IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 2
5558581

	BETWEEN	BRIDGET ZONNEVELD (Labour Inspector) Applicant
	A N D	VIEWBANK DAIRY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Greg La Hood, Counsel for the Applicant Brendan Barns, Advocate for the Respondent
Investigation Meeting:	29 October 2015 at Christchurch
Submissions Received:	7 & 24 December 2015 on behalf of the Applicant 18 December 2015 on behalf of the Respondent
Date of Determination:	8 January 2016

DETERMINATION OF THE AUTHORITY

A. I order compliance with parts of the applicant's Improvement Notice.

B. I impose upon the respondent a global penalty in the sum of $7,500.

C. Costs are reserved.

Employment relationship problem

[1] Ms Zonneveld (the Labour Inspector) seeks a compliance order under s.137 of the Employment Relations Act 2000 (the Act) in relation to alleged non-compliance by the respondent of an Improvement Notice issued under s.223D of the Act. She also seeks that penalties be imposed by the Authority upon the respondent for

breaches of the Minimum Wage Act 1983 under s.64(4) and s.65(4) of that Act, and under s.75 of the Holidays Act.

[2] The respondent failed to serve and lodge a statement in reply despite having been given a generous extension of time within which to do so, taking into account a request from Mr Barns for indulgence, given that the farm was heavily engaged in calving at the time of the case management conference call. However, Mr Barns and an associate did attend the investigation meeting and did cooperate and provide information and assistance to the Authority and the Labour Inspector at the meeting and afterwards. I am satisfied that the respondent acted in good faith in attempting to resolve the issues in question, at least by the time the investigation meeting took place.

Brief account of events

[3] The respondent operates a dairy farm milking approximately 1,300 cows, according to the Labour Inspector. It employed both permanent employees and short term employees, many of whom were from overseas working under the INZ working holiday scheme.

[4] On 26 November 2014 the Labour Inspector wrote to Mr Barns advising him of an impending visit by her in order to undertake an audit as part of Phase 4 of the Labour Inspectorate's National Dairy Sector Strategy. She asked Mr Barns to produce a number of documents including time and wage records, holiday and leave records, employment agreements, documentation relating to non-statutory deductions and details of final holiday pay calculations and payments made to two employees. This latter documentation was required because the Labour Inspectorate had received a complaint from two former employees of the respondent, who claimed that they had not received their final week's wages.

[5] During her visit to the farm on 28 November 2014, the Labour Inspector was provided with a number of original records as well as numerous printouts regarding leave from the respondent's ACE payroll system. The Labour Inspector also interviewed five current employees.

[6] The Labour Inspector asserts that a number of irregularities were found. These were as follows:

(a) Several employees, both those currently working at the time of the inspection and previously, had been treated as casual employees when they were, in fact, permanent employees.

(b) This arrangement led in turn to the respondent paying holiday pay to those employees incorrectly, pursuant to s.28 of the Holidays Act. That is to say, it paid holiday pay of 8% inclusive of the rate of pay.

(c) A number of employees (the Labour Inspector identified 16) were paid at an hourly rate which was below the prevailing minimum wage order either including the 8% holiday pay or after the 8% was deducted.

(d) A number of employees had either not been issued with individual employment agreements, or the respondent had failed to retain copies of those agreements.

(e) The respondent had failed to keep accurate and complete records that fully complied with the requirements of s.81 of the Holidays Act.

(f) The respondent had paid out a proportion of accumulated annual holidays to two permanent employees that had not been requested by the employees in writing and which was for more than the maximum amount of one week as permitted by s.28A of the Holidays Act.

(g) The respondent did not record any entitlement to sick leave for the employees who it had treated as casuals.

(h) Deductions were made from employees' pay without evidence that they had given proper consent.

[7] The Labour Inspector prepared an audit summary report dated 10 March 2015 which set out the respondent's observance or otherwise of the law in respect of a number of areas. This report was emailed to the respondent on 13 March 2015 and, on 23 March 2015, the Labour Inspector sent the respondent a letter regarding the audit and issued the respondent with an Improvement Notice. This gave the respondent no later than 5pm on 21 April 2015 to comply.

[8] The Improvement Notice is lengthy, comprising ten pages and so it will not be replicated here. However, the Improvement Notice specified that the respondent was

either failing or had failed to comply with the following provisions of minimum employment standards:

- Section 64 of the Act;
- Section 65 of the Act;
- Section 6 of the Minimum Wage Act;
- Section 81(2) of the Holidays Act;
- Section 28 of the Holidays Act;
- Section 28A of the Holidays Act;
- Section 56 of the Holidays Act;
- Section 63 of the Holidays Act;
- Section 8A of the Minimum Wage Act; and
- Sections 4 and 5 of the Wages Protection Act.

