IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 110
EMPC 226/2017

IN THE MATTER	of applications under Part 9A of the Employment Relations Act 2000
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	PRABH LIMITED First Defendant
AND	RAJWINDER KAUR Second Defendant
AND	BALJINDER SINGH Third Defendant

EMPC 354/2017

IN THE MATTER	of proceedings removed from the Employment Relations Authority
AND BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	PRABH LIMITED Defendant

Hearing:	22 May 2018 (Heard at Auckland)
Appearances:	A Dumbleton, counsel for plaintiff S Clews, counsel for defendants
Judgment:	24 September 2018

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve a factual matrix which spans the introduction into the Employment Relations Act 2000 (the Act) on 1 April 2016 of additional statutory provisions relating to enforcement of employment standards. Amongst the new enforcement provisions introduced into the Act on 1 April 2016 was Part 9A, under which a Labour Inspector may apply directly to the Employment Court for certain remedies for breaches of employment standards. In the present case, these include breaches of minimum entitlement provisions. The Labour Inspector has made such an application in this case against the first defendant employer, Prabh Ltd (Prabh) and the second and third defendants as persons involved in the breaches.

[2] The Labour Inspector also commenced claims in the Employment Relations Authority (the Authority) to recover remedies against Prabh for breaches of minimum standards of employment involving its employees which had occurred prior to 1 April 2016. In view of the fact that the Court was already dealing with the claims under Part 9A of the Act against Prabh, the Authority made an order removing its proceedings to the Court pursuant to s 178 of the Act.[1] The claims by the Labour Inspector filed in the Authority related to alleged breaches by Prabh of the Minimum Wage Act 1983, the Holidays Act 2003 and failure to keep records and copies of employment agreements as required by the Act.[2] The second and third defendants are not parties in the proceedings removed.

[3] The breaches of employment standards specified in the Court proceedings and the proceedings removed are not disputed by the defendants. Nor is it disputed that, for the purposes of claims under Part 9A of the Act, the breaches were serious. These proceedings in their entirety now involve assessment by the Court of the punitive remedies which should be imposed and issues of quantum.

[4] Once the proceedings were removed to the Court by the Authority, it was agreed that both sets of proceedings should be heard together by the Court. The same

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1 *A Labour Inspector of the Ministry of Business, Innovation and Employment v Prabh Ltd* [2017] NZERA Auckland 372.

2 Employment Relations Act 2000, s 130(4).

employment relationship between employer and employees was involved in both sets of proceedings. The second and third defendants in the Court proceedings are persons involved in a breach of employment standards as that is defined in s 142W of the Act. In the pleadings filed, that involvement on the part of the second and third defendants is admitted and will be discussed more fully later in this judgment.

Factual outline

[5] There is very little dispute as to the facts of this matter. Prabh operates general stores in Murupara and Kopuriki; one a remote town and the other a remote settlement in the Bay of Plenty. The second defendant, Rajwinder Kaur, is a shareholder and the sole director of Prabh. Her partner, the third defendant Baljinder Singh, is a 99 per cent shareholder and a major participant in the running of the business by Prabh. He has admitted that at the time when the breaches occurred, he exercised significant influence over Prabh's management and administration.

[6] Three employees, the subject of the employment breaches by the defendants in this case, came to New Zealand from India to study towards qualifications in business management. All three accepted positions of employment with Prabh as shop assistants. The conditions of employment initially set complied with the Minimum Wage Act 1983. However, because of conditions under which they were subsequently required to work, including very excessive hours, they all ended up being paid less than the minimum wage for the hours worked. It is not in dispute that during employment and upon termination of such employment, they were not provided with their entitlements to holidays and holiday pay. Accordingly, there were breaches of the Holidays Act 2003, including breaches of the obligation to keep holiday and leave records.

[7] In addition, and because of the plaintiff's investigation into the matter, it was ascertained that Prabh, as the employer, had not kept adequate time and wages records. There was also evidence of retrospective creation of employment agreements. When such agreements were created, signed copies were not retained by Prabh as required. These facts give rise to the claims for penalties for breaches of the Act.

[8] In their evidence, the three employees spoke of being required to work six and sometimes seven days per week. They were required to work on public holidays, including Christmas Day, without provision for annual leave or days in lieu. The situation was mitigated to an extent by the provision of free accommodation and the employees' ability to obtain food, free of charge, from the stores in which they worked. Each of the three employees mentioned in evidence that the second and third defendants, at times, required them to clean their house, mow their lawns and wash their cars. One of employees was also, at times, required to prepare food for the second and third defendant's children and transport them to and from school.

[9] There was evidence adduced during the hearing of this matter that at some point during the employment of each of the three employees their job descriptions changed from that of shop assistants to assistant store manager or store manager. An immigration consultant participated in the arrangements of employment of all three employees. That consultant had a hand in preparation of employment agreements and liaising with Immigration New Zealand in respect of the visa requirements for the employees. As all three came to New Zealand to complete studies and obtain qualifications in business management, for their visa applications to be successful they were eventually required to be in employment commensurate with their qualifications. One of the employees maintained in evidence that he was performing management duties at the general store where he worked. The other two freely admitted that they did not. While the second and third defendants did not give evidence, I can conclude, from the evidence I did hear and the documents produced, that on behalf of Prabh, they colluded with the immigration consultant and the employees in the dealings with Immigration New Zealand.

[10] The steps taken to obtain work visas in New Zealand are merely collateral to the primary issue in this case, which is the serious breach of minimum standards of employment by Prabh and the involvement in the breaches by the second and third defendants. I do not regard the collateral matter relating to the employees' attempts to improve their immigration status as in any way absolving the defendants from the appalling way the employees were treated over the entire period of their employment. In some ways, the situation was aggravated in that the defendants took advantage of

the employees' vulnerability over immigration status. Any further issue relating to these immigration matters, however, would need to be resolved in another forum.

[11] One other factor which the plaintiff seeks to have considered as an aggravating feature in the claims now made is that the defendants knew of their obligations when employing the three employees involved in this case but purposely ignored those obligations. As early as December 2014, an employment agreement between Prabh and one of the employees contained provisions relating to time and wages and holidays that were legally compliant and showed the defendants knew at that time of the minimum requirements for wage rates, leave and record keeping. Later, in February 2015, a Ministry of Business, Innovation and Employment (MBIE) Client Service Advisor, acting on a complaint by another Prabh employee, investigated its wage and time and holiday records. In correspondence with Prabh, and of necessity, the second and third defendants, they were reminded by the Labour Inspector of their obligation to pay minimum wages and provide holidays and holiday pay. The subsequent events involving the defendants' behaviour towards the three employees in this case are alleged by the plaintiff to show that the defendants had no intention of complying with the requirements previously pointed out to them and of which they were aware. The advice given by the MBIE Client Service Advisor to the defendants in correspondence in February 2015 as to their obligations was very explicit. So far as their post-1 April 2016 behaviour is concerned, the defendants should have been aware, as responsible employers, of the new enforcement regimes introduced into the Act.

