IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 60
3022173

	BETWEEN	AMIT SHARAN Applicant
	AND	REBORN HOLDINGS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter McKenzie-Bridle, counsel for the Applicant Emily Hartson-Maea, counsel for the Respondent and Patrick Renshaw
Investigation Meeting:	15 May 2018 and 16 August 2018 at Wellington
Submissions [and further Information] Received:	17 August 2018 and 20 December 2018 from the Applicant 20 August 2018, 21 August 2018, 24 September 2018 and 9 October 2018 from the Respondent
Date of Determination:	8 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Sharan) alleges that he was employed by the respondent Reborn Holdings Limited (the employer) in two separate periods, the first from 19 May 2016 until 16 January 2017 and the second from 24 March 2017 until 8 September 2017.

[2] Mr Sharan alleges that during those two periods of employment he was not paid wages correctly and is owed significant wages from the employer. Because of various breaches of the minimum code, Mr Sharan also seeks the imposition of a penalty or penalties together with a payment of compensation for hurt and humiliation.

[3] Investigating this matter in order to reach a conclusion has proved unusually challenging. At the investigation meeting on 15 May 2018, the respondent was not represented despite causing the respondent's briefs of evidence and bundle of documents to be filed and served on 11 May 2018. On 14 May 2018 at 3:37 p.m., counsel then acting for the employer indicated she was at home unwell and had only just checked her emails which included an instruction from Kevin Robert Anderson the director of the employer that he was too unwell to proceed with the investigation meeting and that he did not wish counsel to continue to act.

[4] I determined that I would proceed to take the evidence of the applicant. I indicated to the parties on the day of the investigation meeting that I was intending to proceed with the beginning of my investigation and I followed that up with an email the following day (15 May 2018) sent at 2:07 p.m. which acknowledged that the employer's director Mr Anderson had been ill and as a consequence had not been able to attend the scheduled investigation meeting, emphasised that I wished to hear his evidence, would take whatever steps were necessary to make that easy and practical for him including attending on him rather than requiring him to attend at the Authority but making it clear that unless there was a concrete proposal for the respondent's evidence to be given and taken, I would determine the matter on the basis of the evidence I had.

[5] The matter was able to be reconvened on 16 August 2018 and the evidence of Mr Anderson and the other witnesses for the respondent was taken. To ensure that the employer had responded to everything that Mr Sharan had maintained in his evidence at the investigation meeting when it first convened on 15 May 2018, I produced a minute dated 3 September 2018 which set out the evidence that I had taken from Mr Sharan. This particularly emphasised the oral evidence Mr Sharan had given, the employer of course having access to the briefs of evidence filed by Mr Sharan and his witnesses.

[6] By providing the minute of the Authority setting out the detail of the evidence that Mr Sharan had given, my intention was to give the employer every opportunity to appropriately respond to the claims that Mr Sharan made.

[7] In the result, as is detailed in the intituling to this determination, the employer provided a significant amount of material in four separate submissions.

[8] I have of course read all of that material although I am bound to observe that even allowing for Mr Anderson's ill-health (which is acknowledged) the material was invariably provided outside of the timetables variously set by me, and indeed, on the last occasion when I allowed a final right of reply on the footing that it was received by 7 January 2019, no information at all was provided.

[9] Mr Sharan arrived in New Zealand in September 2014 on a visitor's visa and in November of that year, he commenced employment with another entity Zoya Saad Cars Limited. To enable that to occur, his visitor's visa was changed by a variation of condition to a work visa.

[10] Mr Sharan told me that Mr Anderson visited Zoya Saad about three times a week, knew that he was unhappy in his employment at Zoya Saad, and offered to employ him in his own business.

[11] By common consent, the employment with the employer commenced on 19 May 2016 and ended on 16 January 2017. Mr Sharan says that the employment came to an end because of the regular breaches of the minimum employment code by the employer, in particular the non-payment of wages and the unlawful deduction of monies from wages.

[12] These allegations are disputed by Mr Anderson; moreover, allegations by Mr Sharan that he worked 70 hours a week are also in dispute with Mr Anderson maintaining that his real hours of work were more like 20 to 30 per week. To that end, a series of payslips for a portion of the employment was put before the Authority as evidence that only 30 hours per week was worked but there are no wage and time records and Mr Sharan, while acknowledging the existence of the payslips, says they are a fiction.