[9] The Improvement Notice required the respondent to provide information to the Labour Inspector as evidence of the steps taken in compliance with the Notice.

[10] On 22 April 2015 the Labour Inspector emailed Mr Barns pointing out that she had not received the information required by the deadline she had set. She extended the deadline to Friday 24 April 2015. In her email the Labour Inspector made clear that, if the respondent had chosen to not comply with the Improvement Notice, then she would apply to the Authority for an order for compliance and penalties.

[11] On 24 April 2015 the Labour Inspector received a telephone call from Mr Barns saying that, for family reasons, he had been unable to gather all the evidence required to comply with the Improvement Notice and that he would be in touch again by Friday 1 May to provide an update, and how much more time he needed.

[12] On 6 May 2015 the Labour Inspector emailed Mr Barns to say that she had not heard from him or received any information.

[13] On 12 May the Labour Inspector emailed again saying that she had left a voicemail on his cell phone, and that she had not received any information or further communications from Mr Barns. She advised him that she would be filing an application in the Employment Relations Authority. She also advised him that, if he was going to provide any information as evidence of compliance with the Improvement Notice, he needed to provide it by 4pm on 15 May. The Labour Inspector also attached another copy of the Improvement Notice, a fact sheet on Improvement Notices and information regarding the processes of the Authority.

[14] On 19 June 2015 Mr Barns contacted Ms Zonneveld and provided information to her to show compliance with the Improvement Notice. However, the information did not show that all the necessary steps to comply had been taken, and so Ms Zonneveld emailed Mr Barns on 24 June advising him that he still needed to do the following:

a. Show that employment agreements were in place for a number of employees;

b. Provide a wage review report for four named employees, and provide further details in respect of a further five employees, for whom it was not clear that they had been paid the minimum wage;

c. Provide a Leave Owing Report for any employee who was paid holiday pay on an exclusive basis and who worked for more than 12 months;

d. Provide a Leave Owing Report for any employee who had annual holidays paid out;

e. Provide a public holiday review report including information about alternative days paid;

f. Provide a sick leave review report;

g. Provide time sheets for two named employees in relation to a specified period; and

h. Provide proof of written consent from employees who had non statutory deductions made from their pay, or show that no deductions were made for employees from 23 March 2015.

[15] Ms Zonneveld says that no response was received.

The issues

[16] The following issues need to be determined by the Authority:

(a) Whether a compliance order should be issued against the respondent in respect of the Improvement Notice dated 23 March 2015;

(b) Whether penalties should be imposed upon the respondent under s.10 of the Minimum Wage Act;

(c) Whether penalties should be imposed upon the respondent under s.64(4) and s.65(4) of the Act;

(d) Whether a penalty should be imposed upon the respondent under s.75(1)(b) of the Holidays Act; and

(e) If a penalty or penalties should be imposed, the amount of that penalty or penalties.

Should a compliance order be issued against the respondent in respect of the Improvement Notice dated 23 March 2015?

[17] Section 137 of the Act provides that it applies when any person has not observed or complied with any provision of an improvement notice that section 223D(6) provides may be enforced by compliance order. (s.137(1)(a)(iiib)).

[18] Section 223D of the Act provides as follows:

> ***223D Labour Inspector may issue improvement notice***
> *(1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.*
> *(2) An improvement notice issued under subsection (1) must state—*
> *(a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and*
> *(b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and*

(c) the nature and extent of the employer's failure to comply with the provision; and
(d) the steps that the employer could take to comply with the provision; and
(e) the date before which the employer must comply with the provision.
(3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).
(4) An improvement notice may be issued—
(a) by giving it to the employer concerned; or
(b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.
(5) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.
(6) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.

[19] Reviewing the Improvement notice issued by the Labour Inspector, I am satisfied that the requirements set out in s.223D(2) of the Act have been complied with. No objection to the Improvement Notice has been lodged by the respondent in accordance with s.223E of the Act.

[20] By the time of the Authority's investigation meeting, Ms Zonneveld said that, although the Improvement Notice had been complied with in some respects, aspects of it still remained to be complied with. Mr Barns handed over several documents at the investigation meeting which Ms Zonneveld undertook to peruse and assess. On 10 November 2015 she received further information from him on behalf of the respondent company. On 20 November Ms Zonneveld wrote to the Authority with her assessment of the respondent's compliance with the Improvement Notice in light of the further information that had been received.

