

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 402
3019775

BETWEEN A LABOUR INSPECTOR
 Applicant

AND SILVICULTURE SOLUTIONS
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Sarah Blick, Counsel for the Applicant
 Tony Carlyle, Advocate for the Respondent

Investigation Meeting: 21 September 2018 in Rotorua

Determination: 17 December 2018

DETERMINATION OF THE AUTHORITY

- A. Silviculture Solutions Limited (SSL) must pay a penalty of \$35,000 for breaching s 6 of the Minimum Wage Act 1983.**
- B. SSL must pay the penalty to the Labour Inspector by no later than 25 January 2019. The Inspector must then:**
- (i) pay \$5000 of that penalty, in varying amounts set out in this determination, to four former SSL employees who she identified as not being paid the minimum wage for every hour worked; and**
 - (ii) transfer the remaining \$30,000 to the Crown Bank Account.**
- C. SSL must also pay \$4,000 to the Inspector as a contribution to her costs of representation and expenses in bringing this application.**

Employment Relationship Problem

[1] Labour Inspector Monique Williams sought a finding that Silviculture Solutions Limited (SSL) failed to pay four identified employees at least the minimum

wage for every hour worked. If that finding was made, the Inspector sought an order imposing penalties for those breaches of the requirements of s 6 of the Minimum Wage Act 1983 (the MW Act).

[2] The Inspector and SSL had resolved other matters concerning wage arrears due to employees before the investigation meeting. An alternative argument that SSL should be penalised for not properly recording employees' hours did not need to be resolved in light of conclusions reached on the Inspector's primary claim. The issues for determination were:

- (i) Did payments made under a piece work system to the four identified employees of SSL meet the requirements of the MW Act?
- (ii) If the answer to (i) was no, should SSL be ordered to pay a penalty, and, if so, of what amount?
- (iii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[3] The Inspector, SSL director Stewart Hyde and two former employees, Tiwai Spooner and Joseva Ligaqaqa, had lodged written witness statements for the investigation. Each witness attended the investigation meeting. Under oath they answered questions from me and the parties' representatives. The representatives also provided oral closing submissions on the issues for resolution.

[4] At the beginning of the meeting SSL, through its representative, sought to also have oral evidence heard from several current workers who had provided letters of support for the company and which Mr Hyde had attached to his witness statement. Their concern was that, if a penalty was imposed on SSL, an Immigration New Zealand (INZ) policy meant the company would then face a lengthy stand down on approvals for any applications for visas and visa renewals for workers recruited from overseas.¹ As discussed later in this determination, such a potential outcome was not relevant to any assessment by the Authority of whether the company had breached employment standards legislation or, if so, whether penalties should be imposed. However, with representatives of both parties present, I spoke briefly to those workers

¹ See Appendix 10: Rules for non-complaint employers of the Immigration New Zealand Operational Manual: <https://www.immigration.govt.nz/opsmanual/#64502.htm> (retrieved 13 December 2018).

before the investigation meeting proceeded. I explained their concern about the potential effects of that government policy on them and their families (whether resident in New Zealand or in their home countries) was understood and acknowledged but could not directly influence whatever determination the Authority had to reach. Those workers then departed and the meeting proceeded.

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

Payments under the MW Act for piece work

[6] SSL provides silviculture services to forest owners or companies managing forests in the Central North Island. The services include planting, thinning and spraying, pruning, and fertilising forest blocks. The issue of whether SSL had complied with MW Act requirements arose from a Labour Inspectorate audit of ten silviculture businesses in the Central North Island in 2016.

[7] SSL and its associated company CNI Forest Management Limited are run by the same two directors who, along with family members, are also the shareholders of those two companies. Their business is the one of the largest in the region, employing between 150 and 180 workers. About half of its workforce usually comprised workers on ‘tied’ visas, that is visas allowing them to work for SSL but no other employers.

[8] During her inquiries the Inspector checked SSL’s compliance with employment standards legislation against the company’s records for a sample of just four of its employees, three technicians and one crew manager. The employment agreements of the three technicians provided for payment on a ‘piece rate’ basis. The crew manager’s remuneration was based on ten per cent of gross turnover achieved by the crew members.

