

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 133
3091993

BETWEEN LABOUR INSPECTOR
Applicant

AND CHRISTOPH KENEL
Respondent

Member of Authority: Philip Cheyne

Representatives: Toli Sagaga and Claire English, counsel for the
Applicant
Damien Pine and Jessica Hayes, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions Received: 8 October and 5 November 2020 and 4 February 2021
from the Applicant
29 October 2020 and 12 February 2021 from the
Respondent

Date of Determination: 7 April 2021

DETERMINATION OF THE AUTHORITY

A. Within 28 days of this determination, Christoph Kenel is to pay to the Labour Inspector for transfer to a Crown bank account penalties in the sum of \$30,000.00.

B. Costs are reserved, subject to the timetable set below.

Employment relationship problem

[1] Christoph Kenel as a sole trader operated a dairy farm in Winton from 2000. The business was also known as Swiss Farm. Mr Kenel employed workers in the business, including people from overseas in New Zealand on working holidays.

[2] In July 2019 a former employee complained to MBIE about not receiving a written employment agreement and being paid less than the statutory minimum wage. A public holiday fell during the 3 weeks' of the employee's employment. The former employee was not paid time and a half for working that day and did not receive an alternative holiday. That was also an issue for investigation.

[3] A Labour Inspector interviewed Mr Kenel in September 2019 and sought copies of relevant records. Mr Kenel supplied what records he had and made various admissions.

[4] In February 2020, the applicant commenced this action seeking penalties for breaches of the Employment Relations Act 2000 (ERA) and the Holidays Act 2003 (HA) in respect of seventeen employees. Mr Kenel admits most specified breaches.

[5] There is an agreed summary of facts. The applicant sought and the respondent consented to the Authority determining the issues based on that summary and the exchange of written submissions. This determination resolves the claims for penalties.

[6] I first outline the agreed facts before determining the appropriate penalties.

Agreed summary of facts

[7] Seventeen employees were employed by Mr Kenel in the period September 2018 to September 2019.

[8] Sixteen of these employees were not provided with a written employment agreement.

[9] The seventeenth employee (CN¹) supplied Mr Kenel with a written agreement which he signed and returned to her. This written agreement did not include a plain language explanation of the services available for the resolution of employment relationship problems. Mr Kenel did not advise this employee that she was entitled to seek independent advice about the intended agreement, did not give her a reasonable

¹ It is convenient to refer to the employees by their initials.

opportunity to seek that advice and did not consider any issues raised by her and respond to them.

[10] One of the seventeen employees (RD) was not paid time and a half for working on a public holiday. Mr Kenel also did not provide this employee with an alternative holiday, despite the employee working on a public holiday that was an otherwise working day for the employee.

[11] Mr Kenel did not keep a holiday and leave record for any of these seventeen employees.

[12] Mr Kenel did not pay final holiday pay upon the termination of employment for three of these employees (RD, CN and LA).

[13] Mr Kenel did not keep time and wages records recording sufficient detail for any of the seventeen employees.

Penalty Analysis

[14] Counsel both refer me to s 133A of the ERA, discussed and applied by the Employment Court in several cases. Counsel for the Labour Inspector arranged submissions first by 7 statutory considerations² and then by 5 additional considerations. Counsel for Mr Kenel referred to the steps identified in *Boorsboom v Preet PVT & Ors*³ as part of an analysis. I will discuss the statutory considerations and then consider the additional *Preet* steps.

The object of the Act

[15] I am referred to the ERA's object to build productive employment relationships through the promotion of good faith in all aspects of employment by recognising that employment relationships must not only be built on implied mutual obligations, but also the legislative requirement of good faith behaviour; and by acknowledging and addressing the inherent equality of power in employment relationships.

[16] I am also referred to the ERA's object to promote the effective enforcement of employment standards.

² As listed in s 133A of the Employment Relations Act 2000.

³ *Boorsboom v Preet PVT & Ors* [2016] NZEmpC 143.