[13] There was evidence from Mr Sharan's partner, Ms Flanagan that on some work days, Mr Sharan would leave home at four in the morning and not return until 9:30 that night and these work days were not uncommon.

[14] There was, by common cause, a break in the employment until it restarted again on 24 March 2017. Mr Sharan says that the employment came to an end effectively because he was driven out by the underpayment of wages. During the inter regnum between the two periods of employment, Mr Sharan was working as a mechanic at another automotive repair shop.

[15] That new employment, notwithstanding a markedly improved hourly rate of pay, proved challenging because the work visa that Mr Sharan had, specified the name of the employer and eventually the new employer became aware of that and made it clear that Mr Sharan could not continue in the employment given the conditions of his work visa.

[16] Mr Sharan maintains that Mr Anderson advised Immigration New Zealand of the status of Mr Sharan's work visa; Mr Anderson denies this but his diary notes for the relevant period do record that Mr Sharan was having difficulties with Immigration New Zealand because of the status of his work visa.

[17] Ms Natalie Flanagan, Mr Sharan's partner, gave evidence that she approached Mr Anderson in March 2017 seeking to arrange Mr Sharan's reemployment and that Mr Sharan commenced work again with the employer shortly thereafter. I observe that Mr Anderson's diary note for 27 March 2017 records that Mr Sharan worked from 9:00 a.m. to 5:00 p.m. that day.

[18] During the second period of employment, the employer's evidence is that Mr Sharan was a contractor and that was why that no PAYE was paid. There is a letter from Mr Patrick Renshaw who was effectively the employer's accountant dated 15 July 2017 which maintains that Mr Sharan was a contractor during the second period of the employment.

[19] Mr Sharan's evidence to me was that he was very anxious about the suggestion he was a contractor and that he pay his own tax, and in any event, Immigration New Zealand would not countenance such an arrangement and so it simply could not be.

[20] Mr Sharan's work permit expired on 8 September 2017 and accordingly he resigned his employment with the employer. Subsequently, he obtained permanent residence and can now work where he pleases.

Issues

[21] The Authority will need to inquire into and decide the following questions:

(a) Were proper employment records maintained? and

(b) What hours did Mr Sharan work? and

(c) Did Mr Sharan return to the employer as a contractor; and

(d) Is Mr Sharan owed unpaid wages; and

(e) Are there other breaches of the minimum code? And

(f) Can Mr Sharan now claim constructive dismissal concerning the end of the first employment period?

Were proper employment records maintained?

[22] The evidence before me is as clear as can be that proper employment records were not maintained. Mr Sharan told me there were no timesheets or other records of the times that he worked; conversely, Mr Anderson provided me with a copy of his operational diary which he says is an accurate record of the hours that Mr Sharan kept in the workplace.

[23] But if that last proposition were true, it is difficult to square with the offer of employment by letter dated 19 May 2016, nor with the executed employment agreement for the first period of employment which was dated 20 May 2016. Both provide for 40 hours per week of work, and those records are themselves inconsistent first with the payslips which postulate 30 hours of work per week, and the Inland Revenue Department's records together with Mr Sharan's bank statements provide yet more variation.

[24] What is more, Mr Renshaw was quite clear in his evidence to me that the records that he created were created on instruction from Mr Anderson and were not based (as they should have been) on documented, contemporaneous records. In particular, Mr Renshaw told me that the payslips were expressed to be for 30 hours work per week because that is what Mr Anderson told him that Mr Sharan worked and this is so notwithstanding the fact that Mr Renshaw also told me that he had prepared the employment agreement for his client which provides for 40 hours work per week.

[25] Furthermore, Mr Renshaw agreed that the payslips that he had prepared were only developed when Mr Sharan was leaving the employment so there was no sense in which they were a reliable contemporaneous record. That said, Mr Renshaw also conceded that when he did an analysis of the payslips and married those calculations to the amount of PAYE paid for Mr Sharan in the first period of the employment he realised that there had been a significant shortfall and in a final "wash-up" with the Inland Revenue Department at the end of the first period of the employment, an additional $7,860 was paid to the Inland Revenue for PAYE payments for Mr Sharan. Given the amount of money Mr Sharan was being paid, that is a significant amount of money representing a significant shortfall.

