

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 89
EMPC 194/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SHALINI LIMITED Plaintiff
AND	A LABOUR INSPECTOR Defendant

Hearing:	24 February 2020 (Heard at Auckland)
Appearances:	M Keall, counsel for plaintiff M Denyer, counsel for defendant
Judgment:	24 June 2020

JUDGMENT OF JUDGE M E PERKINS

[1] These proceedings relate to claims against Shalini Limited (Shalini) arising from breaches of the Minimum Wage Act 1983 and the Holidays Act 2003. At times material to the claims, Shalini operated three liquor stores and a dairy in Auckland. The claims came before the Employment Relations Authority (the Authority) at which time Shalini accepted its breaches of the Acts and accepted that penalties would be imposed. It had previously settled with the Labour Inspector the outstanding wages and holiday pay for the employees concerned and entered into an agreement for payment on an instalment basis. The matter came before the Authority for investigation only in respect of the quantification of penalties.¹

¹ *A Labour Inspector v Shalini Ltd* [2019] NZERA 334 (Member Trotman).

[2] The Authority in its determination awarded penalties totalling \$100,000 against Shalini. Shalini then filed a non-de novo challenge against that determination, which is the subject of this judgment.

[3] The investigation meeting before the Authority was held on the papers. The parties had provided the Authority with affidavits from the Labour Inspector, four of the seven affected employees and Venu Mohan Reddy Beerapu (Mr Reddy), Shalini's sole director. In addition, the Authority was provided with an agreed statement of facts. This agreed statement was part of the settlement which was reached between the parties as to quantification and payment of the arrears of wages and holiday pay. The parties were given the opportunity of providing submissions which were considered by the Authority in its determination.

[4] The background facts set out in the determination are not in dispute, and as this is a non-de novo challenge there is no need to retrace undisputed facts. The background to the matter was set out by the Authority in its determination as follows:

[5] Shalini was subject to two investigations by the Labour Inspector in 2016. These investigations preceded the investigation in 2017 which forms the basis for the current application for penalties. ...

[6] The first investigation in 2016 was resolved when Shalini agreed to pay arrears to one employee. No penalty was sought by the Labour Inspector. The second investigation involved the Labour Inspector auditing Shalini's wage, time, holiday and leave records and interviewing some current and former staff. Materially the second investigation covered 6 out of 7 of the employees involved with the current matter and overlapped the time period.

[7] The second investigation resulted in the Labour Inspector issuing an Improvement Notice in November 2016 to Shalini. This advised that he considered it was failing, or had failed, to comply with various minimum employment standards. The notice required Shalini to implement and maintain fully compliant wages and time records for all employees as well as holiday and leave records. It went on to require it to provide evidence of the steps it had taken to comply with the Notice by providing full wage, time, holiday and leave records for all of its current employees. The Improvement Notice specifically included requests for evidence of time and a half payments and provision of alternative days for public holidays worked. Shalini was further required to show payment of any arrears of wages or holiday pay calculated.

[8] Mr Reddy responded to the Improvement Notice on Shalini's behalf by providing the Labour Inspector with records that, the parties agree, appeared to show compliance in all respects with the relevant law. ...

[9] On 20 March 2017, following receipt of a complaint from one of Shalini's employees, the Labour Inspector commenced a third investigation into Shalini's workplace practices. This investigation again involved auditing Shalini's wage, time, holiday and leave records, and interviewing some current and former employees. These employees were each employed by Shalini as retail assistants, working between its liquor stores and dairy.

[10] On 9 May 2017 the Labour Inspector wrote to Shalini outlining arrears owed to seven employees arising from minimum wage entitlements, holiday pay on termination and public holiday pay. Shalini responded on 31 May 2017. Thereafter negotiations ensued.

[11] Following unsuccessful private negotiations, two mediations, and proceedings being filed by the Labour Inspector with the Authority and the Employment Court, the parties settled the wage arrears and holiday pay claims. Their agreement was recorded in a record of settlement dated 5 October 2018.