[17] The respondent acknowledges that there is an inherent power imbalance favouring the employer where minimum standards are not adhered to, as here. The respondent also accepts that his failure to keep accurate and compliant time and wage and holiday and leave records undermines the enforcement of employment standards. However, the respondent says that his failure to keep records of an “administrative nature” did not necessarily impact upon employees. He contrasts that with the financial effect on employees not paid the minimum wage. He says that he did not obtain any financial benefit or unfair marketplace advantage from the lack of record keeping.

[18] The requirements of an “administrative nature” around entering into and keeping individual employment agreements, keeping accurate time and wage records and keeping accurate holiday and leave records are central to building productive employment relationships, as is expressed in section 3 of the Act. Effective enforcement of employment standards by the Labour Inspector is compromised (at least) or thwarted by an employer’s non-compliance with those requirements.

[19] I agree with counsel for the Labour Inspector that Mr Kenel’s non-compliance means that the Inspector has not been able to substantiate the complaint it received that Mr Kenel did not pay minimum wages, so the Inspector has not been able to bring claims for minimum wage arrears. Mr Kenel cannot demonstrate compliance with minimum wages so as to refute any suggestion of marketplace advantage, but the Inspector cannot establish marketplace advantage either.

[20] I am left, in determining the appropriate penalties, to have regard to the centrality of compliance with employment standards in building productive employment relationships.

The nature and extent of the breaches

[21] Section 4B of the ERA requires an employer to keep records in sufficient detail to demonstrate that they have complied with minimum entitlement provisions under the HA, the Minimum Wages Act 1983 and the Wages Protection Act 1983. Mr Kenel did not keep records in sufficient detail to demonstrate compliance with the HA and the Minimum Wages Act. He therefore breached s 4B of the ERA. This breach on

its own does not render Mr Kenel liable for a penalty, as no penalty is provided in that provision.⁴

[22] Mr Kenel accepts that as a sole trader he was responsible for the following breaches. He makes the point that he engaged an accountant and is of the view that if the accountant thought there was something wrong with his practices, they would have advised him. However, there is no evidence to show that Mr Kenel engaged the accountant to ensure compliance with employment obligations. The involvement of an accountant does not detract from Mr Kenel's responsibility and liability.

[23] Mr Kenel breached s 65(1) of the ERA by failing to provide any employment agreement (16 employees). He is liable to penalties under s 65(4) of the ERA.

[24] Mr Kenel breached s 63A(2) and s 65(2)(a)(vi) of the ERA by failing to provide a compliant employment agreement for employee CN. Mr Kenel is liable to penalties under s 63A(3) and s 65(4) for these breaches. If treated as separate breaches, Mr Kenel's maximum liability in respect of the non-compliant agreement for CN at \$20,000 would be twice what it would have been if there had been no agreement. I return to this point later.

[25] Mr Kenel breached s 50 and 56 of the HA by failing to pay time and a half and by failing to provide an alternative holiday to RD, who worked on a public holiday. Mr Kenel is liable to penalties under s 75 of the HA for these breaches, as each entitlement is a provision referred to in s 75(2). Penalties would total \$20,000. I return to this point later.

[26] Mr Kenel breached s 23 of the HA by failing to pay holiday pay on termination to CN, RD and LA. Mr Kenel is liable to penalties under s 75 of the HA for these breaches, as s 23 is a provision referred to in s 75(2). Mr Kenel is liable to a maximum penalty of \$30,000 for the breaches in respect of these employees. I return to this point later.

[27] Mr Kenel breached s 130 of the ERA by failing to keep proper time and wage records (17 employees). He is liable to penalties under s 130(4) of the ERA. The maximum penalty would be \$170,000 for these breaches. I return to this point later.

⁴ See s 133(1)(a) of the Employment Relations Act 2000.

[28] Mr Kenel breached s 81 of the HA by failing to keep proper holiday and leave records (17 employees). Mr Kenel is liable to penalties under s 75 of the HA, as s 81 is a provision listed in s 75(2) of the HA. The maximum penalty would be \$170,000 for these breaches.

