IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 43
EMPC 7/2018

IN THE MATTER OF	minimum employment standards under Part 9A of the Employment Relations Act 2000
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	MATANGI BERRY FARM LIMITED First Defendant
AND	JIUBO JIANG Second Defendant

EMPC 324/2018

IN THE MATTER OF	proceedings removed to the Court from the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	MATANGI BERRY FARM LIMITED Defendant
AND	JIUBO JIANG Second Defendant

Hearing: 17 March 2020

Appearances: S Carr, counsel for plaintiff
S-J Davies and W Zhang, counsel for defendants

Judgment: 16 April 2020

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment fixes the quantum of penalties to be imposed on Matangi Berry Farm Limited (MBF) and Mr Jiubo Jiang, a director of that company.

[2] A brief description of history is necessary.

[3] The proceedings as originally brought involved claims brought by a Labour Inspector following an investigation of compliance by MBF of minimum entitlements and standards relating to persons who were regarded as employees.

[4] The Labour Inspector commenced proceedings directly in this Court with regard to alleged breaches of entitlements and standards, under pt 9A of the Employment Relations Act 2000 (ERA), a part which came into effect on 1 April 2016.

[5] The Labour Inspector also commenced proceedings in the Employment Relations Authority with regard to other breaches of minimum entitlements and standards which allegedly occurred prior to 1 April 2016. The Authority ordered removal of those proceedings to the Court.[1]

[6] The parties reached a settlement at mediation in respect of monetary claims for arrears of wages, holiday pay, public holiday pay and interest. At the same time, it was accepted that liability for and quantum of any penalties were not amenable to settlement; any penalties would need to be set by the Court exercising its discretion after receiving such evidence as the parties may wish to place before it and after receiving submissions. The details of all elements of the parties' agreement were set out in a joint memorandum of counsel, which also requested the Court to record details of the agreement in a judgment.

---

1 *A Labour Inspector v Matangi Berry Farm Ltd* [2018] NZERA Auckland 310 (Member Tetitaha).

[7] Judge Perkins issued an interim judgment on 14 June 2019.[2] In it he made orders by consent for payment by MBF of arrears of wages, holiday pay, public holiday pay and interest as follows:[3]

a) $3,975.78 arrears of wages to six workers pursuant to the Minimum Wage Act 1993 (MWA) and a further $318.06 of holiday pay in respect of those arrears;

b) $268.48 arrears of public holiday pay to four workers pursuant to the Holidays Act 2003 (HA) and a further $21.48 of holiday pay in respect of those public holiday pay arrears;

c) $38,392.24 arrears of holiday pay in total to 207 workers pursuant to the HA;

d) $2,148.80 interest on the arrears.

[8] Judge Perkins recorded the following declarations which were also made by consent; they are a necessary prerequisite for the penalty issues which I am now required to resolve:[4]

a) On and after 1 April 2016 during the employment of the workers by it, the first defendant breached the minimum entitlement provisions of the MWA and the HA, and the breaches were serious.

b) The second defendant was a person involved in the first defendant's said serious breach of minimum entitlement provisions of the HA as detailed above, within the meaning of s 142W of the ERA. In particular, the second defendant was, directly or indirectly, knowingly concerned in, or party to, the breaches.

c) Prior to and from 1 April 2016, during the employment of workers by it, the first defendant failed to keep a wage and time record and a holiday

---

2 *A Labour Inspector v Matangi Berry Farm Ltd* [2019] NZEmpC 74.
3 At [11].
4 At [10].

and leave record in respect of the 207 workers, in breach of s 130 of the ERA and s 81 of the HA and failed to provide written employment agreements to the workers in breach of ss 64 and 65 of the ERA.

d) Before 1 April 2016, the first defendant failed to pay the holiday pay in respect of 118 workers in breach of s 75(2)(a) of the HA.

e) On and after 1 April 2016, the second defendant was a person involved in the first defendant's breaches within the meaning of s 142W of the ERA as detailed above; in particular, the second defendant was, directly or indirectly, knowingly concerned in, or party to, the breaches.

[9] For the purpose of assisting the Court when dealing with the issue of penalties, counsel in a joint memorandum included these statements:

> …
>
> (c) for the purposes of determining ordinary penalties under the Removed Proceedings, of the total arrears of holiday pay ... the sum of $23,903.68 relates to annual holiday pay arrears of 118 workers employed by the First Defendant up to 1 April 2016.
>
> (d) for the purposes of determining pecuniary penalties under the Employment Court Proceedings of the total arrears specified ... the sum of $19,072.36 relates to the total arrears of holiday pay, minimum wages, public holiday pay and 8% of the minimum wage and public holiday pay figure of 89 workers post 1 April 2016.

The hearing as to penalties

[10] Prior to the hearing, the parties submitted evidence in the form of an agreed summary of facts, an affidavit from the Labour Inspector, an affidavit from Mr Jiang, and a comprehensive bundle of documents. It was agreed that there was no need for cross-examination.

[11] So as to set the scene, I record the key facts as contained in the agreed summary of facts:

> *The parties*
>
> 1 The plaintiff is a Labour Inspector designated under the Employment Relations Act 2000.

2 The first defendant is a limited liability company duly incorporated on 17 September 2008 under the name Matangi Berry Farm Limited and carries on business growing strawberries and raspberries. At the material time, it also provided seasonal workers to Blueberry Country Limited ("BBC").