[26] I am satisfied then that it is appropriate for me to conclude that there were no proper employment records maintained by this employer in respect to Mr Sharan's work. The issue of how much time Mr Sharan actually worked for the employer will come down to questions of credibility; Mr Sharan's evidence broadly speaking suggests upwards of 70 hours per week was worked while Mr Anderson maintains, notwithstanding his own employment agreement, that 30 hours per week or less was worked by Mr Sharan.

[27] At the risk of being accused of editorialising, I feel obliged to point out that much if not all of the disputation between these parties would have been avoided if the employer had maintained proper written records of the hours worked by Mr Sharan, his rate of pay, the holidays (if any) he took, and the other normal incidents of the employment. Without that information, the Authority is forced to rely on the oral testimony of the principal protagonists and their self-evident enthusiasm to protect their own position. The myriad of documents that have been created for the employer are contradictory and in the main not contemporaneous. Their utility in assisting me to identify for example the actual hours worked is, as a consequence, somewhat limited.

What hours were worked?

[28] Much depends on the answer to this question and as I have already made clear in the last section of this determination, the answer is by no means straightforward. There is no contemporaneous written record. There are manufactured records which were principally produced after the end of Mr Sharan's first period of employment but they disclose a different work pattern from that contemplated by the employment agreement, different again from the evidence of Mr Sharan, different from the work pattern identified by Mr Anderson in his operational diary, and inconsistent as well with the records of the Inland Revenue Department and Mr Sharan's bank statements.

[29] The starting point for this analysis must be the employment agreement which was signed by both parties and which postulates 40 hours work per week at $18 per hour. I agree with the submission made on Mr Sharan's behalf by his able counsel that Mr Sharan's base entitlement must be to the difference between the figure that Mr Sharan actually received and 40 hours a week.

[30] However, that is not an end of the matter because Mr Sharan maintained throughout his evidence, and with support from his partner, that he actually regularly worked up to 70

hours a week and if I am persuaded that that is correct, then he is entitled to the difference between the figure that he actually received and a figure closer to 70 hours a week than 40 hours a week.

[31] Conversely, Mr Anderson's evidence is that Mr Sharan worked significantly less hours than he was contracted for and while it is accepted by the employer that there are wages owing, the employer says that the hours worked are significantly less than those claimed by Mr Sharan, and thus the difference between the amounts each party says is owed, is especially graphic.

[32] Mr Anderson's diary is available for the 2017 year. He appears to allege in his evidence that Mr Sharan removed another diary for the earlier year but whatever the position, only the diary for the second year of the employment is available and if the evidence of that document is to be treated as accurate, Mr Sharan worked significantly fewer hours than he himself claimed.

[33] In the end, as I have already made clear, the matter comes down to one of credibility. Nowhere could I get any understanding from Mr Anderson or Mr Renshaw why the contract the employer prepared should provide for 40 hours work and yet the employer maintained that far less work was actually performed; on their evidence roughly a quarter less than the hours actually contracted for.

[34] That said, I must make some allowance for a number of extraneous factors. I accept that Mr Anderson has not enjoyed good health. I have been provided with evidence of that ill-health from his doctors and I accept that for a man of Mr Anderson's senior years, without the benefit of rude good health, dealing with a complicated matter such as this would not have been easy.

[35] I also accept Mr Anderson's evidence (supported by the evidence of Mr Renshaw) that he assisted Mr Sharan in his engagement with his former employer Zoya Saad and the various attendances with the Labour Inspectorate and police concerning that earlier employment.

[36] Mr Anderson and Mr Renshaw both gave evidence on that point and indicated that they have done their best to help Mr Sharan and I accept that evidence at face value.

[37] I note that that evidence is supported by the documentary evidence that is before me concerning the engagement with police and the Labour Inspectorate which refer to Mr Anderson and/or Mr Renshaw as assisting Mr Sharan as a support person in the various interviews that were necessary to develop a case against the former employer of Mr Sharan.