[21] Ms Zonneveld's assessment was that, as at 20 November 2015, the following issues remained to be complied with:

a. Arrears of wages which Ms Zonneveld says are payable to nine former employees have not been paid as the respondent contests that the sums are owed;

b. No evidence has been provided that arrears of wages have been paid to a further three former employees[1]. It is understood that the respondent

[1] Messrs Boness, Seeman and Calahorrano.

does not contest that these three employees are owed arrears, but that the respondent asserts it did not have account details to pay them the arrears;

c. No evidence has been provided that arrears of pay in respect of alternative holidays have been made to affected employees;

d. No evidence has been provided that certain deductions for rent have been specified and agreed to in respect of three current employees.

[22] Whilst the respondent argues that it is not obliged to pay the arrears referred to in sub-paragraph 21a above, it does not deny its defaults in respect to the issues referred to in sub-paragraphs (b) to (d).

The contested arrears

[23] The reason why the respondent contests that it owes arrears of wages is that it says it provided fully furnished accommodation (including electricity, wireless internet and Sky TV) to former employees in lieu of wages while they worked on the dairy farm on short term contracts. Mr Barns provided a number of emails from former employees which agreed that this had occurred. A typical email, from a Mr Jacobs who had worked for the respondent while on working holiday from Germany, stated:

> *When I worked for you in 2013, Viewbank Dairy ltd provided me with accommodation in return for work. Moreover, the work I did was paid for. These conditions were explained to me before I started working on your farm.*

[24] Notwithstanding Mr La Hood's concerns about the credibility or reliability of the responses received by Mr Barns, I accept that the respondent did enter into oral agreements with many, if not all, of its former short term employees that they would receive free accommodation in return for providing their work. The question that needs to be addressed, however, is whether such agreements were lawful in accordance with the Minimum Wage Act 1983 and the Wages Protection Act 1983. Sections 6 and 7(1) of the Minimum Wage Act provide as follows:

> ***6 Payment of minimum wages***
> *Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been*

> *prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.*
>
> ***7 Deductions for board or lodging or time lost***
> *(1) In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.*

[25] Sections 4 and 5 of the Wages Protection Act provide as follows:

> ***4 No deductions from wages except in accordance with Act***
> *Subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*
>
> ***5 Deductions with worker's consent***
> *(1) An employer may, for any lawful purpose,—*
> *(a) with the written consent of a worker; or*
> *(b) on the written request of a worker—*
> *make deductions from wages payable to that worker.*
> *(2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's wages, by giving the employer written notice to that effect; and in that case, that employer shall—*
> *(a) within 2 weeks of receiving that notice, if practicable; and*
> *(b) as soon as is practicable, in every other case,—*
> *cease making or vary, as the case requires, the deductions concerned.*

[26] The respondent asserts that the accommodation that was provided had an agreed nominal value of $100 a week, and that they worked around 45 to 55 hours per week.

[27] There does not appear to be any recent case law that addresses expressly s.7(1) of the Minimum Wage Act, although some comments of the full Employment Court in *Faitala v Terranova Homes & Care Ltd*[2] do aid the Authority in the approach that should be taken when interpreting the Minimum Wage Act and examining whether there has been compliance with its provisions. Their Honours Chief Judge Colgan and Judge Inglis stated the following in paragraphs [13] to [19] (case citations and other references omitted):

[2] [2012] NZEmpC 199

> *[13] The MWA is designed to prevent the exploitation of vulnerable workers. It is part of a suite of important protective statutes, imposing minimum conditions of employment. Statutory minimum conditions of employment have been part of New Zealand's industrial relations landscape for more than a century. The first Minimum Wage Act was enacted in 1945. …*
> *[14] The MWA has been described by a full Court of the Employment Court as a minimum code. It confers an entitlement on each eligible worker within New Zealand to a minimum rate of pay. The Act has its genesis in international conventions to which New Zealand, along with virtually every other developed country, is party. ….*
> *[15] It is readily apparent that the underlying purpose of the MWA is to ensure that workers receive a living wage, to meet the basic day-to-day living expenses of the worker and his/her family. The rate must be reviewed annually by the Minister. An employer who fails to pay the minimum wage is liable to a penalty, recoverable by the Labour Inspector.*
> *[16] The importance of s 6 is emphasised by its introductory words, which provide that the minimum entitlement is to apply notwithstanding anything to the contrary in "any other enactment, award, collective agreement, determination, or contract of service."*
> *[17] It is also notable that the MWA has not been subject to any significant amendment since its inception. It remains the oldest piece of employment legislation still in force, underscoring its status as a fundamental cornerstone of the statutory framework guiding the interrelationship between employers and employees, and reflecting a Parliamentary concern to redress issues of unequal bargaining power of workers, particularly those on low pay. This is reinforced by the express prohibition on contracting out of the requirement to pay the minimum wage.*
> *[18] The entitlement conferred on an employee by s 6 is to receive payment for his/her work from his/her employer at not less than the minimum rate. ….*
> *[19] As we have said, the purpose of the MWA is to ensure that workers receive a base wage for their work to enable them to meet their daily living expenses for themselves and their family. There is nothing to suggest that it builds in a component for saving for retirement. Rather it is designed to meet the basic necessities of day-to-day living. Thus s 7 provides an express exception that an employer may deduct, at a specified rate, payment in lieu where board and lodgings are provided.*

[28] So, the Minimum Wage Act has as its object the protection of employees, to ensure that they receive a living wage. It is only under very specific circumstances that an employer is permitted to pay less than the minimum rate specified by the Minister from time to time. One such exception is when the employer provides board or lodging to the employee, as provided for in s.7.

