IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 203
EMPC 224/2019

IN THE MATTER OF	breaches of minimum employment standards
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	SOK HOIRNG CHHOIR IN PARTNERSHIP WITH RATTANAK HENG TRADING AS THE BAKEHOUSE CAFÉ First Defendant
AND	RATTANAK HENG IN PARTNERSHIP WITH SOK HOIRNG CHHOIR TRADING AS THE BAKEHOUSE CAFÉ Second Defendant

EMPC 279/2019

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	SOK HOIRNG CHHOIR IN PARTNERSHIP WITH RATTANAK HENG TRADING AS THE BAKEHOUSE CAFÉ First Defendant
AND	RATTANAK HENG IN PARTNERSHIP WITH SOK HOIRNG CHHOIR TRADING AS THE BAKEHOUSE CAFÉ Second Defendant

Hearing:	22–23 July 2020 (Heard at Hamilton) And by further submissions filed on 6 and 20 August 2020
Appearances:	J Perrott and S Blick, counsel for plaintiff M Robson, counsel for defendants and R Cheam
Judgment:	23 November 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] The defendants are husband and wife owners and operators of a bakery in Taumarunui. The Labour Inspector received a complaint and carried out an investigation into the operations of the bakery. The result of the investigation was a finding that the defendants had breached various provisions of the Holidays Act 2003 and minimum entitlements as to pay and leave.

[2] The Labour Inspector filed a claim in the Court for the imposition of pecuniary penalties and banning orders and a parallel claim for ordinary penalties for record-keeping breaches in the Employment Relations Authority. The Authority transferred the latter claim to enable all matters to be dealt with together.

[3] Following the commencement of these proceedings the defendants accepted the alleged breaches and failures and undertook to pay arrears of minimum entitlements and holiday pay to the two affected ex-employees. The ex-employees have received full payment (totalling $36,191.11 gross) from the defendants prior to the hearing.

[4] At the outset of the hearing Mr Robson, counsel for the defendants, conceded that declarations of breach should be made, along with associated compensation orders, pecuniary penalty orders and orders for ordinary penalties, but said that the defendants were opposed to the making of any banning orders and disputed the quantum of the compensation orders and penalties sought by the Labour Inspector. Those concessions narrowed the matters in dispute. During the course of submissions,

a further issue arose which was unanticipated by the parties and which I allowed further submissions to be filed on. It is convenient to deal with that issue first. It relates to the admissibility of statements made to the Labour Inspector by the first defendant during the course of the Labour Inspector's investigation.

Admissibility of statements made to the Labour Inspector

[5] The Labour Inspector may exercise a number of powers under the Employment Relations Act 2000 (the Act), including to enter premises, interview persons, and require the production of documents for inspection.[1] Questions may be directed to an employer about compliance with applicable legislative requirements.[2] While the Act confers coercive powers on the Labour Inspector, it also incorporates some protections. So, no person is required to give any answer to any questions tending to incriminate that person.[3] Section 229(5A) provides:[4]

> (5A) A person is not excused from answering a Labour Inspector's questions under subsection (1) on the grounds that doing so might expose the person to a pecuniary penalty under Part 9A, *but any answers given are not admissible in criminal proceedings or in proceedings under that Part for pecuniary penalties*.

[6] The first defendant answered questions put to her by the Labour Inspector during his investigation. Written statements were prepared, which were signed by the first defendant. The statements were put before the Court in the common bundle of agreed documents and extracts from the written statements were incorporated into an agreed summary of facts which was filed prior to the hearing. When the issue was raised at the hearing the parties agreed that the written statements would be removed from the bundle of documents. Issues remained as to the extent to which s 229(5A) might apply to render references to the statements in the summary of facts inadmissible in these proceedings.

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1 Employment Relations Act 2000, s 229.
2 Section 229(1)(f).
3 Section 229(5).
4 Emphasis added.