[38] A particular generator of the very long hours Mr Sharan claims are the trips that were made by Mr Sharan and Mr Anderson together to dispose of tyres in the Wairarapa. Both of the principal protagonists acknowledge that these trips were made and both seem to accept that when they were made, they necessitated a very early start in the morning and a late finish at night. Mr Sharan's evidence, which does not appear to be specifically challenged by Mr Anderson, is that he would regularly leave home at about 4:00 a.m. in the morning and return at about 9:30 p.m. that night. That evidence is certainly supported by his partner Ms Flanagan.

[39] Where the dispute between the parties occurs is in the frequency that those trips were made. According to the flavour of Mr Sharan's evidence, these trips to the Wairarapa to dispose of old tyres were a relatively common occurrence. According to Mr Anderson, during the totality of Mr Sharan's employment they made fourteen such trips. Accepting that figure as accurate (it was not challenged by Mr Sharan's evidence) that would mean that during Mr Sharan's employment with the employer which totalled 58.6 weeks taking the two periods of employment together, a trip to dispose of the old tyres would have happened once every four weeks or thereabouts and would certainly not be any more regular than that.

[40] Mr Sharan also says in his evidence that he frequently worked during weekends and on public holidays, that he worked in a number of different places for the employer, all of which he said were unsafe work places. He says that on occasion, he was asked to work on vehicles without any proper equipment and to work on vehicles that had simply stopped in a roadway for example. Again, none of those allegations are denied by Mr Anderson or his witnesses.

[41] It is common cause that Mr Sharan needed to take time off for immigration purposes; both parties give evidence to that effect. It is also evident that Mr Sharan felt that the employer was trying to interfere in his private business whereas the evidence for the employer is that they were simply trying to find out precisely what Mr Sharan's immigration status was to ensure that they were in conformity with the law. In any event, taking all of

these matters into account, I have to start from the premise that the employer's own document, the employment agreement postulated 40 hours work per week and so I reject Mr Anderson's evidence that Mr Sharan worked only an average of 30 hours a week. If that were the position, Mr Anderson ought to have renegotiated the employment arrangement with his employee to reflect the actual position.

[42] For the avoidance of doubt, I prefer the evidence of Mr Sharan that the hours that he worked were at least 40 hours a week. That said, I have not been persuaded that Mr Sharan worked on average 70 hours per week, as he contends. The law on this matter is clear. The employer has an obligation to maintain wage and time records so that this kind of arid dispute does not need to happen. The employer in this case maintain no appropriate wage and time records at all. That means that the effect of s 132 of the Employment Relations Act 2000 entitles me to prefer the evidence of the employee in the absence of any proper documentary evidence from the employer.

[43] I do so, but I consider that the employee has not satisfied me that the totality of the hours that he worked averaged 70 per week. His actual evidence is ephemeral and while I am certain he worked more than 40 hours a week on occasion, he does have an obligation to satisfy me with evidence of the hours he actually worked. The efforts of his very able counsel will not avail in papering over the absence of actual evidence.

[44] So I have concluded that Mr Sharan worked a minimum number of hours of 40 per week, that he did not work 70 hours per week on average, as he claimed but my considered view is that to do justice between the parties the proper approach is to split the difference between the 40 hours a week postulated by the employment agreement and the 70 hours per week claimed by Mr Sharan. The effect of that decision would be that the lost wages claimed by Mr Sharan will be calculated at 55 hours per week.

Did Mr Sharan return as a contractor?

[45] The employer maintains that the second engagement of Mr Sharan was as a contractor and not as an employee. If that were so, it would run directly counter to Mr Sharan's evidence of the requirement that Immigration New Zealand made for him to be an employee.

[46] When I questioned Mr Sharan about this matter, he expressed himself to be very fearful about the prospect of being a contractor and being responsible for paying his own tax.

He was very clear that this was not what Immigration New Zealand expected of him and he seemed to me to be concerned that he was, or would be, breaking the law if he agreed to this arrangement.

[47] There is a letter which has been provided to me dated 24 March 2017 written by Mr Renshaw and addressed to an Immigration consultant that was then looking after Mr Sharan's affairs. That letter proceeds on the footing that Mr Sharan was an employee in the first period of the employment and would remain an employee in the second. The only issue posited by that letter was whether the employer would be Reborn Holdings Limited, the respondent in this matter, or another corporate entity Superior Autos Limited which Mr Sharan and Mr Anderson were joint shareholders in. There is no suggestion whatever that Mr Sharan is to be a contractor.