The claims made by the Labour Inspector and the pleadings

[12] The plaintiff filed an amended statement of claim in the proceedings filed directly with the Court. Separate remedies are sought against the three defendants respectively. The following remedies are sought against Prabh:

> a. that this Court exercise its powers under section 142B(2)(a)(i) and (b) of the Employment Relations Act 2000 and order a declaration of breach for serious and persistent breaches of minimum entitlement provisions by the first defendant, ... and
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> b. that this Court exercise its powers under section 142E(1) of the Employment Relations Act 2000 and order pecuniary penalties against the first defendant, to a maximum of 3 times $67,075.32 ($201,225.96)

being the amount of financial gain made by the first defendant, for serious and persistent breaches of minimum entitlement provisions; and

c. that this Court exercise its powers under section 142M(1) of the Employment Relations Act 2000 to make a banning order to remain in force between 12 and 18 months against the first defendant for serious and persistent breaches of minimum entitlement provisions;

d. That this court orders the plaintiff's costs and expenses of and incidental to these proceedings be paid by the first defendant.

[13] Insofar as the second defendant, Rajwinder Kaur, is concerned, the following remedies are sought:

e. That this Court exercise its powers under section 142B(2)(a)(ii) and (b) of the Employment Relations Act 2000 and order a declaration of breach for involvement by the second defendant in breaches by the first defendant of minimum entitlement provisions ... and

f. that this Court exercise its powers under section 142E(1) of the Employment Relations Act 2000 and order pecuniary penalties, to a maximum of $50,000, against the second defendant, either as a person declared to have been involved in the breaches of the first defendant, or as a person held to have been involved in the breaches of the first defendant, for serious breaches of minimum entitlement provisions; and

g. that this Court exercise its powers under section 142M(1) of the Employment Relations Act 2000 to make a banning order against the second defendant, either as a person against whom a declaration of breach has been made or as a person held to have persistently been involved in breaches of minimum entitlement provisions, such order to remain in force between 12 and 18 months; and

h. that this Court orders the plaintiff's costs and expenses of and incidental to these proceedings be paid by the second defendant.

[14] Insofar as the third defendant, Baljinder Singh, is concerned, the following remedies are sought:

i. that this Court exercise its powers under section 142B(2)(a)(ii) and (b) of the Employment Relations Act 2000 and order a declaration of breach for involvement by the third defendant in breaches by the first defendant of minimum entitlement provisions ...and

j. that this Court exercise its powers under section 142E(1) and order pecuniary penalties against the third defendant, to a maximum of $50,000, either as a person declared to have been involved in the breaches of the first defendant or as a person held to have been involved in the breaches of the first defendant, for serious breaches of minimum entitlement provisions; and

k. that this Court exercise its powers under section 142M(1) of the Employment Relations Act 2000 to make a banning order against the third defendant, either as a person against whom a declaration of breach has been made or as a person held to have persistently been involved in breaches of minimum entitlement provisions, such order to remain in force between 12 and 18 months; and

l. that this Court orders the plaintiff's costs and expenses of and incidental to these proceedings be paid by the third defendant.

[15] The defendants filed a statement of defence to the plaintiff's amended statement of claim. While the facts relating to the breaches are in the main admitted, there is a denial of the alleged extent of vulnerability of the employees. This mainly relates to the immigration matters earlier referred to. The claims for banning orders are opposed.

[16] In the proceedings removed, no separate pleadings were filed in the Court. The statement of problem filed with the Authority is now part of the Court file. The claims against Prabh in respect of unpaid minimum wages and holiday pay prior to 1 April 2016 have been paid. The plaintiff seeks determinations (they will now be judgments of the Court) as to breaches by Prabh under the Minimum Wage Act, the Holidays Act and the Act. For such breaches, penalties are sought for each breach to a maximum of $20,000. The total number of breaches alleged are nine, being three breaches for each of the three employees. The total claim made is $180,000. In addition, all costs and expenses are sought.

[17] Prabh filed a statement in reply in the Authority. The breaches under the Minimum Wage Act, the Holidays Act and the Act are admitted. Prabh refers to the arrangement which is now made with the three employees concerned to pay the arrears of minimum wages, holiday pay and interest. It admits the breaches of the Act in relation to the keeping of records. The statement in reply consented to the removal of the penalty claims to the Court.

[18] In the proceedings filed in the Court for which pecuniary penalties are sought pursuant to Part 9A of the Act, a different method for calculating maximum pecuniary penalties is adopted by the plaintiff. The entitlements to pecuniary penalties, while based on both the Minimum Wage Act and the Holidays Act, have been conflated so

that only one pecuniary penalty against each defendant is sought. This is discussed more fully later in this judgment.

[19] The monetary claims for wages and holiday pay specified, in both the amended statement of claim filed in the Court proceedings and in the statement of problem in the Authority which has now been removed to the Court, are not completely consistent between the two sets of proceedings. However, submissions made on behalf of the Labour Inspector by Mr Dumbleton, counsel for the plaintiff, refer to employees having now received a full payment in total of $156,455 (less PAYE) and interest from the date the arrangements for payment were made. Mr Clews, counsel for the defendants, did not dispute this figure, and part of it is used in the methodology adopted by the plaintiff for calculation of pecuniary penalties against Prabh.

[20] Despite the inconsistencies between the proceedings as to the monetary claims, no claim is now made for the sums owing for wages and holiday pay, as Prabh, in conjunction with the second and third defendants, has reimbursed the employees for all sums agreed as outstanding. Upon that agreement being reached, the plaintiff discontinued the claims filed in the Authority to recover minimum wages and holiday pay but pursues the claims for penalties. In the Court initiated proceedings, a claim pursuant to s 142J and s 142L of the Act for compensation has been deleted by amended pleadings.

Principles applying in calculation and imposition of penalties

[21] The full Court in *Borsboom v Preet PVT Ltd* comprehensively considered the issue of imposition of penalties in this Court.[3] The facts it considered in that case had occurred prior to the amendments to the Act on 1 April 2016 which introduced Part 9A as well as s 133A contained in Part 9 of the Act. By the time of the decision, the amendments had been enacted. Nevertheless, the discussion in *Preet* was anticipated by the Court to be of assistance also in the future assessment by the Court of penalties for serious breach under Part 9A and for claims initiated in the Authority to recover penalties pursuant to s 135 of the Act adopting the criteria set out in s 133A.[4] This

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3 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072.

4 At [4]-[6]. The equivalent section in Part 9A to s 133A is s 142F, containing identical criteria.

would clearly include the imposition of penalties against both employers and persons involved. Proceedings for recovery of penalties, other than pursuant to Part 9A of the Act, must be commenced in the Authority. The Court also considered that the factors in s 133A statutorily encapsulated those factors which, as a matter of previous judge-made law, were to be included in the assessment of penalties.[5] It held that the matters set out in s 133A were not exhaustive in any event and the Court enunciated four further matters which might be relevant and which could be considered in addition.[6] Those factors will be discussed later in this judgment.

