Employment Court of New Zealand

Labour Inspector v Daleson Investment Limited [2019] NZEmpC 12 (11 February 2019)

Last Updated: 16 February 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2019] NZEmpC 12
EMPC 93/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	DALESON INVESTMENT LIMITED Defendant

Hearing:	1 November 2018 (Heard at Auckland)
Appearances:	A Dumbleton, counsel for plaintiff W Chen, agent for defendant
Judgment:	11 February 2019

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Daleson Investment Limited ran a liquor store in Onehunga. The Labour Inspector carried out an investigation into complaints that it had underpaid a number of workers, in breach of the applicable minimum statutory requirements. The Labour Inspector pursued a claim for lost wages and for penalties. The Employment Relations Authority upheld the claim for lost wages, ordering the company to pay $12,542.52 plus interest.1 The Authority adjourned the penalties aspect of its investigation to provide an opportunity for the company to pay the outstanding wages. The company subsequently paid the amount ordered against it, although not the interest component

1 *Labour Inspector v Daleson Investment Ltd* [2017] NZERA Auckland 92 (arrears determination).

of it. The issue of penalties then came back before the Authority. Despite adopting a starting point of $220,000 in relation to penalties, the end-point the Authority arrived at was 0.1 per cent of this figure, namely $220.2

[2] The Labour Inspector's challenge is primarily focused on what is said to be the manifest inadequacy of the penalty imposed and the Authority's approach to penalty setting, which the Labour Inspector contends reflects errors of fact and law.

[3] While the challenge proceeded on the basis of the material which was before the Authority at the time it reached its

determination on penalties, updated evidence in relation to the company's current financial position was given at hearing. In summary, the company is no longer trading, has limited assets and has been on-sold. As it transpires, the company is now part-owned by the directors' son.

[4] The defendant advised that it is in the Court's hands as to appropriate penalty but wished to emphasise three particular points. The first is that it believed that one of the affected employees had stolen from the company and his wages had been underpaid to reflect this. Once the Authority ordered that wage arrears be paid, the company did so immediately. The second, related, point is that the directors of the company did not have a good understanding of the Authority's processes and this undermined the company's ability to feed into the Authority's two investigations. The third point is that if the multiplier referred to in some of the cases cited in the Labour Inspector's submissions is adopted, it would result in a substantially reduced penalty to that sought by the Labour Inspector. It was also submitted that one of the underpayments was due to an administrative error.

The factual context

[5] The facts can be summarised as follows.

2. *Labour Inspector v Daleson Investment Ltd* [2018] NZERA Auckland 79 (penalties determination).

[6] The defendant company traded under the name Thirsty Liquor Onehunga. It employed a number of workers, including one employee who was a migrant from overseas (Mr Singh) and whose work visa was tied to the company.

[7] The Labour Inspector received a complaint about the working conditions of employees of the company and instigated an investigation. The Labour Inspector advised the company of the results of the investigation and her findings that six employees (including Mr Singh) had been underpaid minimum wages and holiday pay, and that other breaches had occurred in relation to statutory record-keeping and documentation requirements. The Labour Inspector subsequently took recovery action against the company and sought penalties for breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000 (the Act), in respect of the six employees.

[8] The Labour Inspector filed written submissions in advance of the Authority's investigation, setting out (in relation to the claim for penalties) the principles which were said to emerge from the full Court's judgment in *Borsboom v Preet PVT Ltd.*3 She identified 14 alleged breaches giving rise to the imposition of a penalty, and sought penalties amounting to $80,000 after a reduction from a starting point of $280,000. During the course of the Authority's investigation meeting (which took place on 29 March 2017), the Authority orally examined the Labour Inspector and Mr Singh. The company did not appear or seek to be heard.

[9] Following the investigation meeting, the Authority issued a determination, finding that the company had breached its obligations in relation to six employees.4 It ordered arrears of $12,542.52, plus interest at five per cent. The Authority made an order in favour of Mr Singh for a sum higher than that originally sought by the Labour Inspector, because it determined (of its own motion) that Mr Singh had been underpaid his contractual wage rate which (at $16 per hour) was higher than the statutory minimum wage rate claimed, of $14.25. As Mr Dumbleton noted during the course of submissions in this Court, there is no power to make such an order in the context of a

3 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072.