[48] Moreover, while this is not conclusive, there is no evidence before me of a written contract defining the terms of the relationship.

[49] What is more, Mr Sharan and his partner Ms Flanagan both gave evidence to me that when Ms Flanagan initiated discussions with Mr Anderson to have Mr Sharan return to the employment, Mr Anderson assured both of them that Mr Sharan could return and as an employee or to make the same point less directly both witnesses were very clear that there was no suggestion of a change in the nature of the relationship and no mention of a contractual rather than employment relationship.

[50] Indeed, as counsel for Mr Sharan astutely points out, the only evidence to support the notion that Mr Sharan was a contractor rather than an employee postdates the return of Mr Sharan to the employment by some months and appears to have coincided with Mr Sharan identifying and complaining to Mr Anderson that no PAYE was being paid by the employer in respect to the second period of employment.

[51] Whether a person is an employee or a contractor depends on the real nature of the relationship: *Bryson v Three Foot Six Limited* [2005] NZSC 34.

[52] I am satisfied after examining the evidence before me that the real nature of Mr Sharan's relationship with the employer was one of an employee. I conclude this because it seems to be on the evidence quite plain that Mr Sharan was integrated into the business of the employer in a way that would be quite impossible if he were a contractor, that Mr Sharan

was under the control of the governing director of the employer, was told what to do and when to do it including being told to fix vehicles that were not then in any proper workshop and that Mr Sharan was effectively under the day-to-day control and management of Mr Anderson to such an extent as to obviate any prospect of Mr Sharan being an independent contractor. Considering the fundamental test, the question has to be if the putative employee held himself out as performing the services as if he were in business on his own account. I answer that last question firmly in the negative.

[53] I conclude that Mr Sharan was employed by the employer for both periods of employment; it follows that Mr Sharan's claims against the employer in respect of the second period of employment can stand and be considered and disposed of by this Authority.

Is Mr Sharan owed unpaid wages?

[54] Because of my conclusion that Mr Sharan worked hours that he was not paid for, I am satisfied that he is entitled to payment of additional wages. In an earlier section of this determination I concluded that Mr Sharan had worked an average of 55 hours per week and not the 70 hours per week that he claimed.

[55] On that footing then, the following calculations apply:

First period of employment:	19 May 2016 to 16 January 2017
No. of weeks:	34.6 weeks
Hourly rate:	$18 per hour
Weekly contract entitlement:	At 55 hours per week $990
Gross wages due for first period at 55 hours per week:	$34,254
Income already received:	Cash payments of $300 per week between 19 May and 5 July 2016 $2,014.29
Bank deposits between 6 July 2016 to 16 January 2017:	$9,610.00
Sub Total	$11,624.29

Balance owing is the difference between $34,254 and $11,624.29 being $22,629.71

Second period of employment:	24 March 2017 to 8 September 2017
No. of weeks:	24 weeks
Hourly rate:	$18 per hour
Weekly contract entitlement:	At $55 per week $990
Gross wages due for second period at second period at 55 hours per week:	$23,760
Income received Bank deposits between 24 March 2017 and 8 September 2017:	$12,445

Balance owing is the difference between $23,760 and $12,445 being $11,315.00

Total of the two periods of employment:

Total owing	**$33,944.71**

Are there other breaches of the minimum code?

[56] Mr Sharan claims he was not paid the minimum wage, was subject to deductions from his wages which he did not consent to, and of course it is alleged there was a failure to provide an employment agreement for the second period of the employment because, it is said, the first employment agreement was expressed to be for one year only.

[57] Dealing with that last point first, I do not accept the submission. The employment agreement actually does not specify a time in which it is to operate; the only reference to a one year term is in the accompanying letter which seems to have been sent with the employment agreement. What is true is that Mr Sharan terminated the employment, for whatever reason, on 16 January 2017 and whatever the provisions of the operative employment agreement, that brought that employment relationship to an end.

[58] There was then a second employment relationship which commenced on and from 24 March 2017 and I am satisfied that there is no proper employment agreement in place for that second engagement.