[7] These proceedings are not criminal. They involve a claim for pecuniary penalties under Part 9A, along with a claim for ordinary penalties (which falls outside Part 9A).

[8] Mr Robson submits that the Court cannot admit the first defendant's statements to the Labour Inspector, even if the first defendant agreed to them being put before the Court in the common bundle and referred to (by way of extract) in the agreed summary of facts. That is because, it is said, s 229(5A) is unequivocal and imposes a clear prohibition on admissibility. Mr Robson also raises a number of additional concerns, directed at the reliability of the statements, including whether the first defendant ought to have been offered the assistance of an interpreter; ought to have been asked, and permitted to answer, questions in her own language; and suggests that the level of English reflected in the written statements (which were taken by the Labour Inspector) does not reflect the first defendant's abilities to communicate in English as a second language. These points are said to support exclusion of the statements and, by extension, those parts of the summary of facts which incorporate reference to them, if otherwise admissible.

[9] Counsel for the Labour Inspector submit that, while the statement would otherwise not have been admissible, the agreement to incorporate the statements in the bundle of documents and the summary of facts alters the landscape. In this regard, it is said that s 9 of the Evidence Act 2006 provides useful guidance, which can be applied by analogy in this case, to allow the evidence to be admitted.

[10] There has been minimal judicial consideration of s 229(5A) and limited discussion about the purpose of the provision and what prompted its enactment.[5] It is, however, tolerably clear that Parliament was seeking to strike a balance between allowing the Labour Inspector to conduct their investigation by ensuring they could obtain relevant information but also making sure that an employer in alleged breach was entitled not to have that information used against them for the purposes of a proceeding under Part 9A.[6] The legislation does not make clear how s 229(5A) is

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5 See *NewZealand Fusion International Ltd (in administration) v Guan* [2020] NZEmpC 195 at [21]–[24] for a brief discussion.

6 See Employment Standards Legislation Bill 2005 (53-1) (explanatory note) at 18.

intended to operate in circumstances involving dual claims, for both pecuniary penalties (s 229(5A) applies) and ordinary penalties (s 229(5A) does not apply).

[11] While the Evidence Act does not have direct application to proceedings in the Employment Court,[7] the way in which the privilege against self-incrimination is approached in that Act may provide a useful frame of reference for how s 229(5A) might appropriately be applied and interpreted. Section 60 of the Evidence Act provides:

> **60 Privilege against self-incrimination**
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> (1) This section applies if—
>
> (a) a person is (apart from this section) required to provide specific information—
>
> (i) in the course of a proceeding; or
>
> (ii) by a person exercising a statutory power or duty; or
>
> (iii) by a Police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence; and
>
> (b) the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.
>
> (2) The person—
>
> (a) has a privilege in respect of the information and cannot be required to provide it; and
>
> (b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.
>
> (3) Subsection (2) has effect—
>
> (a) unless an enactment removes the privilege against self-incrimination either expressly or by necessary implication; and
>
> (b) to the extent that an enactment does not expressly or by necessary implication remove the privilege against self-incrimination.
>
> …
>
> (5) This section is subject to section 63.

[12] Section 63 provides:

> **63 Replacement of privilege with respect to disclosure requirements in civil proceedings**

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[7] Evidence Act 2006, ss 4-5; Employment Relations Act 2000, s 189(2). See also *Lyttelton Port Company Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [49]-[53].

(1) This section applies to a person who is required by an order of the court made for the purposes of a civil proceeding—

(a) to disclose information; or

(b) to permit premises to be searched; or

(c) to permit documents or things to be inspected, recorded, copied, or removed; or

(d) to secure or produce documents or things.

(2) The person does not have the privilege provided for by section 60 and must comply with the terms of the order.

(3) No evidence of any information that has directly or indirectly been obtained as a result of the person's compliance with the order may be used against the person in any criminal proceeding, except in a criminal proceeding that concerns the falsity of the information.

