

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 44
3020814

BETWEEN A LABOUR INSPECTOR
 Applicant

AND JAPAN POWER LIMITED
 Respondent

Member of Authority: Andrew Dallas

Representatives: Claire English, counsel for the Applicant
 Angeline Boniface, counsel for the Respondent

Investigation Meeting: On the papers

Submissions 7 December 2017 and 12 January 2018 for the Applicant
 22 December 2017 for the Respondent

Determination: 12 April 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By lodgement of a statement of problem on 4 October 2017, a Labour Inspector, Sacha Hodgson sought penalties from Japan Power Limited. Japan Power operates two restaurants in Christchurch, which employ 27 people. The company has two directors, including Masakazu Takeuchi.

[2] In September 2016, after receiving an anonymous complaint from a member of the public about possible breaches of minimum employment standards, the Labour Inspectorate commenced an investigation.

[3] On 4 October 2016, two Labour Inspectors, including Ms Hodgson, met with Mr Takeuchi. During the meeting, Mr Takeuchi confirmed employees were paid out their annual leave entitlement each year on the anniversary date of their employment. He also advised the Labour Inspectors, on their account, that he did not agree with New Zealand employment law and ran his business “how it is in Japan”.

[4] The Labour Inspector then met with two employees from each of Japan Power’s restaurants about their employment.

[5] As a consequence of the Labour Inspector’s inquiries, she determined Japan Power was paying its employees’ annual leave, alternative holiday pay and public holiday pay on the basis of the relevant minimum wage rather than their agreed hourly rate of pay. The Labour Inspector also established Japan Power’s employees were just being paid out their annual leave on their respective anniversary dates and did not actually receive any time off work.

[6] On 24 February 2017, the Labour Inspector furnished Japan Power with a copy of her investigation report. Japan Power, through its then legal representatives sought, and was granted, more time to respond to the report. Comment was provided on behalf of Japan Power on 28 April 2017.

[7] The Labour Inspector issued Japan Power with an improvement notice on 1 May 2017, having earlier provided a draft of the same. The improvement notice stated Japan Power had failed to comply with s 16, 18, 21, 22, 24, 25, 49, 50, 57, 60 and 81 of the Holidays Act 2003 in respect of its employees. The notice described the failures as “systematic and affect current and past employees” and identify the corrective steps to be taken.

[8] The Labour Inspector said Japan Power complied with the improvement notice. The Labour Inspector said Japan Power was put on notice on three separate occasions an application to the Authority would be made due to the severity of the breaches.

[9] The application for penalties to the Authority concerns breaches by Japan Power of ss 16, 21 and 81 of the Holidays Act. The Labour Inspector said this was due to the severity of the breaches, the vulnerability of the employees and because Japan Power’s employees did not fully have access to rest and recreation as intended by the Holidays Act.

[10] Japan Power did not contest the breaches of minimum standards as alleged by the Labour Inspector. The company said the breaches were not intentional and arose out of a lack of understanding of New Zealand employment law. Japan Power said it complied with the Labour Inspector's improvement notice, implemented new systems and processes and paid any arrears owing to current and former employees.

The Authority's investigation

[11] During a case management conference with the parties, it became apparent there was no factual dispute between them and no contest over the alleged breaches of minimum standards. Japan Power also accepted the likelihood of the imposition of penalties for such breaches.

[12] By agreement with the parties, the Authority heard this matter "on the papers". An exchange of submissions was agreed upon. Japan Power was also encouraged to provide information in the form of an affidavit from an authorised person about its ability to pay any penalties imposed by the Authority.

Issues

[13] This issues for determination are:

- (i) Whether penalties should be imposed on Japan Power for breach of s 16 of the Holidays Act and if so, in what amount?;
- (ii) Whether penalties should be imposed on Japan Power for breach of s 21 of the Holidays Act and if so, in what amount?;
- (iii) Whether penalties should be imposed on Japan Power for breach of s 81 of the Holidays Act and if so, in what amount?; and
- (iv) Whether either party should contribute to the costs of representation of the other?.