Whether the breaches were intentional, inadvertent or negligent

[29] The respondent submits that, being foreign to New Zealand, he did not understand the strict requirements for written records to be kept. He operated under the mistaken view that the employment agreements did not need to be recorded in writing. While he operated the dairy farm for almost 20 years he did not employ staff for the entire duration of his work.

[30] The breaches were neither inadvertent, nor negligent. Mr Kenel apparently took no steps throughout his history as an employer in New Zealand to familiarise himself with his legal obligations as an employer. His breaches did not arise from an incomplete or mistaken understanding of his obligations or from an incidental failure to properly comply with them. The best that can be said about how Mr Kenel operated over many years is that he was wilfully blind to his statutory obligations. The breaches resulted from his deliberate decisions about how he employed workers to work in his business. I find these breaches were intentional.

The nature and extent of loss/damage suffered or gains made/losses avoided by the breaches

[31] The respondent accepts that for one employee (RD), there was a failure to pay properly what should have been paid under the Holidays Act 2003. The amount represents a loss suffered by RD and a gain made to the applicant. I am told this is a “very minimal” amount. The respondent says that no other employees have suffered a loss, so no other losses can be treated as a gain to him.

[32] The Labour Inspector says that the lack of records means it has not been possible to accurately assess how often there were minimum wages breaches so it is not possible to determine the extent of losses to employees. The record-keeping failure is compounded by Mr Kenel’s practice of paying a fixed daily wage without reference to the statutory obligation to pay the minimum wage for each hour worked.

[33] I am unable to assess the extent of losses suffered by employees (and consequential gains to Mr Kenel). The Labour Inspector has only been able to follow up a few employees, because the employees have left New Zealand. The follow-up that was achieved resulted in limited information about days and hours of work. However, it is improbable that only one employee was underpaid minimum wages, given the seasonal labour demands in a dairy farm operation. It is improbable that RD was the only employee who worked on a public holiday as an otherwise working day. The evidence is that no employee was ever paid time and a half for such work. I note also that it is admitted that three employees were not paid 8% holiday pay upon termination of employment. The Labour Inspector cannot establish that other employees were not correctly paid holiday pay.

[34] Quite apart from whether there have been breaches of minimum entitlement provisions as to minimum wage payments and holidays, the employees have suffered the loss or damage of being denied the protection of employment standards such as written employment agreements and proper records (time and wage records and holiday and leaves). The Labour Inspector has lost the ability to determine that relevant statutory provisions have been complied with. Mr Kenel has not had to incur the financial and administrative impost of creating and keeping proper records.

[35] I do not accept that I should determine the penalties payable on the basis that Mr Kenel has only caused “very minimal” loss to employees, with minimal gain to himself. I conclude that the loss/damage caused and gains/losses avoided are material.

Steps to mitigate effects of the breaches

[36] The present claim does not include a claim for arrears, so whether payment of money owing is evidence of contrition rather than mere late performance of a duty does not arise here.⁵ However, it is submitted that I should take a similar approach to what Mr Kenel says about his steps to mitigate the breach.

[37] Mr Kenel says that he has sold his farm, left New Zealand and does not intend to return to New Zealand in the capacity of an employer. Mr Kenel also says he made offers to remediate the breaches and offered to enter into other enforcement actions. He says there was no response to these offers. Instead, this claim was lodged.

⁵ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [33] – [35].

[38] I agree with the Labour Inspector that Mr Kenel was obliged to keep sufficient records to demonstrate compliance with minimum entitlements. Offers or undertakings to do so in the future and statements about the sale of the farm and not returning to New Zealand in the capacity of an employer do not amount to “compensation, reparation or restitution” for those affected by the breaches.

[39] However, Mr Kenel cooperated with the investigation and accepted responsibility for the breaches.

Circumstances in which the breach took place

[40] The Labour Inspector says that there has been a consistent and ongoing failure to keep records affecting a large number of employees temporarily in New Zealand on working holidays, probably since about 2000. Mr Kenel operated his business in New Zealand over a long period in breach of the ERA and the HA. That is a circumstance in which the breaches took place.