[13] In short, s 63 provides an exception to the privilege against self-incrimination in civil proceedings. Notably the privilege is slightly weakened in the civil (as opposed to criminal) context: the person must still provide the information, but is granted a privilege preventing it from being admitted into evidence in a criminal context.

[14] Section 65 of the Evidence Act provides for waiver of privilege as follows:

64 Waiver

(1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.

(2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.

(3) A person who has a privilege waives the privilege if the person—

(a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or

(b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.

(4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.

(5) A privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

[15] If s 229(5A) is interpreted, as I think it should be, as conferring a privilege on information provided to the Labour Inspector, that is a privilege which can, in the usual way, be waived. There is a strong argument that, by agreeing to put the statements in the bundle of documents and summary of facts for hearing without objection, the defendants consented "to the production or disclosure of… [the] information… in circumstances that are inconsistent with a claim of confidentiality".[8] That is not, however, a slam dunk for the Labour Inspector. There are two potentially relevant exceptions provided for in s 65(4): if the disclosure occurred "involuntarily" or "mistakenly".

[16] Might such exceptions apply to the inclusion of the statements in the agreed bundle of documents and summary of facts? The inclusion cannot be said to be involuntary; it involved a conscious act.[9] Was inclusion of the statements a "mistake"? In one sense it was, as Mr Robson readily accepts. The statements were considered relevant and Mr Robson's attention had not been drawn to the existence of s 229(5A). A mistake of this sort would not generally be regarded as falling within the exclusions contained within s 65(4), as explained in *Body Corporate No 191561 v Argent House Ltd*:[10]

> [42] I conclude that the mistake must be a mistake as to the act of disclosure itself rather than the implications of it. Thus, a mistake in the handing over of a group of documents which were thought to contain all non-privileged material, but which unbeknownst to the discloser contained privileged material, would be the sort of mistake envisaged. *However, if the mistake was a deliberate handing over of a document without a consideration that it was privileged, or forgetting that it was privileged, that would not be the sort of mistake covered by the section*.

[17] Does s 189 of the Act provide a route for dealing with the issue? After all, it, rather than the Evidence Act, is the starting point for deciding what evidence ought to be received by the Court.[11] Section 189 provides:

> **189 Equity and good conscience**
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> (1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith

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8 Applying s 65(3)(a) by analogy.

9 See the discussion, in terms of the definition of "involuntarily" in *Body Corporate No 191561 v Argent House Ltd* (2008) 19 PRNZ 500 (HC), at [38].

10 Emphasis added.

11 *Pender*, above n 7, at [49]-[53].

> behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
>
> (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[18] The defendants submit that the discretionary powers to admit or exclude evidence contained within s 189 only apply when not "inconsistent with this or any other Act". Allowing the statements to remain before the Court would be inconsistent with s 229(5A) of "this … Act" and so, the analysis goes, the Court has no discretion under s 189 to exercise.

[19] I do not accept this analysis. While s 189(1) mentions inconsistency with the Act, that subsection relates to determining matters and making decisions and orders. Section 189(2) relates to evidence and information, so it is that subsection which is relevant for present purposes. Unlike s 189(1), s 189(2) contains no express restriction in terms of inconsistency. Equity and good conscience are the guiding lights. This is not to say that s 229(5A) can be ignored. The Court must approach the exercise of its discretion in a principled way. Relevant to the discretionary exercise in this case is whether the privilege that would otherwise exist by virtue of s 229(5A) has been waived.

[20] There may be, as the Labour Inspector points out, cases where a defendant would wish to waive privilege and have a statement admitted, for example to demonstrate co-operation with the Labour Inspector's investigation. That is not however, the situation here.

[21] I approach the issue of the statements in this case in the following way. The statements would not usually be admissible. The defendants waived privilege in the statements by agreeing to their inclusion in the agreed bundle of documents and summary of facts for hearing. I accept that this was an oversight – they were unaware of s 229(5A) and it was not brought to their attention during the process of preparing the bundle and summary of facts to enable them to consider the position. English is not the defendants' first language and it was the Labour Inspector who recorded the statements. Standing back and having regard to the particular circumstances of this

case, I do not consider it appropriate to allow the statements to be admitted. They are accordingly excluded.