4 *Daleson* (arrears determination), above n 1.

claim by the Labour Inspector in respect of minimum entitlements.5 The total figure for penalty-setting purposes was accordingly too high.

[10] The Authority deferred imposing any penalties. Rather, it gave the company an opportunity to pay the amount of arrears and interest awarded against it. In doing so the Authority made it clear that any such payment would "affect the amount of penalties (if any) that may be awarded." The Authority directed that the penalties claim would be heard in June/July 2017 on the papers.6

[11] On 11 May 2017 the company paid the arrears of wages ordered against it. No interest was paid at the time. The Labour Inspector invited the Authority to proceed to deal with the penalties application, and further submissions were filed by the Labour Inspector. The Authority subsequently issued a direction requiring the company to provide information in relation to its financial situation. The company filed limited information on 22 September 2017.

[12] The Authority then provided both the Labour Inspector and the company with an opportunity to provide additional submissions on penalties, by 7 November 2017. The company paid the outstanding interest on 8 November 2017. The Labour Inspector filed and served further written submissions. The company did not.

[13] As the Authority member noted in its determination, the defendant took a limited role in the investigation. The

company now says that it misunderstood the Authority's process, although acknowledges that when it raised issues in respect of this, counsel for the Labour Inspector drew its attention to the challenge rights contained within the Act and also the ability to apply for a rehearing. Neither step was taken. It is also notable that the company directors confirmed in written submissions before the Court that they have been employing workers for a number of years and are well aware of their employment obligations.

5. *GSTech v A Labour Inspector of Ministry of Business, Innovation and Employment* [2018] NZEmpC 84 at [9].

6 *Daleson* (arrears determination), above n 1, at [4].

The Authority's penalties determination

[14] The Authority delivered a brief determination on 5 March 2018, awarding a total of $220 in penalties against the company.7 Because of its brevity, the Authority's factual findings and its determination of the issues before it can be set out in full:

Relevant Facts

[2] The Labour Inspector seeks penalties for breaches for:

a. Failure to pay two employees the minimum wage pursuant to s10 Minimum Wage Act 1983 (MWA);
b. Failure to pay holiday pay to four employees pursuant to s75(1)(b) and (2)(a) of the Holidays Act 2003 (HA);
c. Failure to pay public holiday pay to four employees pursuant to s75(1)(b) and (2)(c) of the HA;
d. Failing to provide a written employment agreement pursuant to s64 and 135 of the Employment Relations Act 2000 (ERA).

Non-appearance by respondent

[3] The respondent has not participated in this investigation other than to pay the arrears and provide evidence about its financial circumstances. No other steps have been taken to defend the issue of penalties. In the circumstances I intend determining this matter without further reference to them.

Determination

[4] Sections 10 MWA, s76A HA and s64 ERA all refer to s133A or to the recovery of penalties under the ERA. The Court has also issued a decision known as *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited* that also deals with penalties involving multiple breaches.

[5] The nature and extent of the breaches here were originally 11 breaches that on *Borsbooms* analysis could have garnered penalties of $220,000.

[6] At hearing there was clearly an issue about the majority of the wages and holiday pay owed to Mr Singh. The wage arrears have also been paid in full indicating an admission and remedial action. The failure to provide a written employment agreement has not and probably cannot be remedied as Mr Baksh is no longer employed and was not produced at hearing. No loss has been suffered by him although non-compliance with the statute is an issue.

[7] In the circumstances the penalties are reduced to $220.

7 *Daleson* (penalties determination), above n 2.

