

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 134
5602923

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

A N D SIONE ELISI UASI
 Respondent

Member of Authority: Peter van Keulen

Representatives: Ella Tait, Counsel for the Applicant
 No appearance by or for the Respondent

Investigation Meeting: 16 August 2016 at Blenheim

Oral Determination
delivered: 16 August 2016

Written Determination
issued: 18 August 2016

ORAL DETERMINATION OF THE AUTHORITY

**This determination is a written record of an oral determination delivered on
16 August 2016.**

Employment relationship problem

[1] The Labour Inspector, Laurence Norton, seeks the following orders against the
respondent, Sione Uasi:

- a. Penalties for breaches of the Minimum Wage Act 1983 and the
Holidays Act 2003.

- b. Payment of \$2,479.49 for minimum wage arrears owed to employees of Mr Uasi.
- c. Compliance with an Improvement Notice issued to Mr Uasi on 18 September 2014.

Preliminary matters

[2] The Statement of Problem in this matter was served on Mr Uasi at his home address on 14 January 2016. Mr Uasi accepted the statement of problem personally and signed to acknowledge delivery.

[3] A Statement in Reply was not filed.

[4] Mr Uasi was advised in writing on 23 February 2016 by an Authority officer that a case management conference would be held by conference call on 4 March 2016 at 9:30 am. This letter was couriered to Mr Uasi at his home address on 24 February 2016.

[5] Mr Uasi could not be contacted on 4 March 2016 and the telephone conference proceeded without him. Directions were issued for an investigation meeting to take place on 14 June 2016.

[6] The directions were recorded in a notice of direction and notice of investigation meeting and these were served on Mr Uasi on 15 March 2016. I have seen an affidavit of service confirming that Mr Uasi was personally served.

[7] Unfortunately, the investigation meeting could not proceed on 14 June 2016 due to illness and a new date was assigned for the investigation meeting, being 16 August 2016. This new date was recorded in a letter to Mr Uasi dated 22 July 2016 and a notice of investigation meeting. Both the letter and the notice were served on Mr Uasi on 8 August 2016.

[8] The notice of investigation meeting advised Mr Uasi of today's meeting and stated further that *If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*

[9] Mr Uasi has chosen not to attend today and has not contacted the Authority to explain why he cannot or will not attend. There was no apparent reason why this matter could not continue today in his absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Background Facts

[10] Mr Uasi operates a viticulture labour contracting business in Marlborough. He is a sole trader and operates under the name Jkava Temping Solutions.

[11] The Labour Inspector served an improvement notice issued under s 223D of the Act on Mr Uasi on 18 September 2014 (the Improvement Notice).

[12] The Improvement Notice advised that the Labour Inspector reasonably believed that Mr Uasi had failed to meet his obligations under the Holidays Act, the Minimum Wage Act, the Wages Protection Act 1983 and the Employment Relations Act 2000.

[13] The Improvement Notice required Mr Uasi to:

- a. Provide the Labour Inspector with evidence that all employees working for Mr Uasi from 18 September 2014 until 20 October 2014 were receiving minimum employment standards; and
- b. Pay \$4,129.89 (gross) for minimum wage and public holiday arrears identified in the Improvement Notice as being owed to employees.

[14] Mr Uasi failed to comply with the Improvement Notice. Mr Uasi did not object to the Improvement Notice nor did he suggest that the arrears claimed were not payable. Mr Uasi claimed some of his employees had “cheated” him, he had debts of \$50,000 and he was closing his business.

[15] After investigating Mr Uasi’s ability to pay the arrears claimed, the Labour Inspector advised Mr Uasi that the Inspectorate would not pursue him for the arrears provided he complied with minimum employment standards in the future. This was recorded clearly by the Labour Inspector in a letter dated 1 December 2014 that was sent to Mr Uasi.

[16] No further action was taken at that time in respect of the Improvement Notice.

[17] In June 2015, the Labour Inspector was advised that an employee of Mr Uasi had complained about not being paid minimum wage.

[18] As a result of subsequent investigations, including a meeting with Mr Uasi and a review of his employment records, the Labour Inspector determined that Mr Uasi employed up to 50 employees as seasonal workers. Some of these workers reported to the Labour Inspector that they were required to sign timesheets at the start of each day of work that simply recorded the start time and no finish time, subsequently the time sheets were completed to record less hours worked than that which the employees did. Other employees reported that they had worked certain days but their timesheets did not record them working on that day.