[29] Given the comments of the Employment Court in *Faitala*, the Authority must apply the provisions of s.7 strictly, to ensure that the fundamental protections

provided by the Minimum Wage Act are not eroded in a way not envisaged by Parliament.

[30] The terms *board* and *lodging* are not defined in the Minimum Wage Act. In the New Zealand Oxford Dictionary[3] the term *board* is defined as *the provision of regular meals, usu. with accommodation, for payment.* The term *lodging* is defined as *1 temporary accommodation. 2 (in pl.) a room or rooms (other than a hotel) rented for lodging in. 3 a dwelling place.*

[31] It appears that employees were provided by the respondent with lodging only, and not board. There is nothing in s.7 to allow for the provision of other amenities such as power, broadband or Sky TV to be taken into account when permitting the reduction of a worker's wage below the minimum wage order prevailing at the particular time.

[32] Mr Barns states that a nominal value of $100 a week was agreed with respect of the value of the lodging provided. However, this has not been confirmed by any of the former employees whose emails have been provided by Mr Barns. Furthermore, and more importantly, this value was not provided for in the individual employment agreements entered into by the employees in question. Nor has it been asserted by Mr Barns that the cash value was fixed by any Act, determination or other agreement relating to the employees' employment.

[33] In the absence of any such Act, determination or written agreement with the employees in question as to the value of the lodging provided, the provisions of s.7(1) have not been satisfied and so I am unable to find that the respondent was entitled to pay its former employees below the prevailing minimum age rate by reference to its asserted value of $100 a week.

[34] As the value of the accommodation was not fixed, as required by s.7, then the deduction made each week by the respondent in respect of each affected employee could not lawfully exceed such amount that would reduce his or her wages by 5%. I therefore find that the respondent did breach s.6 of the Minimum Wage Act.

[35] In view of this breach, I order the respondent as follows:

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[3] Eds. Tony Deverson and Graeme Kennedy, Oxford University Press, 2005

a. within 28 days of the date of this determination to calculate what wages would have been due to each of the nine former employees in question by reference to the prevailing minimum wage at the material times during their employment, less 5% and further less any wages actually paid to each;

b. within 5 days of finalising the calculation for each employee, to advise the Labour Inspectorate of each calculation, with sufficient details to enable the Labour Inspectorate to understand the calculations;

c. having made the calculations for each affected employee, within a further 14 days to pay the respective sums due to each employee; and

d. within 5 days of having made payment, to provide evidence of such payment in respect of each employee to the Labour Inspectorate.

[36] In any case where the respondent does not have both current bank account details and contact details for any affected employee, it must advise the Labour Inspectorate of that fact no later than 35 days from the date of this determination. If the Labour Inspectorate then makes a request to the respondent that any wages due in respect of such an employee be paid to it, so that it may hold the monies on trust for that affected employee, the respondent is to comply with that request within 5 days of receiving it, provided that sufficient banking details have been provided by the Labour Inspectorate to enable the respondent to comply.

Arrears owed to Messrs Boness, Seeman and Calahorrano

[37] It is not known whether the arrears have yet been paid to these individuals. If the arrears have been paid to the three individuals, the respondent must provide to the Labour Inspectorate evidence of such payments within 14 days of the date of this determination.

[38] If the arrears have not yet been paid to the individuals, within 14 days of the date of this determination the respondent must pay the respective arrears to the employees and provide evidence of such payment to the Labour Inspectorate within a further 5 days.

[39] In any case where the respondent does not have both current bank account details and contact details for any of the three employees, it must advise the Labour Inspectorate of that fact no later than 14 days from the date of this determination. If the Labour Inspectorate then makes a request to the respondent that any wages due in respect of such an employee be paid to it, so that it may hold the monies on trust for that affected employee, the respondent is to comply with that request within 5 days of receiving it, provided that sufficient banking details have been provided by the Labour Inspectorate to enable the respondent to comply.

Arrears in respect to alternative holidays

[40] If the arrears have been paid to the affected individuals, the respondent must provide to the Labour Inspectorate evidence of such payments within 14 days of the date of this determination.