[9] The Inspector’s analysis resulted in her concluding those four employees were not paid the minimum wage for every hour worked. She drew this conclusion from looking at the starting and finishing times recorded on crew daily production sheets. From conversations with Mr Hyde and SSL’s finance manager Betty Waiariki (a

shareholder and wife of SSL's other director, Raymond Waiariki), the Inspector understood those recorded hours were not used for calculation of wages and were not entered into the payroll system.

[10] Rather, as confirmed by Mr Hyde's evidence to the Authority investigation, hours recorded and paid for were only those that the company regarded as "productive hours". SSL received what is known in its industry as a 'man day rate' from forest owners or managers to carry out particular services in forest blocks, such as pruning or planting. Using that man day rate as a starting point, SSL then calculated a daily target for how many trees needed to be pruned or planted by each crew member. The daily target was then divided by the number of hours of work expected that day. If a worker met the resulting hourly target for the number of trees to be pruned or planted or whatever, the hour's work was deemed to be a 'productive hour'. It was those productive hours for which SSL then paid the worker.

[11] SSL allowed new workers a period of grace to reach their hourly and daily targets at the beginning of their employment. For as long as three months after starting the job a new worker would be 'topped up' to the minimum wage for each expected productive hour. However, after that period on the job, a new worker was expected to be 'up to speed' and from then on was only paid the statutory minimum hourly rate if they met the company's hourly targets.

[12] Employment agreements signed by Mr Spooner and Mr Ligaqaqa in 2016 contained the following clauses setting out SSL's pay regime:

3.3 Remuneration will be based on a 'piece rate' basis.

3.4 In order to comply with wage legislation the Employer will convert production information to hourly rate equivalents based on hours worked by the Employee as provided for in Schedule 1.

3.5 Hours spent on site which the employee chooses not to work will not be paid for and will not be "working hours" for the purpose of wages calculations.

Schedule 1

1. Remuneration

The Employee shall be paid on a piece work basis, typically per tree or per hectare. The rate paid to the Employee will be variable and will be affected by:

- (i) The price paid by the forest owner and the type of work completed.
- (ii) Incorrect tallies recorded by crew members.
- (iii) Poor quality work that requires re-working which was previously paid for.
- (iv) The Employee choosing not to work or not working a full day even though they are physically present in the forest. (Hours spent in the forest where the employee chooses not to work will not be treated as working hours).

These matters will be taken into account in deriving affective (*sic*) average hourly rates paid which will not be less than \$15.25 per hour.

[13] Section 6 of the MW Act begins with the phrase “notwithstanding anything to the contrary in any ... agreement”. The Court of Appeal has confirmed that phrase demonstrated Parliament’s unequivocal intention for the section to prevail over any statement in an employment agreement supposedly limiting to a worker’s entitlement to the prescribed minimum wage.²

[14] The Inspector’s evidence, reporting on her inquiries, established SSL had not paid that minimum hourly rate, as it was at that time, for every hour the four named workers had worked.

[15] SSL’s concept of paying workers only for what it deemed were productive hours was clearly in breach of the MW Act s 6 requirement that a worker is “entitled to receive from his employer payment for his work at not less than that minimum rate”. A worker may have failed to meet a production target for the hour but nevertheless have been working during that hour. Similarly, workers required to carry out a “redo” of an area, if their original work was said not to have met necessary standards, were working but SSL did not pay them at least the minimum hourly rate for that work. Both were instances where SSL could address any problems of supposedly slow or inadequate work by its training and supervision of workers, not by underpaying them. The same answer applied to SSL’s concern, expressed by Mr Hyde, that the company did not want to pay workers for time he said they chose to sit in the van rather than work. All those circumstances could be addressed through use of performance management and, if necessary, disciplinary action to ensure reasonable work targets or standards were met. However the company was not

² *Terranova Homes and Care Limited v Faitala* [2013] NZCA 435 at [31].

entitled to deny those workers their statutory right to be paid at least the minimum wage for each hour worked.

