

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 91
5631953

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

A N D WATARAI COMPANY LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Jodi Ongley, Counsel for Applicant
 No appearance for Respondent

Investigation Meeting: 9 April 2018 at Christchurch

Submissions Received: 19 April 2018 for Applicant

Date of Determination: 18 June 2018

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination, Watarai Company Limited must pay to the Labour Inspector, for the employees employed on fishing vessel Koshin Maru 7 for the period 1 May 2015 to 23 June 2015, the sum of \$97,715.87 for minimum wage entitlements.**
- B. Within 28 days of the date of this determination, Watarai Company Limited must pay to the Authority, for subsequent payment into a Crown bank account, a penalty totalling \$80,000.00.**

- C. Within 28 days of the date of this determination, Watarai Company Limited must pay \$2,071.56 to the Ministry of Business Innovation and Employment for the costs incurred by the Labour Inspector in pursuing this matter.**

Employment relationship problem

[1] A Labour Inspector has applied to the Authority for payment of wage arrears and a penalty for failing to keep adequate wage and time records in respect of a fishing voyage undertaken by Koshin Maru 7, a fishing vessel owned by Watarai Company Limited.

Preliminary matter

[2] Watarai is a Japanese company. I granted leave for the statement of problem to be served out of the jurisdiction and made directions about the method of service in Japan.

[3] Despite service being effected in line with my directions Watarai did not lodge a statement in reply, nor did it lodge any evidence in this matter and it did not appear at the investigation meeting.

[4] I am satisfied that through a combination of service of documents on Watarai by the Labour Inspector and then the Authority, Watarai was aware of the statement of problem, the evidence lodged in support, the date, time and location of the investigation meeting, and that the investigation meeting could proceed in its absence.

[5] Watarai has not contacted the Authority to explain why it could not or would not attend the investigation meeting.

[6] In all the circumstances, I was satisfied that Watarai was aware of the investigation meeting, the issues that would be addressed and the risk to it if it did not attend on the day. On this basis, I proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Background

[7] Watarai owns and operates the fishing vessel “Koshin Maru 7”.

[8] New Zealand Japan Tuna Company Limited had a valid fishing permit to take fish stock from New Zealand waters. New Zealand Japan Tuna chartered the Koshin Maru 7 to undertake fishing in New Zealand waters using this permit.

[9] In order to operate in New Zealand waters, the Koshin Maru 7 had to be registered with the Ministry of Primary Industries. On 24 April 2015, Watarai was granted a certificate of registration for Koshin Maru 7.

[10] The registration and chartering arrangement reflected the requirements of the applicable legislation for foreign owned fishing vessels operating in New Zealand waters, at that time. Effectively, New Zealand Japan Tuna became the agent for Watarai in respect of the fishing operations of the Koshin Maru 7 in New Zealand waters.

[11] Pursuant to the chartering arrangement, Watarai supplied the Koshin Maru 7 with 6 Japanese crew and 18 Indonesian crew. Whilst New Zealand Japan Tuna chartered the Koshin Maru 7, Watarai operated it¹.

[12] As a result, Watarai was the employer of the crew pursuant to the relevant legislation².

Fishing operations

[13] The Koshin Maru 7 undertook fishing operations in New Zealand waters for a period of approximately two months from the end of April 2015 through to late June 2015.

¹ The charter agreement provides for this.

² The Fisheries Act 1986.

[14] On 29 June 2015, a Labour Inspector requested wage and time records for the Koshin Maru 7 for the period between 20 May 2015 and 23 June 2015. In response to this request New Zealand Japan Tuna provided records of time sheets for the employees on Koshin Maru 7 for the period 25 April 2015 until 23 June 2015 being the time the Koshin Maru 7 was fishing in New Zealand waters.

[15] The Labour Inspector then requested payslips for the employees on Koshin Maru 7. New Zealand Japan Tuna provided records of pay slips for the employees, payment details and proof of payment of minimum wage.