[41] If the arrears have not yet been paid to the individuals, within 14 days of the date of this determination the respondent must pay the respective arrears to the employees and provide evidence of such payment to the Labour Inspectorate within a further 5 days.

[42] In any case where the respondent does not have both current bank account details and contact details for any of the affected employees, it must advise the Labour Inspectorate of that fact no later than 14 days from the date of this determination. If the Labour Inspectorate then makes a request to the respondent that any wages due in respect of such an employee be paid to it, so that it may hold the monies on trust for that affected employee, the respondent is to comply with that request within 5 days of receiving it, provided that sufficient banking details have been provided by the Labour Inspectorate to enable the respondent to comply.

Deductions for rent specified and agreed to in respect of three current employees

[43] Within 14 days of the date of this determination the respondent is to provide written evidence to the Labour Inspector that the following deductions were either specified and agreed to by the affected individual or that the deductions have been repaid:

a. The sums of $602.09 and $850.20 in respect of Mr Ryan Barns;

b. The sums of $236.12 and $334.81 in respect of Mr Coffey; and

c. The fortnightly deductions of $100 and $200 in respect of Mr Parsons.

The general principles relating to the imposition of a penalty

[44] The Employment Court in *Xu v McIntosh*[4] set out some guidance for the Authority in deciding whether to impose a penalty, and if so, in what amount. This guidance was as follows:

> *[47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*
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> *[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. .....*

[45] In *Tan v Yang & Zhang*[5] the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

> *a) The seriousness of the breach;*
> *b) Whether the breach is one-off or repeated;*
> *c) The impact, if any, on the employee/prospective employee;*
> *d) The vulnerability of the employee/prospective employee;*
> *e) The need for deterrence;*
> *f) Remorse shown by the party in breach; and*
> *g) The range of penalties imposed in other comparable cases.*

[46] These general principles apply equally, regardless as to which enactment applies under which the penalty may be imposed. It is permissible for a globalisation

[4] 2 ERNZ 448
[5] [2014] NZEmpC 65.

approach to be adopted where penalties may be imposed for more than one breach of an enactment or under more than one enactment.[6]

Should penalties be imposed upon the respondent under s.10 of the Minimum Wage Act?

[47] Section 10 of the Minimum Wage Act provides:

> ***10 Penalties and jurisdiction***
> *Every person who makes default in the full payment of any wages payable by that person under this Act and every person who fails to otherwise comply with the requirements of this Act is liable to a penalty recoverable by a Labour Inspector, and imposed by the Employment Relations Authority, under the Employment Relations Act 2000.*

[48] The data provided by the Labour Inspector, annexed to the statement of problem, shows that there were several cases where employees were paid at a rate lower than that in force at the relevant time.

[49] I accept that employees were paid below the relevant minimum wage rate because the respondent had provided accommodation to the employees in question, and because these employees had agreed that they would provide their work in return. I also accept that Mr Barns believed in good faith that the respondent was entitled to have entered into this arrangement. Indeed, it was so entitled, but failed to ensure that it did so in a lawful way, so as to protect the employees in accordance with their legal rights. I accept that such a failing was not wilful and do not consider that the imposition of a penalty is appropriate.

[50] It would also appear that the respondent did not keep a record of all hours worked, which is a requirement of s.8A(1)(g) of the Act. Plainly, without a proper record of hours worked, it is not possible to be certain as to whether an employee has been properly paid for his or her work.

[51] It is not clear why the respondent failed to keep proper records. This default is not excusable, as this requirement has been in place for many years and accurate record keeping is a fundamental requirement of all businesses, especially those engaged in large scale farming operations. Even if the respondent relied on its payroll

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[6] See *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC); *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 (EmpC)

provider to ensure that it was compliant with its record keeping requirements, it must retain accountability as an employer of numerous employees.

[52] I believe that this failing does justify the imposition of a penalty. I shall address the amount below.

Should penalties be imposed upon the respondent under s.64(4) and s.65(4) of the Act?

[53] Section 64 of the Act provides as follows:

> ***64 Employer must retain copy of individual employment agreement or individual terms and conditions of employment***
> *(1) When section 63A applies, the employer must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment (as the case may be).*
> *(2) If an employer has provided an employee with an intended agreement under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not—*
> *(a) signed the intended agreement; or*
> *(b) agreed to any of the terms and conditions specified in the intended agreement.*
> *(3) If requested by the employee, the employer must, as soon as is reasonably practicable, provide the employee with a copy of the employee's—*
> *(a) individual employment agreement or current terms and conditions of employment retained under subsection (1); or*
> *(b) intended agreement retained under subsection (2).*
> *(4) An employer who fails to comply with subsection (1), (2), or (3) is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*
> *(5) Before bringing an action under subsection (4), the Labour Inspector must—*
> *(a) give the employer written notice of the breach of this section; and*
> *(b) give the employer 7 working days to remedy the breach.*
> *(6) To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not—*
> *(a) signed the intended agreement; or*
> *(b) agreed to any of the terms and conditions specified in the intended agreement.*

[54] This section applies, inter alia, in relation to terms and conditions of an individual employment agreement, including any variations to that agreement.

