IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 333
3001414

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	GENGY'S MANAGEMENT LIMITED First Respondent
	AND	NZ DURHAM LIMITED Second Respondent
	AND	NZ C & J LIMITED Third Respondent

Member of Authority:	Robin Arthur
Representatives:	Alastair Dumbleton, Counsel for Applicant Michael Kim, Counsel for the Respondents
Investigation Meeting:	On the papers
Submissions Received:	4 and 8 August 2017 from the Applicant and 4 August 2017 from the Respondent
Date of Determination:	24 October 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Labour Inspector Jackie Sun sought orders for penalties to be imposed on the three respondent companies for a small number of breaches of the Minimum Wage Act 1983 (MWA) and a larger number of breaches of the Holidays Act 2003 (HA). The companies operated restaurant businesses. Each company was under the control of Wonki (Monty) Cho who was the sole director and shareholder.

[2] Negotiations between counsel for the Inspector and the three companies had resulted in agreement for the payment of arrears arising from those breaches. Gengy's Management Limited agreed to pay $3,870.72 to the Inspector for the use of

the 17 workers affected by those breaches. NZ Durham Limited agreed to pay $22,083.70 to the Inspector for the use of 37 workers affected by the breaches. NZ C&J Limited had agreed to pay the Inspector $71,375.84 to the Inspector for the use of 78 workers affected by the breaches.

[3] Two issues remained for determination. One specific question concerned whether one particular person was an employee or not. The other was the broader question of what level of penalties to set for these breaches of statutory employment standards, applying the steps described by the Employment Court in *Borsboom v Preet PVT Limited.*[1] Those steps consider:

(i) the nature and number of breaches and potential maximum penalties;
(ii) adjustments from those maximums to take account of any aggravating or mitigating factors;
(iii) the employers' financial circumstances; and
(iv) whether any further adjustment of penalties is required to provide for a proportionate outcome.

[4] This matter has been determined on the papers. Those papers included an agreed statement of acts, thorough submissions from counsel, and witness statements lodged before the parties had agreed on settlement of arrears payments.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received. It has stated findings of fact and law, expressed conclusions on the issues requiring resolution and specified orders made.

The issues

[6] The specific questions for resolution include the following:

(i) Was Doo Yeon Kim, a chef who worked at one restaurant on 7, 8 and 9 March 2016, really a "volunteer" in carrying out tasks she did on those days, as she and Mr Cho claimed, or was she, as far as the law was concerned, really an employee so that failure to pay her for work on those days amounted to a breach of the MWA?

[1] [2016] NZEmpC 143 at [152]-[198].

(ii) Should four breaches of the Minimum Wage Act be excluded from the calculation of penalties because they were for very small amounts and said to have resulted from a computational error?

(iii) Should some breaches of the Holidays Act be excluded from consideration in setting penalties because those breaches were for minor amounts and arose out of a computational error?

(iv) Allowing for any adjustments made under (ii) and (iii), what was the nature and total number of breaches by each of the respondent companies and the consequent potential maximum penalties, including considering whether "global" penalties should be considered for those breaches rather than each individual breach generating a liability for the potential maximum penalty?

(v) How severe were those breaches, considering aggravating factors that may have made those breaches worse and mitigating factors that could warrant a reduction from the provisional maximum penalty amounts?

(vi) Did the financial circumstances of the respondent companies warrant a reduction in the provisional level of penalties?

(vii) Was the level of provisional penalties reached by applying those earlier steps a proportionate outcome for the nature and gravity of the breaches of employment law in this particular matter or was some further adjustment appropriate?

The status of Ms Kim

[7] The Inspector sought a penalty for a breach of the MWA because Ms Kim was not paid at least minimum wages or holiday pay for three working days she spent at the restaurant operated by NZ Durham Limited. While the agreement between the Inspector and respondent companies for payment of arrears included amounts for wages and holiday pay she would have been entitled to as an employee for work on 7, 8 and 9 March 2016, NZ Durham Limited denied she was its employee at that time. Instead Ms Kim and Mr Cho said Ms Kim attended training sessions as a volunteer on those days. Mr Cho said he had not asked her to do so. She provided a written statement to the Inspector saying she was a volunteer and was not coerced in any way to be there without pay. She confirmed those comments in a statement written for the Authority investigation.