3 The second defendant was at material times, and still is, the sole director and sole shareholder of the first defendant and, as such, was a person in a position to exercise significant influence over the management or administration of the first defendant.

Blueberry Country Limited Contract

4 BBC is, and was at all material times, a grower of blueberry fruit with orchards at Ohaupo, Hamilton, and other places.

5 On 30 November 2012 the first defendant entered into a contract for services with BBC to provide agricultural workers ("seasonal workers") to BBC to pick blueberries and BBC's orchard in Ohaupo ("the BBC contract").

6 Material terms of the BBC contract were:

(a) the seasonal workers were described variously as "contractors", "employees" and "staff";

(b) the seasonal workers were free to choose their own hours of work within normal BBC operating hours;

(c) the basis for payment under the BBC contract was to be negotiated between the first defendant and BBC;

(d) the seasonal workers would be paid weekly for the period beginning on Monday morning and finishing the following Sunday evening;

(e) the first defendant was responsible for paying the seasonal workers and all relevant taxes relating to the first defendant and the seasonal workers.

7 To fulfil its contract to BBC, the first defendant advertised the availability of seasonal berry picking work in New Zealand via the Backpackers and Skykiwi websites.

8 Between 1 November 2015 and 31 October 2017 the first defendant employed a total of 207 seasonal workers ("workers") most of whom held work visas under the Working Holiday Scheme, while a few had a different type of visa permitting them to work in New Zealand.

9 The first defendant did not provide the seasonal workers with written employment agreements.

10 Instead, before the seasonal workers commenced employment, the first defendant completed and signed a form for each worker headed "Blueberry Country Ltd CONTRACTORS Sign in sheet." The form

contained the name and address of the first defendant, its contact person and phone number, the seasonal worker's date of birth, country of origin, IRD number, tax code, and the worker's bank details for payment of their wages.

Wages

11 The seasonal workers' hours and days of work were intermittent and/or irregular. The durations of their employment varied from worker to worker. BBC kept records of the Blueberry varieties picked, days and hours of work for each worker and the amount of kilos each worker picked per day.

12 The seasonal workers were paid piece rates based on the number of kilo boxes of blueberries they picked each day and at a dollar per kilo rate set by BBC for the whole season without discussion with the defendants. The price per kilo BBC set varied on a daily basis.[5]

13 BBC calculated the wages due to each worker each day including holiday pay on the basis of its records of the number of kilos picked by each worker times the dollar per kilo rate it set.

14 BBC then supplied the first defendant with a weekly schedule showing its calculations of what to pay each worker that week based on the weight of berries each worker picked daily and the daily piece rate.

15 BBC generated the first defendant's invoices on behalf of the first defendant and paid the first defendant the aggregate amount of weekly wages payable to the seasonal workers together with a 12% loading as commission. The 12% loading was BBC's payment to the first defendant for its services under the BBC Contract.

16 The first defendant paid each seasonal worker the amounts specified in the BBC weekly schedule.

17 The first defendant did not keep its own wages and time record in accordance with section 130 [of the ERA] in relation to the employment of the seasonal workers. However, it kept informal time records in Mandarin. The first defendant did not keep a holiday and leave record in accordance with section 81 of the [HA] in relation to the employment of the seasonal workers.

18 The first defendant failed to pay holiday pay to the seasonal workers on termination of their employment as required by section 23 [HA].

19 The first defendant deducted PAYE, remitted the PAYE to Inland Revenue and completed IRD Monthly Schedules to IRD.

Holiday Pay Arrears

---

5 It is understood that the parties intend this paragraph to mean that BBC set prices per kilo for each day during the season.

20 The plaintiff investigated complaints received by MBIE in January 2017 from 12 seasonal workers who had been employed by the first defendant to pick blueberries at BBC's Ohaupo orchard in the 2016/2017 summer harvest season.

21 The workers complained they had not been paid at the applicable statutory minimum wage rate for the hours they had worked.

22 The plaintiff found:

(a) Six of the complainants were owed a total of $3,975.78 arrears of wages when the piece rates they were paid fell below the minimum wage for certain hours worked in the relevant periods. This period relates to post 1 April 2016.

(b) Four workers were owed a total of $268.48 arrears of public holiday pay. This period relates to post 1 April 2016.

(c) 207 workers were owed a total of $38,731.78 arrears of holiday pay of which:

(i) $23,903.68 related to 118 workers employed pre 1 April 2016;

(ii) $14,828.10 related to 89 workers employed post 1 April 2016.

(d) Interest of $2,148.80 is to be added to the arrears.

23 The defendants accept the following amounts are owed:

$3,975.78	Minimum wages
$ 268.48	Public holiday pay
$38,731.78	Holiday pay
$ 2,148.80	Interest
$45,124.84	**Total**

Investigation

24 The defendants co-operated fully, freely and constructively in the plaintiff's investigation and supplied all information requested by the plaintiff on a timely basis.

Record of settlement

25 It was agreed between the parties in the record of settlement dated 22 May 2019 the total amount owed would be paid in three equal instalments on:

(a) 12 June 2019

(b) 31 July 2019

(c) 30 September 2019

26 As at the date of these agreed facts,[6] the first two instalments have been paid in full by the first defendant in accordance with the record of settlement.