[22] Insofar as the proceedings removed in the present case are concerned, the Court is in no different position from that experienced in *Preet*. Section 133A of the Act was introduced on 1 April 2016 and therefore does not apply specifically to the proceedings removed. The Court in *Preet*, however, in dealing with the same issues, stated as follows:

> [64] We have already determined that the new statutory considerations under s 133A cannot apply retrospectively to this case. Nevertheless, we consider that they confirm largely, but not completely, the previous judge-made law which is applicable to this case. To that extent, therefore, and because the new s 133A list is not exhaustive, our following observations will apply to future cases in addition to this one from the pre-section 133A days.

[23] The Court dealt with these matters, including the additional factors it considered should apply, as follows:[7]

> [67] The first judgment is that of Judge Inglis in *Tan v Yang*. That, too, was a case involving migrant employees whom the Judge described as "vulnerable to exploitation". Although it involved principally the payment of an unlawful premium for employment, which is not a feature of this case, the Judge dealt with penalties including for breaches of the Wages Protection Act which is another of the minimum code statutes. At [32] the Judge set out what she described as a "non-exhaustive list of factors [that] may usefully be considered" in assessing a penalty, as follows:
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> - the seriousness of the breach;
> - whether the breach is one-off or repeated;
> - the impact, if any, on the employee/prospective employee;
> - the vulnerability of the employee/prospective employee;

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5 At [64].
6 At [66]-[69].
7 Footnotes omitted.

- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.

> [68] Many of the factors bullet-pointed by Judge Inglis in *Tan* are now reflected in the matters to which the Authority and Court are to have regard in determining a penalty under s 133A. We would add that the following factors also need to be assessed by the Authority and the Court in determining whether a penalty should be imposed and, if so, be reflected in that penalty:
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> - when assessing deterrence, to do so both in relation to the particular person to be penalised and to the wider community of employers;
> - when considering the seriousness of the breach, the degree of culpability of the person in breach;
> - the general desirability of consistency in decisions on penalties; and
> - when assessing a penalty or penalties, to stand back and evaluate whether the anticipated outcome is one which is proportionate to the breach or breaches for which the penalty is imposed.

[24] Following its lengthy analysis, the Court in *Preet* arrived at four steps, which are to be considered by the Court as an established methodology for setting penalties. The Court set out the four steps in summary form as follows:[8]

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
>
> Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
>
> Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
>
> Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[25] Also of assistance in the present case is the full Court's discussion of multiple breaches and continuous breaches, and how they may be dealt with. Its analysis is set out as follows:

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8 At [151].

> [70] The Labour Inspector submitted that cases of multiple breaches can and should be distinguished from those to be categorised as ones of "continuous breach". The plaintiff says, for example, that a failure to pay an employee at or above the minimum wage over the course of a year, but by weekly pay cycles, amounts to what counsel describes as "one continuous breach". Further, counsel submitted that an employer of five employees who are likewise underpaid, should be dealt with as an employer facing five continuous breaches. That is despite the fact that, in law, there is arguably a separate breach on each occasion when there is an underpayment (in the example relied on) 52 times per year or (taking account of holidays) 48 times per year. The Labour Inspector submitted that a case of below-minimum wage payments to multiple employees continuously over one year should result in penalties being ordered effectively for five breaches: that is on an employee-by-employee basis. Ms Milnes, counsel for the Labour Inspector, submitted that s 135 of the Employment Relations Act contemplates specifically multiple penalties being able to be imposed in this fashion. Subsection (3) allows the bringing of a "claim for 2 or more penalties against the same [employer]" being joined in the same action.
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> [71] We conclude that subs (4) does not require an applicant to specify the amount of a penalty or, even if an inspector does, that the Authority or the Court must be bound to award no more than that amount. That is because subs (4) provides:
>
> > In any claim for a penalty the Authority or the court may give judgment for the total amount claimed, or any amount, not exceeding the maximum specified in subsection (2), or the Authority or the court may dismiss the action.

[26] The approach adopted by the full Court in *Preet* is a sensible way to deal with the similar factors existing in the present proceedings. Indeed, that approach is like the way it has been pleaded by the Labour Inspector in the present case and argued by counsel for the Labour Inspector. Mr Clews did not dispute that the approach urged by Mr Dumbleton was appropriate.

[27] The principles in *Preet* may be applied in the present case to both the Court originated proceedings and the proceedings removed. There are similarities between those facts which pertained in *Preet* and those applying in the present case. As indicated earlier, the full Court in *Preet* gave an indication that the principles which it set would also assist the Court in future proceedings originally initiated in the Court pursuant to Part 9A, except that the threshold is that serious breaches must be involved. Where such serious breaches are proved, or admitted, then a higher level of penalties needs to be considered. If the breaches are proved but not established as serious, the Court may then deal with penalties on the usual basis under Part 9 of the Act.

[28] After *Preet* was decided, the Court's decision in *Labour Inspector v Victoria 88 Ltd*[9] considered a case in which proceedings had been initiated in the Court pursuant to Part 9A of the Act and applied to breaches which had occurred following the introduction of the amended legislation on 1 April 2016. The Court adopted the approach taken in *Preet* to s 133A of the Act, although under Part 9A, the equivalent provision is s 142F. On this issue, Judge Corkill in *Victoria 88 Ltd*, stated:

> [49] Given the similarity between ss 133A and 142[F], I considered that a *Preet* analysis would provide assistance to the Court for the purposes of this case, when considering whether the parties' submission as to a pecuniary penalty should be accepted.
>
> [50] I emphasise, however, that whilst such an approach is helpful for present purposes where there is agreement between the parties, the Court may have to consider whether a *Preet* analysis is appropriate in other contexts.

[29] The case in *Victoria 88 Ltd* was presented to the Court as an agreed position on penalties and the fact that banning orders were not opposed. Judge Corkill analysed the position using *Preet* to ensure that a principled approach was applied before the Court would accept that the agreed position was appropriate. As already set out in [50] of the decision, because of the way in which the case had been pleaded and presented, some reservations were expressed as to its precedent value. While the present case involves agreement in the main to the factual position, the quantum of penalties and whether banning orders should be made remains at large.

[30] *Victoria 88 Ltd* involved claims made only against employers as did *Preet*. The present case would appear to be the first where remedies pursuant to Part 9A of the Act, including penalties and banning orders, are sought against persons involved in the breaches in addition to the proceedings against the employer entity. In the present case, claims are not only made against Prabh under both the proceedings removed and the proceedings initially commenced in the Court, but also remedies are sought in the Court initiated proceedings against the second and third defendants, having regard to their positions as a director, shareholders and persons exercising significant influence over the management of the employer company.

