

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 85  
5640369

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

AND                                MANUKAU AUTO VALET  
   LIMITED  
   Respondent

Member of Authority:        Vicki Campbell

Representatives:              Sarah Blick and Alastair Dumbleton for Applicant  
   Dharmesh Kumar for Respondent

Investigation Meeting:        On the papers

Submissions Received:        6 March 2017 from Applicant  
   7 March 2017 from Respondent

Determination:                27 March 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A.        Within 28 days of the date of this determination Manukau Auto Valet Limited is ordered to pay penalties to the Authority totalling \$145,000.**
- B.        Within 28 days of the date of this determination Manukau Auto Valet Limited is ordered to reimburse the Labour Inspector the filing fee of \$71.56.**

**Employment relationship problem**

[1] A Labour Inspector (the Labour Inspector) of the Ministry of Business Innovation and Employment (MBIE) has applied to the Authority for the imposition of penalties against Manukau Auto Valet Limited (MAVL). The application for penalties relates to breaches of minimum standards.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the Labour Inspector and MAVL but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[3] The parties have consented to this matter being determined by the Authority on the papers currently before it.

**Background**

[4] On 4 September 2015 a complaint was made to the Labour Inspectorate which resulted in an investigation being undertaken to establish whether MAVL was meeting its minimum employment standards.

[5] MAVL co-operated with the investigation which ultimately resulted in a finding that a total of \$96,451.66 had not been paid in minimum wages and holiday pay for a total of 221 employees, employed by MAVL from 2010 to June 2016.

[6] Since this matter was raised with MAVL it has altered its systems to ensure compliance with the minimum standards for all its employees.

[7] On 2 September 2016 the Labour Inspector lodged a statement of problem with the Authority seeking payment of the arrears of minimum wages and holiday pay, plus penalties for breaches of the Minimum Wage Act 1983 (MWA) and/or the Holidays Act 2003 (Holidays Act).

[8] The parties agreed to attend mediation which resulted in the claims for arrears of wages being resolved. The arrears were paid into MBIE's trust account for disbursement to the individual employees named in the signed Record of Settlement. The Labour Inspector has advised the Authority that she wishes to continue with the penalty claims.

[9] The Labour Inspector lodged an amended statement of problem with the Authority on 22 December 2016 which reflected the agreement to withdraw the claims of arrears of wages.

### **Issues**

[10] The issue for determination is what, if any penalties should be imposed on MAVL.

### **Determination**

[11] The Labour Inspector undertook an initial investigation into MAVL's compliance with minimum standards which found MAVL had failed to pay minimum wages and/or holiday pay to at least 115 employees. The investigation related to records supplied by MAVL from 2014 to 2015. Mr Dharmesh Kumar, a director and the major shareholder of MAVL was invited to respond to the Labour Inspector's initial report and was advised that there may be further arrears for employees who were employed by MAVL prior to 2014.

[12] On 21 June 2016 Mr Kumar wrote to the Labour Inspector by email and assured her that he had reviewed his records prior to 2014 and was happy that he was following everything correctly. This proved to be incorrect and the Labour Inspector identified a further 106 employees who had not received their minimum entitlements as employees.

[13] At the time Mr Kumar wrote to the Labour Inspector assuring her MAVL was compliant prior to 2014, he was or ought to have been aware that his systems were not meeting minimum standards. MAVL had, after all, just taken the steps necessary to rectify its business systems to ensure its compliance. The information Mr Kumar provided to the Labour Inspector has led me to conclude that I should treat the statements he has made in submission on this matter cautiously.

[14] Given the extent and duration of the breaches MAVL is liable to a penalty under section 10 of MWA and section 75 of the Holidays Act of up to \$20,000 for each breach.

[15] The objectives of penalties in employment law generally are to:<sup>1</sup>

- a) punish those who breach statutory obligations;
- b) deter deliberate breaches;
- c) compensate the victim of the breach;
- d) eliminate unfair competition in business.

[16] The full bench of the Employment Court provided guidance as to the method for assessing the level of penalties to be imposed by the Authority which requires the application of a four step process:<sup>2</sup>

- a) Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
- b) Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
- c) Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
- d) Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

***Step one – nature and number of breaches***

[17] There are 221 employees named in schedule A to the amended statement of problem. The following failures between 2010 and June 2016 in respect to each of the employees has been identified:

- a) failure to pay holiday pay under section 27 of the Holidays Act – 206 employees amounting to \$66,515.87;
- b) failure to pay public holiday pay under sections 49, 50 and 56 of the Holidays Act – 21 employees amounting to \$4,628.76;

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<sup>1</sup> *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143at [61]-[63].