Alleged errors of fact and law

[15] The Labour Inspector alleges that the Authority erred in law by imposing a penalty that was "disproportionately small, inadequate and inappropriate", having regard to the maximum penalty prescribed for a breach; the objects of the relevant legislation; s 133A of the Act (which sets out the matters to which the Authority must have regard in determining the amount of penalty for any breach); the judgment of the full Court in *Preet*; the purposes for which penalties are imposed; the facts presented to the Authority; the facts established in the Authority; and other penalty determinations of the Authority. It is further alleged that the Authority erred in law in failing to sufficiently state relevant findings of fact; or sufficiently state and explain findings on relevant issues of law; or sufficiently express conclusions on matters requiring determination, as required by s 174E(a) of the Act.

[16] The Labour Inspector seeks an order setting aside the penalties awarded by the Authority and a substituted order requiring the defendant to pay penalties to the Crown. I understood the Labour Inspector to seek a substituted order of $40,000 during the course of the hearing and having regard to the particular circumstances of this case.

What is the legal framework for the penalty-setting exercise?

[17] In order to deal with the Labour Inspector's claim that the Authority misapplied the law, it is necessary to understand what the law in relation to penalty-setting is. The starting point is the Act. It sets out the breaches which can give rise to the imposition of a penalty (namely breach of an employment agreement or breach of any provision of the Act for which a penalty in the Authority is provided in the particular circumstances).8

[18] Having decided that a breach or breaches have occurred the Authority/Court is then required under the Act to have regard to numerous considerations in determining the amount of penalty to impose. In this regard s 133A provides:

8 Employment Relations Act 2000, s 133.

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
(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.

[19] I recently summarised what I perceive to be the applicable framework when setting an appropriate penalty, having regard to the statutory requirements and following the full Court's judgment in *Preet*.9 The considerations follow (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case): the object stated in s 3 of the Act (statutory consideration 1); the nature and extent of the breach or involvement in the breach (statutory consideration 2); whether the breach was intentional, inadvertent or negligent (statutory consideration 3); the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (statutory consideration 4); whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5); the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6); previous conduct (statutory consideration 7); deterrence, both particular and general (*Preet* additional consideration); culpability (*Preet* additional consideration); consistency of penalty awards in similar cases (*Preet* additional consideration); ability

9 *Nicholson v Ford* [2018] NZEmpC 132 at [18]; citing *Preet*, above n 3.

to pay (*Preet* additional consideration); and proportionality of outcome to breach (*Preet* additional consideration).

[20] In *Preet* the Court identified a four-step process as helpful.10 Step 1 requires the Court to determine the number and nature of the breaches. This in turn involves four sub-steps - identify the number of breaches; identify the nature of each breach (for example, a breach under the Holidays Act; Minimum Wages Act etc); identify the maximum penalty for each of the identified breaches; and consider whether "global" penalties should apply ("globalisation" might be considered at this stage and "at all or at some stages of this stepped approach"). Step 2 - establish a provisional starting point by assessing the severity of the breach in each case. Aggravating and mitigating features are considered. 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. The final step, the Court said, required standing back and assessing whether the final penalty was proportionate to the original amount in issue, including whether the final penalty was likely to be paid, if ordered against the employer.11

[21] Insofar as the present case is concerned, the point is whether the Authority made an error, or errors, of law in relation to its approach. The short answer is yes, for reasons which become apparent from an analysis of each of the considerations as they apply to the circumstances of this case.

Nature of each breach

[22] There was a failure to pay two employees the minimum wage under the Minimum Wage Act; a failure to pay four employees holiday pay under two related provisions of the Holidays Act; a failure to pay public holiday pay to four employees under two related provisions of the Holidays Act; and a failure to provide one employee with a written employment agreement.

10 At [19], referring to *Preet*, above n 3, at [151].

11 *Preet*, above n 3, at [190]-[191].

What is the number of breaches for penalty-setting purposes?

[23] As observed in *Nicholson v Ford*, applying *Preet*, the answer to this question will depend on whether the breaches are to be regarded as separate or indivisible for penalty purposes:

(a) Breaches of different statutory provisions in different Acts (such as unpaid holidays entitlements, breach of the minimum wage, and the failure to provide a written employment agreement) comprise separate breaches, falling into the former (separate breaches) category.12

(b) Materially identical breaches of a regularly repeated nature against each affected employee fall into the second category (indivisible breaches) and may therefore give rise to a single penalty in respect of each separate employee affected.