[16] A similar analysis applied to the time spent travelling into remote forestry blocks, not necessarily accessible for physical, safety and security reasons by workers using private transport. SSL provided transport for the workers but, at the time of the Inspector's audit, did not pay for time spent travelling to and from those work sites. However it was clearly time that more likely than not fell into the definition of "work" as referred to in s 6 of the MW Act. Applying factors considered by the Employment Court, travelling to work in the work van involved constraints on the freedom of the worker to do as he or she pleased during that time and the time was spent for the benefit of the employer, that is getting labour into a position and place to carry out tasks necessary for the company's business.³

[17] The same analysis applied to time spent on arrival at the day's work site in preparing equipment and taking part in a safety briefing, which did not appear to be included as part of the 'productive' hours for which SSL paid.⁴

[18] The Inspector's audit of the records for the four selected workers identified a short fall in minimum hourly pay entitlements totalling \$8,672 for the one year that she reviewed. The following extract from notes of a meeting between the Inspector, SSL's directors and the company's accountant held in June 2017 demonstrated the potential wider ramifications of her conclusions:

[The accountant] says that given the arrears calculated for the 4 employees is \$8672 or \$2169 per employee, if you multiply \$2000 by the number of employees they employ each year (150) it is possible arrears would equate to \$300,000 per year or \$1.6 million over 6 years.

[19] The company had refused to carry out an audit for all its workers for the full six year statutory period during which arrears could be assessed and claimed. It said its capacity to do so was limited, its finance manager Mrs Waiariki refused to do the task and, if amounts owed were confirmed to be at that level, the company would go out of business.

³ *Idea Services v Dickson* [2009] ERNZ 116 at [64]-[70].

⁴ *A Labour Inspector v Smiths City Group Ltd* [2018] NZEmpC at [38]-[39].

[20] In her final report on her inquiry the Inspector elected to seek only arrears for breaches of minimum wage entitlements for current employees of SSL and advised that she would ask the Authority to impose penalties for those breaches.

Penalties for breach of the MWA on payments

[21] The appropriate penalty for SSL's breaches of s 6 of the MW Act is assessed by applying four broad steps recommended by the Employment Court.⁵ This includes considering matters identified by s 133A of the ER Act.

Step 1: The number and nature of the breaches

[22] SSL is liable for a penalty of \$20,000 for each occasion on which it breached the requirements of s 6 of the MW Act by not paying each of the four identified employees at least the minimum wage for each hour worked. Taken one by one this involved many dozens of breaches over the course of a year, effectively occurring each pay day. However the Employment Court has given the following guidance on how to assess the starting point for penalties in such circumstances:⁶

Although each such breach incurs, theoretically, liability for a penalty of up to \$20,000, that is not the way in which we consider the defendants' breaches of s 6 of the Minimum Wage Act should be determined for penalty purposes. These breaches were materially identical on each occasion on which they were committed by the defendants. ... In these circumstances, we consider that the defendants' breaches of s 6 of the Minimum Wage Act should be treated as making them liable for a single penalty in respect of each separate employee affected.

[23] Accordingly SSL's liability to a penalty provisionally totalled \$80,000 for the four affected workers.

Step 2: Severity of the breach - aggravating factors

[24] SSL's breaches of the minimum wage provisions occurred over a protracted period. A high proportion of its workforce were vulnerable migrant workers with little bargaining power and, likely, limited knowledge of their rights and limited confidence in asserting those rights.

[25] As late as the time of lodging its statement in reply in the Authority in October 2017 SSL also persisted in arguing that the Inspector was mistakenly seeking to apply

⁵ *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143.

⁶ *Preet*, above n 4, at [155].

“the hourly rate system”, as the company called it, rather than its piece rate system. It demonstrated no significant remorse or contrition for its breaches.

[26] Contrary to SSL’s submission that its actions resulted from a mistaken appreciation of how the minimum wage legislation should be applied, the company had deliberately designed, applied and persisted with a coercive piece work regime that it could and should have known was unacceptable. Correspondence in Inspectorate files showed that as long ago as December 2009 (and again in June 2010) an Inspector had expressly advised Mr Hyde that “any piecework payments must be equal to or greater than the current minimum hourly rate for the hours actually worked”. As a relatively large business in its competitive industry, SSL had the capacity and resources to engage professional advice about how to meet this statutory requirement.