...

[12] The Labour Inspector, Christine McLean, gave detailed evidence as to the history of the thorough investigation which she undertook, including interviews of multiple persons affected, and of members of management of the two companies involved. She emphasised the fact that the failure of MBF and Mr Jiang to keep and maintain accurate wage and time records, and holiday and leave records had significantly hindered her ability to properly investigate and establish whether the employees had received their minimum statutory entitlements, and to accurately calculate the quantum of arrears owing to each worker.

[13] As an aspect of the investigation, Ms McLean wished to interview the sole director of MBF, which records of the Companies Office confirmed was Mr Jiang. Over time, she conducted interviews with a person whom she thought was Mr Jiubo Jiang, but which later transpired was his son, Mr Shuai Jiang. Ms McLean explained that when this fact was ultimately revealed by lawyers acting for MBF, she considered she had been misled, and that this occurrence had made the investigation more complicated and convoluted than it needed to be.

[14] In his evidence, Mr Jiang stated that he cannot speak or read English, and needs therefore to rely on English-speakers to communicate for him, especially when dealing with matters involving English-speaking people. He therefore relies on his son and on other managers of MBF. That said, he acknowledged he was head of the business, and made important decisions relating to it.

[15] He also confirmed that his son had been appointed under a power of attorney so as to render assistance to him for his personal property and business matters in New Zealand. He thought this meant his son was authorised to act and speak on his behalf and to sign his name on any documents. He said that is why he asked his son to attend

---

6 23 September 2019.

interviews with Ms McLean. He felt there was no difference between what his son said on his behalf and what he would have said; he emphasised he did not intend to mislead Ms McLean in any way.

[16] Mr Jiang went on to explain the modus operandi of MBF's business, which was to recruit fieldworkers for BBC to work on its berry farms in the Waikato, as detailed in the agreed summary of facts.

[17] He explained that what MBF did was to find workers for BBC, sign them up as contractors for his company and take them to a BBC farm each day to pick berries. He confirmed BBC calculated the wages. Upon receiving money from BBC, MBF passed it on to the workers relying on BBC's records, and deducted income tax for each worker. In return, MBF received a 12 per cent loading fee as commission. One of his managers dealt with BBC with regard to the management of workers.

[18] Mr Jiang said that he did not know how to use internet banking, so asked his son to make the necessary payments from MBF's bank account. BBC had told MBF what to pay and he believed that the payments to workers were therefore correct. He said he was confused when the Labour Inspector told him MBF had underpaid them. However, as director of MBF, he took responsibility for the mistakes which were made.

[19] He said the agreed arrears of wages had been paid in four instalments but acknowledged that only one was paid on the due date, because the company had been financially struggling, and he had to borrow money from friends and relatives, so he could make these payments.

[20] Mr Jiang went on to produce documents verifying MBF's financial circumstances, as well as his own.

[21] The financial reports of the company for 2014 to 2019 show losses in three years, minimal profit in one year, modest profit in others, and modest shareholder salaries with PAYE deducted. They also show substantial cash deposits by Mr Jiang to his current account over the period. Cash drawings over the same period exceeded

the deposits by nearly $250,000; however, the withdrawals have to be considered alongside the current summary of Mr Jiang's financial circumstances. A two-year forecast for MBF was also produced, showing anticipated losses.

[22] Mr Jiang's affidavit of financial circumstances includes reference to his assets and liabilities. Although he has an interest with his wife in several properties, the debts secured over those properties exceed their values. He also owes significant sums to family members.

Submissions

[23] Both counsel placed written submissions before the Court which, after referring to the background as already summarised, went on to discuss quantum in light of the applicable principles. I will summarise these shortly. It suffices at this stage to record that the methodology for determining the quantum of either an ordinary penalty under s 135 of the ERA, or a pecuniary penalty under s 142E and the sections which follow, were not in dispute. In summary, counsel agreed that for the purposes of the present case the Court should assess the various statutory considerations as described in ss 133A or 142F, and then work through the four steps identified by the full Court in *Labour Inspector v Preet PVT Ltd*.[7]

[24] Section 133A of the ERA states:

> **133A Matters Authority and court to have regard to in determining amount of penalty**
>
> In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—
>
> (a) the object stated in section 3; and
>
> (b) the nature and extent of the breach or involvement in the breach; and
>
> (c) whether the breach was intentional, inadvertent, or negligent; and
>
> (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
>
> (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution,

---

7 *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

> or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
>
> (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
>
> (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[25] Section 142F, which deals with pecuniary penalties, is identical.

[26] The four steps referred to in *Preet* were explained as being:[8]

a) *Step 1*: Identify each penalisable statutory breach, the maximum penalty for each breach, and whether global penalties should apply at any stage.

b) *Step 2*: Assess the severity of the breach to establish a provisional penalties starting point by considering both aggravating and mitigating features.

c) *Step 3*: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in step 2.

d) *Step 4*: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[27] Counsel, in their helpful submissions, analysed all relevant factors; there was a consensus on the appropriate components of most of them.

[28] There was also common ground with regard to the assessment of the first step. The divergence between the parties related to the conclusions to be reached for each of the subsequent steps.

---

8 At [138]–[151].

The parties' assessments

[29] Before summarising each party's approach, it should be noted that some complexity arises for three reasons.