(c) Breaches of different provisions of one Act might fall within the indivisible breach category, depending on whether such breaches were sufficiently "interrelated" that it is appropriate to deal with them as one breach (again I would add the additional gloss identified above). Breaches of different sections of the Holidays Act relating to working on and being paid for public holidays are, following *Preet*, to be regarded as one breach.13

[24] Applying the approach to separate and indivisible breaches in *Preet* would lead to two separate breaches for the failure to pay two individual employees the minimum wage on an ongoing basis; four separate breaches for the failure to pay four individual employees holiday pay under two related provisions of the Holidays Act and for the failure to pay public holiday pay under two related provisions of the Holidays Act (on the basis that all four provisions are sufficiently interrelated) and one breach for the failure to provide a written employment agreement. That accordingly leads to seven (not 11) penalisable breaches applying the *Preet* separate breach/indivisible breach approach.

12 At [153]-[155].

13 At [157].

[25] The maximum penalty for each separate breach is $20,000. Following *Preet*, the maximum total penalties in this case is, accordingly, $140,000.

[26] It appears from the discussion in *Preet* that globalisation can occur across the penalty-setting exercise, and either wholly or in part. A global approach can apply in circumstances involving more than one defendant; and/or more than one employee; and/or multiple penalties (the latter point appears to be a different way of referring to separate or indivisible penalty-setting). In this case there is one employer and more than one employee. I see no reason why separate penalties for each of the breaches should not apply, leading to a total amount.

Statutory consideration 1: the object stated in s 3

[27] The circumstances of this case reinforce the need to promote the obligation of good faith, mutual trust and confidence, and to address the inherent inequality of power between employer and employee. It can be inferred that the failure to provide an employment agreement put the employee at a disadvantage and arose in circumstances involving a distinct power imbalance. There is nothing in the determination to suggest that this factor was taken into consideration. The end-point suggests that if it was taken into account it was given no weight.

Statutory consideration 2: the nature and extent of the breach or involvement in the breach

[28] The Authority identified each of the breaches and touched on the extent of the breach, in its substantive determination.

[29] The company was responsible for the breaches that occurred, although it is now said that in relation to one employee underpayment resulted from a degree of ignorance of the law, including that they thought it was permissible to stop paying him to make up the short-fall in terms of the money he is alleged to have stolen from them. That was not an option that was available and does not provide an excuse. They would have had to pursue other remedies for the recovery of any amount

alleged to have been stolen. This point does not emerge from the Authority's determination.

Statutory consideration 3: whether the company's breach was intentional, inadvertent or negligent

[30] The breaches were plainly intentional, as is implicit in the Authority's penalty determination and as is expressly referred to in its earlier substantive determination. The intentional nature of the breaches (an aggravating factor) does not emerge as a factor that was taken into consideration by the Authority.

Statutory consideration 4: the nature and extent of any loss or damage suffered by the employee or gains made or losses avoided by the employer because of the breach or involvement in the breach

[31] The Authority expressly dealt with this factor in relation to the non-provision of a written employment agreement, finding that no loss had likely been sustained. No reference was made to the losses sustained by virtue of the other breaches. As Mr Dumbleton pointed out, at the very least the affected employees lost the use of the money they were entitled to at the time it became due. Conversely, the company received the benefit of the money it was not entitled to retain. Through the breach the company was able to reduce the costs it would otherwise have incurred and, in this sense, gain an unfair advantage over its competitors. Such losses and gains were not referred to in the Authority's determination and do not appear to have been taken into account by it.

Statutory consideration 5: whether the company has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach

[32] The only step the company has taken is to pay the amounts it was found liable to pay. The Authority Member clearly took this factor into account, regarding it as reflecting "an admission" and "remedial action".14 It can be inferred that this mitigating factor, together with the assessment of established loss, were what drove the starting point of $220,000 down to the ultimate figure of $220. This placed disproportionate weight on the fact of payment and what could be drawn from it, leading to a manifestly inadequate penalty.