[27] When challenged by the Inspector’s inquiry and report, SSL’s own accountant identified, by extrapolation, the considerable benefit the company had gained from its illegal pay system, potentially amounting to as much as \$300,000 a year across the entire workforce.

[28] As the Inspector’s closing submissions in the Authority investigation suggested, the problem was wider than “the ring-fenced sample”. SSL’s non-compliance with statutory minimum requirements had given it an anti-competitive advantage over other contracting businesses who the Inspector’s 2016 audit had found did, in the main, comply with those requirements.

[29] Considering the object of the ER Act to promote effective enforcement of employment standards and to acknowledge and address the inherent inequality of power in employment relationships, SSL’s offence in relation to the four named workers had to be assessed as serious.

[30] No adjustment was needed for the uneven effect on those four workers of the breaches arising from SSL’s illegal application of its pay regime. On the Inspector’s calculations Mr Spooner was short paid \$4,846 below his minimum wage entitlement. Mr Ligaqqa was short paid \$2,613. The other two workers, who it was not necessary to identify by name in this determination, were short paid \$970 and \$241. The penalty assessment, in the facts of this case, addresses the overall use by the employer

of an illegal system of calculating pay rather than the relative degree of its effect on the particular workers.

Step 2: Severity of the breach – ameliorating factors

[31] Some allowance could be made for SSL's co-operation with the Inspector in providing records in a timely matter and meeting with her to discuss the issues that arose. The company also said it had since taken some steps to ensure compliance with the legislation for its current employees. It had paid some arrears for minimum wages. It had also since changed its system for recording hours of work.

[32] Balancing those aggravating and ameliorating factors a reduction of 50 per cent could reasonably be applied to the provisional total penalty, that is to \$40,000.

Step 3: The means and ability of SSL to pay the provisional penalty

[33] SSL submitted it could face commercial collapse if required to pay the full amount of arrears liability that, on its accountant's extrapolation, could result from an assessment of payments below the minimum standard to all previous employees over a six year period. However its evidence did not establish it lacked the means and ability to meet a penalty of the level provisionally reached here. Rather, its summary of financial results showed net operating surpluses for its 2016 and 2017 financial years were more than sufficient to pay such a penalty. Its 2018 figures were not available. It was also now paid a significantly higher man day rate. The current rate, negotiated with forestry owners and managers, was around 50 per cent higher than that applying in 2016 so the company had more room to ensure wages paid complied with the statutory employment standards.

[34] Mr Hyde gave written and oral evidence to the effect that SSL's ability to meet a penalty would be affected, in turn, by any consequential application by INZ of its stand down policy applied to employers ordered by the Authority or the Employment Court to pay penalties for breaches of employment standards. A penalty of more than \$20,000 but less than \$50,000 could see SSL, as a non-compliant employer, stood down for as long as 18 months from being granted visa applications and visa renewals for overseas workers. He said this, in turn, would affect its commercial viability given the company's reliance on overseas workers to complete its contracts.

[35] However, as already noted above, the Authority's assessment of liability to a penalty, and the appropriate level to set such a penalty, cannot reasonably be calibrated to enable an errant employer to escape or reduce the effects of a government policy. This is consistent with the approach taken on the same point in previous Authority determinations.⁷ Neither is the stand-down, if applied by INZ, a double penalty. Rather it is simply another consequence of a failure by any particular employer in that situation to meet employment standards that Parliament, during governments of varying hues, has declared and maintained over many decades. The Authority cannot reasonably curtail its own obligation to enforce those standards in order to enable a non-compliant employer to then avoid further commercial consequence. To do otherwise would give an anti-competitive advantage to non-compliant employers over those who conduct their business responsibly within the law. It could also result in an unfairly lower penalty to SSL than might be applied to other non-compliant employers who do not employ migrant workers and are not affected by INZ's visa stand-down policy.

[36] No further reduction of the provisional level of the penalty was warranted in respect of SSL's means and ability to pay it or for the effects on its business of such a penalty.