[41] Mr Kenel says that the employees were generally employed for only weeks or months because of their travels, so were mostly not employed for long periods of time. He also says they were not “comparatively vulnerable” compared with employees reliant on their employer for visas who are unable to move on.

[42] I accept that the employees were not tied to their employment with Mr Kenel, so were not vulnerable in that sense. However, as employees present in New Zealand on working holidays, they were likely to have little personal experience of New Zealand employment standards and little ready access to support and information about those standards or enforcement of them. That is a circumstance in which the breaches took place.

Previous conduct

[43] Mr Kenel came to the attention of the Labour Department previously in 2010. The correspondence describes Mr Kenel withholding wages which were due and not paying for work on two public holidays. Mr Kenel says he “immediately rectified” the issue. The file record shows that the Department ceased its investigation after payments were made. However, Mr Kenel has not previously been found by the Authority or the Court to have engaged in similar conduct.

[44] There is no explanation about why that interaction with the enforcement authority did not prompt Mr Kenel to check on his compliance with the ERA and the HA more generally. Mr Kenel not checking supports my conclusion that his breaches were intentional.

Preet step 1 – number and nature of the breaches

[45] In *A Labour Inspector v Parihar*⁶ the Employment Court accepted the parties' approach that the failure to keep time and wage records and the failure to keep holiday and leave records could properly be treated as a single breach per employee. Later, in *Labour Inspector v Matangi Berry Farm Ltd*, the Employment Court globalised the record keeping breaches to a single breach of each statute.⁷ The Court noted that it was dealing with breaches of several statutes in respect of many workers, compared to earlier cases that had involved significantly fewer employees. The Court's approach in *Matangi* was adopted by the Authority recently in *Labour Inspector v Nekita Enterprises Limited and ors*.⁸ Matters dealt with by the Authority in that case included claims by a Labour Inspector for penalties for failure to keep time and wage records and holiday and leave records for 59 employees. The Authority globalised the record keeping breaches to a single penalty under each statute. The Member considered that this resulted in a sensible maximum starting point and would avoid an artificial approach when working through later *Preet* steps. I apply that same approach here.

[46] The 16 breaches of s 65(1) of the ERA for 16 separate individuals can properly be globalised and treated as a single breach for the purposes of assessing penalties. Maximum liability would be \$10,000.00.

[47] The breaches of s 63(A)(2) and s 65 of the ERA were in respect of 1 employee (CN). Mr Kenel signed a non-compliant form of an employment agreement and did not advise and allow for independent advice. These breaches arose from a single course of conduct which infringed related statutory provisions. They can properly be globalised and treated as a single breach, resulting in a maximum liability of \$10,000.00.

⁶ *Labour Inspector v Parihar* [2019] NZEmpC 145.

⁷ *Labour Inspector v Matangi Berry Farm Ltd* [2020] NZEmpC 43.

⁸ *Labour Inspector v Nekita Enterprises Limited and ors* [2020] NZERA 509.

[48] The breaches of s 50 and s 56 of the HA were in respect of 1 employee (RD) and 1 public holiday. The two breaches reduce to a failure to pay RD correctly for work on the public holiday, given the alternative day entitlement converted to a payment entitlement at the end of RD's employment. I globalise these breaches as they result from a single course of conduct and are closely related provisions of the same statute. This results in a maximum liability of \$10,000.00.

[49] The breaches of s 23 of the HA by not paying CN, RD and LA holiday pay of 8% of gross earnings at termination of their employment affected separate individuals at different times. There is no basis on which these breaches can be globalised. There is a maximum liability of \$30,000.00.

[50] There are 17 breaches of s 130 of the ERA and 17 breaches of s 81 of the HA. The 17 breaches of the separate statutes are for the same employees. The Labour Inspector opposes treating the breaches as 17 record keeping failures, given the distinct focus of the separate statutory record keeping obligations. I am referred to *Preet* in support of this submission. *Preet* was considered in *Matangi*. In the latter case, the Court globalised to a single penalty for the breach of each statute. I apply the same approach here. That results in a maximum penalties of \$10,000.00 for the breach of the HA and \$10,000.00 for the breach of the ERA.