14 *Daleson* (penalties determination), above n 2, at [6].

[33] While mitigating actions are relevant to the penalty-setting exercise, care needs to be taken not to create perverse incentives, encouraging employers to sit on their hands until forced, by virtue of a determination of the Authority, to pay what was previously due.15 The Australian Fair Work Commission put it in the following way in *Fair Work Ombudsman v Australian Sales & Promotion Pty Ltd*:16

I do not agree that payment of sums owed is evidence of contrition ... Belatedly doing what the law required to be done at an earlier time amounts to no more than the late performance of a duty.

[34] It goes without saying that the Labour Inspector does not have the resources to pursue every underpayment claim on behalf of affected employees. Employers, who might otherwise be minded to seek to avoid their obligations, need to be encouraged to comply without waiting for the Labour Inspector to intervene. I see strength in the observation in *Fair Work Ombudsman v AIMG BQ Pty Ltd* that:17

In the absence of... any evidence of genuine contrition or corrective action, the only inference the Court can draw is that rectification of the underpayment appears more a matter of expediency, a *"cost of doing business"*, than an acceptance of wrongdoing.

[35] In the present case there is no evidence of remorse or contrition. The company paid the money owed to the employees but only after it was ordered to do so, and no other steps were taken to address the losses the employees had suffered by its default. Mr Dumbleton acknowledged that the company's payment was relevant as a mitigating factor. I agree with his overarching submission that to allow a substantial discount in the circumstances of this case, as the Authority appears to have done, would run the risk of encouraging the very thing the legislation is designed to discourage. In *Preet* and *A Labour Inspector v Prabh Ltd*, discounts of 50 per cent were applied overall for mitigating factors.18 It is not clear what proportion of those discounts were directed at payment before hearing, although it is apparent in *Preet* that the Court saw such payment as evidence of a real intention to rectify the default.19 I do not think the same thing can be said of the payment in this case. As I have said, it

15 See Employment Relations Amendment Bill (No 2) (196-1) (explanatory note) at 11; cited in

Preet, above n 3, at [58].

16 *Fair Work Ombudsman v Australian Sales & Promotion Pty Ltd* [2016] FCCA 2804 at [82].

17 *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024 at [113].

18 *Preet*, above n 3; *A Labour Inspector v Prabh Ltd* [2018] NZEmpC 110.

19 *Preet* at [179].

appears that the Authority applied a very significant discount to reflect the plaintiff's payment following the institution of proceedings, after the substantive determination but before the penalties hearing. In the particular circumstances, and having regard to the general level of discounts which emerge from the cases to date and the desirability of broad consistency, 20 per cent would (in my view) set the outer limit. The apparent discount allowed by the Authority in this case falls well outside the range and was in error.

Statutory consideration 6: the circumstances in which the breach, or involvement in the breach, took place, including the employee's vulnerability

> [36] The breach occurred over a period of around 19 months. Mr Singh was in a particularly vulnerable position, as the company would have been aware, because his employment was linked to his visa. These matters were not expressly referred to in the Authority's determination and it cannot reasonably be inferred that they were taken into account.

Statutory consideration 7: whether the company has previously been found in proceedings under the Act or any other enactment, to have engaged in similar conduct

> [37] There is no evidence to suggest that the company has been found to have engaged in similar conduct in the past, and the Authority made no finding one way or another.

Preet additional consideration 1: deterrence, having regard to the particular person to be penalised and the wider community of employers

> [38] The Authority made no express mention of this consideration and the final figure alighted on (namely $220) strongly suggests that it was a factor that received little, and probably no, weight.
>
> [39] While there is nothing to suggest that the company has previously engaged in similar conduct, there is a need to bring home to it the employment standards it is required to meet as an employer. It should also be made plain, including to other employers, that minimum entitlements are non-negotiable, are not to be met merely when it suits the employer, or when they are put under pressure by the Labour

Inspector, the Authority or the Court to do so, and cannot be put to one side when it is considered convenient or justified for whatever reason (in this case on the basis of alleged misconduct by the employee).