Step 4: Proportionality

[37] The final step of the assessment requires the Authority to stand back and consider whether the final penalty is proportionate to the seriousness of the breaches, the harm done, consistent with the levels imposed in other cases and just in all the circumstances.⁸

[38] A penalty at the provisional level of \$40,000 would be appropriate to punish SSL for its prolonged breach of minimum wage entitlements and to deter SSL or other employers acting in the same or a similar way in the future.

[39] Its proportionality to the harm done cannot reasonably be assessed only on the basis of the \$8,672 shortfall in payments due to four workers over one year. Rather

⁷ See *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 293 at [49] and *A Labour Inspector v One World Resourcing Limited* [2017] NZERA Christchurch 48 at [41].

⁸ *Preet*, above n 4, at [147] – [148].

the proper measure is the likely harm done to a workforce of more than 150 workers over a six year period. Even if the extrapolation of SSL's accountant on the basis of \$2000 shortfall per worker per year proved to be exaggerated by as much as 50 per cent, the harm done by this breach of an employment standard amounted to \$150,000 each year. In that context, a penalty of \$40,000 was arguably too lenient and disproportionately low.

[40] Consistency with other cases was difficult to assess as applications brought by Labour Inspectors typically involve multiple breaches across several of the Acts in which the employment standards are found.⁹ The *Boorsboom v Preet* case, referred to earlier, is one such example and a useful yardstick.¹⁰ In that case, two closely-associated companies breached employment standards applying to five employees. Breaches of the MW Act comprised about one quarter of the initial provisional liability to penalties of \$400,000. Having applied the steps followed above in this determination, the Court ultimately imposed a penalties totalling \$100,000 for the two companies.

[41] In SSL's case, considering the comparative degree of severity of its breaches, and particularly the prolonged and planned nature of its errant pay regime, a further reduction of the provisional penalty from \$40,000 to \$35,000 was sufficient to allow for a proportionate, consistent and just outcome which would punish and deter such behaviour.

[42] Accordingly, SSL must pay a penalty of \$35,000 for its breaches. To allow sufficient time for SSL to do so and to allow for the coming Christmas-New Year break, the date by which the penalty must be paid has been set as 25 January 2018.

Application of penalties recovered

[43] Applying s 136 of the ER Act it was appropriate to make an order requiring SSL to pay the penalty directly to the Inspector as the means of its collection by the Crown.

[44] In the eventuality of a penalty being imposed the Inspector had asked the Authority to also direct payment of some portion of it to the four workers whose

⁹ Employment Relations Act 2000, s 5 definition of "employment standards".

¹⁰ *Preet*, above n 4.

records she had analysed in her inquiry. SSL had, eventually, paid those workers for the actual minimum wage arrears that the Inspector had identified but the non-economic harm to them of being short paid, when on low wages anyway, was not readily compensable.¹¹

[45] Allowing, broadly, for the degree of harm to which they were exposed, the sum of \$2,000 each of the penalty, once paid by SSL, must then be paid by the Inspector to Mr Spooner and Mr Ligaqaqa. The sum of \$500 each must be paid to the other two workers. The remaining \$30,000 must be transferred by the Inspector to the Crown Bank Account.

[46] If, after one year and after making reasonable endeavours to do so, the Inspector has not been able to contact any of the workers to whom a payment of part of the penalty has been directed, the Inspector must then transfer that unpaid sum to the Crown account.

Costs

[47] In the event the Inspector was successful in her application she sought an order for costs and reimbursement of the filing fee. In closing submissions the Inspector accepted application of the Authority's usual daily tariff would be appropriate, with no factors requiring an upward or downward adjustment. SSL submitted costs should lie where they fall. Given the outcome reached in this determination it was reasonable that the company should contribute to the Inspector's costs of representation. The investigation meeting took slightly shorter than a full day so the part tariff figure of \$4000 was an appropriate amount to award for both the Inspector's costs and the expense of the \$71.56 fee she paid to lodge her application in the Authority.

Robin Arthur
Member of the Employment Relations Authority

¹¹ *Preet*, above n 4, at [196]-[197].