[8] Ms Kim, a 37 year old from South Korea, had worked at the restaurant in 2013. When she returned to New Zealand in 2016 she applied for a work visa in order to take up a further period of employment with the company. She arrived on a visitor's visa in 2016. This was replaced with an interim visa while her work visa application was being processed. She had signed an employment agreement that was associated with that work visa application on 17 February 2016. The agreement provided for a work commencement date subject to approval of her work visa application. She was granted the work visa in June 2016.

[9] The query about Ms Kim's status only arose because she was on the restaurant premises when an inspector conducted a workplace compliance inspection on 9 March. The inspection was made after two previous employees of one of the companies had complained they were not properly paid their holiday pay. A visiting inspector found Ms Kim wearing a company uniform and had her answer an employee questionnaire form.

[10] Ms Kim is no longer employed by NZ Durham Limited. The respondents submitted that, as her current visa status was not dependent on them, there was no reason to doubt what she said about not being required to work and not wanting wages for those days. They said Ms Kim expected no reward for the time she spent at the restaurant on those days and there was no intention to take advantage of any vulnerability due to her immigration status. However, even accepting those descriptions as correct would not negate the inspector's analysis that Ms Kim was an employee and not a mere volunteer.

[11] Ms Kim had signed an employment agreement in February. She was therefore a person who had been offered and accepted work as an employee. This brought her within the scope of the definition of an employee at s 6 of the Act that includes a "person intending to work". There was also no doubt what Ms Kim did at the restaurant on those days included tasks that could and would normally be carried out by an employee entitled to all of the ordinary statutory protections, including payment of at least the minimum wage. Objectively anyone else eating or working there on those days would have seen that she was doing the same or similar tasks as other employees. The objective view must prevail over her subjective description that she was a volunteer who did not expect to be rewarded for work she performed. If it were otherwise there is too greater risk that people, both employers and migrants wanting

to live and work in New Zealand, could avoid visa and employment standard requirements by simply 'relabeling' their activities. Ms Kim did tasks that were work and she should have been paid at least the minimum statutory requirements for her time and effort on those days.

Excluding MWA breaches as computational errors

[12] Including the failure to pay wages to Ms Kim, the inspector identified five breaches of the MWA. Two employees of NZ C & J Limited and two employees of NZ Durham Limited were underpaid amounts totalling $5.54, $30.78, $53.87 and $6.85 over the course of more than a year's employment.

[13] The respondents sought exclusion of those underpayments from consideration of penalties because they were said to have resulted from computational errors.

[14] When the starting point for assessment of a penalty for any breach of a statutory employment standard is $20,000 it is not unreasonable to consider whether a breach is so minor in amount or effect that inclusion from that starting point is unreasonable. Arrears due for the five breaches in this case totalled about $300.

[15] It is artificial to include every minor or technical breach on the basis that it can later be discounted in the assessment steps that consider severity and proportionality. In the context of this particular case, where the respondents acknowledged the error and agreed to payment of arrears, those five minor breaches of the MWA did not warrant inclusion and further calculation in an assessment of penalties.

Excluding some HA breaches as computational errors?

[16] For similar reasons the respondents sought exclusion from the consideration of penalties for short payments in final holiday pay due to eight employees of NZ C&J Limited, six employees of Gengy's Management Limited and one employee of NZ Durham Limited. The value of those short payments ranged from $6.49 to $48. They were said to have resulted from a computational error made by a payroll officer. They were of a sufficiently minor nature to be excluded from the assessment of penalties for breaches of the Holidays Act involving other employees that are set out in the remainder of this determination. Similarly no penalty has been assessed for the holiday pay due to Ms Kim that NZ Durham Limited had agreed to pay as part of its arrears settlement with the inspector.

The nature and total number of breaches – individual or globalised assessment?

Gengy's Management Limited

[17] Six workers were not paid holiday pay as required by s 23 of the HA. Two of those were not paid for a public holiday falling on a day that was otherwise a working day, as required by s 49 of the HA. The total number of breaches of the HA was eight. At the maximum of $20,000 for each breach, total penalties were $160,000.

NZ Durham Limited

[18] Twenty-seven workers were not paid the holiday pay required by s 23 of the HA. Fourteen workers were not paid for a public holiday falling on a day that was otherwise a working day, contrary to s 49 of the HA. Sixteen workers were not paid at the T1½ rate for work performed on a public holiday, contrary to s 50 of the HA. Fourteen workers were not provided an alternative holiday for work performed on a public holiday, contrary to s 56 of the HA.

[19] The total number of breaches of the HA was 71. At the maximum of $20,000 for each breach, total potential penalties were $1.42M.