[59] By Order in Council dated 29 February 2016, the minimum wage for the two separate periods of Mr Sharan's employment was $15.25 per hour. Despite a contractual amount of $18 per hour and the Order in Council fixing the minimum adult wage at $15.25 per hour, what Mr Sharan was actually paid was dramatically less than either the contract sum or indeed the minimum wage provided by regulation.

[60] The breaches are straightforward and egregious and must be the subject of a penalty.

[61] During the first period of the employment, Mr Sharan was paid $300 a week and in the second period of the employment $500 a week. Neither of those sums comes anywhere near close to what Mr Sharan ought to have been paid in terms of the Minimum Wage Act 1983 and of course, as counsel for Mr Sharan observes, the problem is magnified when the number of hours worked increases.

[62] The Wages Protection Act 1983 prohibits an employer from making deductions from workers' wages except where the worker consents in writing.

[63] While it is difficult to be specific about the extent of the deductions made from Mr Sharan's wages, given difficulties of an evidentiary nature, it is apparent that there have been a number of deductions which on their face, would appear to be unauthorised.

[64] Indeed, Mr Anderson seemed to acknowledge in his evidence that deductions had been made and to claim that Mr Sharan knew perfectly well what they were for. The short point is unless there is a proper legal acknowledgement and acceptance of the right to make deductions from a worker's wages, those deductions are illegal.

[65] Reliance is placed on a single provision in the employment agreement which purports to give permission for the employer to recover the costs of the preparation of the agreement from the employee. Even if I were to accept that that provision entitled the commensurate deduction, and I confess to taking a most jaundiced view of this sort of provision, the balance of the deductions which can be identified appear to be for payments to Mr Renshaw.

[66] It is said that Mr Renshaw provided Mr Sharan with various periods of assistance in respect to his immigration difficulties and there is a schedule before me which attempts to justify these payments.

[67] I do not need to decide whether Mr Renshaw did anything for Mr Sharan or not. The short point is that nothing in the evidence supports the contention that Mr Sharan agreed to those deductions and that is an end of it. The deductions are thoroughly improper, a breach of the Wages Protection Act and will sound in penalties.

[68] The final breach I have already commented on briefly. It is the failure to provide an employment agreement for the second period of the employment. I do not see this breach as being as egregious as the other two. It is apparent that the employer either genuinely thought, or sought to convince itself that Mr Sharan had returned to the employment but as a contractor. Of course the relationship should have been documented but as I have already observed, I am not persuaded this breach is as serious as the other two.

[69] Given that penalties are sought, the Employment Court requires the Authority to apply a four step process in determining the quantum of penalties. The detail of that four step test is set out in *Boorsboom v Preet Pvt Limited* [2016] NZEmpC 143.

[70] The first step is to identify the nature and number of statutory breaches. The Authority must identify the maximum penalty for each breach and determine whether global penalties should apply.

[71] There is one Employment Relations Act breach concerning the failure to provide a written employment agreement for the second period of employment. For ease of consideration I number this breach one and the succeeding breaches are consecutively numbered. The maximum penalty for this breach is $20,000 given that the breach was perpetrated by Mr Sharan's employer, a limited liability company.

[72] There are three identifiable breaches of the Wages Protection Act 1983. These breaches are breach two. Each of these breaches, again perpetrated by the employer, attracts a maximum penalty of $20,000.

[73] Finally, there is a breach of the Minimum Wage Act 1983 in a continuing failure to pay rates of pay that are at least equal to the minimum wage determined by regulation. This

is breach three. Because the breach is continuing across each pay period, there is an argument that there is effectively a breach occurring each payday. However, using the same logic as was used by the Court in *Preet* I consider the proper course is to apply a single penalty for a single employee. On this basis, a maximum penalty of $20,000 is identified.

[74] Step two of the *Preet* system requires an analysis of the severity of the breaches. This includes considering aggravating features and mitigating factors and should end in the establishment of a provisional starting point for the imposition of penalties.

[75] I have already observed that I regard the breaches of the Wages Protection Act and the Minimum Wage Act to be particularly egregious; conversely, the failure to provide an employment agreement in the second period of the employment given the general air of confusion around the totality of the parties' relationship, I regard as less serious. This is especially the case when the former employment agreement can be regarded as having persuasive value.