[55] Section 65 provides:

> ***65 Form and content of individual employment agreement***
> *(1) The individual employment agreement of an employee—*

> *(a) must be in writing; and*
> *(b) may contain such terms and conditions as the employee and employer think fit.*
> *(2) However, the individual employment agreement—*
> *(a) must include—*
> *(i) the names of the employee and employer concerned; and*
> *(ii) a description of the work to be performed by the employee; and*
> *(iii) an indication of where the employee is to perform the work; and*
> *(iv) an indication of the arrangements relating to the times the employee is to work; and*
> *(v) the wages or salary payable to the employee; and*
> *(vi) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and*
> *(b) must not contain anything—*
> *(i) contrary to law; or*
> *(ii) inconsistent with this Act.*
> *(3) [Repealed]*
> *(4) An employer who fails to comply with this section is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*

[56] It is not clear why the respondent failed to comply with these statutory requirements, although I understand that it is now compliant as it uses employment agreements provided by Federated Farmers of New Zealand. I echo the remarks of Ms Zonneveld when she stated that it was important that the respondent take care that each agreement issued be completed correctly.

[57] I am satisfied that the respondent did not retain a copy of an individual employment agreement for each employee. I am also satisfied that the Labour Inspector gave the respondent written notice of the breach and gave it more than 7 days within which to remedy the breach, as is required by s.64. I am also satisfied that the respondent did not give a written employment agreement to every employee.

[58] For these reasons I accept that it is appropriate to impose a penalty. I shall address the amount below.

Should a penalty be imposed upon the respondent under s.75(1)(b) of the Holidays Act?

[59] Section 75 of the Holidays Act provides:

> ***75 Penalty for non-compliance***
> *(1) An employer who fails to comply with any of the provisions listed in subsection (2) is liable,—*

> *(a) if the employer is an individual, to a penalty not exceeding $10,000:*
> *(b) if the employer is a company or other body corporate, to a penalty not exceeding $20,000.*
> *(2) The provisions are—*
> *(a) section 16 and sections 21 to 28 (which relate to an employee's entitlement to, and payment for, annual holidays):*
> *(b) section 40(3) (which relates to an employee's entitlement to be paid for a public holiday that would have occurred during the employee's annual holidays):*
> *(ba) sections 28A and 28B (which relate to a request by an employee for a portion of his or her annual holidays to be paid out and payment for that portion):*
> *(c) section 46, sections 49 to 56, section 60, and section 61(3) (which relate to an employee's entitlement to, and payment for, public holidays and alternative holidays):*
> *(d) section 63, section 65, and sections 69 to 72 (which relate to an employee's entitlement to, and payment for, sick leave and bereavement leave):*
> *(e) section 83 (which relates to the failure to keep or provide access to a holiday and leave record).*

[60] Section 28(1) of the Act provides:

> ***28 When annual holiday pay may be paid with employee's pay***
> *(1) Despite section 27, an employer may regularly pay annual holiday pay with the employee's pay if—*
> *(a) the employee—*
> *(i) is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement to work for less than 12 months; or*
> *(ii) works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16; and*
> *(b) the employee agrees in his or her employment agreement; and*
> *(c) the annual holiday pay is paid as an identifiable component of the employee's pay; and*
> *(d) the annual holiday pay is paid at a rate not less than 8% of the employee's gross earnings.*

[61] It does not appear that any employee who received their holiday pay with their pay were employed on an employment agreement that satisfied s.66 of the Act or worked on a basis that was so intermittent or irregular that it was impracticable for the respondent to have provided the employee with 4 weeks' annual holidays under s.16 of the Holidays Act. Therefore, the 16 employees who received their holiday pay with their pay did so in breach of this provision.

[62] Ms Zonneveld accepts that this situation arose because Mr Barns incorrectly believed that these employees were casual employees.

[63] A casual employee is generally someone whose work fulfils some or all of the following characteristics:

a. engagement for short periods of time for specific purposes;

b. a lack of regular work pattern or expectation of ongoing employment;

c. the employment is dependent on the availability of work demands;

d. there is no guarantee of work from one week to the next;

e. employment occurs as and when needed;

f. there is a lack of an obligation on the employer to offer employment, or on the employee to accept any other engagement; and

g. employees are only engaged for the specific term of each period of employment. [7]

[64] The Labour Inspector asserts that none of the employees employed by the respondent for whom she saw evidence were employed on a basis that would fall within this definition. I accept this assertion.