[22] A final point. It is not unusual for proceedings pursued by the Labour Inspector to involve non-legally represented defendants or representatives who may not be as familiar with the detail of the legislative framework as the Inspector is. While there may be no legal obligation to do so, situations such as the present might best be avoided by drawing s 229(5A) to the attention of the other side at the time bundles of documents and summaries of fact are being prepared for hearing. Of course, the admissibility issue only arises where pecuniary penalties are being sought.

The facts

[23] The defendants' bakery is open seven days a week, between approximately 5 am and 5 pm (Monday to Saturday) and 6 am to 5 pm (Sundays). It opens on all public holidays, and half a day on ANZAC Day.

[24] The defendants employed two employees for a period, Ms Wood and Ms Salvador. Ms Wood was employed from around 8 August 2017 to 30 April 2019 as front of house/shop assistance at the bakery. She worked a total of 34 hours each week, from 10 am to 5 pm on Tuesday and Wednesday (14 hours); 7.30 am to 2.30 pm on Thursday and Friday (14 hours) and 11 am to 5 pm on Sunday (6 hours). Ms Salvador was employed from about 15 May 2018 to 1 January 2019 as a baker. She worked a total of 44 hours each week, from 7.30 am to 2.30 pm on Monday and Wednesday (14 hours); 5 am to 1 pm on Tuesday and Thursday (16 hours); 10 am to 5 pm on Friday and Saturday (14 hours).

[25] Ms Wood signed an individual employment agreement on 17 July 2018. Under the agreement she was to work 30 hours each week, with work between 7am to 4pm Monday to Sunday. Her rate of pay was to be $16.50 per hour. Ms Wood took annual holidays from 7 May 2018 to 19 June 2018; she worked on public holidays. She received no payment for her annual holidays; did not receive time and a half for working on a public holiday and did not receive an alternative day off.

[26] Ms Salvador was working overseas at the time she agreed to come and work at the bakery. She signed an individual employment agreement on 25 January 2018, before arriving in New Zealand. Under her agreement she was to be paid an hourly rate of $19.50. Ms Salvador worked one public holiday during her time at the bakery. She did not receive time and a half for working this day, and nor did she receive an alternative day off. Labour Day 2018 would have otherwise been a working day but she did not receive public holiday pay for that day.

[27] At the relevant time the Minimum Wage Rate applicable under the Minimum Wage Act was $15.75 per hour from 1 April 2017 to 31 March 2018; $16.50 per hour from 1 April 2018 to 31 March 2019; and $17.70 per hour from 1 April 2019.

[28] In total the minimum wage arrears owing to Ms Wood were $15,114.25; and to Ms Salvador $8,958.00 (so a combined total of $24,072.25).

[29] In total the holiday pay owing to Ms Wood was $8,073.06; to Ms Salvador $4,045.80 (so a combined total of $12,118.86).

[30] The defendants completed payment of the arrears on 9 August 2019. Neither defendant has previously been before either the Authority or the Court on claims involving the Labour Inspectorate.

[31] As I have said, the issues now before the Court go to quantum rather than liability, although the acceptance of liability has some relevance to quantum, for reasons I will come to.