[19] The Labour Inspector audited Mr Uasi's wage and time records for the two weeks of 29 June 2015 to 12 July 2015. He established that Mr Uasi owed employees minimum wage arrears for this period totalling \$2,479.49. The Labour Inspector also concluded that Mr Uasi had failed to keep wage and time records and holiday and leave records for all employees for this period.

[20] These findings were set out in an investigation report that the Labour Inspector provided to Mr Uasi.

[21] The only response the Labour Inspector received from Mr Uasi was a text message on 17 September 2015 in which Mr Uasi reported he was unemployed and continued to be in financial difficulty.

Penalty

[22] The Labour Inspector seeks penalties for the events of 2015 which are:

- a. Failure to pay employees the minimum wage in breach of s 6 of the Minimum Wage Act;
- b. Failure to keep wage and time records in breach of s 8A of the Minimum Wage Act;
- c. Failure to keep holiday and leave records in breach of s 81 of Holidays Act.

[23] Section 8A of the Minimum Wage Act was repealed with effect from 1 April 2016. However, clause 3(7) of Schedule 1AA of the Act makes clear that s 8A continues to apply, despite its repeal, to proceedings brought in relation to conduct that occurred before the amendments to the Minimum Wage Act. Therefore, I have the jurisdiction to consider the Labour Inspector's claim made under s 8A of the Minimum Wage Act.

[24] I am satisfied, based on the Labour Inspector's evidence, that Mr Uasi has breached the provisions as alleged. I am also satisfied, given the evidence about the time sheets, that he did so knowingly and deliberately. Given these failures, a penalty is appropriate.

[25] I have considered the list of factors the Employment Court set out as being relevant to the question of quantum of any penalty¹. In this case it is my view that the relevant circumstances include:

- a. The breaches in 2015 are essentially a second set of failings that are similar to the failings in 2014 that were subject to the Improvement Notice. Mr Uasi received the benefit of the Labour Inspector's discretion not to proceed with compliance and/or penalties for his failure to comply with the Improvement Notice because of his financial situation in 2014 and on the basis that Mr Uasi would comply with minimum employment standards in the future. Mr Uasi has abused this benefit and is a repeat offender;
- b. The breaches are serious not only because there is a failure to pay the minimum wage entitlements but because of the manner in which the breaches were effected. In the circumstances I have concluded that Mr Uasi knew what his obligations were (at the very least because of the Labour Inspector's action in 2014) and he took steps to conceal those breaches. This occurred with 22 employees for rights that the Employment Court has stated are *sacrosanct*²;
- c. The failure to keep adequate records raises concerns about how employees have been treated overall but the Labour Inspector is unable to verify this because of the failure to keep records. As counsel for the Labour Inspector submitted, any further breaches relating to payment

¹ *Tan v Yang and Zhang* [2014] 2 ERNZ 448 at [32].

² *Macrury v Cyprus Villas Ltd* [2015] NZEmpC 157 at [32]

of minimum entitlements are masked by this failure to keep the required records and I accept that is a real possibility in this case;

- d. The breaches by Mr Uasi occurred in relation to migrant employees who are vulnerable to this type of exploitation. Mr Uasi has, in my view, taken advantage of these employees;
- e. There seems to be little remorse from Mr Uasi, he was essentially given a second chance after the events of 2014 but did not amend his ways. He failed to respond in substance to the investigation report produced by the Labour Inspector and has failed to participate in this process. Mr Uasi's only response has been to state that he is unemployed and in financial difficulty. I am not convinced that this short explanation of Mr Uasi's circumstances should be relevant now. He claimed financial hardship in 2014 and received the benefit of the Labour Inspector's discretion then, in the hope he would comply with minimum entitlements in the future. Despite this, Mr Uasi continued to employ people and deliberately breached his obligations and is not deserving of any leniency.

