

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 82  
5541339

BETWEEN            LABOUR INSPECTOR WARREN  
                         GERARD SMITH  
                         Applicant

AND                    VIKRAM SINGH MANKU  
                         Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Ella Tait, Counsel for Applicant  
                              Sam Rama, Advocate for Respondent

Investigation Meeting:    25 August 2015 at Wellington

Submissions Received:    Orally and in writing on 25 August 2015 from the  
                                  Applicant  
                                  Orally on 25 August, from the Respondent

Determination:            25 August 2015

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     This is the written record of a determination issued orally on 25 August 2015.

**Employment relationship problem**

[2]     Labour Inspector Smith filed a statement of problem in the Authority in February 2015 seeking orders that the respondent pay wage and leave arrears due to three former employees. He also sought penalties against the respondent for failing to pay minimum wages in respect of two of those employees; failure to maintain wage and time records; failure to maintain leave records; failure to pay holiday pay upon termination of employment in respect of two employees; and failure to pay public holiday and alternative holiday entitlements.

[3] In his statement in reply, Mr Manku denied many of the Labour Inspector's claims but acknowledged he had paid one of the employees at a rate \$0.25 per hour below the minimum wage for a period of eleven months, and \$0.75 per hour for a period of just over one month.

### **Subsequent developments**

[4] A telephone conference between the parties took place on 8 May 2015. In the course of that telephone conference, the parties were directed to mediation. Unfortunately mediation was unsuccessful.

[5] On 28 July 2015, the Authority received an unsigned letter from Mr Singh, one of the three employees referred to above, stating that he wished to stop the proceedings with respect to him, as payments owed to him by Mr Manku had now been made. The letter expressed Mr Singh's happiness with the settlement that had been reached with him and stated he did not wish to proceed further with these charges.

[6] The Labour Inspector shortly thereafter acknowledged that payments had now been made to the employees in question. However, the Labour Inspector notified he did not intend to withdraw the claim for penalties against Mr Manku. That position was confirmed in a further telephone conference with the parties on 4 August 2015.

[7] Subsequently the Labour Inspector, through Ms Tait, helpfully proposed to narrow the issues between the parties by confining its pursuit of penalties in relation to the second employee, Mr Dhingra, to the undisputed 10 hours per week he had worked, rather than to an additional disputed 10 hours. Penalties would still be sought in relation to Mr Manku's breach of the Minimum Wage Act of paying Mr Dhingra an hourly rate below the minimum wage in relation to the acknowledged 10 hours a week that he worked.

[8] The penalties sought for the respondent's failure to provide Mr Dhingra with annual holiday pay entitlements upon termination of his employment would be pursued only in respect of the 10 hours per week which it was agreed between the parties Mr Dhingra worked. The Labour Inspector proposed dropping his claim for a penalty against Mr Manku for failing to pay public and alternative holiday entitlements to Mr Dhingra.

[9] Mr Smith still intended to pursue penalty claims in respect of Mr Manku's failure to pay holiday and leave entitlements to Mr Singh, penalties for failing to maintain wages and time records, and holiday and leave records, as well as the cost of the filing fee in the Authority. The Labour Inspector did not intend to pursue claims in respect of a third employee, and would no longer seek an award of interest on wage arrears.

[10] The Authority's investigation proceeded on that basis and I thank the Labour Inspector for his proposal which resulted in a significantly shorter investigation than originally scheduled.

### **Background**

[11] The applicant is a Labour Inspector designated under s.223 of the Employment Relations Act 2000 (the Act). Mr Manku was, at the time the Labour Inspectorate commenced its investigation, a sole trader who operated a café business in Petone. The café employed one chef and up to five part time waiting staff.

[12] On 28 April 2014, the Labour Inspectorate received a complaint from Mr Dhingra, who had recently ceased employment at the café. He alleged he had not been paid the minimum wage, had not been paid for working an additional 10 hours a week throughout most of his employment and had not been paid holiday pay when his employment ended.

[13] The investigation of Mr Dhingra's complaint was commenced by Labour Inspector Monica Searancke, and passed to Labour Inspector Smith in September 2014. It revealed that Mr Dhingra had commenced employment with Mr Manku on or about 6 May 2013 as a kitchen hand in the Petone cafe. His employment had finished on 27 April 2014. Mr Dhingra claimed not to have taken any annual leave during his employment and not to have been paid out any accrued annual leave upon termination of his employment.