Compensation orders

[32] The Labour Inspector does not seek compensation orders relating to the actual arrears for the simple reason that the arrears have now been paid. The Inspector does, however, seek a compensation order in respect of non-pecuniary losses suffered by the affected employees in the sum of $10,000 each. I did not understand counsel for the defendants to take issue with the ability of the Court to make such orders in the

circumstances, and orders of around $70,000 were made in favour of each affected individual in *Labour Inspector v Newzealand Fusion International Ltd*.[12]

[33] The factors that are relevant to an assessment of compensation for non-pecuniary loss include the impact on the individual concerned and the extent to which the impact may have been lessened by remedial efforts made by the person in breach. The case law on compensation awards under s 123(1)(c)(i), including the bands identified by the Court as helpful in those cases, can be referred to.[13]

[34] The level of damage sustained by each individual in this case is appreciably less than that sustained in *Newzealand Fusion International Ltd.* However, I am satisfied that each was adversely impacted. Ms Wood described feeling cheated and exploited, as well as fearful of losing her job because of her status as a migrant. The hours of work and lack of days off also strained her marriage. Ms Salvador said that the experience was traumatic, and described physical, mental and emotional pain and trouble sleeping.

[35] The amount sought by way of compensation is well within the applicable range, in terms of the categories referred to in *Richora Group Ltd v Cheng* and *Waikato District Health Board v Archibald.*[14]

[36] In assessing the compensation orders against each defendant, I have had regard to the more significant role played by the first defendant in the breaches and causing the non-pecuniary losses suffered. The first defendant is ordered to pay Ms Wood the sum of $8,000 by way of compensatory order; the second defendant is ordered to pay Ms Wood the sum of $2,000 by way of compensatory order (so $10,000 in total). The first defendant is ordered to pay Ms Salvador the sum of $8,000 by way of compensatory order; the second defendant is ordered to pay Ms Salvador the sum of $2,000 by way of compensatory order (so $10,000 in total). Such sums are to be paid

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12 *Labour Inspector v Newzealand Fusion International Ltd* [2019] NZEmpC 181, [2019] ERNZ 525 at [97].

13 At [94]–[96].

14 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67]; *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

to the Labour Inspector, on behalf of Ms Wood and Ms Salvador, within a period of 20 working days of the date of this judgment.

Banning orders appropriate?

[37] The Court has a discretion to impose a banning order where a declaration/or declarations of breach have been made. The discretion is to be exercised in accordance with principle. I do not share the Labour Inspector's view that a banning order is necessary to ensure that the defendants do not repeat the conduct which led to them coming before the Court. Unlike in *Newzealand Fusion International Ltd*, they have acknowledged wrong-doing at least to an extent by making good the arrears owing, and the first defendant made it clear to the Court that she wanted to upskill and work to understand her (and her husband's) obligations as employers.

[38] Both of the defendants are, like the affected employees, originally from overseas and have settled in New Zealand in order to find a better life and to provide for their respective families. I note that it is regrettable that the learning process, which Ms Chhoir refers to, is taking place well after they have become employers and at a considerable cost both to them (in terms of the remedies and penalties I am imposing) and the affected employees (who were adversely affected by the defendants' breaches), rather than a first step in the process, before they became employers in New Zealand.

[39] Neither defendant has previously come to the attention of the employment institutions so, to this extent, are to be regarded as first-time offenders. This factor points against a banning order being imposed, although it does not (as *Newzealand Fusion International Ltd* demonstrated) prevent an order being made in appropriate circumstances. Certainly, if either or both of the defendants come before the Court again it will make a banning order a distinct possibility, as it will likely indicate that the defendants have not learnt the lessons they say they have learnt. This judgment, and the orders that I am making against the defendants, will serve as a reminder to them of the perils of breaching any future employee's entitlements and serve a broader purpose of reinforcing the point to others in a similar position.

[40] I decline to make banning orders in respect of either defendant. They should, however, be under no illusion that if they come before the Court again on a similar matter such orders are likely.

What quantum of penalties (pecuniary and ordinary) should be ordered?