[12] Pursuant to the record of settlement:

- a. Shalini accepted the Labour Inspector's findings that it had breached minimum entitlement provisions by failing to pay minimum wages and holiday pay to seven employees. The agreement set out the terms of payment of arrears.
- b. The parties agreed to discontinue Employment Court proceedings that had been filed by the Labour Inspector and to file a joint memorandum with the Authority advising that the arrears had been settled and asking for a determination on penalties. They agreed this memorandum would attach an agreed statement of facts, and a copy of the record of settlement.
- c. The parties agreed on the following approach to the resolution of penalties:

The Labour Inspector will seek total penalties of up to \$50,000.00 in relation to 14 breaches; namely 7 breaches of the Minimum Wage Act, 2 breaches of the Holidays Act relating to holiday pay on termination and 5 breaches of the Holidays Act relating to working on public holidays.

[5] In her determination, the Authority Member sets out the basis for arriving at final total penalties of \$100,000 for the breaches of the Minimum Wage Act and the Holidays Act. The process adopted followed that set out in a series of decisions of the Employment Court.² There is no criticism by the plaintiff as to the Authority's adoption of the methodology set out in those decisions which in turn applied the

² *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514; *Nicholson v Ford* [2018] NZEmpC 132, [2018] ERNZ 393 at [18]; and *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12, [2019] ERNZ 1 at [19].

criteria for assessment of penalties pursuant to s 133A of the Employment Relations Act 2000.

[6] There are three matters upon which the non-de novo challenge to the determination is now based. First, that the Authority was in error in finding that two of the employees were renting accommodation above their place of work with Shalini from Mr Reddy. The Authority Member found that was an aggravating feature in that it increased the employee's vulnerability in all of the circumstances. Shalini alleges that the employees were not in fact renting the accommodation from Mr Reddy but from the owner of the premises and that Mr Reddy was merely a go-between. Secondly, Shalini alleges that the Authority Member made an erroneous finding that Shalini's financial accounts for the years ending 31 March 2017 and 31 March 2018 show an ability to pay penalties. Related to this is an allegation that the Authority Member wrongly interpreted the accounts by stating that they showed Shalini repaid inter-company loans and a bank term loan for a sum of just over \$200,000 when this was simply a restructuring of liabilities between Shalini and the other connected companies. Thirdly, that the Authority erred by failing to give weight to the parties agreed approach to penalties which was an important feature of the comprehensive settlement under which Shalini accepted responsibility and entered into an agreement for payment of the arrears of minimum wage and holiday pay.

[7] I deal first with the accommodation arrangement for two of the employees. Having perused the evidence before the Authority on this point, the evidence is brief. The two employees who were living above the store simply mentioned this fact. It was in the context of their working long hours. There are no statements from them, however, that this made them feel more vulnerable. Mr Reddy in his affidavit in answer filed with the Authority, explains the reasons why rent was being paid to him as opposed to the owner of the premises. The owner apparently refused to have a tenancy agreement with the employees and insisted that Mr Reddy act as head tenant with a sub-letting to his employees. There is no evidence as to whether the employees knew Mr Reddy was not their landlord.

[8] I am not sure that the true position alters the assessment of vulnerability. The employees paid rent to their employer in circumstances where they were heavily

dependent on the employment for continued immigration status. It is not unreasonable to infer that there was an element of extra vulnerability arising from this circumstance. The Authority Member in her determination felt that it did. I do not consider there was any error in reasoning on this point. In any event, it is not a point which appears to have been regarded as anything other than one of the number of aggravating features in the overall assessment of the inequality of power between Shalini and its employees.

[9] This ground for challenge is not upheld.

[10] In considering the second matter raised, I also consider that the Authority's reasoning cannot be criticised. While the statement in the determination that Shalini repaid term liabilities may not be literally correct, Shalini did reduce secured liabilities by a restructuring of debt between associated companies and their bank. There are features of this part of the challenge which lead me to the view that the Authority Member had grounds not to apply a discount for the allegation by Shalini of an inability to pay.

[11] The first point I note is that the Authority Member stated she had carefully considered the financial statements provided to her in evidence. From a perusal of the financial records provided for the year ended 31 March 2018, the company achieved a profit of \$50,816. The determination refers to this. This was clearly contemplated in the accounts as being available to Mr Reddy as director's fees and was distributed to him as shareholder to reduce net profit to zero. What is not mentioned in the determination is that in the previous year (2017) the profit was \$63,589 and, at a time when Shalini had been subject to earlier auditing by the Labour Inspector, the profit for 2016 was \$117,579.

