

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 87
5632508

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

A N D WHITE DEVELOPMENTS
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Catherine Milnes, Counsel for Applicant
 No appearance for Respondent

Investigation Meeting: 2 March 2017 at Hokitika

Submissions Received: 12 April 2017, from the Applicant
 30 March 2017, from the Respondent

Date of Determination: 31 May 2017

DETERMINATION OF THE AUTHORITY

- A Within 28 days of the date of this determination, White Developments Limited is ordered to comply with the Improvement Notice dated 21 March 2016, by providing the information required by the Labour Inspector and paying to the Labour Inspector for Ming Ju, Wu and Ju Fen, Chang the sum of \$5,009.80.**
- B Within 28 days of the date of this determination White Developments Limited is ordered to pay penalties to the Authority totalling \$16,000.00.**

C Within 28 days of the date of this determination White Developments Limited is ordered to pay the sum of \$1,800.00 together with a filing fee of \$71.56 to the Labour Inspector for costs incurred in this matter.

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment has applied to the Authority for a compliance order relating to an improvement notice and penalties relating to breaches of minimum standards.

[2] The Labour Inspector says that the respondent White Developments Limited (White Developments) has failed to comply with an improvement notice issued on 21 March 2016. That improvement notice related to alleged failings by White Developments to keep wage and time records, and holiday and leave records. It also pertained to breaches of the Wages Protection Act 1983 and a failure to pay minimum wage under the Minimum Wage Act 1983. The Labour Inspector seeks penalties for these breaches and the failure to comply with the improvement notice.

[3] In its statement in reply, White Developments says that it did keep records but concedes it is its fault for not keeping the appropriate records. It denies that it has breached minimum standards by not paying minimum wage in relation to the two employees in question. Essentially White Developments challenges the hours the two employees claim to have worked and it says that it paid them a salary that covered the hours worked at least at minimum wage. It also denies that it made unlawful deductions, suggesting that the two relevant employees agreed to the deductions that it took.

[4] The statement in reply also raises a number of mitigating factors on behalf of White Developments.

Preliminary matter

[5] No one attended the investigation meeting on behalf of White Developments. This was despite the fact that White Developments took part in the progression of this matter through attendance at a case management telephone conference, lodging and serving a statement in reply and confirming availability for the investigation meeting set for 2 March 2017.

[6] On 10 November 2016 an Authority officer issued a Notice of Investigation Meeting which confirmed the date for the investigation meeting, setting out the time and venue. This Notice of Investigation was emailed to White Developments at the email address given for service and was recorded as having been received. Additionally, the Notice of Investigation Meeting was sent by hard copy to White Developments' registered office.

[7] I note that the investigation meeting was set once the date was confirmed as being suitable for a representative of White Developments, and in fact, the time was set to accommodate that representative's travel time to the investigation meeting venue in Hokitika.

[8] White Developments did not comply with the directions issued in respect of lodging and serving witness evidence for the investigation meeting. On 16 January 2017, the representative for White Developments sought an extension until 30 January 2017 to lodge the required statements of evidence. Despite that extension being granted nothing was ever received from White Developments. Nothing further was heard from White Developments until after the investigation meeting.

[9] I attended at the investigation meeting in Hokitika and was prepared to commence the investigation meeting at 10:00 am, being the specified time. I delayed the investigation meeting for a short period to allow for any late arrival due to travel issues.

[10] The representative for White Developments did not turn up any time during the investigation meeting.

[11] In all the circumstances, I was satisfied that White Developments 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

[12] White Developments operates a dairy farm in Hari Hari, West Coast. It employs a number of part time, permanent, employees, some of whom are New Zealand citizens, the rest of which are migrants on various working visas.

[13] In November 2015, the Labour Inspector received a complaint from two former employees of White Developments, Ming Ju, Wu (Miller) and Ju Fen, Chang (Josseline). The complaint from Miller and Jocelyn was that White Developments had not paid them for all of the hours that they had worked, nor had White Developments paid their final holiday pay at the end of their employment.

[14] After preliminary investigations into the complaints, the Labour Inspector notified White Developments that she wished to undertake an audit in relation to the complaints. She requested that White Developments provide her with wage and time records, holiday and leave records, copies of relevant employment agreements, and a schedule of all deductions made from employees' wages or salary.

[15] There were various communications between White Developments and the Labour Inspector throughout December and the start of January. This culminated in a meeting on 26 January 2016. In that meeting, White Developments provided the Labour Inspector with the limited information that it had. White Developments conceded that it did not have employment agreements for Miller and Jocelyn, nor did it have complete wage and time or holiday and leave records.