[41] The defendants accept that they are liable for penalties (pecuniary, in relation to the failure to pay minimum wage; annual holiday pay and public and alternative holiday pay; and ordinary, in relation to the failure to keep wages and time records). The issue is appropriate quantum. I did not understand counsel for the defendants to disagree with the Labour Inspector's assessment of the appropriate starting point – namely $340,000 in relation to each defendant. That total is comprised of the following:

- 2 x failures to pay minimum wage = 2 x $50,000 = $100,000
- 2 x failure to pay annual holiday pay = 2 x $50,000 = $100,000
- 2 x failure to pay public and alternative holiday pay = 2 x $50,000 = $100,000
- 4 x failure to keep wages and time record, holiday and leave record = 4 x $10,000 = $40,000
- The starting point for the pecuniary penalties for each defendant is: $300,000
- The starting point for ordinary penalties for each defendant is: $40,000

[42] The next stage of the assessment process involves a number of considerations, which are now well established.[15] There are a number of considerations, which

[15] *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514; *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110, [2018] ERNZ 310; *Labour Inspector v Parihar* [2019] NZEMpC 145, [2019] ERNZ 406.

include mitigating and aggravating factors, all of which need to be appropriately weighed in arriving at a just result.

[43] First, *the object of the Employment Relations Act 2000*. This factor is relevant because it underpins the importance that Parliament places on the need for employers to meet their minimum obligations to their employees, to support good faith dealings and to acknowledge the inequality of power between employers and employees. The underlying objectives of the penalty provisions in particular, and the broader objectives of the legislative more generally, must be kept firmly in mind when assessing each of the remaining considerations and the impact of them in the quantum-setting exercise.

[44] Second, *the nature and extent of the breaches*. I have already referred to the key facts in this case, and they do not need to be repeated. Suffice to say that there were numerous breaches of the employees' minimum entitlements to pay and leave, and associated breaches of the requirement to keep wage and time records. The failure to keep records effectively masked the other defaults. The breaches were only uncovered following a complaint to the Labour Inspector, the Labour Inspector's intervention and his subsequent investigation. The breaches had each spanned 15 months before they saw the light of day.

[45] It is clear that the first defendant effectively took the lead in managing the interaction with the employees, including liaising over terms and conditions and discussing what was required (in relation to hours of work and the like). The second defendant appears to have had little to do with such matters and effectively sat in the back seat in respect of the breaches. He was, however, complicit in them. It is appropriate that the defendants' differing degrees of involvement in the breaches, and their individual levels of culpability, be reflected in the quantum of penalties imposed.[16]

[46] Third, while I am prepared to accept that the defendants were not fully familiar with the detail of the legal requirements relating to their employer obligations, I am satisfied that *the breaches were intentional*, rather than one-off, inadvertent or

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16 *Parihar*, above n 15, at [20].

negligent. This is particularly reflected in the differences between the provisions in the written employment agreements contrasted with the reality of working life for the two employees. This is an aggravating factor.

[47] Fourth, *the nature and extent of the losses sustained by each of the two employees* was not insignificant, both in financial terms and more generally. They each missed out on money they were entitled to at the time they were entitled to receive it, and over a lengthy period of time. They also each felt let down and disappointed by their employer, who they had placed a degree of trust in; their trust was abused. They were in a relatively vulnerable position and this was exploited by the defendants for their own financial gain.

[48] Fifth, the defendants did take some steps *to mitigate the losses sustained by the employees*. They made good the financial arrears prior to the hearing. However, this step should not be overstated in the quantum-setting exercise. The reality is that the arrears were not paid until a relatively late stage, and after the Labour Inspector's investigation had been completed, the findings provided to the defendants, and proceedings had been filed – the writing was on the wall in large letters and it might be inferred that payment reflected a pragmatic decision rather than any genuine attempt to acknowledge wrong-doing and make amends.[17]

[49] I also take into account that the defendants have accepted liability and did not seek to defend their breaches. Rather, the dispute has been around the level of order sought by the Labour Inspector. The defendants' approach to the Labour Inspector's claim has reduced the scope of the hearing and meant too that the matters at issue insofar as the two affected employees' evidence was concerned was restricted.[18] The defendants are entitled to an allowance for these steps.

[50] Sixth, there was *a degree of opportunism involved in these breaches*. Both of the employees were relatively unfamiliar with New Zealand employment laws and

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17 *See Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12, [2019] ERNZ 1 at [35].