[76] The starting point for the two most serious breaches I assess at 70% and the starting point for the failure to provide an employment agreement is 50%. I am satisfied those percentages are in accordance with decided cases and reflect the seriousness of the respective breaches having regard to the theoretical possibility of still more egregious behaviour in each case.

[77] It follows that the starting point in regard to breach one (the failure to provide an employment agreement) is $10,000. The starting point for breach two, the breaches of the Wages Protection Act is $42,000, being 3 breaches each at $20,000 totally $60,000 times 70%. The starting point for breach three is $14,000, being one breach (for one employee) of $20,000 times 70%.

[78] I must now consider if there are mitigating factors which warrant a reduction in any of the provisional penalties identified above. The only matter that seems to me to justify a reduction is the air of general confusion and muddlement in the operations of the employer. I allow a reduction of 20% in this regard. This reduces the total provisional penalty sum to $52,800.

[79] Step three of the *Preet* test requires me to assess the financial circumstances of the respondent about which I have little or no direct information of relevance. I can however

deduce from the evidence I have that the employer is not well resourced financially and given my obligation to consider this matter, I deduce that I should further reduce the provisional penalty sums by another 20%. That calculation further reduces the provisional penalty to $42,240.

[80] Step four of the *Preet* test seeks to develop the proportionality of the outcome and the application of this principle will often have the effect of reducing the totality of the penalties that are actually to be paid. This is because each breach attracts an individual penalty and where the breaches is a continuing one such as the failure to ever pay the minimum wage over two periods of employment lasting more than one year, the effect of the breaches if subjected to individual penalties, can be very high indeed.

[81] Having considered the matter in the round, I am satisfied that a total penalty of $30,000 to be payable to Mr Sharan reflects the gravity of the imposition he has been subjected to. This figure represents a reduction in the total amounts derived from the earlier steps of fully $12, 240 but I consider that reduction is appropriate in all the circumstance.

Can Mr Sharan now claim constructive dismissal?

[82] In his statement of problem filed in the Authority on 6 November 2017, Mr Sharan does not raise a personal grievance for constructive dismissal or indeed any other kind of personal grievance. He does seek compensation for hurt and humiliation for "unfair and unreasonable treatment".

[83] There is nothing between the filing of the statement of problem on the one hand and the suggestion of a constructive dismissal in counsel's submissions filed on 17 August 2018 that could be construed as the raising of a personal grievance for constructive dismissal or indeed, any other form of personal grievance.

[84] That said, I agree with counsel that I think it likely that Mr Sharan did feel that effectively he was being driven out of the employment because he was not being properly paid.

[85] However, the law is clear. A personal grievance has not been raised within the justiciable period and there is no application before me to allow it to be raised out of time.

[86] The effect of all of this is to make it impossible to deal with the matter fairly and appropriately because the employer has had simply no opportunity to put the matter right either at the time that the matter was raised proximate to the events complained of, or with the benefit of the additional protections for the employer where the Authority grants leave for the matter to be progressed out of time.

[87] In those circumstances then, I do not consent to the constructive dismissal claim proceeding. No personal grievance claim of any sort has been raised with the employer and thus, no remedies under that head, can be contemplated.

Conclusion

[88] Mr Sharan's wage claim is resolved on the basis the employer is to pay him the sum of $22,629.71 for the first period of the employment and a further sum of $11,315 for the second period of the employment being an aggregate total of $33,944.71 gross.

[89] Because there may be income tax issues in respect to the second period of the employment (the employer maintaining that Mr Sharan was a contractor in that period), the employer, Reborn Holdings Ltd must also account to the Inland Revenue Department for tax that has not been paid on Mr Sharan's wages.

[90] The employer is to pay an aggregate penalty of $30,000 for its breaches of the Employment Relations Act, the Wages Protection Act and the Minimum Wage Act and that sum is to be paid, in its entirety to Mr Sharan. I have heard ample evidence of the effect on Mr Sharan of the defaults of the employer and this penalty sum will go some way to redressing the balance.

[91] Mr Sharan does not have a personal grievance having not satisfied me he has taken any steps to notify the employer of that grievance, or sought my leave to raise his grievance out of time.

Costs

[91] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority