

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 218
3000991

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
AND	WALIAZ LIMITED First Respondent
AND	TARANDEEP SINGH Second Respondent

Member of Authority: Christine Hickey

Representatives: Jessica Ellison, Counsel for the Applicant
Tiffany McRae, Counsel for the Respondent

Investigation meeting: On the papers

Submissions and further evidence received: 8 September 2017 from the Applicant and 8 August and
22 September 2017 from the Respondents

Date of Determination: 14 December 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Labour Inspector Nicola Rowe asked the Authority to impose penalties on Waliaz Limited (Waliaz) and Tarandeep Singh for six breaches each of the employment standards legislation.

[2] Mr Singh is Waliaz's sole director and one of two shareholders. The breaches relate to Waliaz's employment of one employee, who was a migrant student on a work visa.

[3] Part way through these proceedings, and prior to an investigation meeting, on 4 April 2017, the parties lodged a joint memorandum. Waliaz accepted that it had

committed the six breaches and owed the employee the amount of \$9,815.91. It agreed to pay the arrears directly to the employee in monthly instalments.

[4] As a result, I vacated the investigation meeting set down for 6 April 2017. At that stage, the Labour Inspector notified me that she was still seeking penalties against Waliaz. She asked me to stay any consideration of Mr Singh's liability for the arrears until Waliaz provided proof that it had paid the employee in full.

[5] Waliaz paid the final instalment on 19 September 2017. The Labour Inspector has confirmed that she seeks penalties against Waliaz only, and not against Mr Singh.

[6] The parties agreed that I would deal with the application for penalties on the papers. Those papers include witness statements issued before the parties had agreed on the settlement of arrears payments, submissions from counsel and Waliaz's financial information.

[7] I have to consider imposing penalties for the following six agreed breaches:

- (i) Failure to keep a record showing the number of hours worked each day and in a pay period and the pay for those hours – s 130 of the Employment Relations Act 2000 (the Act).
- (ii) Failure to keep holiday and leave records – s 81 of the Holidays Act 2003 (HA).
- (iii) Failure to provide a written employment agreement when employment commenced – s 64 of the Act.
- (iv) Failure to pay the adult minimum wage for hours worked – s 6 of the Minimum Wage Act 1983 (MWA).
- (v) Failure to pay the employee the employee's relevant daily pay or average daily pay for unworked public holidays – s 49 of the HA.
- (vi) Failure to pay final holiday pay at 8% of the employee's gross earnings since commencement of the employment, when the employment ended within 12 months – s 23 HA.

[8] As permitted by s 714E of the Act, this determination does not record all evidence and submissions received. It states findings of fact and law, expresses conclusions on the issues requiring resolution and specifies orders.

The issues

- [9] The specific questions I need to resolve include:
- (i) Should I impose penalties?
 - (ii) What are the potential maximum penalties for all six breaches, including considering whether “global” penalties should be considered rather than each breach generating liability for the potential maximum penalty?
 - (iii) How severe were those breaches? I need to consider aggravating factors that may have made those breaches worse and mitigating factors that could warrant a reduction from the provisional penalty amounts.
 - (iv) Do the financial circumstances of the respondent company warrant a reduction in the provisional level of penalties?
 - (v) Is the level of penalties reached by applying the earlier three steps a proportionate outcome for the nature and gravity of the breaches of employment law in this matter, or is some further adjustment appropriate?

Should I impose penalties?

[10] The purpose of penalties in minimum standards cases is to punish the employer who has breached the standards, to deter that employer and other employers from similar breaches in the future, and to prevent unfair business competition with law-abiding employers. In suitable cases, it can also have the result of compensating victims of a breach.

[11] I consider that imposing penalties for each of these six breaches of minimum standards is required to uphold the importance of the minimum standards, to punish, deter (specifically and generally) and to prevent unfair business competition.

The nature and total number of breaches

Holidays Act

[12] There are three separate breaches of the HA. Two were breaches of a failure to pay. One of those breaches is a failure to pay the employee for unworked public

holidays, under s 49. The other such breach is a failure to pay final holiday pay at 8% at the end of employment, under s 23.

[13] The third breach is a breach of s 81 of the HA for failing to keep holiday and leave records.

[14] At a maximum of \$20,000 for each breach, the total penalties would be \$60,000.

[15] The three breaches are breaches of the same Act. Therefore, according to *Borsboom v Preet PVT Limited*¹ I can consider whether to impose global penalties rather than three separate penalties. Global penalties may be appropriate in cases of multiple similar breaches of statutory standards.² In this case, the breaches were separate and distinct. There are not multiple breaches of the same section of the Act affecting the one employee.

[16] I am satisfied that the starting point for breaches of the HA is three separate penalties of \$20,000 making the maximum potential penalty \$60,000.

Employment Relations Act

[17] There are two separate breaches of the Act. These are a failure to supply a written employment agreement (s 64) and a failure to keep wages and time records under s 130.

[18] It is not appropriate to globalise the penalties for these two very different types of breaches. That means that the total maximum potential penalties for breaches of the Act amount to \$40,000 (two breaches x \$20,000 each).

Minimum Wage Act

[19] The failure to pay the minimum wage for every hour worked is a breach of s 6. The maximum potential penalty is \$20,000.

Maximum total potential penalties for all breaches

[20] The maximum potential penalties are \$120,000.

¹ [2016] NZEmpC 143.