[30] First, the Court is required to consider breaches of several statutes in respect of many workers – unlike previous judgments where a small number of employees' circumstances were reviewed.[9]

[31] Second, the Court is required to consider the imposition of both ordinary penalties and pecuniary penalties.

[32] Third, the Court is required to consider the imposition of penalties against MBF on the one hand, and Mr Jiang on the other.

[33] In summary, Ms Carr, counsel for the Labour Inspector, submitted:

a) Ordinary penalties should be imposed against MBF in respect of 118 employees for the period prior to 1 April 2016. The breaches were a failure to keep holiday and leave records; a failure to retain copies of employment agreements and a failure to pay annual holiday pay.

   The multiple breaches should be globalised; that is, reduced to three breaches only at a maximum of $20,000 each, a total of $60,000. Aggravating factors as a proportion of maxima would justify an assessment of 60 per cent; ameliorating factors reducing the aggravating factors' subtotal should be 25 per cent, producing a total of $27,000. An assessment of the defendants' financial circumstances and issues of proportionality would follow.

---

9 Such as *Preet*, above n 7, which involved a breach of three statutes in respect of five employees; *A Labour Inspector v Prabh Ltd* [2018] NZEmpC 110, (2018) 15 NZELR 1171 which involved a breach of three statutes in respect of three employees; *Labour Inspector v Victoria 88 Ltd (T/A Watershed Bar and Restaurant)* [2018] NZEmpC 26, [2018] ERNZ 88 which involved a breach of one statute in respect of five employees; *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 which involved a breach of three statutes in respect of six employees; and *Nicholson v Ford* [2018] NZEmpC 132 which involved a breach of one statute in respect of one employee.

b) Ordinary penalties should be imposed against MBF in respect of 89 persons, from 1 April 2016. The breaches were failure to keep holiday and leave records, and failure to provide and retain copies of employment agreements. Globalising all such breaches to two breaches at a maximum of $20,000 each, provided a figure of $40,000. Aggravating factors would justify an assessment of 60 per cent, and ameliorating factors should be 25 per cent, producing a provisional penalty of $18,000. A consideration of the defendants' financial circumstances and issues of proportionality would follow.

c) Ordinary penalties should be imposed against Mr Jiang in respect of 89 persons, from 1 April 2016. The breaches were a failure to keep holiday and leave records, and a failure to provide and retain copies of employment agreements. Globalising all such breaches to two breaches at a maximum penalty of $10,000 each provided a figure of $20,000. Aggravating factors would justify an assessment of 60 per cent of that figure; ameliorating factors would be 25 per cent of that total, producing a provisional penalty of $9,000. A consideration of the defendants' financial circumstances and issues of proportionality would follow.

d) Pecuniary penalties should be imposed against MBF for serious breaches in respect of 89 persons, from 1 April 2016. The breaches were a failure to pay annual holiday pay to 89 persons, a failure to pay public holiday pay to four persons, and a failure to pay minimum wage to six persons. Globalising the three serious breaches at a maximum of $100,000 each provided a total of $300,000. Aggravating factors would justify an assessment of 60 per cent of that figure; ameliorating factors would be 25 per cent of that total, producing a provisional penalty of $135,000. A consideration of financial circumstances and issues of proportionality would follow.

e) Pecuniary penalties should be imposed against Mr Jiang for serious breaches, in respect of 89 persons, from 1 April 2016. The breaches were a failure to pay annual holiday pay in respect of 89 persons, a failure to

pay public holiday pay in respect of four persons, and a failure to pay minimum wage in respect of six persons. Globalising the three serious breaches at a maximum of $50,000 each provided a total of $150,000. Aggravating factors would justify an assessment of 60 per cent of that figure; ameliorating factors would be 25 per cent of that total, producing a provisional penalty of $67,500. A consideration of the defendants' financial circumstances and issues of proportionality would follow.

[34] In summary, Ms Davies, counsel for the defendants, submitted:

a) Save for one issue, each of the globalised assessments just described were accepted.

b) The exception related to the first two claims, both of which involved globalised claims for ordinary penalties against the company, for the period prior to 1 April 2016 (118 persons) on the one hand, and for the period from 1 April 2016 (89 persons) on the other. It was submitted that this was an arbitrary approach, and potentially amounted to a double jeopardy. The preferable approach would be for the Court to consider one claim only for these breaches in respect of 207 persons.

c) Aggravating factors as a proportion of maxima should be 40 per cent rather than 60 per cent.

d) Ameliorating factors, reducing the aggravating factors subtotal should be 50 per cent and not 25 per cent.

e) Financial circumstances justified a further reduction of 20 per cent in each case.

f) Proportionality should then be considered.

[35] In response to the double jeopardy point, Ms Carr acknowledged that there was a potential difficulty with the approach the Labour Inspector had adopted but stated that were a composite approach to be adopted for 207 employees across the entire

period, ameliorating factors should be 20 per cent, rather than the 25 per cent she had originally submitted was appropriate.

Analysis

[36] I adopt the methodology utilised by counsel. I will consider each of the statutory factors, then move on to make the necessary assessments utilising the four steps identified in *Preet*.

The object of the ERA

[37] Section three of the ERA describes its objects, which include the promotion of good faith in all aspects of the employment environment, the effect of enforcement of employment standards by Labour Inspectors, and the inherent inequality of power in employment relationships.