18 See *Daleson*, at [59]; *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881 at [57]–[67].

their rights and entitlements. Both spoke (as do the defendants) English as a second language, and both were new to the district and without extensive support networks. I infer that the defendants were prepared to take advantage of the situation that presented itself to them for their own gain. This is an aggravating factor.

[51] Seventh, as I have said there *is no evidence of either defendant engaging in similar conduct*. The fact that they have not previously come before the Court on a Labour Inspector matter is, in my view, neutral. At best it suggests that the defendants have previously complied with their legal obligations. That is base level behaviour expected of all employers. It is not a factor that warrants a discount.

[52] Eighth, it is plainly *important to send a strong message* to these employers and other would-be employers that cutting employment standards at the expense of their workforce is a high-risk business strategy that is best avoided. Parliament has made it crystal clear that employers who default on their obligations will be exposed to stiff penalties and other orders (such as banning orders). Parliamentary intention must be adequately reflected in the penalty-setting exercise.

[53] Ninth, both defendants, but most particularly the first defendant (for reasons which I have already touched on), demonstrated over time *a disregard for the employment rights of the two employees*. The breaches are made worse by the fact that the employment agreements said one thing as to hours of work, hourly rate of pay and holiday entitlement but the way in which the employees were treated significantly differed. The first defendant has a heightened degree of culpability in relation to the breaches, and I have taken this into account in assessing quantum.

[54] Tenth, there are still an insufficient number of cases to draw any particularly useful conclusions in terms of *consistency* in respect of the pecuniary penalties sought by the Labour Inspector; the ordinary penalty component for a failure to keep records differs. As to the pecuniary penalties sought by the Labour Inspector I would not place this case in the same category of seriousness as *Newzealand Fusion International Ltd* since, in this case, at least some wages were paid at the time (they have since been paid in full) and there has been acceptance of liability (the issue of quantum being in dispute). Nor would I place this case on a par with *Prabh* as, despite the similarity in

the nature of the breach, this case deals with only two employees for a shorter duration of time.

[55] Eleventh, I accept that the defendants may find it difficult to satisfy an order against them, but it is clear that they do have *financial resources* available to them. I understood counsel for the defendants to accept that they had the financial means to meet an order of the quantum sought by the Labour Inspector. In any event, and as was pointed out in *Daleson Investment Limited*, the financial circumstances of a defaulting party are not a factor that Parliament considers pivotal to the penalty-setting exercise. In addition, it should not be forgotten that the liability to pay a penalty differs from subsequent enforcement.

[56] I pause to note that the Labour Inspector submits that a 20 per cent discount would be appropriate for financial capacity. Having regard to the defendants' current financial position and the difficulties their business has sustained over the pandemic, I consider a discount of 20 per cent appropriate.

[57] Taking into account the aggravating and mitigating factors identified above, I arrive at a provisional starting point (combined pecuniary and ordinary, for both defendants) of $90,000.

[58] At this point it is necessary to consider *proportionality*. The Labour Inspector submits that there are three factors of particular relevance in assessing the proportionality of the provisional amount: the fact that both of the defendants are the employer and separately liable for a penalty; the amount originally at issue; and whether there is any real prospect that the final amount will be paid.

[59] The first factor, in particular, seems to me to warrant a reduction in the amount of penalties that might otherwise be ordered. In this regard I have found it helpful to consider the sort of penalty that would be imposed on the defendants if they were one single entity, rather than two separate individuals, and I have taken that into account

in arriving at a final amount to ensure that the defendants, as individuals, bear an overall just financial burden.[19]

[60] The amount originally at issue is not at the top end in terms of comparable cases but nor can it be said to be modest, or at the lower end. Nor should the amount at issue be given undue weight – after all, it may well simply reflect the point in time a defaulting employer's default comes to the attention of the Labour Inspector. I do not think that the provisional penalties arrived at would, if imposed, be significantly out of kilter in terms of proportionality.

