

[3] In a telephone conference that I convened with counsel on 2 July 2015, the parties agreed to the matter being dealt with on the papers and a timetable was decided for the exchange of submissions.

[4] Ms Magill is a warranted Labour Inspector and Rapport a limited liability company which at the relevant time provided employees to work in the kiwifruit industry in the Bay of Plenty picking and pruning vines. I am satisfied on the material before me that Rapport no longer operates that business.

[5] The background to this matter is that on 18 December 2013, another Labour Inspector conducted a seminar for labour hire contractors who operated within the Bay of Plenty kiwifruit industry. An attendee at that seminar was the governing director of Rapport, Mr Jahangir Alam. Amongst other things, Mr Alam and the other employer parties present were advised of the minimum standards legislation, advised of their obligations to engage with warranted Labour Inspectors, and given advance notice that there would be an audit undertaken in the near future.

[6] That audit subsequently took place in respect of Rapport on 13 May 2014 and two days later as part of a joint operation involving the Labour Inspectorate, Immigration New Zealand and Police, a visit to a particular kiwifruit orchard in Te Puke was staged.

[7] Six workers at that Te Puke orchard claimed to work for Rapport; of that number, all but one were identified as not being legally entitled to work in New Zealand.

[8] The Labour Inspector satisfied herself that the claim by the six workers that they were employed by Rapport was in fact accurate (and for the avoidance of doubt, I note that that claim is not denied by Rapport in these proceedings), and subsequently on 23 July 2014, Ms Magill wrote to Rapport requesting records pertaining to their employment and their employment agreements.

[9] By letter dated 12 August 2014, Mr Alam for Rapport initially denied that five of the six employees (the five not legally allowed to work in New Zealand) were his employees.

[10] Subsequently on 30 November 2014, there was an interview of Mr Alam by the Labour Inspectorate as a consequence of which there was an admission that the

earlier claim that five of the six workers were not employed by him was false and that he had thrown away records pertaining to the five workers who were not supposed to work in New Zealand.

Issues

[11] I have already intimated that the employer, Rapport, does not deny the breaches alleged but says that it has ceased operating in this particular market, is able to pay a penalty, but it asks that matters in mitigation be taken into account before penalties are fixed.

[12] It is also noteworthy that counsel for Rapport in his submissions makes proper concessions where those are appropriate and readily acknowledges that there has been a breach of the minimum standards legislation.

[13] Accordingly, the only question for determination here is what quantum of penalty ought to be imposed.

What quantum of penalty ought to apply?

[14] While not strictly necessary given the admissions made for Rapport, I note first that the claim for a penalty has proceeded within the 12 month time limit required by law, that the standard of proof is the ordinary civil standard on the balance of probabilities and that given the admissions made by Rapport, questions of whether the matters pleaded are made out need not be extensively traversed.

[15] For the avoidance of doubt, I accept, as does Rapport, that there have been breaches of s.229(3) of the Act (failure to keep wage and time records), a breach of s.75(2)(e) of the Holidays Act 2003 (failure to keep holiday and leave records) and a breach of s.65(4) of the Act (failure to have written employment agreements).

[16] As both counsel acknowledge in their helpful submissions, it is available to the Authority to consider the three breaches separately and then impose a global penalty, and I propose to adopt that course here.

[17] The usual basis for consideration of the Authority's penalty jurisdiction is the helpful decision of the Employment Court (Judge Inglis) in *Tan v. Yang & Zhang* [2014] NZEmpC 65 where Her Honour sets out a non-exclusive list of the factors that

the Authority needs to take into consideration in reaching a conclusion concerning the application of a penalty or penalties.

[18] First is the seriousness of the breach. While the Labour Inspector maintains that the breaches are serious and deliberate and the only reliable records provided concerned the single employee lawfully able to work in New Zealand, Rapport contends that, while the breaches are neither minor nor technical, they are also not at the serious end of the spectrum because of the “*context*” in which the breaches occurred.

[19] The “*context*” is a reference to the fact that the five employees who were not allowed to work in New Zealand were being employed effectively as a favour to those employees and in the context of Rapport’s governing director having a significant social position within the local Bangladeshi community.

[20] Submissions for Rapport on this point proceed on the footing that save for the five employees who were not allowed to work in New Zealand, the records are more or less intact. I do not hear the Labour Inspector accepting that proposition; as I understand the Labour Inspector’s evidence, her view continues to be that even in respect of the employee who was allowed to work in New Zealand, holiday and leave records were not properly kept for example.

[21] What I am invited to consider in counsel for Rapport’s submissions is that there was a cultural obligation on Mr Alam to assist the five Bangladeshi men who were not legally allowed to work in New Zealand and that he was effectively imposed upon by these five men and employed them unwillingly.