[38] On the facts of this case, it is obvious there was a very significant imbalance of power. It is clear from the material before the Court that English was the second language of the migrant workers involved, and that they had no knowledge of basic employment rights in New Zealand. They were on working holiday visas in a foreign country, away from their family and friends.

[39] These issues were compounded by the fact that the company, through its director, Mr Jiang, set up a system that paid no heed to minimum employment standards. The status of the workers was not properly understood, and accurate records that would allow the workers entitlements to be checked did not exist.

[40] The Labour Inspector accepts that this was not deliberate, and it was no doubt catalysed by the fact that Mr Jiang did not understand English. He relied heavily on others. All of this however, meant that the objects of the ERA were compromised.

Nature and extent of breaches

[41] Six employees were affected by the failure to pay the minimum wage (from 1 April 2016), 207 by the failure to pay annual holiday pay (118 before 1 April 2016 and 89 from April 2016), four by the failure to pay public holiday pay (from

1 April 2016), 207 by the failure to keep proper records (118 before 1 April 2016 and 89 from 1 April 2016), and 207 by the failure to provide and retain employment agreements (118 before 1 April 2016 and 89 from 1 April 2016.

[42] Ms Carr noted that for the record keeping breaches and failure to provide and retain employment agreements, MBF was subject only to ordinary penalties, both before 1 April 2016, and from that date. These are not breaches of "minimum entitlement provisions" as defined in s 5, and so such a breach could not be susceptible to a declaration and pecuniary penalty.

[43] Similarly, Mr Jiang as a person involved could only be subject to ordinary penalties from 1 April 2016 for the record keeping breaches and failure to provide employment agreements because they are not breaches of the "minimum entitlement provisions" as defined in s 5. This definition, however, does include breaches of the MWA and HA, so pecuniary penalties can be imposed against Mr Jiang for this class of breaches from 1 April 2016. He is liable for ordinary penalties only for the record keeping and employment agreement breaches because these infringe "employment standards" as defined; s 142X stipulates that a penalty may be imposed for such a breach against a person involved.

[44] Here, there were numerous and repeated breaches. But as Ms Carr submitted, were the Court to impose penalties for each breach for each employee, MBF would potentially be liable for 838 breaches resulting in a total maximum figure (ordinary and pecuniary) of $24,680,000; and Mr Jiang would be liable for 366 breaches (ordinary and pecuniary) resulting in a total maximum figure of $7,620,000.

[45] As Ms Carr acknowledged, these would obviously be unrealistic figures. She submitted the Court should accordingly adopt a globalisation process to provide a figure which realistically reflects the gravity of the offending. Such an approach had been adopted in other cases. She also said it was more appropriate to globalise at the start of the process rather than at a later stage, so as to ensure that a transparent and fluid process could be adopted. The focus should be on each type of breach, taking account of the availability of ordinary and/or pecuniary penalties for the periods involved.

[46] As already noted, Ms Davies agreed that such a method is appropriate, and did not dispute the figures it produced.

[47] In *Preet*, the full Court referred to the principle of globalising.[10] In *A Labour Inspector v Parihar*, Judge Perkins took the view that where consideration of a maximum penalty tied to individual breaches resulted in an enormous total, there would have to be an artificial approach to discounting thereafter to reach a realistic level of penalties.[11]

[48] Having regard to these and other authorities, the proposed method of globalisation is both principled and logical. It provides a fair means of fixing a figure for appropriate maximum penalties in each instance.

[49] I adopt Ms Davies' approach concerning ordinary penalties for MBF, as explained above.[12] That is, the ordinary penalties should be considered as one claim of three globalised breaches in respect of 207 employees, rather than in two separate claims for the period prior to 1 April 2016, and for the period from 1 April 2016. Such an approach avoids a potential double jeopardy.

Nature and extent of loss or damage suffered by the workers

[50] Ms Carr submitted in summary that the arrears owed to each employee were not significant, but the overall amounts were. It was also noted that MBF received a 12 per cent commission on the volume of berries picked by each employee; this was an obvious financial advantage to the company. She also referred to the fact that Mr Jiang's reliance on a power of attorney in favour of his son was unsatisfactory, because it led to a misleading of the Labour Inspector, and needless work on her part.

[51] Ms Davies said the average amount owed to each worker was $200. She also submitted that the breaches spanned two seasons, each of which ran for three to four months. There was no compulsion on employees to work for fixed days and hours, and for some, the extent of the breach related to a short period only.

---

10 At [139].
11 *A Labour Inspector v Parihar* [2019] NZEmpC 145 at [39].
12 Above at para [34](b).

[52] There is no dispute as to any of these points, which need to be considered in the Court's assessment of culpability.

Were the breaches intentional, inadvertent or negligent?

[53] Ms Carr submitted that all breaches by both MBF and Mr Jiang were as a result of their deliberate business decision to implement a system that suited the contractual relationship it entered into with BBC and that failures were systemic.

[54] She said the Labour Inspector accepted that Mr Jiang believed the system he set up was satisfactory, that he relied on BBC for the detail, and was a migrant with limited English and inexperienced in employment law. In short, she said there was no intention to deliberately break the law.

[55] Ms Davies submitted there was no concealment of the breaches in MBF's business practices, and no intention to exploit the company's workers. She went on to submit in effect that there had been undue reliance on BBC's practices which led to the failure to comply with the necessary standards. She said Mr Jiang acknowledged the breaches were negligent.