[16] The Labour Inspector then reviewed all of the information provided to her by White Developments and determined the following:

- a. White Developments had failed to keep wage and time records and holiday and leave records in accordance with the requirements of the Act and the Holidays Act 2003.
- b. Miller and Jocelyn had worked a roster of six days on and one day off and had kept their own time records. A copy of the time records provided by them indicated that White Developments had not paid the statutory minimum wage for all of the hours that they worked.
- c. White Developments had deducted accommodation and power costs from Miller and Jocelyn's wages but did not have written consent from them to do so.

[17] Because of the conclusions that the Labour Inspector had reached regarding breaches of minimum entitlements by White Developments she issued an Improvement Notice on 21 March 2016 (the Improvement Notice).

[18] In order to comply with the Improvement Notice White Developments was required to:

- a. Create an employment agreement that complied with the Act for all current employees and meet certain requirements in relation to informing those employees of their rights.
- b. Establish and continue with a system of time and wage records for all current employees both in relation to keeping wage and time records and holiday and leave entitlements.
- c. Conduct a review of all public holidays worked by current and past employees to ensure that White Developments had paid its employees appropriately for any work on public holidays.
- d. Establish if any employees had worked on a public holiday, were entitled to an alternative holiday, and then calculate any payments for public holidays, including alternative holidays, owed to any employees.
- e. Pay any unpaid hours and final annual holiday pay to Miller and Jocelyn in accordance with the Labour Inspector's calculations.

[19] On 14 April 2016, White Developments sought an extension for compliance with the Improvement Notice. The Labour Inspector granted this and allowed White Developments until 10 June 2016 to comply with the Improvement Notice.

[20] On 17 June 2016, White Developments advised the Labour Inspector that it had not paid the amounts outstanding but it would do so, and it also requested an address to post a copy of the employment agreement to the Labour Inspector.

[21] Since 17 June 2016 White Developments has not complied with the Improvement Notice and other than taking part in this claim, White Developments made no further contact with the Labour Inspector in respect of the Improvement Notice or the underlying breaches of minimum standards.

Analysis

Compliance order

[22] I am satisfied that White Developments has failed to comply with the Improvement Notice and that a compliance order is appropriate.

Penalties

[23] In respect of the penalties sought by the Labour Inspector I must consider firstly whether there have been breaches as alleged by the Labour Inspector and if so in the circumstances whether penalties are appropriate. If I determine that penalties are appropriate I must then calculate quantum of those penalties and will do so based on *Borsboom v Preet PVT Ltd*¹.

[24] On the evidence given by the Labour Inspector and the admissions made in the statement in reply by White Developments I am satisfied that White Developments has failed to comply with the Improvement Notice. I am also satisfied that White Developments has breached minimum standards as alleged by the Labour Inspector. That is, White Developments has failed to keep adequate wage and time records and holiday and leave records. It has also failed to pay Miller and Jocelyn minimum wage for all of the hours that they worked and it made unlawful deductions from the wages paid to Miller and Jocelyn.

[25] In determining whether I should award penalties for the breaches that I have established have occurred, I must consider s 133A of the Act as well as the other matters outlined by Judge Inglis in *David Lumsden v SkyCity Management Ltd*². The factors that I must consider, therefore, 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.

¹ [2016] NZEmpC 143

² [2017] NZEmpC 30

- e. Whether White Developments 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.
- g. Whether White Developments 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 breaches that occurred are significant. The failure to comply with the Improvement Notice is inexcusable given the admissions by White Developments and its apparent desire to comply, coupled with assurances that it would comply. The failure to provide the records in compliance with the Improvement Notice compounds the issues confronted by the Labour Inspector. That is the Labour Inspector is unable to assess whether White Developments has complied with minimum standards because the records have not been provided. Further, because it has failed to comply with the Improvement Notice, the Labour Inspector cannot be satisfied that White Developments is now complying with minimum standards.

[27] The breach of minimum standards impacts on employees and, in particular in this case, there was a known impact on Miller and Jocelyn. Although there are some circumstances outlined in relation to the business of White Developments and the difficulty that it has had in obtaining employees, this does not mitigate against imposing penalties.

[28] 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 and the failure to comply with an improvement notice, I consider it entirely appropriate to impose penalties against White Developments.

[29] I had expressed at the end of the investigation meeting by way of oral indication to the Labour Inspector that I will grant compliance and impose penalties for the reasons set out.

[30] I was, however, unsure at that point as to the quantum of the penalties that I would impose. I wanted to give White Developments the opportunity to provide any submissions in mitigation, on quantum. And subsequently a further opportunity for the Labour Inspector to provide any submissions in relation to quantum, particularly in light of any matters that White Developments raised in its submissions.

