

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 100
5629823

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

A N D WYATT FARM LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Jodi Ongley, Counsel for Applicant
 Adam Gallagher, Counsel for Respondent

Submissions Received: 10 May 2017, from the Applicant
 2 June 2017, from the Respondent

Date of Determination: 21 June 2017

SECOND DETERMINATION OF THE AUTHORITY

- A Wyatt Farm Limited is ordered to pay a penalty for breaches of the Holidays Act 2003 and the Minimum Wage Act 1983 in the sum of \$7000.**
- B The penalty is to be paid to the Employment Relations Authority for payment to the Crown Bank Account within 28 days of this determination.**
- C Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] In my determination dated 5 May 2017¹ I found that Wyatt Farm Limited had breached:

- (a) Section 81 of the Holidays Act 2003 in respect of three employees by failing to keep compliant holiday and leave records;
- (b) Section 50 of the Holidays Act 2003 for failing to pay two employees for working three public holidays;
- (c) Section 6 of the Minimum Wage Act 1983 for failing to pay one employee the adult minimum wage.

[2] The Authority ordered payments for arrears in the total sum of \$1,550.84 gross together with interest. It was agreed that after the Authority had determined disputed issues, any arrears payable and breaches it would following receipt of submissions, determine the issue of penalties. Financial information and submissions on penalties have now been received.

Penalties and employment law

[3] Mr Gallagher submits that the breaches in this matter do not warrant the imposition of a penalty or if they do then it should be at the lower end of the scale as the breaches were technical in nature. Ms Ongley seeks penalties on behalf of the Labour Inspectorate and submits that the Authority should impose a meaningful and deterrent penalty.

[4] The objective of penalties in the employment area is set out in the judgment of the full Court of the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*.² Penalties for minimum standards breaches are to punish those who breach the standards and deter others from deliberate breaches. In some cases there is a compensatory objective to a penalty because of the statutory discretion to award the whole or any part of a penalty to another person. One of the objectives the full Court stated is to eliminate unfair competition between law abiding and non-law abiding employers.

¹ [2017] NZERA Christchurch 69

² [2016] NZEmpC 143 at 61, 62 and 63

[5] I find in the circumstances where I have found breaches of minimum standards there should be consideration of a penalty. I shall proceed to apply the four step process outlined in *Preet*³ when determining a penalty.

Step 1 – Nature and number of breaches and maximum penalties

[6] The nature and number of breaches are set out below with the maximum penalty:

- (a) \$60,000 for the breaches of s 81 of the Holidays Act 2003 affecting 3 employees;
- (b) \$40,000 for the breaches of s 50 of the Holidays Act 2003 affecting 2 employees;
- (c) \$20,000 for the breach of s 6 of the Minimum Wage Act 1983 affecting 1 employee.

[7] Ms Ongley submits that the breaches of s 81 of the Holidays Act 2003 can be globalised into a single penalty of \$20,000 because although the breaches relate to three employees the failure can be described as poor record keeping rather than specific instances that relate to individuals. I accept that it is appropriate to globalise the three breaches for the purpose of assessing penalties.

[8] Ms Ongley submits that it would be inappropriate to globalise the s 50 breaches as a failure to pay holiday pay related to two employees and affected them individually. I accept that submission.

[9] In relation to the final breach I accept Ms Ongley's submission that it remains a discreet breach.

[10] The maximum of the penalties claimed taking globalisation into account for the s 81 breaches is \$80,000.

³ Above N1 at [51]

Step 2 – The severity of the breaches considering aggravating and mitigating factors

Breach of s 81 of the Holidays Act 2003

[11] Mr Gallagher submits that breaches by Wyatt Farm of its record keeping obligations are technical and minor and do not amount to significant departure from the requirements of s 81. He further submits that the failure to comply with record keeping obligations was not deliberate or knowingly calculated to cause the affected employees disadvantage or loss. He submits that Wyatt Farm generally and honestly believed it was complying with its legal obligation.

[12] Ms Ongley does not disagree that the breaches of s 81 do not appear to be deliberate but are rather a “*careless approach to maintaining accurate paperwork.*” She refers to the breach as being one of moderate severity to be assessed at 50% or \$10,000.

[13] I accept that the breaches of s 81 were not wilful and deliberate but rather of a careless nature. Holiday and leave records need to be fully compliant with s 81 and accurate. They are a fundamental statutory requirement of an employer. The failure in this case clearly caused difficulty for both the Labour Inspectorate and indeed Wyatt Farm itself in being able to rely on the records. Although initially the failure to comply with s 81 was not accepted in the statement in reply it was then accepted and acknowledged before the investigation meeting. I take that into account.

[14] I also take into account that the records were partially compliant with s 81 of the Holidays Act.

[15] Ms Ongley submits that the severity of the breach should be assessed at 50%. Mr Gallagher submits that the severity of the breach should be reduced by 80%. I find that reduction would not reflect adequately the failure to keep accurate records. I find that the severity of the breach should be assessed at 40% of \$20,000 which is \$8,000.

[16] This takes into account an appropriate concession that there was a failure to keep accurate records in accordance with the requirements in s 81 of the Holidays Act for three employees. It reflects that whilst it was not established to be a deliberate but more a careless breach, there were consequences as a result of the inaccurate records. It also takes into account that this is an important and fundamental statutory requirement but that there was partial compliance.