[51] Given the above approach, Mr Kenel's maximum liability is \$80,000.00.

Preet step 2 – severity of breaches

[52] Mr Kenel submits that most of the breaches were of a "record keeping nature" and inadvertent failures given his "mistaken understanding" of New Zealand legislation. As above, record keeping is central to building productive employment relationships. Calling the breaches "record keeping" or of an "administrative nature" does not diminish their severity.

[53] Mr Kenel says that the parties agreed at the outset how their relationship would work and that he was of the mistaken view that it was not necessary to record what had been agreed.

[54] As explained, I do not accept that the breaches were inadvertent. These are properly understood as intentional.

[55] There is no evidence that the employees raised concerns during their employment. Mr Kenel did not take advantage of the opportunity that arose in 2010 to get advice about compliance obligations at the time. However, he has not previously been found in breach of the present or similar obligations.

[56] There is no reason to increase the level of penalties to act as a deterrent to Mr Kenel. He appears to be unlikely to resume activity in New Zealand as an employer. If he does, the following penalties would be sufficient deterrence to avoid further non-compliance. The level of penalties does need to be set to make it clear to other employers that they must comply with employment standards.

[57] At this point, I adopt the proportions advanced most recently in submissions for the Labour Inspector, subject to the globalisation approach indicated above.

[58] A penalty for the breaches of s 65(1) of the ERA reduces to \$5,000.00.

[59] The Labour Inspector did not seek an additional penalty for the non-compliant employment agreement for CN. Although that no doubt arises from the different approach advanced on globalisation, I consider it remains appropriate on the view taken by me. The default in respect of CN was less serious than the default in respect of the other 16 employees. If CN had been treated by Mr Kenel the same as the other 16, there would have been a seventeenth breach of s 65(1) but it would not have affected the globalisation decision.

[60] The penalty for the public holiday failures affecting RD reduces to \$6,000.00.

[61] Penalties for the failure to pay holiday pay on termination to CN, RD and LA reduce to \$15,000.00.

[62] The penalty for the breach of the ERA for time and wage records reduces to \$6,000.00.

[63] The penalty for the breach of the HA for holiday and leave records reduces to \$6,000.00.

[64] Total penalties at this point come to \$38,000.00.

Preet step 3 – Means and ability to pay

[65] The Labour Inspector accepts that a further reduction of no more than 33% could be applied if the Authority considered that present circumstances were analogous to several other decided cases. However, the submission must be understood in the context of a different approach to globalisation compared to the approach I consider appropriate.

[66] Mr Kenel must prove an inability to pay if his financial circumstances are relied on to reduce the level of penalty. There is no evidence to establish that Mr Kenel would be unable to pay penalties. Counsel for Mr Kenel does not seek a reduction under this head. Given the absence of evidence to show an inability to pay, there is no basis for a reduction.

[67] At this point, combined penalties remain at \$38,000.00.

Preet step 4 - Proportionality

[68] Counsel for the Labour Inspector accepts that proportionality could result in a further reduction of the level of penalties. That too should be understood in the context of the differing approach to globalisation.

[69] Mr Kennel operated his business without complying with minimum entitlements under the Holidays Act, affecting three employees. He did not have written employment agreements for 16 employees and he adopted a non-compliant written agreement for one. He did not keep proper time and wage records or holidays and leave records for 17 employees.

[70] Compared to *Nekita Enterprises*, Mr Kenel's employees were less vulnerable and suffered less financial loss. The manner in which Mr Kenel operated his business was less calculated to enhance business profitability. A proper comparison of the level of penalties also needs to account for the higher level of penalty for a company.

[71] Penalties if set at \$38,000.00 would be out of proportion to those set in *Nekita Enterprises*, looking at the cases broadly. I note that the Member had checked his outcome against a selection of other cases. To take account of consistency with other cases, I reduce the total penalties to \$30,000.00.

[72] I will reserve costs. A claim for costs should be supported by submissions lodged and served within 14 days and the other party may reply within a further 14 days. I will then determine costs based on those submissions.

Philip Cheyne
Member of the Employment Relations Authority