

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 118
5447417

BETWEEN ERIN SPENCE, LABOUR
 INSPECTOR
 Applicant

A N D VINETECH LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 Shima Grice, Counsel for Respondent

Investigation Meeting: 31 March 2014 at Tauranga

Additional Information: 01 April 2014 from Applicant
 02 April 2014 from Respondent

Date of Determination: 02 April 2014

DETERMINATION OF THE AUTHORITY

- A. Vinetech Limited (Vinetech) is ordered to pay a penalty of \$1,000 to the Crown bank account for its breaches of s.6 of the Minimum Wages Act 1983 (MWA83), s.130 of the Employment Relations Act 2000 (the Act) and s.81 of the Holidays Act 2003 (HA03).**
- B Because of its financial situation Vinetech may pay this penalty in two monthly instalments of \$500 starting on 01 June 2014.**
- C Vinetech is ordered to reimburse the Labour Inspector \$71.56 for the filing fee.**

Employment relationship problem

[1] Peter and Ann Altham are the shareholders in Vinetech with Mr Altham being the sole director. The Althams have been involved in the kiwifruit industry in the Bay of Plenty for around 23 years.

[2] Vinetech was incorporated in 2005. It contracts to orchard owners and packhouses to work on kiwifruit orchards. Mr Altham works in the orchards while Mrs Altham manages the administration of the company and payroll.

[3] Vinetech's workforce is very transient (it would employ around 100 different employees each year on a short term casual basis). Many of its casual staff are backpackers who are passing through the region.

[4] The Labour Inspector Ms Spence seeks penalties against Vinetech for breaches of minimum employment legislation which relate to its engagement of Ms Sinae Kim during the weeks ending 25 August and 01 September during the 2013 pruning season.

[5] Ms Kim had previously worked as a casual for Vinetech during the picking season in 2013 and was paid correctly for that. After the picking season finished Ms Kim's boyfriend Dongho Ha continued to be employed by Vinetech and did pruning.

[6] For the winter pruning Vinetech's employees were paid per bay they pruned. Mr Altham records the hours each employee works per day and the number of bays completed. Mrs Altham then inputs these figures to calculate the employee's pay. She then cross checks this against the hours the employee has actually worked to ensure they are not being paid less than the minimum wage. If these calculations result in the employee being paid less than the minimum wage for the hours actually worked then Vinetech does a top-up payment to ensure that no employee earns less than the minimum wage for each hour worked.

[7] Vinetech's records show that Ms Kim and Mr Ha each worked 39 hours the week ending 25 August and 22.5 hours the week ending 01 September. Mr Ha was paid correctly but Ms Kim was not paid at all because Vinetech viewed her as merely assisting Mr Ha so he could work more quickly and thus earn more money by pruning more bays.

[8] Mr Altham says he did not want to employ Ms Kim but was pressured by Mr Ha to allow Ms Kim to help him (Mr Ha) because she was bored sitting at the backpackers by herself all day. Mr Altham says Mr Ha's idea was that he (Mr Ha) would do the pruning which was a much more physically difficulty job and Ms Kim would clip the canes on to the wires running through the orchard which would enable him to complete pruning each bay more quickly thus resulting in more pay for him (due to being paid per bay).

[9] Mr Altham says that he thought that Mr Ha and Ms Kim were working as one unit so he did not tell his wife that Ms Kim had returned to work or that she should be added to the payroll system. Mr Altham now realises that this was a serious error of judgment which should not have occurred.

[10] Vinetech accepts Ms Kim was an employee during the period in issue because she was doing work which benefited it and no arrangements had been made for her to attend as a volunteer only. Vinetech accepts that Ms Kim should have been paid the minimum wage for the 61.5 hours she assisted Mr Ha with his pruning.

[11] In September 2013 the Ministry of Business Innovation and Employment (MBIE) received complaints from four Vinetech employees that they had not received minimum wage or holiday pay for the work they had completed. Ms Spence investigated and as a result of that determined that one employee, Ms Kim, had not been paid a minimum wage or annual holiday pay for the work she had completed during the weeks ending 25 August and 01 September 2013.

[12] The Labour Inspector seeks penalties be imposed on Vinetech for:

- (i) Failure to pay minimum wage to Ms Kim in breach of s.6 of the Minimum Wage Act 1983 (MWA83);
- (ii) Failure to keep adequate and accurate wage and time records for Ms Kim in breach of s.130(4) of the Act;
- (iii) Failure to keep holiday and leave records for Ms Kim in breach of s.81 HAO3.

[13] Vinetech admits all of these breaches so the Authority's investigation related to the penalty claims only.

Issues

[14] The issues for determination include:

- (i) How should penalties be assessed?
- (ii) What if any penalties should be imposed?
- (iii) What if any time payment arrangements should be ordered for any penalties imposed?

How should penalties be assessed?

[15] The parties were agreed that the Authority should adopt a totality based approach to penalties so one penalty is imposed to reflect all three breaches instead of a separate penalty for each breach.

[16] The leading case on the approach to be taken to penalties is the Employment Court decision of *Xu v. McIntosh*¹ which I note was decided prior to the 01 April 2011 doubling of the penalties in the Act. *Xu v McIntosh* provides guidance on relevant factors to be assessed when determining the appropriate penalty. These include:

- (a) How much harm has the breach caused?
- (b) How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?
- (c) Was the breach technical or inadvertent or was it flagrant and deliberate?

How much harm has the breach caused?

[17] The harm in this case was limited. Ms Kim appeared to have shared Mr Altham's view that she was merely assisting her partner Mr Ha to be more productive and thus earn more because she did not raise any issue with Vinetech at the time about not being paid.