[14] Wage records supplied by Mr Manku showed that Mr Dhingra was paid \$13.50 an hour or \$135 per week gross. This was below the minimum wage applying at the time which was \$13.75 an hour. Mr Dhingra had been given an individual employment agreement (IEA) which he signed, with a commencement date of 7 June 2013.

[15] The Labour Inspector says that Mr Dhingra's wages remained at \$135 per week gross throughout his whole employment period. He noted the minimum wage increased to \$14.25 per hour on 1 April 2014.

[16] In the course of the Labour Inspectorate's investigation it established that Mr Amaninder Singh was employed by Mr Manku on 13 August 2012 as the café manager. Mr Singh received an IEA on this date that recorded a salary of \$36,000 a year for a 40 hour week. This amounted to \$17.30 an hour or \$692 per week gross. Labour Inspector Smith says in April 2013 Mr Singh was asked by Mr Manku to become the café chef on the same salary, and agreed to do so. Mr Singh's employment ended on 13 July 2014 when he purchased the café business from Mr Manku.

[17] Mr Singh's evidence to the Labour Inspector was that in relation to annual leave he asked for paid leave for a period during late 2013 in order to travel to India. His request was declined by Mr Manku and Mr Singh took unpaid leave. Labour Inspector Smith says Mr Singh did not take any paid leave while employed by Mr Manku and was not paid out any accrued leave upon the termination of his employment.

[18] Mr Smith says that on 22 October 2014, Mr Manku telephoned him and advised that, when Mr Singh purchased the business from him, he did not charge Mr Singh for the stock at the café. This was valued at around \$4,000. Mr Manku told the Labour Inspector this was to balance up with holiday pay that he owed Mr Singh. Labour Inspector Smith says he has viewed the purchaser's copy of the sale and purchase agreement for the sale of the café to Mr Singh and noted that stock in trade was valued at \$5,000 and formed part of the purchase price. Mr Smith told the Authority he thought Mr Manku had been untruthful about this matter.

[19] The Labour Inspector calculated Mr Singh was owed a total of \$5,408 comprising annual leave for his first year of employment and 8% of his gross earnings for his second part- year of employment. He also determined that Mr Singh worked a total of 17 public holidays during the term of his employment. In respect of nine of these days he was paid ordinary pay but did not receive time and a half. An alternative holiday was owed in respect of one of those days. In respect of four of those public holidays, Mr Singh was paid time and a half but did not receive an alternative day's holiday to which he was entitled.

[20] In response to the claims of the Labour Inspector, Mr Manku said Mr Dhingra had been in New Zealand as a student. He had worked 10 hours per week at the café but that when Mr Dhingra left his employment, he had claimed Mr Manku had to pay him 20 hours a week because his employment contract referred to 20 hours per week.

[21] Mr Manku acknowledged that Mr Dhingra was paid below the minimum wage for the period of his employment at the café. He told the Labour Inspector this was because he had asked Mr Singh, the café manager, to prepare Mr Dhingra's employment agreement and it was Mr Singh's mistake that he continued to pay \$13.50 per hour despite the minimum wage being \$13.75 per hour at the commencement of Mr Dhingra's employment and \$14.25 per hour from 1 April 2014.

[22] Mr Manku told the Authority that the Petone cafe was the first business he had owned and, although he was aware of some of his responsibilities as an employer, he acknowledged his deficiencies when it came to the keeping of records that complied with the standard required by law.

[23] He has since purchased another business and says he is fully compliant in the documentation he is required to maintain. With regard to Mr Dhingra, Mr Manku said he had wanted to pay him holiday pay when Mr Dhingra's employment ended but, because Mr Dhingra disputed the hours he had worked, he did not have the opportunity to do so. He had paid Mr Dhingra in full for all monies owing, including the disputed hours, on 16 July 2015.

[24] With regard to Mr Singh, Mr Manku told the Labour Inspector he paid Mr Singh in cash when he needed money urgently to travel back to India in late 2013. Mr Manku was unaware how Mr Singh recorded his leave as he was the manager at the time. Mr Manku said Mr Singh had taken other leave for which he was also paid. Nonetheless, Mr Manku paid Mr Singh all payments the Labour Inspector was claiming on his behalf. That payment was also made on 16 July 2015.

### **Penalties**

[25] Although acknowledging that payments to Mr Dhingra and Mr Singh have been made in full, the Labour Inspector submits this is an appropriate case for penalties. This is because of the breaches of the Holidays Act and the Minimum Wage Act by Mr Manku. With respect to the Minimum Wage Act breach Ms Tait submits, on behalf of the applicant Labour Inspector, that awareness of the minimum

wage and payment of that wage to all employees is the most basic and fundamental of requirements.

