of the breaches, the provisional penalties have become \$1,220,000.

Step Three: means and ability of Binde to pay

[80] There is no evidence before the Authority of Binde's ability to pay these provisional penalties. The submission of Nirvan Singh for Binde, in recognising the potential liability for the imposition of very significant penalties, was that if penalties were imposed, they should be imposed at the lowest possible level.

[81] Nirvan Singh said that he had recently been appointed as accountant for Binde and he was endeavouring to put Binde's "books in order".

[82] It is not clear what, if any, cash or assets Binde holds. The situation is potentially complicated by the fact the Sutherland appears to now be contracting with another of Jujhar Singh's companies, Binde Recruit Limited. It may be, having been deprived of income from the Sutherland labour supply contract Binde is a "shell" of a company.

[83] In the absence of evidence about Binde's ability to pay the penalties, there is no adjustment made to the provisional penalties at this stage of the process.

Step Four: proportionality of outcome

[84] The Court in *Boorsboom* said the penalties imposed should be proportionate to the amount of money unlawfully withheld.⁸ The Labour Inspector calculated that the total amount unlawfully withheld by Binde was \$208,184.16.

[85] At this point in the process, provisional penalties stand at \$1,220,000. The amount of unlawfully withheld wages and holiday pay is approximately 17 per cent of this amount. Clearly, this is disproportionate. Further, there is little real prospect of the penalties in that amount being paid to the Crown. Indeed, the imposition of orders by the Authority requiring payment approaching \$1,500,000 (including arrears) would incentivise rapid liquidation of Binde.

⁸Ibid at [190]

[86] Standing back and assessing the proportionality of the outcome for Binde, it has become apparent that a further “globalising” process now needs to occur in respect of the breaches of s 6 of MW Act. This would appear to be the only sensible way to arrive a proportionate and just outcome. The provisional penalties for 75 breaches of the MW Act are currently \$1,125,000. The minimum wages arrears owed by Binde to its employees is \$185,974.52.

[87] In all the circumstances of the case, it is appropriate to impose a significant, but proportionate, penalty on Binde for breaching the MW Act. That penalty will be a global penalty of \$125,000, which is approximately 10 per cent of the total provisional penalties for the breaches.

[88] The overall result then, is that within 28 days of the date of this determination, Binde must pay the Authority, for subsequent payment into a Crown bank account, a total of \$220,000 in penalties comprising:

- (i) \$125,000 as a global penalty for breaching s 6 of the MW Act
- (ii) \$15,000 for breaching s 27 of the H Act;
- (iii) \$15,000 for breaching s 49 of the H Act;
- (iv) \$15,000 for breaching s 50 of the H Act;
- (v) \$15,000 for breaching s 56 of the H Act;
- (vi) \$10,000 for breaching s 81 of the H Act;
- (vii) \$15,000 for breaching s 5 of the WP Act; and
- (viii) \$10,000 for breaching s 65 of the ER Act.

Costs

[89] The Labour Inspector sought a reasonable contribution to legal costs, reimbursement of additional external administrative costs associated with preparing the claim and those associated with personal service (for which invoices were provided) and reimbursement of the Authority’s filing fee.

[90] On the basis of its internal accounting processes, the Ministry of Business, Innovation and Employment said the costs of providing legal services to the Labour Inspector were in the order of \$4,800.00. The amount was calculated at a notional rate of \$160 an hour for a senior solicitor multiplied by 30 hours. This comprised time taken to draft the statement of problem, attending case management conferences,

drafting evidence and submissions and preparing for and attending the investigation meeting. In my view, those costs were reasonably incurred. On the principle that costs follow the event, the Labour Inspector was entitled to a reasonable contribution to those costs of representation.⁹

[91] Those costs had to be assessed against the Authority's notional daily tariff of \$3,500 for applications lodged before 1 August 2016, for a full-day investigation meeting. This particular investigation meeting was completed within four hours. The starting point for assessing costs would be half of the daily amount – that is \$1,750. From that starting point, and in light of the actual and reasonably incurred costs of preparation and attendance at the investigation meeting, \$1,750 seemed a modest and reasonable contribution to require from Binde.