Preet additional consideration 2: degree of culpability

> [40] The Authority did not refer expressly to this consideration and it cannot be inferred that it was taken into account. There were a number of factors which increased the company's culpability, to which I have already referred, and which should have weighed in favour of a more substantial penalty.

Preet additional consideration 3: the general desirability of consistency in decisions on penalties

> [41] The Authority referred to *Preet* but that appears to have been directed to the starting point assessment. It made no express reference to other cases, and the awards made in them. In *Preet* and *Prabh*,20 which involved multiple breaches against five employees in one case and three in the other, penalties of $100,000 were imposed, from a maximum starting point of $400,000 in the former and $381,225.96 in the latter. *Preet* also involved penalties imposed under Part 9A of the Act for serious breaches. There appears to be no case in which a penalty of the quantum in this case has been imposed, including in circumstances where the amount of outstanding wages has been paid by the employer prior to the penalty-setting hearing. All of this reinforces a conclusion that consistency across the cases was not a factor that fed into the Authority's determination.

Preet additional consideration 4: ability to pay

> [42] The company did place before the Authority limited financial information to which the Authority member referred in passing in the determination. It is unclear what, if any, weight the company's financial capacity had in the Authority's final determination. What is clear is that the information put before the Authority by the company could not reasonably have led to the reduction in final quantum that was

20 *Preet*, above n 3; *Prabh*, above n 18.

applied, even having regard to the pre-payment issue (which I have already referred to).

> [43] The company's present position, as at the date of hearing, appears to be that it is not trading but is still registered. Although the financial statements lacked detail, I understood Mr Dumbleton to accept that the company likely had no present ability to pay via its own resources, but that it might nevertheless find the means to meet any order against it as it had done (through the two directors) when faced with the Authority's substantive orders. Mr Dumbleton noted that there is no certainty as to what the company's future might hold and that it would be beneficial to the Labour Inspector to have a penalty order in her "back pocket" to draw out in the event that the company enjoys a change of fortune.
>
> *[44] Prabh* is a recent case involving a defaulting company with a very limited ability to pay. There the Court accepted that financial capacity was a relevant factor and reduced the penalties it would otherwise have ordered, but only by 20 per cent, and said nothing about whether that discounted amount would likely be paid or not.21 Balancing the other, aggravating, factors, the Court imposed significant penalties against the company.22 This reflects that a weighting exercise is required having regard to the particular circumstances. Mere financial incapacity, without more, is unlikely to be regarded as warranting a penalty reduction to nil, or next to nil, having regard to the relevant statutory scheme and its underlying objectives.
>
> [45] I pause to note that it is not uncommon for company fortunes to ebb and flow. Liability to pay a penalty is different from subsequent enforcement. This is particularly so in circumstances where Parliament has set out an extensive list of considerations and the financial circumstances of the defaulting party is not one of them. That is not to say that it is irrelevant – and s 133 makes it plain that the list is not exhaustive.23 It is clear, however, that it is not a factor that Parliament itself considers pivotal to the penalty-setting exercise.

21 *Prabh*, above n 18 at [70].

22. The Court in *Prabh* arrived at figures of $100,000 against the company, and $16,000 against each director.
23. The Court in *Preet* described this factor as a "relevant consideration", but not as an absolute; *Preet*, above n 3, at [80].

> [46] In this regard it is notable that Parliament provided that the Authority/Court would address issues of financial capacity via a particular route, namely a payment by instalment regime. While *Preet* confirmed that financial capacity, and likelihood of payment, were relevant it seems to me that placing too much weight on financial circumstance of the defaulting individual or company runs the risk of skewing the underlying statutory scheme. At the end of the day, and as *Prabh* makes clear, it is one factor of many; it ought not to be given disproportionate weight.