NZ C&J Limited

[20] Thirty-nine workers were not paid the holiday pay required by s 23 of the HA. Twenty-eight workers were not paid for a public holiday falling on a day that was otherwise a working day, contrary to s 49 of the HA. Forty-two workers were not paid at the T1½ rate for work performed on a public holiday, contrary to s 50 of the HA. Thirty-nine workers were not provided an alternative holiday for work performed on a public holiday, contrary to s 56 of the HA.

[21] The total number of breaches of the HA was 148. At the maximum of $20,000 for each breach, total potential penalties were $2.96M.

Globalisation of breaches?

[22] Global penalties may be appropriate in cases of multiple similar breaches of statutory standards.[2] In this case the number of breaches being assessed for penalties has already been reduced by exclusion of the MWA breaches and the exclusion of 13 HA breaches said to have been due to computational errors.

[2] *Borsboom*, above n 1, at [141].

[23] The other breaches of the HA can be treated as a single course of conduct in relation to each affected worker. Some workers were affected by more than one breach so the tally is less than the total number of breaches.

[24] Globalising those breaches for each worker adjusted the assessment of maximum potential penalties as follows:

(i) $160,000 for breaches affecting eight employees of Gengy's Management Limited;
(ii) $540,000 for breaches affecting 27 employees of NZ Durham Limited; and
(iii) $1.4M for breaches affecting 70 employees by NZ C&J Limited.

Severity of breaches – aggravating factors

[25] The respondents sought a substantial reduction of those provisional penalties. They relied on an observation by the Employment Court in *Preet* that failures to make payments for entitlements under the HA, while unlawful, did not have the same significance as constant underpayment of wages.[3] However they also made three important admissions: that they knew the Holidays Act requirements, that the breaches were not inadvertent except for those made by computational error, and that the breaches affected the majority of their employees.

[26] While breaches appeared to have occurred, at least in part, because of financial difficulties for the companies, their employees were mostly migrants. They were mainly Korean or Japanese and students on study visas permitted to earn some extra money. Those workers were denied entitlements by an employer who knew its obligations and to some extent exploited the relative lack of knowledge of those employees.

[27] As an aggravating factor, the nature and number of breaches was not the most serious. The Labour Inspector submitted they were "mid-level" transgressions. He proposed the starting point for further assessment of the penalties could be set at 50 per cent of the globalised maximums already identified. Adopting that proposal as an appropriate adjustment gave the following further provisional penalty:

(i) $80,000 for Gengy's Management Limited

[3] *Borsboom*, above n 1, at [170].

(ii) $270,000 for NZ Durham Limited

(iii) $700,000 for NZ C&J Limited

Severity of breaches – mitigating factors

[28] Three mitigating or ameliorating factors warranted a significant further reduction of those provisional penalties.

[29] Firstly, the respondents' director Mr Cho had co-operated with the Inspector throughout the investigation.

[30] Secondly, Mr Cho acknowledged the wrongdoings in respect of payments to the respondents' employees and set about devising a repayment plan. This plan is expected to deliver more than $100,000 in arrears to the affected employees over an agreed period of time.

[31] Thirdly, the respondents have not previously been found to have engaged in similar conduct.

[32] As observed by the Employment Court in *Preet* acceptance of culpability and an indication of a real intention to rectify its effects warrant consideration of a discount from the provisional penalty.[4]

[33] Accordingly, a further 50 per cent reduction in the provisional penalties applicable to each respondent may be applied without compromising the objectives of penalties to punish and deter such breaches. For each respondent the subtotal at this stage is therefore:

(i) $40,000 for Gengy's Management Limited

(ii) $135,000 for NZ Durham Limited

(iii) $350,000 for NZ C&J Limited

Financial circumstances of the employer companies?

[34] The respondents' ability to pay penalties does not dictate absolutely what amounts may be imposed but are a relevant consideration among others.[5] A penalty imposed regardless of financial capacity to pay risks no realistic prospect of recovery. The respondents bore the onus to establish their financial circumstances.

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[4] *Borsboom*, above n 1, at [179].

[5] *Borsboom*, above n 1, at [80].

[35] The respondents showed their financial statements to the Inspector and provided that evidence to the Authority. The Inspector's submissions accepted some reduction of penalties was appropriate due to financial constraints revealed by those statements and because the companies had committed to the burden of repaying about $100,000 in arrears over time.