[61] I do not consider that the third factor is engaged having regard to the defendants' financial position. The business is solvent and operating, and there is no reason to believe that the defendants will fail to make any payment ordered against them although, as I have said, it may put a strain on them.

[62] I have, however, had regard to the compensatory orders I have made in favour of each of the defendants in coming to a final figure. I have done this for two main reasons. First, while it is appropriate for the affected employees to be compensated for the non-pecuniary losses sustained as a result of the defendants' breaches, it is also appropriate to have regard to the weight of those orders when reaching a view on the quantum of other orders being made against the defendants to ensure a degree of proportionality.[20]

[63] Second, while the Court has an ability to order part of any penalty be paid to a person affected by the breach,[21] there is a need to avoid any double counting, to ensure that the employer is not penalised twice to achieve the same end (namely addressing losses sustained by the employee).

[64] During the course of closing submissions counsel for the Labour Inspector submitted that penalties of $50,000 (pecuniary and ordinary) in respect of each defendant would be appropriate.

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19 See *Parihar*, above n 15, at [20].

20 See *Stumpmaster*, above n 18, at [65]–[66]; *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR (HC) at [64]–[65].

21 Employment Relations Act 2000, s 136.

[65] It is, of course, necessary for the Court to reach a considered view on what is appropriate having regard to the particular circumstances, including as between the two defendants. It is appropriate that any penalties ordered reflect their respective contributions to the breaches. I am satisfied that the following orders are appropriately imposed: the first defendant is to pay a total of $50,000 by way of penalties (pecuniary and ordinary); the second defendant to pay a total of $20,000 by way penalties (pecuniary and ordinary), so $70,000 in total. Such sums are to be paid to the Labour Inspector within 60 days of the date of this judgment.

[66] It will be apparent that I have staggered the timeframes for payment. I have done this to provide the defendants an additional opportunity to make the necessary arrangements to meet the compensation orders (first payment) and the penalty orders (second payment). Having said that there is, of course, nothing to prevent the defendants making all payments by the earlier date.[22]

Apportionment of penalties?

[67] The Labour Inspector submits that if no compensation orders are made and pecuniary penalties are imposed it would be appropriate to order a portion of those penalties be paid to the affected employees.

[68] I have made compensation orders and consider those orders sufficient to account for the harm caused to the employees by the employer's breaches. I do not consider it appropriate to also order an apportionment of penalties to the affected employees.

Summary of orders

[69] The first and second defendants breached the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000. A declaration is made in respect of each of these breaches.

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[22] I was not invited to exercise my power under s 135(4A) to order payment by instalment, and nor would I have been satisfied that the company's financial position required it in any event.

[70] It is appropriate that compensation orders are made. The first defendant is ordered to pay Ms Wood the sum of $8,000 by way of compensatory order; the second defendant is ordered to pay Ms Wood the sum of $2,000 by way of compensatory order. The first defendant is ordered to pay Ms Salvador the sum of $8,000 by way of compensatory order; the second defendant is ordered to pay Ms Salvador the sum of $2,000 by way of compensatory order. Such sums are to be paid to the Labour Inspector, on behalf of Ms Wood and Ms Salvador, within a period of 20 working days of the date of this judgment.

[71] The first defendant to ordered to pay a total of $50,000 by way of penalties (pecuniary and ordinary); the second defendant to pay a total of $20,000 by way penalties (pecuniary and ordinary). Such sums are to be paid to the Labour Inspector within 60 days of the date of this judgment.

[72] I decline to impose a banning order on either defendant.

[73] I decline to order any part of the penalties imposed on the defendants be paid to the affected employees.

Costs

[74] Costs are reserved. I encourage the parties to seek to resolve costs issues between themselves. If that does not prove possible I will receive memoranda, with the Labour Inspector filing and serving within 20 working days of the date of this judgment; the defendants within a further 20 working days and anything strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 4:25pm on 23 November 2020