[16] The Labour Inspector then requested a further breakdown of the records provided and New Zealand Japan Tuna provided wage and work records in response.

[17] During this time, the Labour Inspector also received information from a Ministry of Primary Industries Fisheries Observer who had been on board and observing Koshin Maru 7 from 23 April 2015 until 23 June 2015.

[18] The Labour Inspector then received records of the Catch Effort Return for the Koshin Maru 7 from the Ministry of Primary Industries. The captain of the fishing vessel completes these records and they record the start and end of line setting as well as the start and end of the haul.

[19] The Catch Effort Return records matched the times recorded by the MPI Observer for starts and finish times for each fishing session by the Koshin Maru 7.

[20] The Labour Inspector was able to use the information received from MPI to calculate the hours worked by the employees on Koshin Maru 7 and the amount of wages that should have been paid. The method of calculation was based on calculations completed by an accountant in a similar case, involving Ikeda Suisan Company Limited, owners and operators of Hoshin Maru 77³. I accept that the method of calculation was appropriate and the results are accurate.

³ *A Labour Inspector of the Ministry of Business, Innovation and Employment v Ikeda Suisan Company Limited* [2017] NZERA Christchurch 127.

[21] The records supplied by New Zealand Japan Tuna did not match the Labour Inspector's calculations.

[22] On the evidence I heard from the Labour Inspector I accept that the MPI records are more reliable and accurate and I conclude that the Labour Inspector's calculations of the hours worked by the Indonesian crew members and the shortfall of wages, are correct.

[23] As a result, I find that Watarai failed to keep compliant wage and time records pursuant to s 8A of the Minimum Wage Act 1983 and s 130 of the Act. And, I find that Watarai failed to pay the Indonesian crew members \$97,715.87 in wages.

Penalty

[24] In determining whether I should award a penalty for the breach that I have established, I must consider s 133A of the Act as well as the other matters outlined by Judge Inglis, as she was then, in *David Lumsden v SkyCity Management Ltd*⁴.

[25] The factors that I must consider include:

- a.* The object of the Act as stated in s 3.
- b.* The nature and extent of any breaches.
- c.* Whether any breaches were intentional, inadvertent or negligent.
- d.* The nature and extent of any loss or damage suffered by any employees.
- e.* Whether Watarai has paid any amount of compensation, reparation or restitution, or taken other steps to mitigate the effects of any of the breaches.
- f.* The circumstances in which the breach took place, including the vulnerability of the employees.

⁴ [2017] NZEmpC 30

- g. Whether Watarai has engaged in similar conduct previously.
- h. The need for general deterrence, and the desirability of broad consistency with other penalties.

[26] I am satisfied that the failure to keep compliant wage and time records is significant and, on the face of it appears deliberate in order to avoid paying crew their minimum entitlements. Because of the inaccurate wage and time records employees were underpaid to the extent of \$97,715.87.

[27] In all of the circumstances, and bearing in mind the need to punish and deter as well as be consistent with other cases in which penalties have been applied for breaches of minimum standards, I consider it entirely appropriate to impose a penalty against Watarai.

[28] I will now consider the quantum of this penalty based on the four stage criteria set out in *Borsboom v Preet PVT Ltd*⁵.

Step 1 – Nature and number of breaches

[29] I am satisfied that there has been 18 separate breaches in relation to failing to keep compliant wage and time records – i.e. one breach for each employee.

[30] I accept the submission made on behalf of the Labour Inspector that, in this case, it is only appropriate to globalise breaches in relation to every failure to keep wage and time records for each employee but not across employees.

[31] So I have 18 breaches and a maximum starting point for quantum of \$360,000.00.

Step 2 – Severity of breaches

[32] Based upon the Labour Inspector's calculations there is \$97,715.87 owed to 18 employees for unpaid wages. The underpayment has been caused by the incorrect wage and time records.

⁵ [2016] NZEmpC 143

[33] The failure to keep adequate records that then facilitates breaches of minimum standards is a serious breach.