[36] Gengy's Management Limited was affected by a reduction in income from its franchisees and that situation was not, realistically, expected to improve. The Inspector accepted a reduction of 50 per cent in the provisional penalty was appropriate given those financial circumstances.

[37] NZ Durham Limited was not currently conducting a business. It sold its restaurant in October 2016. It said sales proceeds were exhausted in meeting other business commitments and investments. This was not an entire answer to its obligations to pay penalties for its earlier conduct. A 30 per cent reduction, as proposed by the Inspector, was the appropriate measure.

[38] NZ C&J Limited remained in business. The respondent submitted that it was this company that would "assume all financial burdens" in this case. This included meeting the requirements for payment of arrears under the repayment plan agreed by Mr Cho. In those circumstances a further 50 per cent reduction of potential penalties was appropriate to recognise its financial burdens.

[39] For each respondent the subtotal at this stage was therefore:

(i) $20,000 for Gengy's Management Limited
(ii) $94,500 for NZ Durham Limited
(iii) $175,000 for NZ C&J Limited

Proportionality of penalties

[40] The Inspector's submissions made the following apt observation about the application of the preceding steps in setting penalties:

> A formulaic approach may result in some degree of unrealism about the totals produced to this point and also some disconnection with the gravity of the overall employment law transgression.

[41] Those submissions also included comparison with other cases decided since *Preet* as a means of cross checking. One factor referred to in that crosscheck was the

ratio of penalties proportionate to the arrears that were due to the workers. The Inspector proposed a proportionate adjustment of penalties to provide a ratio of around 1.5:1 between penalties and arrears. However, a raw ratio does not necessarily reflect particular factors that may justly require a higher or lower amount of penalty when adjusting for proportionality. Those factors could include some that also may be taken into account in the earlier step concerning severity of the breaches. They include co-operation with the Inspector, whether breaches were committed in a calculated way, concealment, duration, repetition, numbers of workers affected, the degree of impact on affected workers and any history of previous breaches.

[42] In this case the respondents' co-operation and their commitment to a repayment plan, which the Inspector appeared to consider had some realistic prospect of being implemented, was relevant to an adjustment for proportionality to the following amounts:

(i) $6,000 for Gengy's Management Limited
(ii) $15,000 for NZ Durham Limited
(iii) $78,000 for NZ C&J Limited

[43] They were penalties appropriate for the nature of repeated breaches of the HA which affected more than one hundred workers over an extended period of time. These amounts would be a significant deterrent for any other employers who might contemplate such unlawful action.

[44] The total, $99,000, was considerably more than the sum of $64,250 that the respondents had submitted should be imposed. However it was still an amount there was some realistic prospect they could pay. Those penalties were, approximately, in a ratio of 1:1 to the arrears due. Looked at another way, the respondents were being fined an average nearing $1000 for each of the 100 or so workers short changed on their holiday pay.

[45] The steps and outcome are summarised as follows:

	Gengy's Management Ltd (8 workers)	NZ Durham Ltd (27 workers)	NZC & J Limited (70 workers)
Step 1: Nature and number of breaches – potential maximum penalties			
s 23 HA s 49 HA s 50 HA s 56 HA	6 2 - -	27 14 16 14	39 28 42 39
Total individual breaches	8	71	148
	$160,000	$1.42M	$2.96M
Globalised (per worker)	8	27	70
	$160,000	$540,000	$1.4M
Step 2: Aggravating factors			
Relative seriousness – 50 % reduction	$80,000	$270,000	$700,000
Step 2: Ameliorating factors			
Co-operation and repayment plan – 50% reduction	$40,000	$135,000	$350,000
Step 3: Respondents' financial circumstances			
Reduction	$20,000 (50%)	$94,000 (30)%	$175,000 (50%)
Step 4: Proportionality of outcome			
	$6000	$15,000	$78,000
Total penalties			**$99,000**

Orders for payment of penalties

[46] As a result of this assessment the respondent companies must pay to the Labour Inspector, for transfer to the Crown account, the following sums as penalties imposed under s 75 of the HA:

(i) $6,000 from Gengy's Management Limited

(ii) $15,000 from NZ Durham Limited

(iii) $78,000 from NZ C&J Limited

[47] Costs are reserved. If the parties cannot agree any issue of costs and an Authority determination is required, the Inspector should lodge and serve a memorandum on costs within 28 days of the date of this determination. The respondents would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Robin Arthur
Member of the Employment Relations Authority