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9 *Labour Inspector v Victoria 88 Ltd* [2018] NZEmpC 26.

[31] A third decision which is of assistance in the present case, in view of the fact that remedies are sought against persons involved in the breaches, is the decision of the *Labour Inspector v Sampan Restaurant Ltd*.[10] That decision was issued to provide an opinion on questions of law for the Authority pursuant to s 177 of the Act. The primary issue for which the Court's opinion was sought was the way that the Authority should treat differing levels of penalties, to be imposed pursuant to s 75 of the Holidays Act, as between the employing company involved in that case and the person involved in the breach, who was a director. The Court held that each needed to be separately considered based on their individual culpability and not on a joint, apportioned basis. However, the overall discretion is not to be approached in a formulaic way, but by exercising the discretion having regard to the facts arising and to proportionality, fairness and justice, like the approach taken in the fourth step in *Preet*.

[32] The approach which the Court took in its opinion in *Sampan Restaurant Ltd* was effectively the way the treatment of penalties separately for the three defendants was argued for by counsel for the Labour Inspector in the present case. That approach again was not disputed by counsel for the defendants; their arguments being directed at quantum and the appropriateness and fairness of making banning orders.

[33] Finally, in addition to the three Employment Court decisions referred to, the High Court in *Department of Internal Affairs v Qian Duoduo Ltd* has recently considered the imposition of civil penalties for the purposes of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.[11] Justice Powell, in that decision, reached an approach to assessing penalties not dissimilar from that adopted in *Preet*. In dealing with the approach to be utilised, he stated:[12]

> [25] Having identified the maximum penalties, I broadly adopt the approach utilised by Toogood J in *Ping An* based on the approach taken under the equivalent provisions in the Commence Act, but "tailored for the scheme of the … Act". This requires:
>
> (a) Assessing the seriousness of the civil liability acts to select a starting point based on the seriousness of the non-compliance and the aggravating and mitigating factors relating to it.

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10 *Labour Inspector v Sampan Restaurant Ltd* [2018] NZEmpC 69.
11 *Department of Internal Affairs v Qian Duoduo Ltd* [2018] NZHC 1887.
12 Footnotes omitted.

(b) Next, considering aggravating and mitigating factors relating to the circumstances of the reporting entity, to determine whether these warrant imposition of a higher or lower penalty.

(c) Next, deducting from the starting point to reflect any admission of liability and/or co-operation with the authorities, especially in relation to others who have breached the Act.

(d) Finally, taking into account totality considerations by looking at the number of separate breaches, ensuring there is no overlap between the penalties imposed for difference types of non-compliance, and considering whether the total penalty imposed fairly and adequately reflects the overall extent of non-compliance.

[34] Obviously, the approach specified in *Qian Duoduo Ltd* involved far different considerations from the present case, but Justice Powell's decision provides an indication from another jurisdiction for the approach the Employment Court should adopt towards breaches, both prior to and following the introduction of the amendments to the Act on 1 April 2016.

Counsel submissions

[35] Mr Dumbleton summarised the Labour Inspector's position on remedies as follows:

12. In relation to the unlawful conduct of the first defendant Prabh before 1 April 2016 (when pecuniary penalties for breaching employment legislation and banning orders were introduced by Part 9A of the Employment Relations Act 2000), the plaintiff asks the Court for ordinary penalties to be awarded under the law that applied during that time.

13. No claims have been brought against the second and third defendants in relation to breaches by Prabh in the pre-1 April 2016 period[.]

14. The plaintiff asks the Court to find and formally declare that after 1 April 2016 Prabh seriously breached the Minimum Wage Act, the Holidays Act and the Employment Relations Act. The plaintiff asks for orders that Prabh pay pecuniary penalties for those serious breaches and receive a ban of up to 18 months from being an employer.

15. If the Court finds there were breaches by Prabh but they were not serious breaches, the plaintiff seeks orders that Prabh pay ordinary penalties for the breaches, up to a maximum of $20,000 for each breach.

16. In relation to the involvement of the second and third defendants in Prabh's serious breaches, the plaintiff asks the Court for a declaration

> of involvement in those breaches, pecuniary penalties to be imposed, and a ban from entering into an employment agreement as an employer, being an officer of an employer, or being involved in the hiring or employment of employees.

[36] There is one flaw in the Labour Inspector's position on remedies in that a declaration of breach is unavailable and, therefore, pecuniary penalties cannot be awarded, for breaches of the Act. A declaration of breach, which must precede the making of a pecuniary penalty order, can only be made for breach of a "minimum entitlement provision". Minimum entitlement provisions are defined in the Act as minimum entitlements and payment for those under the Holidays Act 2003 and minimum entitlements under the Minimum Wage Act 1983. The provisions of the Wages Protection Act 1983 are included in the definition but not relevant in these proceedings. Breaches of the Act are not included in the definition.

[37] There is no issue as to the fact that the breaches alleged occurred and that the breaches were serious, as that is admitted by the defendants. Based on the level of default and the accepted actions of the defendants, the Court would, in any event, have held that the breaches were serious. There is no need, therefore, to consider the imposition of penalties for ordinary breaches of the Minimum Wage Act and Holidays Act minimum entitlement provisions under Part 9 of the Act for the breaches post-1 April 2016. Such a penalty, for the reasons just discussed, could be imposed for post-1 April 2016 breaches of the Act. I have decided not to consider a further penalty under this head in view of the fact that Prabh, as a result of the breaches, would be penalised twice for the same continuous behaviour simply because it spans the 1 April 2016 date.

[38] Mr Dumbleton's summary of the starting points for quantification for remedies sought was as follows:

> <u>Prabh:</u>
>
> (i) Pre-l April 2016; ordinary penalty orders for non-serious breaches to a maximum of $180,000.
>
> (ii) From 1 April 2016; declarations of serious breach, pecuniary penalty orders to a maximum of $201,225.96 and a ban not exceeding 18 months.

Rajwinder Kaur:

(i) Pre-l April 2016; no orders sought.

(ii) From 1 April 2016; declarations of involvement in serious breach, pecuniary penalty orders to a maximum of $50,000 and an 18 month ban.

Baljinder Singh:

(i) Pre-l April 2016; no orders sought.

(ii) From 1 April 2016; declarations of involvement in serious breach, pecuniary penalty orders to a maximum of $50,000 and an 18 month ban.

[39] The amended statement of claim contains, at [62], a helpful outline of the matters the Labour Inspector considered rendered the breaches serious. Most of these factors are admitted by the defendants with five exceptions. These factors also provide a useful summary of those matters the Court could consider as aggravating features, both against Prabh as employer and in determining the separate culpability of the second and third defendants as persons involved in the breaches. Although they are pleaded in respect of the period after 1 April 2016, they assist the Court in considering the claims against Prabh for the period covered by the proceedings removed. The factors contained in the amended statement of claim and upon which Mr Dumbleton relied in his submissions, are as follows:

(i) The money unpaid to the workers involved was a significant sum of $67,075.32 in total under both statutes.