[26] With respect to Mr Manku's failure to keep records, she submits this is serious because it impedes the Labour Inspectorate from assessing whether or not the employer is complying with many other statutory obligations. It also can impact on an employee's ability to establish their entitlements and therefore to recover arrears owed.

[27] Ms Tait notes that the breaches continued over a substantial period of time, in Mr Dhingra's case, throughout his employment. The breach of the Holidays Act concerning failure to pay holiday pay on termination occurred firstly in relation to Mr Dhingra and then again in relation to Mr Singh.

[28] Ms Tait made submissions regarding the vulnerability of employees and the need for deterrence, the latter of which she considered to be a key consideration noting that "*It is important for the Respondent personally and employers generally to understand that breaches of minimum employment standards in New Zealand are taken seriously and will not be tolerated.*"

[29] On behalf of Mr Manku, Mr Rama submitted that in this case none of the statutory breaches had been intentional and that Mr Manku had rectified the breaches. He was not in the business of exploiting workers and this was not a case where penalties were appropriate.

[30] The submissions of both parties have merit. Penalties are at the discretion of the Authority and I need to assess whether this is an appropriate case for their imposition. To assist me in making that assessment Ms Tait referred me to *Tan v Yang & Zhang*<sup>1</sup> in which Judge Ingles set out a non-exhaustive list of factors that could usefully be considered when determining whether a penalty pursuant to s13 of the Wages Protection Act was warranted.

[31] While the current case does not involve the Wages Protection Act, those factors have relevance in any consideration of penalties and I have taken note of them. They include the seriousness of the breach, whether it is a one-off or repeated, the

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<sup>1</sup> [2014] NZEmpC 65

vulnerability of the employee; need for deterrence; remorse shown by the party in breach; effect on the employees; and penalties imposed in comparable cases.

[32] Mr Manku came to New Zealand as a student in 2003 and undertook a series of part time jobs while still studying. He then worked in hospitality and purchased his first business, the café in Petone, in March 2011. He sold the café to his café Manager/Chef in 2014 and purchased a new business at around the same time. I accept he did not intentionally pay Mr Dhingra at less than the minimum wage, although he should have made himself familiar with the level that was current at the time Mr Dhingra was employed, and with the subsequent increase as of 1 April 2014. As owner of the café it was his responsibility to do so.

[33] Mr Manku acknowledged that error and remedied it in July 2015. He did not pay holiday pay owing to Mr Dhingra at the end of his employment in April 2014 and I accept his evidence that this was because of the dispute over the hours Mr Dhingra claimed to have worked. Nor did he pay holiday pay to Mr Singh to whom he sold the café in July 2014. Again, while the omission was later rectified, the payment should have been made earlier than July 2015.

[34] I note however from Labour Inspector Smith's evidence that Mr Manku said in the course of a meeting in November 2014 that he could not afford to pay the money at that time but he could come to some arrangement. Mr Smith confirmed his understanding that Mr Manku was proposing to pay the money owing over time. He also confirmed this was not an uncommon arrangement in such situations. The Labour Inspector did not pursue this option which, if he had, may well have resulted in significantly earlier payments being made to Mr Dhingra and Mr Singh.

[35] I find this is not a case meriting the imposition of substantial penalties. Ms Tait stressed in her submissions the importance of deterrence to other employers in imposing penalties on Mr Manku. In my view the effect would not be salutary. In fact it might have the effect of deterring other employers in Mr Manku's situation from providing the level of cooperation he provided to Ms Searancke and Mr Smith. Both Labour Inspectors confirmed to the Authority that Mr Manku was cooperative, and forthright during their investigation. He supplied documentation and maintained telephone and email contact with the Labour Inspectors, meeting with them at their request.

[36] Mr Manku said he had learned a lot from the Labour Inspectors through the investigation process. I have no reason to doubt that, or to question his evidence that his current business is fully compliant with all statutory requirements. In this instance I believe justice is best served by the imposition of one global nominal penalty only, to recognise the breaches of the Holidays Act and the failure to maintain the required level of wage and time and holiday and leave records.

### **Determination**

[37] For the reasons given above I order Vikram Singh Manku to pay a penalty of \$500 to the Crown account.

### **Costs**

[38] Mr Manku is to pay costs in the order of \$71.56 to the applicant Labour Inspector.

Trish MacKinnon  
Member of the Employment Relations Authority