Preet additional consideration 5: is the anticipated outcome proportionate to the breach or breaches for which the penalty is imposed?

> [47] Again, a reduction to the amount allowed by the Authority would very likely lead to perverse incentives, with defaulting employers applying a cost/benefit approach to taking a chance with non-payment. Rather than supporting the objectives of the Act, such a minimal penalty would likely undermine them. The point about minimum entitlements is that they are just that – entitlements, to be paid as and when they fall due, not when recovery action is instituted.
>
> [48] The Authority made errors of fact and law in arriving at the final quantum for penalty purposes.

Error of law: failure to give reasons

> [49] The second part of the Labour Inspector's challenge relates to an alleged error of law by the Authority in failing to explain adequately its reasons for arriving at the figure of $220; and/or the failure to apply the law as to remedy-setting correctly.
>
> [50] Section 174E (Content of written determinations) provides:

A written determination provided by the Authority in accordance with section 174A(2), 174B(2), 174C(3), or 174D(2)-

(a) must –

(i) state relevant findings of fact; and
(ii) state and explain its findings on relevant issues of law; and
(iii) express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and
(iv) specify what orders (if any) it is making; but

(b) need not –

(i) set out a record of all or any of the evidence heard or received; or
(ii) record or summarise any submissions made by the parties; or
(iii) indicate why it made; or did not make, specific findings as to the credibility of any evidence or person; or
(iv) record the process followed in investigating and determining the matter.

[51] The nub of the Labour Inspector's case is that the determination jumps from what appears to be a provisional starting point of penalties totalling $220,000 to a final figure of $220 (or 0.1 per cent of the maximum). It is said that this is without adequate explanation of how either the original figure or the final figure was arrived at. It is tolerably clear that three factors were taken into account and led to the figure of $220, namely:

(a) The wage arrears having been paid in full, which the Authority took as an admission and representing remedial action;
(b) the fact that the company's ability to remediate the failure to provide a written employment agreement was limited, because the employment had come to an end; and
(c) the fact that, while non-compliance with the statute was an issue, no employee loss was sustained.

[52] A cross-reference to the considerations identified above reflects that a number do not emerge as having informed the Authority Member's decision, (including, for example, the need to have regard to the objects of the Act), as I have already concluded.

[53] I do not think that the Authority can be criticised fairly for omitting a detailed analysis of *Preet*, particularly where the Court made it clear that it was not attempting to prescribe the approach to be taken to setting penalties. That case was factually convoluted, involving multiple breaches across statutory provisions and multiple employees and multiple employers. The structured approach set out by the full Court was designed to provide a framework for analysis in the context of the case but is not

one that, at least in my view, needs to be slavishly applied in every case – including cases such as this, where there are a limited number of breaches by one employer involving a limited number of employees.

[54] Nor is it appropriate to apply a gold-star standard of perfection to determinations of the Authority. The Act specifically mandates otherwise, and makes it clear that the Authority is expected to process its work in an expeditious manner. The need to give reasons contained within s 174E must be read with other provisions and within the broader context of the Act, including having regard to the way in which Parliament intended the Authority to operate. Compliance with the provision does not require the Court to apply a microscope to the task of assessing whether the minimum standard (as opposed to the gold-plated standard) has been met. A sense of realism must be brought to bear; otherwise it runs the risk of making a difficult job even more cumbersome, and of undermining Parliamentary intent.

[55] Was enough done? The obligation to identify adequate reasons for a decision has been discussed in a number of recent cases spanning different jurisdictions and was usefully summarised in *Butch Pet Foods v Mac Motors Ltd, Ngati Hurungaterangi v Ngati Wahiao*, and *Flannery v Halifax Estate Agencies Ltd*.24

[56] At its most fundamental level, the duty to give adequate reasons is a function of due process and therefore justice. As the Court of Appeal observed in *Ngati Wahiao*, reasons are the articulation of the logical process employed by the decision maker, and serve to concentrate the mind. The ultimate decision is likely to be soundly based if a reasoned approach is brought to bear.