(ii) The breaches were a series of instances repeated in respect of three workers.

(iii) The breaches were intentional, because the first defendant through the second and third defendants had been informed in writing of the requirements to provide minimum wage and holiday entitlements to workers in 2013 by Labour Inspector Varsha [Mistry].

(iv) Prior to its breaches on and after 1 April 2016 the first defendant had since the end of 2014 in the case of the workers engaged in unlawful employment practices depriving the workers of their entitlements to remuneration.

(v) The first defendant failed to comply with record keeping requirements in relation to wage and time records, holiday and leave records and retention of employment agreements.

(vi) The workers were recent migrants from India, under 25 years old, with English as a second language, employed in a relatively sparsely populated country area distant from major towns or cities and where immersion and assimilation in relation to New Zealand local and national culture was more challenging for them.

(vii) The workers were tied to work only for the first defendant by 'employer specific' work visas and they were not lawfully able to be employed by anyone else.

(viii) The workers were beholden to the first defendant to retain the permission they needed to be employed, and they were fearful of any withdrawal by the first defendant of its support for their being given permission to work.

(ix) The workers' inequality of power was more highly pronounced because of their immigration status, national origins, relative youth, inexperience of local and national culture and their educational background.

(x) The first defendant increased its earnings and profits at the direct and immediate expense of the workers and their rights to receive minimum entitlements.

(xi) The first defendant's breaches enabled it to prevent business competition, or to at least achieve unfairly an advantage over competitors or potential competitors, at the workers' expense.

[(xii)] The breaches prevented or restricted employment opportunities for other employees in the Bay of Plenty area by limiting competition.

[(xiii)] The first defendant did not reasonably provide for other workers to relieve the workers in store work during long opening hours on up to seven days a week, particularly during periods when the second and third defendants travelled together away from New Zealand and were unable themselves to relieve the workers.

[40] Of these factors, the defendants denied that the earlier notification by a MBIE Client Service Advisor in 2015 led to a conclusion that the later breaches were therefore intentional. They also denied knowledge of the employees being beholden to the first defendant for work and being fearful of withdrawal of the first defendant's support. They denied knowledge of the assertions relating to business competition and its alleged deprivation of employment opportunities in the Bay of Plenty. They also denied unreasonably failing to provide other workers to relieve the three employees from having to work excessive hours. Apart from these pleadings, the defendants admitted most of the factors contained in [62] of the amended statement of claim.

[41] Mr Clews conceded in submissions that the facts relating to the breaches are largely agreed. He indicated that where the defendants differ from the employees on the facts is in relation to the extent of vulnerability of those employees. That refers partly to the matters dealt with earlier in this judgment relating to the immigration status of the three employees. Mr Clews submitted that any other employee who was not part of what he refers to as the "deception" was employed on terms that were consistent with New Zealand employment law. He further submitted, by way of mitigation, that each of the employees was provided with accommodation at no cost, and each was given free access to stock for their own use, again at no cost. In this way, all the employees' food and other needs were met.

[42] In his submissions, Mr Clews further pointed to the fact that throughout the initial investigation by the Labour Inspector into these matters and for the duration of the proceedings, the defendants have co-operated fully. He submitted that they have been frank and honest in their admissions, had made arrangements to remedy the situation to the extent that they were able to, and have made every concession available to them to ensure that this proceeding can be progressed in a timely way and without unnecessary expense.

[43] The defendants oppose banning orders. Mr Clews made several submissions to support this opposition as follows:

(a) In respect of those employees who were not party to the deception, no breaches have occurred or been suggested.

(b) The defendants have demonstrated their ability and willingness to comply with New Zealand employment law.

(c) The deception in which they agreed to participate only arose in respect of immigrant workers.

(d) The defendants will no longer be eligible, in any event, to employ migrant workers. This is because Immigration New Zealand operational instructions require employers to comply with minimum

employment standards in recruiting migrant workers.[13] Protection, therefore, of potential future employees ought to be viewed against that background.

(e) The overall circumstances of the case do not warrant the extreme measure of banning.

[44] So far as the financial position of Prabh and the second and third defendants is concerned, the financial statements for Prabh to the date of hearing were provided to the Court with Mr Dumbleton's consent. Mr Clews submitted that a banning order would have the likely effect of preventing the business from continuing to operate. The financial position and trading future for Prabh are doubtful. As Mr Clews submitted, it continues to trade only because of the security provided to it by the other two individual defendants. However, their financial resources have been exhausted in paying the arrears that have arisen and in keeping the business afloat generally. He submitted that to ensure that the employees have received their entitlements in this case, payments to other creditors have been deferred. Apparently the second and third defendants' credit cards have been used to the extent of available credit limits.

[45] As indicated, the second and third defendants did not give evidence in this matter. Mr Clews, however, provided the information on their financial position in his submissions.

[46] As to Step 4 of the *Preet* analysis, Mr Clews submitted as follows:

> 15 The plaintiff has provided appendices which undertake an assessment based on the 4 step Preet analysis. The Courts findings as to the impact of what the defendants say was a commonly agreed deception is a factor which could serve to distinguish the defendants' circumstances from those in Preet. It is the defendants' submission that the absence of true exploitation reduces the seriousness of the breaches with the result that the percentage in step 1 should be reduced. No issue is taken with the plaintiffs suggested adjustment for ameliorating factors in step 2. Once the financial accounts are available any need for

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13 Employment New Zealand "Employers who have breached minimum employment standards" (20 September 2018) <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/employers-who-have-breached-minimum-employment-standards/>.

adjustment as a result of the defendants' circumstances can be addressed.

16 Step 4 in the Preet analysis involves an application of a proportionality or totality test. In the plaintiffs analysis it appears to have been used to reflect compensatory payments pursuant to Section 136(2) which is not what the Full Court was intending. The correct application of Step 4 is to determine provisional penalties using steps 1 to 3 and to then assess whether the indicated penalties are justly proportionate to the seriousness of the breaches and the harm done by them [Preet at 188]. The penalties imposed should be in proportion to the amounts of money withheld but the penalties should not be at such a substantial level in relation to the breaches committed that the defendants have an incentive to avoid paying them or cannot pay them. As a matter of principle the Court should not award penalties in respect of which there is little prospect of compliance through genuine impecuniosity.