<sup>2</sup> *Ibid* at [151].

- c) failure to pay minimum wages under section 11 of the MWA – 95 employees amounting to \$25,307.03.

[18] The total breaches number 322.

#### Failure to pay holiday pay

[19] MAVL accepted the Labour Inspector's conclusions that it had failed to pay holiday pay at the end of the employment relationship. This was the most far reaching breach as it affected a significant number of employees being 206 out of the named 221. This amounts to a provisional total of \$4,120,000.

#### Failure to pay public holidays

[20] MAVL accepted the Labour Inspector's conclusions that it had failed to pay its employees correctly for public holidays. Affecting 21 out of the 221 employees this amounts to a provisional total of \$420,000.

#### Breaches of the MWA

[21] MAVL accepted the Labour Inspector's conclusion that it had failed to pay at least the minimum wage to its employees. The failure to pay employees at least the minimum wage for all hours worked is a serious matter. It deprives the employees of income on an ongoing basis and allows the employer to profit from its own breach.

[22] I have preferred when dealing with the breaches of the MWA to treat the breaches as a single course of conduct.<sup>3</sup> Affecting 95 out of the 221 employees this amounts to a provisional total of \$1,900,000.

#### Globalisation of the breaches

[23] MAVL is liable to a total maximum for provisional penalties of \$6,440,000.

[24] The Court in *Preet* held:<sup>4</sup>

Where there are materially similar or even identical multiple breaches committed by a defendant, these may be treated as making that defendant liable for a single penalty in respect of each separate affected employee. We are attracted by the Australian legislation's phrase "single course of conduct" to describe such situations. This approach counts as a single contravention, one that is committed by the same person

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<sup>3</sup> Ibid at [141].

<sup>4</sup> Ibid at [139].

and the contravention “arose out of a course of conduct by the person.” That single course of conduct would not, however, encompass breaches of other Acts, for example breaches of both the Minimum Wage Act and the Holidays Act in respect of the same employee.

[25] Following the Court’s approach I have globalised the breaches of the Holidays Act for 15 of the employees affected by MAVL’s failure to pay public holidays in accordance with the Act as they were also affected by the failure to pay annual holidays. The provisional penalties for the breaches of the Holidays Act for the 206 employee’s remains at \$4,120,000.

[26] The provisional penalties for the failure to pay public holidays will reduce to six employees and amounts to provisional penalties of \$120,000.

[27] As noted above I have already treated the breaches of the MWA as a single course of conduct and am unable to globalise penalties under the MWA further, which leaves the provisional total at \$1,900,000.

[28] At the end of step one the provisional penalties amount to \$6,140,000. The inability to globalise penalties further than I have already has led to a large inflationary effect which is disproportionately large. I will deal with the inflationary effect at step four.

***Step two – severity of breaches***

[29] The failure to pay minimum standards is serious and resulted in MAVL paying over \$96,000 to rectify its failures. This is a significant sum of money. Mr Kumar has now rectified his systems to ensure compliance and was co-operative with the Labour Inspector throughout her investigation.

[30] In its statement in reply MAVL attributes the failure to pay minimum standards correctly to a misunderstanding of the statutory requirements and mistakes in applying them. I agree with the Labour Inspector’s submissions that this is not a mitigating factor. It is the obligation of all employers to understand and adhere to the law.

[31] In relation to aggravating factors I have accepted the Labour Inspector’s submissions that the provisional penalties should be subject to a reduction. I consider the appropriate reduction for each element is as follows:

- a) The failure to pay holiday pay, by scale, was the most serious breach and the appropriate reduction should be 30 per cent amounting to \$2,884,000;
- b) The failure to pay public holidays can be reduced by 50 per cent amounting to \$60,000; and
- c) The failure to pay minimum wages can be reduced by 40 per cent amounting to \$1,140,000.

[32] Giving credit to MAVL's steps taken to remedy the breaches and the immediate payment of the outstanding arrears in full is appropriate and there will be a further reduction of 50 per cent across the board.

[33] The total liability for provisional penalties at the end of step two is \$2,042,000.