[18] This issue appears to have arisen from the Labour Inspector's investigation which identified that she should have been paid the minimum wage for the hours she

¹ [2004] 2 ERNZ 49

worked and holiday pay on that amount and that wage and time records should have been kept for the less than two weeks Ms Kim assisted Mr Ha with pruning. Vinetech says that as soon as the Labour Inspector drew this matter to its attention Ms Kim was paid.

[19] Mrs Altham had no idea that her husband had engaged Ms Kim (by agreeing that she could assist Mr Ha) which was why Ms Kim did not appear on the payroll for the relevant weeks. I consider the harm occasioned by the breaches in issue is at the very low end of the scale.

[20] I also acknowledge that Vinetech has suffered severe financial consequences as a result of the breaches relating to Ms Kim's less than two weeks' work. Because of its breaches Vinetech lost its biggest client. It has also been unable to obtain any replacement contracts to provide services to new clients who are concerned about these proceedings.

[21] This has left Vinetech in a situation where it has no income coming into the business and no immediate prospects of engaging new clients. This is an extremely serious situation for the Althams because they both work in the business and it is their sole method of generating income. I consider the harm Vinetech has sustained as a result of its breaches regarding Ms Kim is significant.

How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[22] After hearing from Mr and Mrs Altham I am satisfied they understand the seriousness of the breaches that occurred and are well aware that employers must be proactive in ensuring full compliance with employment law requirements.

[23] It is however necessary to set penalties at a level which will deter other employers throughout New Zealand from taking a lax or casual approach to their employment legislation obligations.

Was the breach technical or inadvertent or was it flagrant and deliberate?

[24] I accept Vinetech's submission that its breach was not flagrant nor deliberate. I am prepared to accept it was an inadvertent breach.

Other factors

[25] The Labour Inspector identifies that an aggravating factor is that Vinetech has had a number of interactions with the Labour Inspectorate during which it has been reminded of the need to fully and properly comply with its employment law obligations. The Labour Inspector's view was that she had given Vinetech guidance and education around its obligations and therefore expected to see full compliance from it.

[26] The Labour Inspector identified four prior engagements with Vinetech. One of those was initiated by Vinetech to ensure that it was meeting all legal requirements so I am not concerned with that.

[27] The other three engagements involved investigations initiated by the then Department of Labour (now Ministry of Business Innovation and Employment – “MBIE”) as a result of a pro-active engagement project it was undertaking in the kiwifruit industry. The Labour Inspector says Vinetech has previously not paid nine employees correctly so that should be reflected in the penalty imposed.

[28] That may be the case but no enforcement proceedings were necessary and I do not have full details about any previous concerns. I therefore treat Vinetech as a first offender because it has not appeared before the Authority before.

What if any penalties should be imposed?

[29] The maximum penalty for each breach is \$20,000. The Authority has discretion about whether to impose a penalty and if so regarding the level of penalty imposed.

[30] Vinetech submits that no penalty should be imposed. Vinetech says the Labour Inspectorate of MBIE has already taken punitive action against it which resulted in Vinetech losing its biggest client. Vinetech relies on an email sent by Alex Macgill, Labour Inspector, on 04 February 2014 to [Vinetech's major client] which says:

Just letting you know that continuing to use the services of the contractor Vinetech Limited may put you in breach of s.8.5.5 of the RSE Policy which could result in the loss of RSE status for [you].

[31] Vinetech says that email resulted in its client declining to engage its services for the current season. That loss has left Vinetech with no work and therefore no income. Vinetech's attempts to obtain other clients have been unsuccessful because potential clients have asked whether Vinetech has had any interactions with the Labour Inspectorate and when Vinetech discloses these proceedings potential clients have declined to consider engaging its services until this matter has been determined.

[32] Alternatively, Vinetech submits that if a penalty is to be imposed it should be at the lowest end of the scale.

Ability to pay

[33] Mr and Mrs Altham each gave evidence about Vinetech's very serious financial challenges. The Althams have combined their personal finances with Vinetech's business finances which are both subject to a mortgage over their family home. The Altham's home has been on the market for some months and they intend to use the sale proceeds to reduce Vinetech's liabilities and to cover their living expenses given they now have no income to live off because Vinetech no longer has any clients.

[34] Vinetech also owes \$50,000 arrears to the Inland Revenue Department and has no immediate prospects for generating income.

[35] I am satisfied that Vinetech has an extremely limited ability to pay any penalties imposed in the current circumstances. I also accept the Altham's evidence that Vinetech's admitted breaches of minimum employment legislation may make it difficult for it to obtain new clients and therefore future work.

[36] I would have been inclined to have imposed a penalty of \$10,000 but for Vinetech's inability to pay. However, I consider it appropriate to exercise my discretion to significantly reduce the penalty that would otherwise have been awarded to reflect the severe financial hardship that Vinetech has already suffered as a result of its breaches and the ongoing financial hardship its breaches are likely to cause it going forward.

[37] For these reasons I impose a very modest \$1,000 penalty on Vinetech which is to be paid to the Crown bank account for its breaches of:

- (i) s.6 of the Minimum Wage Act 1983;
- (ii) s.130(4) of the Employment Relations Act 2000;
- (iii) s.81 of the Holidays Act 2003.

What if any time payment arrangements should be ordered for payment of any penalties imposed?

[38] Given Vinetech's financial challenges I consider it should be given time to pay this penalty. I therefore order that the penalty may be paid by two monthly instalments of \$500 starting on 01 June 2014.

Costs

[39] The Labour Inspector appeared in person so there is no issue as to costs. She is however entitled to be reimbursed for the filing fee of \$71.56 so Vinetech is ordered to pay that amount.

Rachel Larmer
Member of the Employment Relations Authority