[65] Mr Barns' mistake in treating employees as casuals is not uncommon, and I am happy to note that, with Ms Zonneveld's patient and helpful guidance, the respondent now understands much better which of its staff are casuals in law and which are not. I believe that, save where already noted, all payments of outstanding holiday pay have now been made.

[66] I do not believe that it is appropriate to impose a penalty for the breaches of s.28 as they were not wilful.

[67] Section 28A(1) of the Holidays Act provides:

> ***28A Employee may request portion of annual holidays be paid out***
> *(1) An employee may request that his or her employer pay out a portion of the employee's entitlement to annual holidays.*
> *(2) A request under subsection (1)—*
> *(a) must be in writing; and*

[7] See *Lee v Minor Developments Ltd t/a Before Six Childcare Centre* EmpC Auckland AC52/08, 23 December 2008 at [43]

> *(b) may be made on 1 or more separate occasions until a maximum of 1 week of the employee's annual holidays is paid out in each entitlement year.*

[68] The respondent made substantial payments to two permanent employees of holiday pay without first receiving a written request, and for more than one week in a single entitlement year. Both these employees were relatives of Mr Barns. I understand that these breaches have been rectified by the respondent. I heard no evidence that any harm has been done by these breaches of s.28A, and I do not believe that it is appropriate to impose a penalty.

[69] Section 56 of the Holidays Act provides:

> ***56 Alternative holiday must be provided if employee works on public holiday***
> *(1) An employee is entitled to another day's holiday (an* ***alternative holiday****) instead of a public holiday if—*
> *(a) the public holiday falls on a day that would otherwise be a working day for an employee; and*
> *(b) the employee works (in accordance with his or her employment agreement) on any part of that day.*
> *(2) If subsection (1) applies, an employer must—*
> *(a) provide the employee with an alternative holiday; and*
> *(b) pay the employee for working on the public holiday in accordance with section 50.*
> *(3) The entitlement to an alternative holiday remains in force until—*
> *(a) the employee has taken the holiday; or*
> *(b) the employee has been paid for the holiday in accordance with section 60(2) or section 61.*
> *(4) An employee is not entitled to an alternative holiday under this section if the employee works for the employer only on public holidays.*

[70] It is the Labour Inspector's evidence that no alternative holiday was provided to any employee who was regarded as casual and who worked on a public holiday that fell on a day that would otherwise be a working day for that employee.

[71] Save where otherwise noted, I believe that all outstanding amounts have now been paid. Again, as this breach was not intentional, I decline to impose a penalty.

[72] Section 63(1) of the Holidays Act provides:

> ***63 Entitlement to sick leave and bereavement leave***
> *(1) An employee is entitled to sick leave and bereavement leave in accordance with this subpart—*
> *(a) after the employee has completed 6 months' current continuous employment with the employer; or*

> *(b) if, in the case of an employee to whom subsection (1)(a) does not apply, the employee has, over a period of 6 months, worked for the employer for—*
> *(i) at least an average of 10 hours a week during that period; and*
> *(ii) no less than 1 hour in every week during that period or no less than 40 hours in every month during that period.*

[73] It is the Labour Inspector's evidence that the respondent did not accrue sick leave for any employee who it treated as casual, who had been employed for longer than six months. All outstanding payments have now been made by the respondent. Again, as this breach was not intentional, I decline to impose a penalty.

[74] Section 83 of the Holidays Act provides:

> ***83 Failure to keep or provide access to holiday and leave record***
> *(1) Evidence that an employer has failed to comply with section 81 or section 82 may be given in an action before the Authority—*
> *(a) to recover holiday pay or leave pay from an employer; or*
> *(b) to enforce an entitlement to annual holidays, public holidays, sick leave, or bereavement leave against an employer.*
> *(2) To avoid doubt, for the purposes of subsection (1), an action before the Authority includes the determination of an objection to—*
> *(a) an improvement notice issued under section 223D of the Employment Relations Act 2000 that relates to holiday pay; or*
> *(b) a demand notice served under section 224 of the Employment Relations Act 2000 that relates to holiday pay.*
> *(3) If, after hearing the evidence, the Authority is satisfied that the employer failed to comply with section 81 or section 82 and that the failure prevented the claimant from bringing an accurate claim, the Authority may make a finding to that effect.*
> *(4) If a finding under subsection (3) is made, then the Authority may accept as proved, in the absence of evidence to the contrary, statements made by the employee about—*
> *(a) holiday pay or leave pay actually paid to the employee:*
> *(b) annual holidays, public holidays, sick leave, or bereavement leave.*

[75] Interestingly, although s.83 is the provision that is expressly referred to in s.75(2)(e) of the Holidays Act, s.83 is not a provision that can be breached, as it enables the Authority to accept as proved statements made by the employee in the absence of records that should have been kept under section 81. However, s.75 does not refer to s.81 as one of the sections that can give rise to a penalty.