[26] The purpose of a penalty is to punish, in order to deter Mr Uasi from any further re-offending, and to deter other employers from such non-adherence³. As the Labour Inspector submitted this is not just about protecting employees' rights but deterrence is about the bigger picture of protecting complying businesses against the unfair advantage some businesses might gain from exploiting employees. It is also about protecting the reputation of the industry both nationally and internationally, particularly in a sector heavily reliant on export. And the message must be clear that financial difficulty will not excuse this type of conduct or mean that enforcement will not be taken, particularly for repeat offenders.

[27] I have considered the range of penalties imposed in other comparable cases⁴, that is, in cases where individual employers have failed to pay statutory entitlements

³ *Tan v Yang and Zhang* [2014] 2 ERNZ 448 at [35].

⁴ Such as *Douglas Hixon, Labour Inspector v Neal Alan Summers* [2015] NZERA 188, *Roderick Francis Brown, Labour Inspector v Mele Ford* [2015] NZERA 112, *Bridget Zonneveld, Labour Inspector v Hugh and Darla Le Fleming as Trustees of Le Emari Trust* [2015] NZERA 130 and *Labour Inspector Warren Smith v Vikram Singh Manku* [2015] NZERA 82

such as holiday pay or minimum wage and/or failed to keep wage and time records or holiday and leave records. I note the following:

- a. Where there is more than one breach of minimum entitlements and/or record keeping alleged, arising out of a connected or related series of events, it is generally accepted that one global penalty is appropriate;
- b. The maximum amount for a penalty that can be imposed against an individual is \$10,000 as opposed to \$20,000 for a company;
- c. There has been a full range of penalties imposed from \$10,000 to \$500. The maximum penalty was imposed for breaches described as *egregious, serious, numerous and repeated*⁵ carried out despite advice from the employer's accountant to amend practices. In contrast, a penalty of \$500 was imposed for failure to pay minimum entitlements and keep records where the breaches were not intentional, the employer acknowledged the failure to pay the entitlements, paid the amounts claimed and was cooperative and forthright in the Labour Inspectorate's investigation⁶.

[28] This case is more in line with *Mele Ford* and lends itself to a higher sanction.

[29] I will order Mr Uasi to pay only a single penalty. However, I note that the penalty relates to three sets of breaches of minimum entitlements and in the case of the minimum wage arrears relates to 22 employees, so it is a single penalty for multiple breaches.

[30] Given the relevant aggravating factors, the need to punish and deter and the range of penalties in comparable cases Mr Uasi is to pay a penalty of \$7,500. Payment is to be made to the Crown via the Employment Relations Authority.

Minimum Wage Arrears

[31] I accept the Labour Inspector's audit of the wage and time records for the period of 29 June 2015 to 12 July 2015 and as a result accept that Mr Uasi has failed to pay minimum wage entitlements to employees in the sum of \$2,479.49. I order Mr Uasi to pay \$2,479.49 gross to the Labour Inspector for the benefit of the

⁵ *Roderick Francis Brown, Labour Inspector v Mele Ford* [2015] NZERA 112 at [11]

⁶ *Labour Inspector Warren Smith v Vikram Singh Manku* [2015] NZERA 82

employees he has identified as being owed minimum wage arrears. I also order Mr Uasi to pay interest on this sum at the prescribed rate under the Judicature Act 1908 (5%) from 1 September 2015 until paid in full.

Compliance order

[32] I am satisfied that the Improvement Notice complies with the requirements of the Act and was properly served. Mr Uasi has not complied with the Improvement Notice.

[33] I make an order that Mr Uasi must comply with the Improvement Notice pursuant to s 137(1)(a)(iii) of the Act, by paying \$4,129.89 gross for arrears identified in the Improvement Notice within 28 days of the date of this determination. I also order Mr Uasi to pay interest on this sum at the prescribed rate under the Judicature Act 1908 (5%) from 1 June 2015 until paid in full.

Costs

[34] Having been successful with this matter the Labour Inspector is entitled to his costs. This matter took less than half a day for the investigation meeting largely because Mr Uasi did not attend. There was a reasonable amount of preparation required including a significant amount of evidence and I am satisfied that an award of costs reflecting half of the daily tariff is appropriate⁷. Mr Uasi is ordered to pay \$1,750 to the Labour Inspector for the costs incurred in this matter.

[35] I further order that Mr Uasi reimburse the Labour Inspector the filing fee of \$71.56.

Peter van Keulen
Member of the Employment Relations Authority

⁷ Applying the principles set out in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].