***Step 3 - Means and ability of MAVL to pay***

[34] MAVL continues to trade. It has provided its financial statements for the years ending 31 March 2015 and 31 March 2016. The financial statements show a steadily improving net profit from \$112,129.60 for the year ended 31 March 2014 (this figure was included in the 2015 financial statements) to \$148,933.10 for the year ended 31 March 2015 (33 per cent increase) and to \$183,453.48 for the year ended 31 March 2016 (23 per cent increase). The Authority has not been provided with any financial statements for the 2016/2017 year.

[35] Mr Kumar requested permission from the Labour Inspector to pay the outstanding arrears by instalment. This was declined. In his submissions to the Authority Mr Kumar records that he has taken out a loan in order to pay the arrears of wages. He also states that his financial position as at 31 March 2017 will not be as strong as previous years because he is now paying all of his staff above the minimum wage rate.

[36] Mr Kumar has benefited since at least 2010 until 2016 by paying less than the law allows. It is highly likely that his profit margins reflect this benefit. I have

accepted the Labour Inspector's submissions that a 10 per cent reduction to the step two provisional total is appropriate.

[37] The total liability for provisional penalties at the end of step three is \$1,837,800.

***Step 4 – proportionality of outcome***

[38] The penalties imposed should be proportionate to the amount of money unlawfully withheld.<sup>5</sup> The total amount unlawfully withheld by MAVL was \$96,451.66.

[39] At this point in the exercise provisional penalties stand at \$1,837,800. The total of unlawfully withheld minimum wages and holiday pay is approximately 5.24 per cent of this amount. Clearly this is disproportionate.

[40] Standing back and assessing the proportionality of the outcome for MAVL, it has become apparent that a globalising process now needs to occur in respect of the breaches to arrive at a sensible, proportionate and just outcome.

[41] The proportionality test also requires the Authority to assess other relevant cases to ensure the result is not inconsistent with others.<sup>6</sup> Of particular relevance to this matter are two decisions of the Authority where there were numerous breaches affecting a large number of employees.

[42] *Labour Inspector v Binde Enterprises Ltd*<sup>7</sup> concerned breaches of the Holidays Act, MWA, the Employment Relations Act and the Wages Protection Act 1983. The breaches related to 75 employees and a total arrears of wages and holiday pay of \$208,000. From the starting point of \$10,520,000 in provisional penalties the Authority imposed total penalties of \$275,000 which equates to just over 2.6 percent of the total potential penalties.

[43] *Labour Inspector v Bahn Thai Restaurant Limited*<sup>8</sup> involved failures to provide written employment agreements, keeping holiday and leave records and keeping wages and time records. The total number of breaches totalled 33. From a

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<sup>5</sup> Ibid at [190].

<sup>6</sup> Ibid at [148].

<sup>7</sup> [2016] NZERA Auckland 399.

<sup>8</sup> [2016] NZERA Christchurch 222.

starting point of \$660,000 in provisional penalties the Authority imposed total penalties of \$25,000 which equates to just over 3.78 per cent of the total potential penalties.

[44] Standing back and considering the breaches for which penalties can be legitimately sought, I consider the Labour Inspector's application for penalties of \$145,000 is appropriate in all the circumstances. This equates to approximately 2.25 percent of the total provisional penalties identified at step one and is in line with the penalties imposed in the cases cited above.

[45] The Authority must impose a penalty at a level that signals its disapproval of the conduct of MAVL in not meeting its minimum standards obligations and which acts as a deterrent to MAVL and other employers who may not be minded to meet their obligations.

[46] Within 28 days of the date of this determination Manukau Auto Valet Limited is ordered to pay penalties to the Authority totalling \$145,000 which will then pay it into the Crown Bank Account.

### **Costs**

[47] Within 28 days of the date of this determination Manukau Auto Valet Limited is ordered to reimburse the Labour Inspector the filing fee of \$71.56.

[48] No submissions on other costs have been received and I therefore reserve costs. If the Labour Inspectorate wishes to seek an order for a contribution towards its legal costs, apart from reimbursement of the lodgement fee, it is to first seek to reach agreement with MAVL in respect of the amount of that contribution.

[49] If the parties are unable to agree the Labour Inspector shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. MAVL shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an

adjustment upwards or downwards, bearing in mind that this matter did not necessitate a hearing and was dealt with on the papers.

Vicki Campbell  
Member of the Employment Relations Authority