[47] I have already dealt with the immigration issue which is what Mr Clews is referring to in paragraph 15 of his submissions. I do not accept his submission that this distinguishes the defendants' circumstances from those in *Preet*. Similar deceptions operated for the employees in *Preet*.[14]

[48] I accept, however, Mr Clews' submission as to the ambit of the plaintiff's reliance upon s 136(2) of the Act, where he is referring to the way the fourth step has been treated in the appendix to Mr Dumbleton's submissions where the plaintiff's calculations are set out. Mr Dumbleton submitted that the Court could consider apportioning part of any penalty to the employees pursuant to that provision as part of its consideration of the *Preet* fourth step. That is not to reflect compensatory payments that relate to unpaid liability for wages. Those liabilities have been settled by the defendants in this case. Any apportionment of penalties to the employees would be for compensation for harm suffered more in the form of general damages. It was specifically considered in that way in *Preet*.[15] I have some difficulty, however, in relating this issue to the Step 4 analysis. I do not perceive Mr Dumbleton's submission on s 136(2) as meaning that the level of penalties should be increased, simply that a portion should be allocated to each employee. The fourth step in *Preet,* however, relates to overall proportionality in the assessment of the quantum of the penalty itself and not in how it should be apportioned between the Crown and the employees. The

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14 *Borsboom v Preet PVT Ltd*, above n 3, at [11].
15 At [196]-[197].

way it has been treated in the appendix to Mr Dumbleton's written submissions is, therefore, not the correct approach as Mr Clews has pointed out.

Application of principles – decision on remedies in this case

[49] The breaches of minimum entitlement provisions having been admitted, declarations of breach will follow. The starting point for assessment of all penalties in this case is the provisions contained in s 133A and s 142F of the Act and how those statutory provisions apply to the facts of the present case. Sections 133A and 142F of the Act specifically apply to both the person in breach and any person involved in the breach. In addition, it is necessary to consider the further factors which the full Court set out in *Preet*. All of the criteria, therefore, with appropriate modifications, need to be taken into account in the separate consideration of the culpability of each defendant. Following the assessment of penalties, it is necessary to consider whether banning orders should be made.

(a) The s 133A and s 142F factors

[50] The factors under s 133A and s 142F are the same. The facts in this case span the date of 1 April 2016 when the legislative amendments took effect and so I consider it appropriate, at the outset of the entire assessment to be made, to deal with these factors as they relate to the entire period of employment. The comments, which can be made having regard to the factors, are as follows:

(a) Clearly, the defendants, through their respective actions in this matter, failed to advance the objects contained in s 3 of the Act. They acted in a way that undermined any prospect of mutual obligations of trust and confidence existing in the employment relationship. There was an absence of good faith behaviour. An inequality of power prevailed which, rather than being addressed, was utilised by the defendants to their financial advantage. Certainly, it could not be said that the actions of the defendants complied with employment standards as they are defined in the Act. There were multiple breaches of a serious kind for which the Court's response must be to consider the imposition of

pecuniary penalties and possibly other remedies as a means of deterrence.

(b) This case involved serious and persistent breaches over a lengthy period of employment. The employees, as migrant workers, had their rights and entitlements abused. The defendants' conduct - the second and third defendants being complicit in the conduct of the employing entity, Prabh - was a cynical and concerted action to take advantage of young persons trying to enhance their education in New Zealand through practical experience in the workplace. The second and third defendants actioned the abuse of standards on behalf of the nominal employer. As Mr Dumbleton submitted, "they conspired to instigate, aid and abet".

(c) Clearly, when the employment continued over the period of time that it did, and having regard to the knowledge the defendants must have acquired from previous dealings with the MBIE Client Service Advisor, the breaches could not be considered other than intentional. This is corroborated by Mr Clews' submissions on their behalf that their non-migrant employees were "employed on terms that were consistent with New Zealand employment law". So they knew what the standards of a good employer were.

(d) The financial losses suffered by the employees were substantial. In addition, they suffered from depression, stress and anxiety. They were humiliated by their predicament. The defendants, on the other hand, gained financially from the breaches by depriving the employees of their entitlements. These factors go towards the further consideration already discussed of whether the penalties should be apportioned to provide compensation to the employees. Mr Dumbleton also submitted that Prabh potentially gained an edge over any would-be competitor by having a reduced overhead in its payroll costs. That might be so if the businesses had been situated in a more heavily populated environment.

In this case, it is unlikely that there were any competitors against whom Prabh would benefit in that context.

(e) The defendants have mitigated the position by paying to the employees the money they had been deprived from earning. Mr Dumbleton, however, makes the submission, with which I agree, that care needs to be taken as to the extent that such a mitigating feature reduces the pecuniary penalties. As he submitted, there is otherwise a risk of "licensing" employers to see if they can evade the consequences of breaches but if apprehended, pay back what has been taken to avoid heavy penalties.

(f) In this case, the circumstances in which the breach, and involvement in the breach, took place were particularly heinous. These were vulnerable employees, desirous of enhancing their employment opportunities and immigration status, who were confined in a remote area of New Zealand for the periods they were required by the defendants to work without proper relief. The fact that other employees were not subjected to such practices indicates that the defendants took advantage of the circumstances of these three employees who undertook the work for a substantial period without protest or complaint. In addition, they were required to perform domestic duties for the second and third defendants.

(g) The Court is required to also consider 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 the Act or any other enactment to have engaged in similar conduct. In this case, there is no indication of that having occurred in respect of the defendants.

(b) The added factors in Preet

[51] In *Preet*, the Court set out the four further factors referred to in [23] of this judgment that a Court needs to assess in determining whether a penalty should be

imposed, and if so, be reflected in that penalty. The first of these factors is that when assessing the issue of deterrence, the Court should do so both in relation to the person to be penalised and to the wider community of employers. This also fulfils the object of the legislature in introducing the amendments to the Act in view of the prevalence of such actions coming to the fore. Accordingly, and in view of the seriousness of the actions involved in this case, not unlike those which were discussed in *Preet*, the penalties and any banning orders should be designed to send a message to the wider community of employers.

[52] Insofar as the second factor, the degree of culpability of the person in breach is concerned, this also applies to the two individual defendants who were involved in the breach. Their individual culpability should be considered. The culpability in the present case in respect of all three defendants is high.

[53] The third factor, which was added by the Court, is the issue of a general desirability of consistency in decisions on penalties. This involves having regard to other cases where similar behaviour has been considered. In this case, some consistency can be applied by consideration of the remedies imposed in *Preet* and *Victoria 88 Ltd*, as similar facts are involved. The present case is different from *Preet* because that decision could not have regard to the amendments, but it nevertheless provides guidance for post-amendment breaches.

[54] The fourth factor added by the Court was that when assessing a penalty or penalties, the Court is to stand back and evaluate whether the anticipated outcome is one which is proportionate to the breach or breaches for which the penalty is imposed. This is an iteration of part of Step 4 of the *Preet* four-step process referred to in [24] above.