The Labour Inspector's claim for penalties

[14] Having reviewed the Labour Inspector's investigation report, the submissions of the parties and taken account of the concessions made by Japan Power about its liability for the imposition of penalties, I find it is appropriate in the all the circumstances to impose penalties on Japan Power for breaches of minimum standards.

[15] It is entirely uncontroversial that the Authority has jurisdiction under s 161(1)(m)(iii) of the Employment Relations Act 2000 (the Act) to hear and determine an application by a Labour Inspector for recovery of a penalties under the Holidays Act.

[16] In determining the quantum of penalties to be imposed, if any, s 133A of the Act sets out the relevant matters the Authority is to have regard to. In addition, the decisions of the Court in *Borsboom v Preet PVT Limited*¹ and *Lumsden v SkyCity Management Limited*² provide useful guidance. Indeed, in *Preet* the Court set out a “four step” process to be followed when assessing penalties so as to provide a reasonably predictable outcome.³

[17] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.⁴ The maximum penalty for a company found liable for a penalty is \$20,000 per breach.⁵

Nature and number of breaches

[18] The Labour Inspector said there were 25 employees of Japan Power affected by its breaches of ss 16, 18 and 81 of the Holidays Act. Within this context, and the framework provided by *Preet*, the Labour Inspector said Japan Power was liable for a maximum penalty of:

- (i) \$240,000 for 12 breaches of 16 of the Holidays Act in respect of 12 employees;
- (ii) \$220,000 for 11 breaches of s 21 of the Holidays Act in respect of 11 employees; and,
- (iii) \$500,000 for 25 breaches of s 81 of the Holidays Act in respect of 25 employees.

[19] Japan Power did not dispute the number of breaches identified by the Labour Inspector nor the maximum penalties that could be imposed.

¹[2016] NZEmpC 143 at [67] and [68].

²[2017] NZEmpC 30

³*Borsboom* at [151].

⁴*Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁵ Employment Relations Act, s 135(2)(b)

Seriousness of the breaches

[20] The Labour Inspector submitted in respect of the breaches of ss 16 and 21 of the Holidays Act the correct starting point for considering the seriousness of these breaches should be 70% of the maximum penalty: so, \$168,000 and \$154,000 respectively). The Labour Inspector said this was consistent with *Preet* and because ss 16 and 21 reflected longstanding and clear obligations on employers to provide paid leave to employees.

[21] The Labour Inspector submitted in respect of the breaches of s 81 of the Holidays Act the correct starting point for considering the seriousness of these breaches should be 50% of the maximum penalty: so, \$250,000. The Labour Inspector drew an analogy with the findings in *Preet* about the effect of breaches of the Act.

[22] The Labour Inspector submitted it was inappropriate to “globalise” penalties beyond the aggregation of penalties set out in paragraph [18] above because the penalties related to breaches of separate statutory obligations and globalisation can, as was submitted here, diminish the significance of an employer’s aggravated and continuing course of conduct.

[23] Consistent with *Preet*, the Labour Inspector and Japan Power identified various “aggravating” and “mitigating” factors which were relevant to the assessment of penalties.

[24] The Labour Inspector identified a number of aggravating factors associated with Japan Power’s breaches. These included:

- (i) Japan Power to appeared to make a business decision not to keep adequate holiday and leave records for its staff;
- (ii) Japan Power acted with intention in breaching employment standards, preferring to conduct its business as it would have done so in Japan;
- (iii) Financial and business benefits flowed to Japan Power as a consequence of its including likely benefiting from anti-competitive behaviour; and,
- (iv) Japan Power’s employees were vulnerable, migrant workers.

[25] Conversely Japan Power identified several “mitigating” factors which it said assisted its position in the assessment of penalties. Japan Power submitted it had cooperated with the Labour Inspector, made corrections to systems and processes and corrected the arrears owing to current and former employees. The Labour Inspector accepted cooperation with the Labour Inspector was a mitigating factor.