Breaches of s 50 of the Holidays Act 2003

[17] Ms Ongley submits that these breaches are at the lower end of the scale and that whilst two employees were affected the evidence relating to the breaches is more directed to poor record keeping than deliberate breaches. There were three public holidays involved. The record keeping was of an inadequate nature about these holidays and payments made. It was not possible to confirm with the necessary degree of accuracy that subsequent payments made to the two employees were for working on public holidays. Ms Ongley submits that the severity of the breach should be assessed at 10% (\$4,000) and Mr Gallagher does not appear to disagree with that. I accept that is appropriate.

Section 6 of the Minimum Wage Act

[18] Ms Ongley submits that this breach is moderate and that the way it came about demonstrates a complete lack of understanding of employment law.

[19] Mr Gallagher submits that this breach is at the lower end of the scale and is not moderate. He submits that the breach occurred as a result of attempts to assist two employees by allowing a departure from the ordinary method of payment or recording of payment of wages and wage related entitlements.

[20] I accept that there was in all probability an attempt by Wyatt Farm to try to assist two employees when one could not undertake the full components of the role and the work was undertaken by the other. The difficulty is that the records did not reflect this change. This was, and Ms Ongley accepts this as likely, not a deliberate attempt to circumvent payment of the minimum wage. I am not however persuaded that this reduces the severity of this breach to the lower end of the scale rather than a breach of moderate severity.

[21] The short point is that the records were inaccurate and on their face did not support payment of minimum wage and there was no other method in which the payment of minimum wage to one employee could be established. It was also not conceded before the investigation meeting that there was an underpayment of the minimum wage on the face of the records so no credit can be given for an early concession. Further Wyatt Farm had been asked in 2013 by the Labour Inspectorate to rectify a breach in relation to s 6 of the Minimum Wage Act 1983. I find it appropriate to assess the severity of the breach at 50% of \$20,000 which is \$10,000.

[22] The provisional penalty at the end of this step therefore is the combined totals of \$8000, \$4000 and \$10,000 which is \$22,000.

Step 3 – Wyatt Farm financial circumstances

[23] Ms Ongley submits that the financial statements of the year ending 2016 indicate a strong business with several million dollars' worth of assets. Further, that the business sustains all the personal expenses of its directors and shareholders. Although Ms Ongley recognised that for the year ending June 2016 the net profit of the business was down on previous years she submits that milk solid prices were particularly low in the 2015-16 period and that the price of milk has increased from the region of \$3.90 to \$6 and it is likely that net profits for the coming year will reflect that.

[24] Mr Gallagher submits that the business is a small family run operation and that it is not appropriate that a penalty undermining the ability of the business to continue to operate and/or the ability of the Wyatts to continue to make a livelihood be awarded. He submits that the respondents no longer employ anyone on the farm and carry out all the work on the farm themselves.

[25] I am not persuaded given the financial circumstances disclosed that a reduction of 30% to the provisional penalty is called for. I am not in a position where I am able to be satisfied that the net profit for June this year will reflect an increase in the price of milk. The profit as at 30 June 2016 is reduced reasonably significantly from earlier years. Wyatt Farm is a small family run business. I find accordingly a 20% reduction should be applied to the provisional penalty of \$22,000 reducing it to \$17,600.

Step 4 – Proportionality or totality test

[26] Ms Ongley submits correctly that penalties have the potential to be disproportionately larger than any sums at issue. In this case the money found to be withheld unlawfully was \$1550.84 but the provisional penalty is \$17,600 which is disproportionate to the underpayment.

[27] The failure to keep clear and accurate records is the main issue. An unusual situation presents itself in this case in that there was in all likelihood no deliberate attempt to avoid paying minimum wage but rather careless record keeping was the issue. That equally applies for the Holidays Act breaches. There were consequences however that flowed from the poor record keeping including the inability for the Labour Inspectorate and then the Authority to be satisfied that payments had been made for three public holidays and minimum wage for a period to one employee. I do take into account that there had been some steps after the enforceable undertaking by Wyatt Farm to try to make sure that the employee received at least minimum wage by top ups before there was the change and then inadequate record keeping.

[28] I accept Mr Gallagher's submission having regard to the overall circumstances of the case that \$17,600 would be disproportionate to the relatively low amount of arrears. When I consider this case alongside other similar cases it is not as serious as many but it is necessary to deter employers from a lack of care and attention with their records. They must be accurate.

[29] A penalty should be at a level where there is a real prospect of it being paid but also at a level to reflect the harm done and the seriousness of the breaches and to deter similar behaviour.

[30] In all the circumstances I consider that the appropriate amount of a total penalty for breaches of the Holidays Act 2003 and the Minimum Wage Act 1983 is the sum of \$7000.

[31] I order Wyatt Farm Limited to pay a total penalty of \$7000 for its breaches of the Holidays Act 2003 and the Minimum Wages Act 1983. The payment of \$7000 must be made to the Employment Relations Authority for payment to the Crown Bank Account within 28 days of this determination.

Costs

[32] I reserve the issue of costs. If agreement cannot be met then Ms Ongley has until 4 July 2017 to lodge and serve submission as to costs and Mr Gallagher has until 18 July to lodge and serves submission in reply.

Helen Doyle
Member of the Employment Relations Authority