[31] On that basis, I provided a minute following the completion of the investigation meeting outlining directions for White Developments to provide submissions and for the Labour Inspector to respond. Those submissions have been received and I have considered those submissions in light of the four steps required by *Preet*.

Step 1 – Nature and number of breaches

[32] I am satisfied that the following breaches have occurred:

- a. The failure to comply with the Improvement Notice.
- b. The failure to keep wage and time records pursuant to s 8A of the Minimum Wage Act³.
- c. The failure to keep holiday and leave records in compliance with ss 81 and 83 of the Holidays Act.
- d. A breach of s 6 of the Minimum Wage Act by failing to pay minimum wage for all of the hours worked by Miller and Jocelyn.
- e. Breaches of s 5 of the Wages Protection Act in respect of unlawful deductions made from Miller and Jocelyn's salary.

³ 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.

[33] In total there are nine breaches, one in respect of the Improvement Notice and four in respect of minimum standards for each of the two employees.

[34] The Labour Inspector has suggested that the failure to maintain records, both in respect of wage and time records and holiday and leave records, can be treated as a global penalty for each employee. On this basis the Labour Inspector has submitted that there are seven relevant breaches for me to consider.

[35] I accept that it is appropriate to globalise the failure to keep information in respect of the wage and time records and the holiday and leave records. I agree with the Labour Inspector that there are seven breaches and therefore, the maximum total amount of penalties that I can award against White Developments is \$140,000.

Step 2 – Severity of breaches

[36] The failure to pay minimum standards is a serious breach. As I have already identified, this breach is compounded by the fact that White Developments has not kept appropriate records. As a result, the Labour Inspector is unable to check the full extent of any possible failure to comply with minimum standards and the full extent of any losses suffered by employees of White Developments.

[37] Based upon the Labour Inspector's calculations and a subsequent payment made by White Developments, there is currently \$5,009.80 owed to Miller and Jocelyn for unpaid wages and accrued but unpaid holiday pay.

[38] Miller and Jocelyn are both migrant employees who, it appears, were not aware of their employment rights. It also appears that they were confused as to the hours they would be required to work and the total payment they would receive, including the amount to be deducted for any accommodation provided.

[39] I agree with the Labour Inspector's submission that the aggravating features suggest in the case of all breaches and penalties to be awarded that the amount should be 70% of the maximum. The total provisional penalties after assessing severity are therefore \$98,000.00.

[40] In mitigation, White Developments did assist the Labour Inspector to the extent that it could by providing information. To date, though, it has still not accepted the total amounts claimed by Miller and Jocelyn, yet it is unable to provide any

information to show otherwise. White Developments has also expressed some remorse in the submissions that it made.

[41] I also accept that White Developments has had difficulty finding suitable employees to work in its remote location and as a result, its directors and shareholders who work on the dairy farm have been extremely busy trying to attend to day-to-day operations, rather than dealing with administrative and management matters that require their attention. I am not satisfied that this is an excuse for failing to meet minimum standards and the rights of employees but it does, to some extent, put in context the failings.

[42] In all the circumstances, the mitigating factors suggest that I should reduce the preliminary total amount of penalties by 20% and the preliminary total for penalties at the end of step 2 is \$56,000.00.

Step 3 – Means and ability of White Developments to pay

[43] White Developments has expressed in its submissions that it is currently operating at a loss. It has not provided financial accounts to prove this but I am satisfied that White Developments is not making a profit, if at all on a day-to-day basis. I make this assessment based upon the continued representations by White Developments that it is financially unstable and at risk.

[44] I believe the financial situation of White Developments is a factor that I must take into account. However, I am limited in how much weight I can give to this because there is limited information available.

[45] Overall, I have to balance the need to impose appropriate penalties and punish White Developments as well as set penalties at a level to deter against the knowledge that White Developments may be unable to pay a significant penalty, and this might only cause it to go out of business or it may be required to make staff redundant. In the circumstances, I am prepared to reduce the preliminary penalties at the end of step 2 by 20%. After my assessment of the financial ability of White Developments to pay I calculate the preliminary total for penalties to be \$44,800.00.

Step 4 – Proportionality

[46] It is clear from *Preet* that the penalties imposed should be proportionate to the amount of money unlawfully withheld⁴. It is also clear from *Preet* that proportionality requires me to assess the penalties imposed in similar cases to ensure that there is some consistency.