[92] Binde must pay \$1,750 to the Labour Inspector as a contribution to his costs of representation within 28 days of the date of this determination. *

[93] In addition, it is fair and reasonable in the circumstances of this case, for Binde to pay the Labour Inspector \$754.31 for additional external administrative costs associated with preparing the claim, \$283.59 as the costs associated with service and a further \$71.56 in reimbursement of the Authority's filing fee. Binde must pay these amounts to the Labour Inspector within 28 days of the date of this determination.

Andrew Dallas
Member of the Employment Relations Authority

⁹*G L Freeman Holdings Limited v Belley (A Labour Inspector)* [2016] NZEmpC 44 at [21].

SCHEDULE A

NAME	ARREARS OWED
1 Mao Tet	\$17,721.79
2 Bah	\$25,806.32
3 Jaskirat Singh	\$3,551.86
4 Surinderjit (Surinder) Singh	\$5,616.44
5 Baljinder Singh	\$8,869.12
6 Gurpreet Singh	\$376.12
7 Kulvir Singh	\$3,119.31
8 Prabjot Singh	\$7,834.86
9 Rohit Sharma	\$534.80
10 Kalandeep Singh	\$1,739.07
11 Avrinder Singh	\$784.89
12 Jatinder Singh	\$7,705.92
13 Guech Ear	\$21,354.70
14 Huot Danh (David)	\$10,329.20
15 Ong Bah	\$7,998.38
16 Hai	\$2,487.34
17 Bun Cheang Broom	\$9,130.84
18 Ankush Kumar	\$1,301.33
19 Mohit Sharma	\$664.08
20 Ramandeep Singh	\$61.56
21 Jatwinder Singh	\$270.81
22 Mandeep Singh	\$261.63
23 Heera Singh	\$8,391.73
24 Kirat Singh	\$3,972.83
25 Gurkaran Singh	\$671.96
26 Narinder Singh	\$2,757.43
27 Bhupinder Jit Singh	\$4,093.74
28 Simranjeet (Simran) Singh	\$5,912.38
29 Whare Ropiha	\$3,835.96
30 Sothea	\$530.96

31	Manpreet Singh	\$3,284.63
32	Ricky (Ricchi) Singh	\$525.88
33	Deep	\$135.41
34	Yadwinder Singh	\$35.63
35	Lali	\$2,342.32
36	Rajan	\$1,258.13
37	Daljit Singh	\$1,240.04
38	Inderjeet Singh	\$379.81
39	Kawaldeep Singh	\$1,627.49
40	Gurinder Singh	\$784.89
41	Paramjit Singh	\$784.89
42	Gurjit Singh	\$820.44
43	Lovepreet Singh	\$489.85
44	Gurdev Singh	\$4,503.53
45	Abhi	\$130.82
46	Charamjit Singh	\$792.59
47	Charnjit Singh	\$923.40
48	Harwinder	\$192.38
49	Harinder Jit Singh	\$130.82
50	Kong	\$261.63
51	Lay	\$392.45
52	Narinderjit Singh	\$1,339.50
53	Marinder Singh	\$1,989.16
54	Neang	\$511.72
55	OG	\$2,111.05
56	Vikoiam	\$130.82
57	Chheang	\$3,974.47
58	Happy	\$135.41
59	Harry	\$634.25
60	Jaswinder Singh	\$261.63
61	Jitinder Singh	\$1,384.50
62	Harpreet Singh Minhas	\$682.19
63	Pardip Singh	\$1,051.38
64	Ranjeet Singh	\$80.80
65	Rajbir Singh	\$245.81

66	Karamveer	\$398.25
67	Ramjit Sidhu	\$135.41
68	Inder	\$1,091.81
69	Harkamal Singh	\$250.75
70	Varun Kapoor	\$121.13
71	Parteek Sharma	\$645.31
72	Partik	\$376.13
73	Kaleo	\$1,154.25
74	Dap Em	\$230.85
75	Ranbir Singh	\$523.36
TOTAL:		\$208,184.16