[12] The Authority was left in an unsatisfactory position insofar as the evidence on this point is concerned. Mr Reddy, in his evidence, simply filed the accounts for 2017 and 2018. He referred to the debt restructuring but provided very little evidence on it. In view of the clear connection between Shalini and other companies, the Authority should have been provided with evidence of how the restructuring of liabilities worked between them. Simply filing the accounts and leaving it to the Authority to surmise was not adequate. Evidence from the accountants acting for the group of companies

should have been given so that the Authority could make a reasoned assessment. Mr Denyer, counsel for the Labour Inspector, referred to this issue in his submissions at [30] as follows:

The plaintiff is part of a group of companies, which Mr Reddy explains in his affidavit dated 2 September 2019 Mr Reddy emphasises in this affidavit that these companies are standalone entities. Clearly, these proceedings only relate to the plaintiff and no obligations can be placed on related entities as a result. Nevertheless, it is submitted that the financial position and capacity to repay debts of the group as a whole is a relevant factor. Mr Reddy notes that the total company group debt exceeds \$4.4 million. It is apparent that the company group has taken on far greater debts than what was imposed by the ERA and that it has the ability to reallocate and reorganise its debt obligations amongst the group of companies. In these circumstances, it is submitted that the ability of the plaintiff to repay a penalty cannot accurately be assessed by only viewing its own financial statements, and it is unclear why this particular additional debt cannot be serviced.

[13] The issue of ability to pay needs to be considered by the Court in dealing with a defaulting company or individual when assessing penalties. The part that it plays in the overall assessment of penalties was considered in the following statements of Chief Judge Inglis in *Labour Inspector v Daleson Investment Ltd*.³ In her judgment she stated as follows:⁴

... This reflects that a weighting exercise is required having regard to the particular circumstances. Mere financial incapacity, without more, is unlikely to be regarded as warranting a penalty reduction to nil, or next to nil, having regard to the relevant statutory scheme and its underlying objectives.

...

... While *Preet* confirmed that financial capacity, and likelihood of payment, were relevant it seems to me that placing too much weight on financial circumstance of the defaulting individual or company runs the risk of skewing the underlying statutory scheme. At the end of the day, and as *Prabh* makes clear, it is one factor of many; it ought not to be given disproportionate weight.

[14] This ground of challenge is also not upheld.

[15] The third ground raised in the pleadings relates to the apparent agreement between the parties in reaching their settlement that parameters for penalties would be put before the Authority. The statement of claim alleges that the Authority erred by

³ *Daleson*, above n 2.

⁴ At [44] and [46] citing *Preet PVT*, above n 2, and *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110, [2018] ERNZ 310.

failing to accord any weight to the parties' agreed approach to penalties arising from the settlement. This point was mentioned in passing in submissions, but appropriately not taken further. The Authority Member properly held that she was not bound by any agreement of the parties. She made the pertinent comment that even at the higher level of penalties proposed by the Labour Inspector, that proposal would be inadequate to reflect the serious nature of the breaches in this case. Neither the Authority nor the Court are bound by any agreement between the parties on penalties unless, following proper analysis, they are held to be at a level which would be regarded as appropriate.⁵

[16] Deterrence must play an important part in assessment of penalties for breaches of minimum standards of employment for vulnerable employees. This is fortified by the nature of the legislation providing for the assessment of such penalties. The deprivation the employees in this case suffered in not receiving their proper monetary entitlements was substantial. Shalini derived financial benefit from these breaches over several years. The Authority's careful assessment of penalties in this case resulted in penalties at an appropriate level.

[17] The challenge is dismissed.

Costs

[18] Insofar as costs are concerned, costs should follow the event. The Labour Inspector is entitled to costs as the challenge is unsuccessful. At an earlier directions conference in this matter, counsel agreed that Category 2B would apply under the Court's Costs Guideline Scale.⁶ Costs are to be calculated on that basis accordingly. Any dispute as to calculation can be referred back to the Court. Once the quantum of costs is resolved, a further judgment of the Court will be issued containing final orders as to costs and disbursements.

M E Perkins
Judge

Judgment signed at 9.30 am on 24 June 2020

⁵ See *Labour Inspector v Victoria 88 Ltd (T/A Watershed Bar and Restaurant)* [2018] NZEmpC 26, [2018] ERNZ 88.

⁶ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.