[56] I accept the breaches were not intentional or inadvertent. They were compounded by Mr Jiang's language issues. This meant that over many years he continued to rely on others without attempting to educate himself on fundamental employment principles.

[57] As the Court has commented previously however, ignorance of the rules about payment of monetary entitlements is no excuse.[13]

[58] Persons who are new to the New Zealand employment environment and who wish to operate a business which employs workers, must if necessary seek advice to ensure they are familiar with relevant statutory provisions and practices, which are designed for the protection of workers who may, as in this case, be vulnerable.

---

[13] *Daleson,* above n 9, at [29].

[59] The short point is that there was a significant power imbalance between the employer and its employees. The Labour Inspector described the workers in her investigation report as having relatively poor English language abilities with Mandarin as their first language; they held temporary working holiday scheme work visas with most being in New Zealand for the first time.

[60] A significant number of the total cohort eventually complained to the Labour Inspector. She went to considerable lengths to establish what occurred. The complainants were at an immediate disadvantage because proper time and wage records were not kept. Then, the Labour Inspector was required to devote considerable time and effort to establishing actual entitlements for some 207 persons.

[61] The systemic failures had, when assessed globally, had significant adverse consequences.

What steps have been taken in mitigation?

[62] The parties agreed that arrears of wages totalling $45,124.84 would be repaid by instalments over a three-month period during 2019. They were paid over a six-month period during 2019, with one only being paid on time. As already noted, Mr Jiang said this was because MBF had struggled financially and money had to be borrowed from relatives and friends.

[63] Although the defendants are entitled to credit for making the agreed payments, it must be acknowledged that the employees will receive their entitlements three or four years after they were due, and only after proceedings were issued. The claims were initially resisted and only later was a constructive approach to resolution of the problem adopted.

[64] As noted in *Daleson*, making an outstanding payment in the context of proceedings brought by the Labour Inspector is no more than late performance of a duty.[14]

---

[14] *Daleson*, above n 9, at [33]–[35].

[65] That all said, I find that the steps taken warrant evaluation as matters of mitigation at the step 2 stage.

Circumstances of the breach and any vulnerability

[66] These factors have already been referred to. The multiple breaches continued over two berry picking seasons against a background where the defendants had operated its labour-supplying business since 2010; there is no evidence that at any time in that period did Mr Jiang, as sole director of MBF, learn about the relevant employment law principles. As a result, a substantial number of vulnerable workers, who no doubt were relying on such earnings as they could obtain, were adversely affected.

Previous conduct

[67] Neither defendant has previously appeared before any employment institution at the behest of the Labour Inspectorate.

Preet analysis

[68] Before turning to the four steps recommended by the full Court in *Preet*, I refer to the additional factors that Court also alluded to: deterrence; degree of culpability; general desirability of consistency of decisions; and proportionality. For the purposes of the present case, it is appropriate to consider the first three at step 2 of the process of assessment; and the last at step 4.

Step 1: Nature and number of breaches

[69] As discussed earlier, I agree with the calculations adopted by the parties, save for the first claim made against MBF, as already explained.[15] I note that the same maximum penalty for each type of breach has been adopted even though the number of employees differs. For two reasons, I consider this approach is appropriate. First, the parties have accepted in effect that this is inherent in the process of globalisation which has been adopted. Second, the claims involve a general systemic failure, so that the same approach in respect of each type of breach is appropriate.

---

[15] Above at para [49].

[70] This is a useful figure, but the next step will establish a provisional penalties starting point by assessing and mitigating ameliorating factors for the fixing of penalties.

Step 2: Severity of breach in each case, considering both aggravating and mitigating features

[71] Here, a number of factors come into play:

a) *Deterrence*: On the basis of the evidence before the Court as to the history of the matter, I am confident that Mr Jiang will have learned from his mistakes and will avoid repetition of them. Deterrence in respect of either defendant's future business activities is not a significant factor.

I accept Ms Carr's submissions that general deterrence is relevant. This is because the Court needs to make it clear to all employers it will not tolerate the exploitation of migrant workers. Employers must learn and implement basic employment standards. The use of a piece-rate is not an acceptable method of remuneration for employees, unless information is recorded by employers which makes it clear that workers are not being paid less than the prevailing minimum wage, and that any entitlements under the HA are being paid.

b) *Culpability*: This factor has already been considered to some extent.

Ms Carr submitted in summary that the offending is in the "medium category of seriousness", justifying a 60 per cent of the maximum penalty as a starting point, acknowledging that there was not deliberate exploitation.

She went on to submit that this assessment was supported by a consideration of the number of affected employees; the systemic nature of the breaches; the fact that migrant workers were involved; an initial denial of the failures and attempts to blame others; the difficulties and complexity of the investigation; and the confusion and extra work

created by Mr Jiang's inappropriate reliance on his power of attorney in favour of his son.

She said a reduction of 25 per cent, or in one case 20 per cent, would be appropriate for ameliorating factors. I assume this was a reference to her acceptance of the fact that the breaches were unintentional and were based on ignorance catalysed by Mr Jiang's inability to understand or speak English. In my view, a consistent approach should be adopted for this factor.