[34] The circumstances of the offending indicates that the employees were exploited and deprived of their minimum entitlements.

[35] It appears that Watarai has not taken any responsibility for its failings – it has ignored the claim and my investigation.

[36] I conclude that these aggravating features warrant an assessment of the penalty at 80% of the maximum, giving a preliminary amount of \$288,000.00.

[37] There are no mitigating circumstances except that Watarai has not been subject to any prior claims by the Labour Inspectorate and it no longer operates in New Zealand waters.

[38] Given these two factors it is appropriate to further reduce the preliminary amount by 20% of the total, giving a preliminary amount at step 2 of \$216,000.00.

Step 3 – Means and ability of Watarai to pay

[39] As Watarai did not participate in my investigation I have no evidence about its ability to pay. The only things I can consider are Watarai continues to trade and appears to have significant assets. And, it is likely to have made a considerable amount of profit from fishing in New Zealand waters, with the Labour Inspector estimating a catch sale price of approximately \$2,500,000.00.

[40] For these reasons, there is no further reduction to the preliminary amount at step 3.

Step 4 – Proportionality

[41] It is clear from *Preet* that proportionality requires me to assess the penalties imposed in similar cases to ensure that there is some consistency.

[42] In this regard, the most relevant case is *Ikeda Suisan Company Limited*⁶ where in very similar circumstances the Authority imposed a penalty of \$40,000.00 for a similar breach. In that case, however, the failure to keep compliant wage and time records concerned 16 employees and there was significant engagement by Ikeda Suisan, including paying wage arrears and cooperating with the Labour Inspectorate.

[43] Considering proportionality with this case and contrasting this with the seriousness of the offending and the failure to engage in this matter, I am satisfied that the total amount of the penalty to be imposed in this case is \$80,000.00.

Costs

[44] The Labour Inspector also seeks a contribution to the costs of pursuing this matter. Counsel for the Labour Inspector submits that costs should be awarded on the basis of the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁷, and suggests that I award \$2,000.00 to reflect the slightly less than half day investigation meeting required to deal with this matter.

[45] Given the High Court decision in *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd*⁸ there may now be some doubt about awarding costs where in-house counsel has represented a party in litigation. Counsel for the Labour Inspector submits that as matters currently stand the Authority has been prepared to award costs to in-house counsel in Labour Inspectorate matters. And I note, so has the Employment Court – in this regard the comments of Judge Perkins in *Ahuja & Ors v A Labour Inspector of the Ministry of Business, Innovation and Employment*⁹ are particularly helpful.

[46] The Authority, which has its own costs regime independent of the High Court, has awarded costs where in-house counsel have been involved, and I see no reason to depart from that in this case. Applying equity and good conscience it is appropriate to award costs in favour of the Labour Inspector.

⁶ *A Labour Inspector of the Ministry of Business, Innovation and Employment v Ikeda Suisan Company Limited* [2017] NZERA Christchurch 127.

⁷ [2005] ERNZ 808.

⁸ [2018] NZHC 971.

⁹ [2018] NZEmpC 53

[47] I accept counsel's submissions regarding the application of the daily tariff and award the Labour Inspector \$2,000.00 as a contribution to the costs incurred in this matter.

[48] The Labour Inspector is also entitled to \$71.56 for the filing fee in this matter.

Determination

[49] Within 28 days of the date of this determination, Watarai Company Limited must pay to the Labour Inspector, for the employees employed on fishing vessel Koshin Maru 7 for the period 1 May 2015 to 23 June 2015, the sum of \$97,715.87 for minimum wage entitlements.

[50] Within 28 days of the date of this determination, Watarai Company Limited must pay to the Authority, for subsequent payment into a Crown bank account, a penalty totalling \$80,000.00.

[51] Within 28 days of the date of this determination, Watarai Company Limited must pay \$2,071.56 to the Ministry of Business Innovation and Employment for the costs incurred by the Labour Inspector in pursuing this matter.

Peter van Keulen
Member of the Employment Relations Authority