[26] Balancing these factors, which are relevant to all breaches, the Labour Inspector submitted the penalties should be discounted by a further 60%. Japan Power said the discount should be 80% based on the mitigating factors it identified. However, I reject this submission in favour of that advanced by the Labour Inspector. In my view, the aggravating factors carry, and should, therefore, be afforded, significantly more weight than those proffered in mitigation.

[27] So then, at this point the proposed penalties to be imposed on Japan Power are:

- (i) \$67,200 for breaches of 16 of the Holidays Act;
- (ii) \$61,600 for breaches of s 21 of the Holidays Act; and,
- (iii) \$100,000 for breaches of s 81 of the Holidays Act.

Totalling: \$228,800

Financial circumstances of Japan Power

[28] As stated above, Japan Power was encouraged to provide information about their respective ability to pay any penalties imposed by the Authority. In an affidavit lodged by Mr Takeuchi, Japan Power provided an overview of its current financial position.

[29] Japan Power asserted, based on the financial information provided by Mr Takeuchi, it could not meet significant penalties imposed by the Authority. It also referred to prospects for current and, potentially, future employees if significant penalties were imposed. On this basis, Japan Power sought a further discount of 70% on the amounts set out in paragraph [27] above.

[30] The Labour Inspector accepted Japan Power was a small business but noted it was still operational and had made good on arrears owed to current and former employees. The Labour Inspector said there was nothing to suggest Japan Power could not meet any penalties, including if ordered payable over time.

[31] The Labour Inspector also said any penalties needed to be significant enough to ensure Japan Power did not benefit from not meeting minimum employment standards and effectively using employee entitlements as a “bank” or informal line of credit. That said, the Labour Inspector suggested a further discount of 60% could be entertained by the Authority.

[32] Having considered the respective positions of the parties, I prefer the slightly higher discount than proposed by the Labour Inspector but not as high as that proposed by Japan Power. The discount at this step is 65%.

[33] At this point then, the proposed penalties to be imposed on Japan Power are:

- (i) \$23,520 for breaches of 16 of the Holidays Act;
- (ii) \$21,560 for breaches of s 21 of the Holidays Act; and,
- (iii) \$35,000 for breaches of s 81 of the Holidays Act.

Totalling: \$80,080

Proportionality of outcome

[34] In *Preet* the Court said the penalties imposed should, in effect, be proportionate to the level of wrongdoing or mischief by the party found in default. The Labour Inspector correctly submitted proportionality of penalties and the possible risk of their non-payment by Japan Power were relevant considerations for the Authority.

[35] Japan Power submitted it should get credit for paying the reinstatement of employees leave balances. It said the amount was \$23,927.20 and this should be deducted from the final penalties award. Taking this discount into account together with various other discounts sought by Japan Power, it was submitted the penalties to be awarded should be \$10,392.80.

[36] The Labour Inspector strongly resisted this submission. The Labour Inspector said penalties and arrears were distinct concepts and it would be wrong for the Authority to conflate the two. I accept this submission. Japan Power has already received a discount on penalties for mitigation including payment of arrears to current and former employees and for cooperation with the Labour Inspectorate. To further discount penalties based on payment of moneys found to be owed as a consequence of failure to adhere to minimum employment standards surely defeats the fundamental logic of a penalties regime in the first place.⁶

Result

[37] Taking these submissions in account, and having regard to all the circumstances of the case, it is appropriate to impose significant, but proportionate, penalties of \$70,000 on Japan Power.

[38] The Labour Inspector said it was neutral as to whether part or all of the penalties should be paid to the affected workers, but offered no further submissions or other relevant information on the issue. Japan Power did not provide any submissions on this issue. In the circumstances, I have decided the penalties should be paid to the Crown.

[39] Japan Power must pay the Authority, for subsequent payment into a Crown bank account, penalties of \$70,000.

[40] Japan Power requested that any penalties imposed be paid in instalments. The Labour Inspector did not oppose this course. Consequently, the parties are directed to use their best endeavours to agree upon a payment schedule and submit this to the Authority for approval.

Costs

[41] Costs are reserved.

Andrew Dallas
Member of the Employment Relations Authority

⁶ See, *Couch v Attorney-General* [2010] NZSC 27