[47] In this regard, I have considered the recent cases in the Authority in which penalties have been awarded for multiple breaches of the Minimum Wage Act, the Holidays Act, and the Wages Protection Act⁵. These multiple breaches range from two breaches through to 307 breaches with a wide range of offending in terms of money withheld by employers that constitutes the breaches of minimum standards. The maximum penalties that the Authority could impose in these cases ranged from \$40,000.00 to \$6,000,140.00.

[48] This is an enormous range in terms of the scale of offending and the possible range of penalties and this makes the exercise of assessing proportionality difficult.

[49] Starting with the ratio between the money withheld, which gives rise to the breach of minimum standards, compared to the amount of penalty imposed, in most cases this ratio is in the region of 1.2 – 1.3 times i.e. the penalty imposed is 1.2 – 1.3 times the amount withheld. This is consistent with *Preet* itself where the proportionality of the money withheld against the penalty is 1.3 times, and the Court was satisfied that was proportionate.

[50] In the case of *White Developments*, applying this ratio would mean the penalty imposed should be as low as \$6,500.00. When I consider the number of breaches and the severity of the breaches, this seems inadequate.

[51] A similar result appears when I consider the proportionality between the maximum possible penalties and the actual penalties imposed. The scale in cases

⁴ *Preet* at [190]

⁵ *A Labour Inspector of the Ministry of Business, Innovation and Employment v IXL Petroleum and Gas Limited* [2017] NZERA Auckland 128, *A Labour Inspector of the Ministry of Business, Innovation and Employment v Precise Contracting Limited* [2017] NZERA Christchurch 56, *A Labour Inspector v D K Transport (2009) Limited* [2017] NZERA Auckland 97, *A Labour Inspector of the Ministry of Business, Innovation and Employment v One World Resourcing Limited* [2017] NZERA Christchurch 48, *A Labour Inspector of the Ministry of Business, Innovation and Employment v Manukau Auto Valet Limited* [2017] NZERA Auckland 85, *Neil Bosman v Total Access Limited* [2017] NZERA Auckland 1, *A Labour Inspector of the Ministry of Business, Innovation and Employment v Bahn Thai Restaurant Limited* [2016] NZERA Christchurch 222, *A Labour Inspector v Binde Enterprises Limited* [2016] NZERA Auckland 399, *A Labour Inspector v Just Kebab Ltd* [2016] NZERA Auckland 383.

where there are a large number of breaches becomes disproportionate to those cases where there is a smaller number of breaches. As an example, in one case,⁶ there were 307 breaches and a possible penalty of \$6,000,140.00 and the resultant penalty was only 2.4% of that amount. Applying the same calculation to other cases where there are a high number of breaches and therefore a high maximum penalty amount, the imposition of penalties tends to be in the region of 1 - 3% of that amount.

[52] In the case of White Developments, if I apply the same ratios, to be proportionate with those cases where there are multiple breaches, the penalty that I should impose would be less than \$4,200.00. Again, the test for proportionality is disproportionate because of the smaller number of breaches.

[53] In the end, I have been persuaded by looking at two cases in which the number of breaches was two in one case and five in the other⁷. In these cases the amounts withheld as part of the breach of minimum standards were similar to the amounts in this case (in one case \$5,000.00 and the other approximately \$11,000.00). In those cases, the penalties awarded were 10% and 14% of the total maximum amount of penalties being \$4,000.00 and \$14,000.00.

[54] Considering proportionality with these two similar cases and contrasting this with the seriousness of the offending, including the number of breaches I am satisfied that the total amount of penalties to be imposed in this case is \$16,000.00.

Determination

[55] Within 28 days of the date of this determination White Developments is ordered to comply with the Improvement Notice, provide the information required by the Labour Inspector, and pay to the Labour Inspector for Miller and Jocelyn the sum of \$5,009.80.

[56] Within 28 days of the date of this determination White Developments is ordered to pay penalties to the Authority totalling \$16,000.00 which will then be paid into a Crown back account.

⁶ *A Labour Inspector of the Ministry of Business, Innovation and Employment v Manukau Auto Valet Limited* [2017] NZERA Auckland 85.

⁷ *A Labour Inspector of the Ministry of Business, Innovation and Employment v IXL Petroleum and Gas Limited* [2017] NZERA Auckland 128, *Neil Bosman v Total Access Limited* [2017] NZERA Auckland 1.

Costs

[57] The Labour Inspector seeks costs against White Developments.

[58] Applying the principles in relation to the application of the daily tariff, I am satisfied that the Labour Inspector is entitled to \$1,800.00 for costs together with the filing fee of \$71.56.

[59] White Developments must pay the Labour Inspector \$1,871.76 for costs and the filing fee incurred in respect of this matter.

Peter van Keulen
Member of the Employment Relations Authority