[76] In light of this, I invited Mr La Hood to provide submissions on whether it is possible to impose a penalty under s.75(2)(e) of the Holidays Act. There does not appear to be any case law specifically on the point, although several Authority cases have imposed penalties for a failure to keep or provide access to holiday and leave

records. Mr La Hood referred me to s.5 of the Interpretation Act 1999, which provides as follows:

> ***5 Ascertaining meaning of legislation***
> *(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
> *(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
> *(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

[77] The Supreme Court addressed the matter of statutory interpretation in *Commerce Commission v Fonterra Cooperative Group*[8], at [22], when is stated;

> *It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.*

[78] Having regard to the following:

a. The stated purpose of the Act, which is to provide employees with minimum entitlements; and

b. the express wording of s.75(2)(e), which refers to *the failure to keep or provide access to a holiday and leave record*; and

c. the title of s.83 (*Failure to keep or provide access to holiday and leave record)*;

I am satisfied that it was Parliament's clear intention to empower the Authority to impose a penalty for a failure to keep or provide access to a holiday and leave record, notwithstanding the reference to s.83 rather than s.81 in s.75(2)(e).

[8] [2007] NZSC 36, [2007] 3 NZLR 767

What should the amount(s) of the penalties be?

[79] I have found that there have been three breaches of legislation which justify the imposition of penalties. Two relate to the failure to keep proper records and one to the failure to issue and keep copies of employment agreements. All three breaches are of a similar nature and I believe that it is appropriate to globalise the penalty.

[80] As for the amount that should be imposed, I would note that it has taken the respondent a considerable amount to time to comply with requests and orders from the Labour Inspector to provide documentation. This was almost certainly because of its failure to keep proper records. A failure to keep proper records is not a minor failing, and it can have a significant impact upon employees who wish to enforce their minimum rights. I also note that the breaches probably led to the respondent failing to comply with the Improvement Notice.

[81] I believe that a penalty in the total sum of $7,500 is appropriate for the three breaches that I have identified. This penalty, which is to be paid in its entirety to the Crown, is to be paid within 14 days of the date of this determination. Pursuant to s.136 of the Act, the penalty is to be paid into the Authority, which will then pay the sum into a Crown Bank Account.

A note about the compliance orders made in this determination

[82] The Authority has made a number of compliance orders in this determination, at paragraphs 35 to 43, pursuant to s.137 of the Act. I draw the respondent's attention to s.138 (6) of the Act, which provides that, where any person fails to comply with a compliance order made under s 137, the person affected by the failure may apply to the Employment Court for the exercise of its powers under s.140(6).

[83] Section 140(6) of the Act provides as follows:

> *Where any person fails to comply with a compliance order made under section 139, or where the court, on an application under section 138(6), is satisfied that any person has failed to comply with a compliance order made under section 137, the court may do 1 or more of the following things:*
>
> > *(a) if the person in default is a plaintiff, order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the plaintiff in the proceedings:*
> > *(b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly:*

> *(c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:*
> *(d) order that the person in default be fined a sum not exceeding $40,000:*
> *(e) order that the property of the person in default be sequestered.*

[84] I draw these potential consequences to the attention of the respondent as they are serious. An illustration of these consequences in practice can be seen in the case of *Lever and Lever v Dick and Alexander*[9], where the Employment Court was prepared to contemplate imprisonment for failure to comply. The Labour Inspectorate does make applications to the Employment Court under s140(6), as is demonstrated by the case of *James Denyer, Labour Inspector v Peter Reynolds Mechanical Limited trading as the Italian Job Service Centre*[10].

Costs

[85] The Labour Inspectorate is entitled to a contribution towards its reasonable legal costs in having to bring the matter to a head by lodging an application to the Authority. The parties should try to agree how those costs will be dealt with between them. However, if they cannot agree within 28 days of the date of this determination, the Labour Inspectorate shall have a further 14 days within which to serve and lodge a memorandum of counsel arguing what contribution to its costs should be ordered, together with reasons, and the respondent shall have a further 14 days within which to serve and lodge a reply. The Authority shall then determine that matter on the papers.

David Appleton
Member of the Employment Relations Authority

[9] [2015] NZEmpC 115
[10] [2015] NZEmpC 41