² *Borsboom*, above n 1, at [141].

Step two: Aggravating factors

[21] The employee was a new migrant, and relatively young. Both factors made him vulnerable, because of his unfamiliarity with his rights under New Zealand law.

[22] The number of different breaches of employment standards affecting the employee is also an aggravating factor.

[23] In relation to the two breaches of failing to keep records and the single failure to provide an employment agreement, the Labour Inspector suggested that a starting point of 50% of the potential maximum penalty is appropriate. I agree and adopt that proposal meaning for those three breaches the provisional penalty is \$30,000, or \$10,000 per breach.

[24] In relation to the failure to pay the minimum wage, the breach is moderate to serious. The Labour Inspector suggests that the appropriate provisional penalty at this stage is 60%, or \$12,000. I agree.

[25] In relation to the two failures to pay appropriately under the HA, the Labour Inspector suggests the failure to pay entitlements is as serious as the failure to pay the minimum wage and warrants the provision level being set at 60%, or \$12,000 for each breach. I agree.

Step two: Mitigating factors

[26] The most significant mitigating factor is that the once the respondents sought legal advice Waliaz immediately acknowledged the amounts due to the employee. It has now paid the employee in full. That admission and payment has avoided the need for an investigation meeting.

[27] I agree with the Labour Inspector's submission that the co-operation of the company and the payments made mean that it is appropriate to decrease the severity of the potential penalties by 50%.

Step three: defendant's financial circumstances

[28] The financial situation of the respondent is relevant to my assessment of whether penalties should be imposed, and, if so, to the amount of those penalties.

[29] I have a copy of Waliáz's 2017 final accounts that show it is operating at a loss. In addition, Waliáz has provided evidence that it has recently lost two ongoing clients who brought in regular income.

[30] Waliáz is a small business and it has not employed any staff since these proceedings began with Mr Singh undertaking all the work himself.

[31] Waliáz submits that any penalty should be modest and requests that it be able to be paid by way of instalment.

[32] The Labour Inspector is willing to accept payment by instalment. She draws my attention to the relevant consideration that the size of a penalty must not be so great as to be unrealistic, meaning it is unlikely to be recovered.

[33] The Labour Inspector suggests a modest reduction of 20% from \$33,000, to \$26,400.

[34] Waliáz's counsel did not suggest a percentage by which I should reduce the potential penalty but relied on me to consider Waliáz's constrained financial circumstances.

[35] I consider that in the light of Waliáz's financial circumstances a reduction of 50% is appropriate leading to potential penalties of \$16,500.

Step four: Proportionality

[36] Waliáz and Mr Singh have not been involved in any previous breaches of minimum standards. No previous penalties have been imposed.

[37] I also need to consider the relationship of the size of the penalties to the amount owed to the employee, while recognising that not all the breaches were because of money owed. In addition, I need to ensure the amount of penalties imposed are in line with other similar cases.

[38] The Labour Inspector submitted that I should impose total combined penalties of \$8,000. However, Waliáz's counsel submitted that total penalties of \$5,000 were more reasonable.

[39] Taking all the relevant factors into account I consider a total combined penalty of \$6,500 is an appropriate amount for Waliaz to pay.

Step 1: Nature & number of breaches – potential maximum penalties		
s 6 MWA	1	\$ 20,000
s 130 ERA	1	\$ 20,000
s 64 ERA	1	\$ 20,000
s 23 HA	1	\$ 20,000
s 81 HA	1	\$ 20,000
s 49 HA	1	\$ 20,000
Total individual breaches	Subtotal	\$120,000
Step 2: Aggravating factors		
MWA		\$ 12,000
ERA		\$ 10,000
ERA		\$ 10,000
HA		\$ 10,000
HA		\$ 12,000
HA		\$ 12,000
	Subtotal	\$66,000
Step 2: Ameliorating/mitigating factors		
50% Reduction		
	Subtotal	\$ 33,000
Step 3: Defendant's financial circumstances		
Reduction of 50%	Subtotal	\$ 16,500
Step 4: Proportionality		
Moderate reduction	TOTAL	\$ 6,500

Orders for payment of penalties

[40] Waliaz Limited must pay the Labour Inspector for transfer to a Crown Bank Account \$6,500 as penalties imposed under s 75 of the HA, s 135 of the Act and s 10 of the MWA. The penalties must be paid by way of the following instalments:

- (i) The first instalment of \$1,000 to be paid on or before 30 January 2018;
- (ii) The second instalment of \$1,000 to be paid on or before 28 February 2018;
- (iii) The third instalment of \$1,000 to be paid on or before 30 March 2018;
- (iv) The fourth instalment of \$1,000 to be paid on or before 30 April 2018;
- (v) The fifth instalment of \$1,000 to be paid on or before 30 May 2018, and
- (vi) The sixth and final instalment of \$1,500 to be paid on or before 30 June 2018.

[41] If any instalments are late or short-paid the full amount outstanding becomes immediately due for payment.

[42] Waliaz Limited must also pay the Labour Inspector \$71.56, as reimbursement for the filing fee. This should be paid by 30 January 2018, along with the first instalment of the penalties.

[43] I understand the Labour Inspector does not claim any further costs. If that is incorrect the parties should seek to agree on costs or come back to the Authority, by 30 January 2018, for a determination costs.

Christine Hickey
Member of the Employment Relations Authority