(c) The Preet four-step process

[55] In his submissions, Mr Dumbleton, in applying the four-step process established in *Preet*, indicated that the plaintiff has elected not to seek penalties for every breach that theoretically occurred. As to the quantum of penalties to be applied to Prabh for the pre-1 April 2016 breaches, he has categorised the breaches and then

indicated a starting point maximum for each category of breach against each of the three employees involved. So far as the claim for post-1 April 2016 pecuniary penalties is concerned, he has conflated the breaches under the three statutes (I have already indicated that the breaches of the Act cannot be included) into one but sought a starting point maximum of three times the financial gain made by Prabh. This is pursuant to s 142G(b)(ii) of the Act. This approach now adopted is different from the plaintiff's pleaded position. This form of categorisation and apportionment, however, was approved by the full Court in *Preet* as indicated in [25] of this judgment. Mr Dumbleton set out the approach which he suggests should apply as follows:

> 50. As to the baseline number of breaches, the plaintiff has elected not to seek penalties for every breach that theoretically occurred. The plaintiff has endeavoured to put the number of breaches in perspective, viewed against;
>
> a. The need for effective enforcement of minimum entitlement legislation
>
> b. the totality of the unlawful conduct
>
> c. the restitution made of wages, holiday pay and interest
>
> d. the bans that have been sought.
>
> 51. There is a separate table for Prabh, Rajwinder Kaur and [Baljinder] Singh, although the percentages applied at steps 2 to 4 are common.

[56] Mr Dumbleton's calculation table appended to his submissions sets out his calculations and is most helpful. I agree with the methodology and the grounds put forward by Mr Dumbleton for dealing with it in that way. Rather than considering the imposition of a separate penalty for each breach, for example multiple breaches over many years of the Minimum Wage Act, the imposition of a penalty could be considered on a global basis. As suggested, the number of breaches could be established on an employee by employee basis. This was the approach discussed in *Preet*.[16]

[57] In a consideration of Step 1 as established in *Preet*, so far as it relates to Prabh for the pre-1 April 2016 period, Mr Dumbleton has, in his calculations, identified three categories of breach by relating the actions of the defendants to each of the three statutes involved, being breach of the Minimum Wage Act 1983, the Holidays Act

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16 At [139]-[141].

2003, and the requirements under the Employment Relations Act 2000 to keep records including copies of employment agreements. He has then applied a multiplier of three to account for each of the three employees, to arrive at a starting point maximum penalty for each category of breach. For the pecuniary penalty claim against Prabh for post-1 April 2016 breaches, he has simply used a one-off calculation based on the financial gain to set a single maximum penalty. Insofar as the second and third defendants are concerned, he has again used the globalisation process to reduce the pecuniary penalties for each of them to only one penalty in each case.

[58] In respect of penalties for the pre-1 April 2016 period, Mr Dumbleton has correctly adopted the maximum provided in s 135 of the Act in the case of Prabh as being a penalty not exceeding $20,000 for each breach. Insofar as the assessment of pecuniary penalties under Part 9A of the Act is concerned, Mr Dumbleton has adopted the maximum penalty of $50,000 in the case of the two individual defendants. For the pecuniary penalties sought against Prabh, Mr Dumbleton has adopted s 142G(b)(ii) of the Act and assessed three times the financial gain under that section as being three times the total sum paid out to the three employees for post-1 April 2016 breaches of the Minimum Wage Act and Holidays Act. This paid out sum is specified in the amended statement of claim as the figure of $67,075.32. A total sum of $201,225.96 is reached by this method. This is the figure placed in Mr Dumbleton's appended table as being the maximum pecuniary penalty leviable against Prabh for the three employees.

[59] For the defendants, this is a generous way of treating the calculation of the pecuniary penalties. Under s 142G of the Act the maximum pecuniary penalty, in the case of a body corporate, is the greater of $100,000 for each breach, or three times the amount of the financial gain made by the body corporate from the breach. Using the figure of $100,000 and adopting the methodology of globalisation to reach two breaches for each of three employees (a multiplier of six), the maximum figure under s 142G of the Act would be $600,000, which is substantially greater than three times the deprivation of wages and holiday pay withheld from the employees post-1 April 2016. Of course, after reaching the maximum pecuniary penalty to be imposed at that level, the Court would then have to consider the factors set out in the remaining steps in the four-step process in *Preet*, which in this case would substantially reduce the end

penalty, particularly having regard to financial ability to pay and proportionality. In respect of the two individual defendants, the maximum penalty could be similarly assessed based on the same multiplier of six. Under s 142G of the Act, the maximum penalty for each declared breach in the case of an individual is $50,000. Using the same multiplier of six, the maximum penalty for each of the second and third defendants would be $300,000.

[60] While the methodology contained in the plaintiff's pleadings and submissions results in lower maximum starting points than could be the case, it is appropriate for the Court to now adopt them. Based on the way the claims have been pleaded and argued, admission of liability has been procured from the defendants in their pleadings and their agreement to the starting points adopted. That might not have been the case had substantially higher starting points been claimed. While the Court is not bound to accept the moderate approach adopted by the Labour Inspector, it might not be fair or just to the defendants to now apply higher starting points. It is emphasised that while a more moderate approach to calculation of maximum penalties is adopted in the present case, that will not invariably apply in future cases coming before the Court. Breaches need to be considered on a case by case basis. Where the facts disclose more serious offending, higher maximum penalties and provisional starting points may be applied.

[61] In considering Step 2, the aggravating features in the present case have already been set out in this judgment. As was the case in *Preet*, the consequences of the breaches on the employees in the present case were severe. As a result of the seriousness of the breaches, they give rise to the substantial penalties and remedies available under Part 9A of the Act. Nevertheless, while the employees in this case were treated in an appalling fashion, there were mitigating factors which need to be taken into account in assessing an appropriate provisional starting point. These are as follows:

(a) The employees were provided with accommodation and food.

(b) The defendants co-operated fully once the investigation into their behaviour commenced. As Mr Clews submitted they had been frank and honest in their admissions, and early on they made arrangements to remedy the situation financially.

(c) That once proceedings were commenced against them, in their own pleadings, they admitted their actions and accepted the fact that ordinary penalties and pecuniary penalties would be imposed, although they opposed the making of banning orders, which will be discussed more fully shortly. The Court was, therefore, relieved from the need of a lengthy hearing on liability.

(d) Of some significance is the fact that in order to assist the Court in dealing with the matter, they instructed legal counsel whose actions in narrowing down the issues meant the hearing was not prolonged.

(e) There are separate mitigating factors favouring the second and third defendants. First, was their decision to use their personal financial resources to contribute to the losses suffered by the employees. Secondly, they have made efforts to ensure Prabh remains in business and therefore, provide continuity of employment to existing employees.

[62] Insofar as a provisional starting point is concerned, Mr Dumbleton has submitted, based on the calculations in *Preet*, that in respect of all of the categories of breach, discounting for purposes of establishing a provisional starting point should be 20 per cent from the starting point maximum. In *Preet* of course, that discount was only adopted for what was regarded as the most serious of the breaches under the Wages Protection Act. Greater discount was given in respect of the breaches under the Holidays Act, and a quite substantial discount was given for the employers' failure to maintain compliant time and wage records and employment agreement documentation for the relevant employees. The Court emphasised that while the

deficiencies were significant, the breaches of the Act were the least serious of the classes of breach considered in that case. The same applies in the present case.