Turning to the assessments made for the defendants, Ms Davies submitted the breaches resulted from a misunderstanding of the relationship between MBF and the workers, which was not straightforward. Thus, she said culpability should be 40 per cent of the maximum penalty as a starting point.

She argued this was appropriate in light of the fact that the number of workers involved in the breaches was significant, and that there was an imbalance in the employment relationship between MBF and the workers.

She also submitted the following ameliorating factors justified a discount of 50 per cent in addition to Mr Jiang's language issues: the breaches were unintentional; the workers were free to choose their hours of work, and could leave at short notice; the quantum of arrears for each worker was relatively small; there was a genuine, but mistaken, understanding that the arrangements were appropriate; the defendants had resolved the liability and arrears issues at mediation, then paid the arrears; and there was no previous history of a relevant breach.

c) *Consistency*: These assessments must be considered in light of the desirability of consistent decision-making.

Counsel referred to all the previous penalty decisions of the Court which have been decided since the full Court judgment of *Preet*.[16]

I have considered these decisions, all of which involve different circumstances; and none of them involve a major systemic failure affecting an entire migrant workforce over a two-year period.

That said, it is worth referring to the two decisions where the Court was required to consider a range of breaches that occurred prior to and from 1 April 2016.

In *Prabh*,[17] Judge Perkins considered applications for ordinary and pecuniary penalties involving breaches of the ERA, the HA and the MWA in respect of three employees; penalty claims were sought against an employer company and its two directors. It is apparent the breaches were considered serious.

The maximum penalties for the various breaches of the company totalled approximately $380,000, and for the directors, $50,000 each. The breaches were found to be intentional; culpability was accordingly fixed by way of a range of several percentages up to 80 per cent of the maximum for the ordinary and pecuniary claims. Mitigating factors were assessed at 50 per cent, less 20 per cent having regard to the financial circumstances of the company and the director. Total penalties of $100,000 were imposed on the company, and $16,000 against each of the two directors.

In *Parihar*,[18] penalty claims were brought against two individuals who operated a partnership, in respect of breaches of the ERA, HA and MWA, prior to and from 1 April 2016 which affected six employees.

---

16 *Victoria 88,* above n 9; *Prabh,* above n 9; *Nicholson,* above n 9; *Daleson,* above n 9; *Parihar,* above n 11; and *A Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* [2019] NZEmpC 181.

17 *Prabh*, above, n 9.

18 *Parihar*, above n 11.

The maximum penalties for the various breaches were $120,000 per partner for the period prior to the 1 April 2016 breaches, and $900,000 per partner for the breaches after 1 April 2016; in total $1,020,000 per partner for all breaches. The breaches were found to be intentional. Culpability was fixed at 50 per cent of the maximum for both the ordinary and pecuniary claims. Mitigating factors were assessed as justifying a 30 per cent discount bringing the figure down to $357,000 per partner for step 2. There were no discounts for ability to pay at step 3. The figures thereby obtained were reduced so as to reach a proportionate outcome – $180,000 for the main partner, and $20,000 for the secondary partner.

I emphasise that these cases differ in a number of respects as to the nature of the breaches and as to the fact that the breaches were intentional, and the fact that that they involved reasonably significant unpaid sums in respect of a small number of employees. But these decisions do provide some general guidance.

d) Standing back and weighing all these factors, I consider that culpability should be assessed at 60 per cent of the maximum penalty, for both the ordinary and pecuniary penalties which are sought.

This figure reflects the fact that a system which failed to ensure minimum entitlements continued for far too long because the parties involved failed to learn about and deal with their employment responsibilities in a situation where they were dealing with particularly vulnerable employees. Additionally, the assessment also takes into account the fact that the breaches, although long-running, were not deliberate; they were negligent.

I reduce the resultant figure by 50 per cent having regard to the various mitigating factors discussed earlier, particularly Mr Jiang's language problems which led him to rely on others – the party with whom workers were being placed, BBC, and the managers of MBF; but I have also given

some weight to the range of mitigating and ameliorating factors identified by Ms Davies. As noted, a consistent approach is appropriate for each claim, since the issues were systemic.

Step 3: Ability to pay

[72] I have already summarised the evidence as to each defendant's ability to pay penalties. Ms Davies submitted that both had suffered significant financial hardship in the last 12 months, and that this would likely continue for the next two years, a point which was reinforced by Mr Jiang's poor health, details of which are before the Court.

[73] She submitted there should be a 20 per cent deduction for this factor, relying on assessments to this effect made in *Preet* and *Prabh*. Assuming such a deduction, she said the defendants should also be permitted to pay the penalties ordered by quarterly instalments over a 12-month period. Ms Carr said there was no opposition to payment by instalments.

[74] In all the circumstances, I find there should be a 20 per cent reduction for this factor. I also agree that payment should take place by instalments. So as to allow the defendants a reasonable opportunity to organise their affairs in the current difficult circumstances, the first of those payments should be made on 1 September 2020.

Step 4: Proportionality

[75] Ms Carr submitted no further reduction would be justified at this stage, given what she described as modest starting points.

[76] Ms Davies submitted that standing back and having regard to the range of factors emphasised by counsel and discussed earlier – especially Mr Jiang's health – the penalties should be adjusted to a lower level so as to ensure there is a proportionate outcome in each instance.