[57] In the present case the brevity, and contents, of the determination cast sufficient doubt on the rationale for the result, and how it was arrived at, so as to fall below the s 174E bar.

24 *Butch Pet Foods v Mac Motors Ltd* [2017] NZHC 2473; *Ngati Hurungaterangi v Ngati Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770; and *Flannery v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811; [2000] 1 WLR 377 (CA Civ)).

Quantum recalculation

[58] The Authority erred in its approach to setting a penalty in the circumstances of this case. Its penalty order must be set aside. That means that I must consider the appropriate quantum of penalty.

[59] It will be apparent from the above that I regard a starting point of $140,000 as appropriate having regard to the number and nature of the breaches. I have already referred to each of the relevant factors as they apply in this case. I would allow two discounts in the particular circumstances - a discount of no more than 20 per cent for financial capacity for the reasons I have traversed and a discount of no more than 15 per cent for payment in advance of the penalty hearing. Some cases may warrant a higher amount for pre-hearing payment, including where attempts have been made at an early stage to make good the wrong. This case is not in that category. That leads to provisional figure of $91,000.

[60] The full Court in *Preet* suggested that two factors were of particular relevance in the proportionality (or "totality") exercise: (i) proportionality of the final penalty to the amount originally at issue, and (ii) whether there was any real prospect that the final amount would be paid.

[61] I have already dealt with the second factor, which links back to *Preet* additional consideration 4. I do not consider it necessary or appropriate to allow a further discount in the particular circumstances of this case. As to the first factor, Mr Dumbleton drew my attention to divergent approaches to proportionality which he submits can be detected in recent penalty determinations from the Authority. It emerges that in some cases a proportionality analysis has been applied to give a final penalty figure on a ratio basis, namely 1:1.2-1:1.5.25 As the defendant submits, applying a ratio of this sort would lead to substantially lower penalties than that originally sought by the Labour Inspector.

25 See, for example, *A Labour Inspector of the Ministry of Business, Innovation and Employment v White Developments Ltd* [2017] NZERA Christchurch 87 at [49]-[53], and the determinations cited therein.

[62] I have doubts about the utility of a ratio-based approach to penalty setting in anything other than the loosest possible cross-check sense. If Parliament had intended the process to be driven by a simple comparison between the original amount in default and the final penalty quantum, there would be no need to go to the trouble of specifying an extensive range of relevant factors. Nor would there be any merit in applying a *Preet* four-step approach, if the final answer could be arrived at by way of a basic mathematical calculation. Each case will be intensely dependent on its own facts, and the final step (of standing back and assessing the justice of the figure proposed to be imposed in all of the circumstances) will, by necessity, be one of general impression.

[63] It is true that the amount at issue was not significant in comparison to some other cases involving the imposition of a penalty, but quantum needs to be viewed in context. The amount at issue was no doubt of particular significance to the employees who were affected by its non-payment and in a vulnerable position. I do however consider that, standing back, an adjustment is warranted. As I have said, Mr Dumbleton's final suggested figure was $40,000. I understood this to be based on a range of factors, including the amount originally at issue but also having regard to the particular path this case has taken and the steps the defendant has been required to take. While I consider that a penalty in excess of this figure would not be inappropriate and $40,000 might be regarded as generous, I am prepared to accept it.

[64] The Authority's penalty orders are set aside. Penalties totalling $40,000 are ordered against the company.

Outcome

[65] The Authority made errors of fact and law in its penalty determination. The determination is set aside in so far as the penalty order is concerned, and the following orders stand in its place:

(a) The defendant is ordered to pay to the Crown the sum of $40,000 by way of penalties.
(b) This amount is to be paid in full no later than 4 pm on 11 March 2019.

Costs

[66] Costs are reserved at the request of the Labour Inspector. If they cannot otherwise be agreed, memoranda may be filed, with the Labour Inspector filing and serving within 15 working days; any reply by the defendant within a further 15 working days; anything strictly in response within a further five working days.

Christina Inglis Chief Judge

Judgment signed at 4 pm on 11 February 2019