

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 128
3000531

BETWEEN

A LABOUR INSPECTOR OF
THE MINISTRY OF
BUSINESS, INNOVATION
AND EMPLOYMENT

Applicant

AND

IXL PETROLEUM AND GAS
LIMITED

Respondent

Member of Authority: Nicola Craig

Representatives: Alastair Dumbleton for Applicant
Garry Pollak for Respondent

Investigation Meeting: On the papers

Determination: 28 April 2017

DETERMINATION OF THE AUTHORITY

- A. IXL Petroleum and Gas Limited is ordered to pay a total penalty of \$14,000 for breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and the Wages Protection Act 1983.**
- B. Payment of that penalty is to be made to the Employment Relations Authority at Auckland (for payment into a Crown bank account) in twelve (12) equal monthly instalments of \$1,166.66, beginning the first business day following the date of the Authority's determination.**

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment, Kerri Ahomiro, filed a claim against IXL Petroleum and Gas Limited (IXL or the company). IXL operates a petrol station in Northland.

[2] The claim alleged various failures to comply with requirements of the Minimum Wage Act 1983, Holidays Act 2003, and the Wages Protection Act 1983.

[3] Prior to the filing of the claim in the Authority, the Labour Inspector had compiled an investigation report regarding IXL's employment practices. In the report she had identified amounts owing to IXL employees which those employees had been underpaid in terms of wages and holiday pay, totalling \$14,587.91. The following day payment of that sum was forwarded to the Labour Inspector. The Labour Inspector subsequently filed this claim which solely concerned penalties.

[4] The Authority held a case management conference with the representatives on 29 March 2017 and a timetable was set for the exchange of evidence prior to an investigation meeting. The parties were encouraged to continue discussion regarding resolution of this matter.

[5] The Labour Inspector's statement of problem identified the Employment Court's finding in *Borsboom v Preet PVT Ltd*¹ that claims for penalties must be determined by the Authority, rather than being fixed solely by consent of the parties. The Authority must satisfy itself that any awards of penalties, and the amounts of them, are appropriate.

[6] The parties have now agreed on a resolution and outlined the process leading to that outcome, in terms of the four steps set out in the *Preet* decision.

¹ [2016] NZEmpC 143 at [41]

[7] In light of the Employment Court's finding in *Preet*², rather than deal with this as a consent determination, I regard ordering of a penalty, and the amount of such a penalty, as a matter which I must decide, based on the papers.

Step 1

[8] Step one of the process outlined in *Preet* is to identify the nature and number of breaches.

[9] Here the Minimum Wage Act breach concerns s 6, with the company defaulting in paying the full minimum wage to two employees. A penalty to the maximum of \$20,000 was sought.

[10] A single penalty was sought for breaches of ss 23, 14 and 17 of the Holidays Act which concerned defaulting on full payment of annual holiday pay and not allowing annual leave when due to three employees. Another penalty was sought for breaches of ss 50 and 56 of the Holidays Act concerning defaulting in paying the full payment of pay on public holidays and not allowing alternative holidays when due for the same three employees. Additionally the Labour Inspector sought a penalty for a breach of the requirement to keep holiday and leave records for the same employees. The maximum penalty for the Holidays Act breaches was also \$20,000 for each of the three penalties sought.

[11] There was also a breach of s 5 of the Wages Protection Act regarding making a deduction from pay without the written consent of one of the same employees. The maximum penalty for this breach was also \$20,000.

[12] In total the parties accept that there are five penalties claimed for breaches of provisions in three statutes in relation to four workers. The Labour Inspector claimed one penalty for each of the five breaches, rather than a penalty for each breach where recurrent or a penalty for each worker the breach related to. I accept that that was appropriate in this instance.

[13] The maximum of the penalties as claimed is therefore \$100,000, being five penalties of \$20,000 each.

² N 1

Step 2

[14] Step 2 of the *Preet* process is to consider the severity of the breach/es and any aggravating and mitigating factors involved. The Labour Inspector identified some of the breaches as being at the more serious end of the range of uncompliant employment practices. These had the effect of depriving employees of the full minimum wage entitlement and their holiday pay entitlements. I consider that the breach regarding the holiday and leave records, where there was partial compliance, whilst still a matter of concern, is not at the more serious end of the range.

[15] A mitigating factor is that when the Labour Inspector's assessment of underpayments was made known to IXL, the company paid the full amount claimed without delay. This is not a situation where the Labour Inspector has had to pursue claims for underpaid entitlements through the Authority and employees have been deprived of their entitlements even once the extent of those entitlements has been established by the Inspectorate.

[16] The parties propose that 60 % of the maximum penalties be considered as the starting point for the Step 2 calculation, amounting to \$60,000. Whilst the non-payment of the full minimum wage entitlement is serious, I note it concerned two employees, rather than the full group. One employee is only involved in a penalty regarding the holiday and leave records issue, rather than not having received any wage or holiday entitlements. The investigation report notes that some records were kept by the company regarding holiday and leave but that these were inadequate to meet the Holidays Act requirements. I agree that looking at the circumstances of this case a starting point of \$60,000 is appropriate.

[17] The parties then considered that a 50% deduction should be made for the company's acknowledgement of underpayments and reasonably prompt payment, resulting in a figure of \$30,000. I regard the recognition of underpayments by the company, and the payment of the full sum claimed as underpayments the day after the investigation report, to require a substantial reduction in the penalty. This enabled the employees to receive their entitlements promptly. Employers should be encouraged to act quickly once inadequacies have been identified by the Inspectorate. A 50% reduction is appropriate, leaving \$30,000 at the end of this step.

Step 3

[18] The third step involves considering the employer's ability to pay. The Labour Inspector agrees that financial information supplied by the company shows a level of indebtedness of the company and its owners and directors which requires a significant further reduction to penalties. A reduction of a little over 50% to \$14,000 is appropriate.

Step 4

[19] This step involves a consideration of whether the provisional penalty of \$14,000 is proportionate to the seriousness of the breaches and harm occasioned by them. In some cases after such an assessment penalties exceed the underpayments. The Labour Inspector considers that in other cases total penalties would exceed underpayments by an approximate 1:1.4 ratio. On that basis the total penalty here would need to be increased to about \$19,000.

[20] However, the company has co-operated with the Labour Inspector's investigation and has limited means to pay, and the parties have agreed that a total penalty of \$14,000 is appropriate.

[21] I consider a final total penalty of \$14,000 sufficient to both punish and deter this company and its owners, and to deter other small businesses from similar activities.

[22] I order IXL to pay a total penalty of \$14,000, for its breaches of the Minimum Wage Act, the Holidays Act and the Wages Protection Act.

[23] Given the company's financial position I order that IXL pay the penalty to the Employment Relations Authority, for payment into a Crown bank account, in twelve (12) equal monthly instalments of \$1,166.66, beginning on the first business day following the date of the Authority's determination.

Costs

[24] No order for costs is sought.

Nicola Craig

Member of the Employment Relations Authority