[77] In my view, although the global approach adopted earlier provides a fair starting point for each class of breach, it remains necessary to assess the outcomes in the round. To this point the penalties for which MBF may be liable amount to $86,400; and for Mr Jiang $40,800.

[78] Were the Labour Inspector's approach to have been adopted, the total would have been approximately $131,040 in respect of MBF, and $61,200 in respect of Mr Jiang.[19] The defendants' preferred approach would have produced total penalties of $57,600 in respect of MBF, and $27,200 in respect of Mr Jiang.

[79] In my view, the approach adopted by the Labour Inspector would be unduly punitive and the approach adopted by the defendants would not have had sufficient regard to the severity of the breaches.

[80] I also consider that the assessments made to this point are appropriate having regard to both the number of employees affected, and the total sums which were unpaid. I have taken Mr Jiang's health into account when assessing the ameliorating factors. I find that no further proportionality adjustments are necessary at this stage. The final figures are as shown on the Appendices attached to this judgment.

Apportionment of penalties

[81] It is common ground that penalties should be apportioned so that each employee receives $200, with the balance paid to the Crown, under s 136(2) of the ERA. I agree that this is appropriate.

[82] Notwithstanding the payment of the repayment of arrears of monetary entitlements, it is also appropriate that the employees receive a further sum in light of the consequences suffered. I will therefore make orders to that effect.

Conclusion

[83] The following penalties are ordered:

a) MBF is to pay penalties totalling $86,400.

b) Mr Jiang is to pay penalties totalling $40,800.

---

[19] These figures assume a mitigation figure of 20 per cent for the claim for ordinary penalties against MBF, and 25 per cent for all other claims; and a 20 per cent deduction for ability to pay considerations.

[84] The total penalties payable by each defendant are to be paid by four equal quarterly instalments, the first of which are to be paid on 1 September 2020.

[85] From the penalties imposed, all the employees whose names are referred to in Schedule A of the second amended statement of claim are to be paid $200. The balance of the penalty sums are to be paid to the Crown.

[86] Costs in relation to the entire proceeding are reserved. These should be discussed between counsel in the first instance. Any application for these, on a 2B basis, should be filed and served within 28 days, with a response to be filed and served in a like period.

B A Corkill
Judge

Judgment signed at 10.30 am on 16 April 2020

Appendix 1 – Ordinary penalty, Matangi Berry Farm

(prior to and from 1 April 2016)

Step 1: globalisation of nature and number of breaches	
ERA[20] (failure to retain employment agreements, 207 employees)	$20,000
HA[21] (records breach – failure to maintain wage and time records, holiday and leave records, 207 employees)	$20,000
HA (failure to pay annual holiday pay, 118 employees)	$20,000
Subtotal:	**$60,000**
Step 2: Aggravating factors as a proportion of maxima in step 1	
60 per cent of $60,000	$36,000
Step 2: Ameliorating factors (reducing aggravating factors subtotal)	
Less 50 per cent	$18,000
Step 3: Financial circumstances	
Less 20 per cent	$14,400
Step 4: Proportionality	
No adjustment	$14,400

[20] Employment Relations Act 2000.
[21] Holidays Act 2003.

Appendix 2 – Ordinary penalty, Jiubo Jiang (from 1 April 2016)

Step 1: globalisation of nature and number of breaches	
ERA (failure to retain employment agreements, 89 employees)	$10,000
HA (records breach – failure to maintain wage and time records, holiday and leave records, 89 employees)	$10,000
HA (failure to pay annual holiday pay, 118 employees)	$20,000
Subtotal:	**$20,000**
Step 2: Aggravating factors as a proportion of maxima in step 1	
60 per cent of $20,000	$12,000
Step 2: Ameliorating factors (reducing aggravating factors subtotal)	
Less 50 per cent	$6,000
Step 3: Financial circumstances	
Less 20 per cent	$4,800
Step 4: Proportionality	
No adjustment	$4,800

Appendix 3 – Pecuniary penalty, Matangi Berry Farm (from 1 April 2016)

Step 1: globalisation of nature and number of breaches	
HA (failure to pay annual holiday pay, 89 employees)	$100,000
HA (failure to pay public holiday pay, 4 employees)	$100,000
MWA[22] (failure to pay minimum wage, 6 employees)	$100,000
Subtotal:	**$300,000**
Step 2: Aggravating factors as a proportion of maxima in step 1	
60 per cent of $300,000	$180,000
Step 2: Ameliorating factors (reducing aggravating factors subtotal)	
Less 50 per cent	$90,000
Step 3: Financial circumstances	
Less 20 per cent	$72,000
Step 4: Proportionality	
No adjustment	$72,000

[22] Minimum Wages Act 1983.

Appendix 4 – Pecuniary penalty, Jiubo Jiang (from 1 April 2016)

Step 1: globalisation of nature and number of breaches	
ERA (failure to pay annual holiday pay, 89 employees)	$50,000
HA (failure to pay public holiday pay, 4 employees)	$50,000
MWA (failure to pay minimum wage, 6 employees)	$50,000
Subtotal:	**$150,000**
Step 2: Aggravating factors as a proportion of maxima in step 1	
60 per cent of $150,000	$90,000
Step 2: Ameliorating factors (reducing aggravating factors subtotal)	
Less 50 per cent	$45,000
Step 3: Financial circumstances	
Less 20 per cent	$36,000
Step 4: Proportionality	
No adjustment	$36,000