[22] Moreover, when he was confronted with the Inspector’s inquiries, rather than produce the records of the employment of these five men which he felt would get them into trouble because he knew they could not legally work in New Zealand, he caused those records to disappear. Again I am invited to give Mr Alam some latitude because presumably the argument goes that although his destruction of the relevant records was the wrong thing to do (and plainly is a breach of the minimum code), it was done to protect the five men from suit by the New Zealand authorities and not to gain any personal benefit for Mr Alam or his company.

[23] Moreover, I am directed to the significant material that has been provided to me by Rapport designed to show that it was a well-run company, that complied with

New Zealand law in respect of a variety of other obligations that a small to medium sized employer must have in our country, and I am also asked to consider the various testimonials from officials in a number of government agencies (particularly the Inland Revenue Department and Police) about Mr Alam's community work and his honesty and integrity.

[24] On the question of whether the breaches were one-off or repeated, again Rapport properly concedes that the breaches were repeated but argues that the explanation for all the breaches was a single common reason and that goes to mitigation. That single common reason was of course the desire to protect the five employees from suit by the New Zealand authorities.

[25] On the impact on the employees, it is suggested to me for Rapport that, in effect, the employees were better off getting whatever income they got from Rapport than they would have been having no income at all and I am invited to conclude that there is no evidence that any of these men were not paid the minimum wage.

[26] On the last point, I do not feel able to draw that conclusion; there is simply not evidence before me which would enable me to reach that conclusion, although I acknowledge that claim is made both by Mr Alam in his sworn affidavit and by counsel in submission.

[27] Of particular importance in this regard is Mr Alam's evidence that four of the five subject employees were instrumental in effectively negotiating the return of Mr Alam and his family to the bosom of the Bangladeshi community in the Western Bay after allegations that, because of Mr Alam's work with Police, Victim Support and Inland Revenue Department assisting those agencies in their work within the Bangladeshi community, he apparently became labelled as what he called a Police informer.

[28] Many of the instances that led to the ostracising of Mr Alam and his family dated back many years, some as far as 2008, and I have been provided with evidence about these matters. Accordingly, I can conclude that Mr Alam and his family might well have suffered this ostracism for many years until the efforts of four of the five subject employees restored the Alam family to the good opinion of the Bangladeshi community.

[29] On the vulnerability of the employees it is suggested for Rapport that although the men were migrants, it would be wrong to conclude that they were taken advantage of; indeed quite the reverse is the position according to Rapport because it is contended that in effect they were better off working for Rapport than they would otherwise have been and while I am not persuaded their rates of pay can be verified, it is I accept difficult to conclude on the evidence before me that they were exploited.

[30] There is a need for deterrence and again Rapport accepts that fact but argues that its behaviour is less culpable than some and Mr Alam is very clear in his remorse about what he has done in this matter. Particularly, he accepts that his initial denial of responsibility was “*unwise*” and that since that time he has cooperated with the Inspector.

Determination

[31] I start my determination of penalty by considering the words of Chief Judge Goddard in *Xu v. McIntosh* [2004] 2 ERNZ 448 where His Honour said the first question was to identify how much harm had been caused and the next question was to identify how culpable the perpetrator was by a consideration of whether the breach was technical and inadvertent or flagrant and deliberate.

[32] Applying those precepts, I conclude that there cannot be a proper basis on which an employer can destroy records required to be kept by statute and so I find that the harm done by Rapport’s action in that regard and in lying to the Labour Inspector is something that society needs to express its repugnance of. Moreover, it is difficult not to see the breach as deliberate even if it was not flagrant.

[33] But I must set those conclusions against the cultural imperative and the context which I am particularly drawn to in Mr Alam’s affidavit in support of his counsel’s eloquent submissions. I accept there was a particular and distressing environment in which Mr Alam and his family lived because of the perception that he was somehow not to be trusted by his own community, that that was to some extent resolved by four of the five individuals who are the principal protagonists in this proceeding and that on that footing, it would have been incredibly difficult for Mr Alam to do what he should have done and refused their request that he employ them notwithstanding the fact that he knew full well they had no right to work in New Zealand.

[34] The Labour Inspector relies on the observations I made in an earlier decision of mine *Labour Inspector Zonneveld v. Maudaara Ltd* [2015] NZERA Christchurch 99, where I considered that the starting point for the application of global penalties in respect of a failure to keep proper records was \$10,000 and that same figure is sought again here. The Labour Inspector also relies on comments I made at para.[51] of that determination where I emphasised the importance of proper recordkeeping in employment matters because of its fundamental contribution to ensuring workers are being properly remunerated.

[35] I stand by that figure and those observations, but this is a different case. I am satisfied that the present matter requires me to take into account the cultural imperative that, on the evidence before me, seems to have provided a context for the behaviour complained of and while not excusing does go some way to mitigating it.

[36] That being my conclusion, I direct that Rapport is to pay into the Authority for the credit of the Crown bank account the sum of \$4,000, such penalty being imposed for the breaches of the obligation to provide wage and time records, holiday and leave records, and written employment agreements: s.136(1) of the Act applied.

Costs

[37] No issue of costs arises.

James Crichton
Member of the Employment Relations Authority