[63] Insofar as the aggravating features in the present case are concerned, there are some distinguishing features which render the culpability of the defendants in the present case less than the defendants in *Preet*.[17] In the present case, there were three employees who were abused, whereas in *Preet,* the two closely connected employers abused five employees. In *Preet*, the employers more overtly exercised their control and power over the employees. The employees were required to work greater hours. There was a failure to pay, or a withholding of, remuneration and failure to make reimbursement for travel and accommodation costs. One employer exercised power over two of the former employees by cutting pay as a disciplinary measure. The employers more overtly threatened to exercise their power to affect the employees' immigration status. There was also evidence that the employers in *Preet* deliberately concealed the underpayments of wages by seeking to persuade the former employees not to disclose their actual rates of pay, but rather to pretend to others they were being paid the contracted for above-minimum rates. In the present case, while the behaviour of the defendants was of a similar kind to that existing in *Preet* from the point of view of assessing a starting point, it could not be regarded as quite so serious.

[64] In considering Step 3 as to the means and ability of the defendants to pay penalties arrived at, the defendants of course did not give evidence. However, financial information concerning all three defendants was presented to the Court. The information provided to the Court was in the form of the draft 2018 financial statements for Prabh, which had been prepared by chartered accountants and contain sufficient information to make an assessment that Prabh is in a difficult financial position. While it would have been preferable for the second and third defendants to give evidence, some information is available through Mr Clews' submissions. While their financial position could be described as precarious as a result of the payments that they have now made to the employees in reimbursement, they have chosen to continue trading the business of Prabh. Prabh owns three commercial properties, and the book values for those properties are set out in the draft 2018 accounts. Mr Clews,

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[17] See at [12]-[14], [19]-[22], [26]-[31].

in his submissions, indicated that the estimated market value of the commercial properties is probably less than the book values disclosed. Overall, however, there is no evidence that insolvency of the defendants is imminent.

[65] The last step under *Preet* is that, having arrived at a provisional penalty, the Court needs to apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances. Clearly, maximum penalties, or penalties close to the maximum, need to be reserved for the most serious case. The Court in *Preet* judged that the behaviour of the employers in that case could not be categorised in that way, and the eventual penalties imposed were substantially less than the maximums provided. That is so for the present case as well.

[66] An additional factor in assessing the overall proportionality or totality test is that deterrence was a primary consideration when the new legislative provisions were enacted. The Act, providing as it does that the maximum amount for a pecuniary penalty for a body corporate for a breach is the greater of $100,000 or three times the amount of financial gain made from the breach,[18] implies that such financial gain should, where appropriate, strongly feature in the calculation. While it cannot be an invariable rule, it is consistent with the purpose of deterrence to impose a pecuniary penalty of at least the amount of the pecuniary gain made by the body corporate after all the aggravating and mitigating factors are considered. Obviously, the fact that the employer involved has reimbursed the employees for their loss will be a strong mitigating feature to consider. Where this has not been done, however, and where there is an ability to do so, a pecuniary penalty of at least the financial gain made by the employer from the abuse of the employees should be imposed. Failure to impose a deterrent penalty in this way would mean that rather than a punishment, the pecuniary penalty becomes a form of licensing for improper employment practices, putting aside the potential of banning orders or other possible remedies such as compensation orders.

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[18] Employment Relations Act 2000, s 142G(b).

Penalties – disposition

[67] I first consider the penalties against Prabh. Having regard to the factors discussed and decided in this case, I have already indicated that I accept Mr Dumbleton's approach (including, substantially, his table of calculations) as to the number of breaches and number of penalties prescribed. For the reasons indicated, I have decided that the discounting which he has made based on *Preet* is not necessarily appropriate in this case. Mr Dumbleton's assessment of the total maximum for Prabh of $381,225.96 is adopted for the purposes of this judgment. A summary of the method by which that figure is calculated is shown in the appendix to this judgment. It is based on pre-1 April 2016 maxima for three breaches under the three statutes for three employees. A multiplier of nine is therefore used against the prescribed maximum penalty of $20,000.[19] The total under this head is $180,000. For the post-1 April 2016 pecuniary penalties, three times the financial gain is $201,225.96.

[68] To reach a provisional starting point, having regard to the aggravating features, I have applied discounting of 70 per cent for the breaches of the Act, 40 per cent for the breaches of the Holidays Act and 30 per cent for the breaches of the Minimum Wage Act. I have accepted Mr Dumbleton's percentage of 80 per cent (20 per cent discount) for the pecuniary penalties. By applying these percentages, the maximum of $381,225.96 is reduced to $256,980.76. That figure is reduced to $128,490.38 by discounting 50 per cent for mitigating and ameliorating factors. Having regard to the financial circumstances of Prabh, a further 20 per cent discount is applied to reach a final total of $102,792.30. I have rounded this down to $100,000.

[69] Insofar as the second and third defendants are concerned, I regard their culpability as equal. They are to be penalised for behaviour which contributed to the breaches by Prabh and of the kind specified in s 142W of the Act. As stated in *Sampan Restaurant Ltd,*[20] their respective culpability needs to be considered separately from Prabh. Nevertheless, because of the significant influence over the management and administration of the company, the aggravating and mitigating factors relating to the behaviour towards the employees was largely common to all three and has been treated

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19 Employment Relations Act 2000, s 135(2).

20 *Labour Inspector v Sampan Restaurant Ltd*, above n 10, at [46]-[47].

in that way in the judgment. It was also pleaded and argued in that way by the Labour Inspector. In future cases coming before the Court, there may be clearer distinctions between the actions of the employee and the person or persons involved in the breach, in which case a different approach will be necessary.

[70] In this case I accept Mr Dumbleton's submission that a single penalty should be imposed on each of the second and third defendants for their involvement in the breaches by Prabh. This is, as he states, following globalisation. The maximum penalty for one breach is $50,000. I consider that a discount of 20 per cent, to arrive at a provisional starting point, having regard to aggravating factors, is appropriate. This results in a reduction from the maximum to $40,000. To take account of the ameliorating factors, the provisional starting point can be reduced by 50 per cent to reach a sub-total of $20,000. To take account of the financial circumstances, a further 20 per cent reduction can be made, reaching a sub-total of $16,000. Having regard to proportionality, I consider a single penalty of $16,000 against each of the second and third defendants is appropriate to take account of their respective culpability in this matter as persons involved. When added to the total penalty to be imposed on Prabh, the three penalties present in their entirety an appropriate deterrence to Prabh, its officers and any other employer who may be tempted to treat employees in the way that the employees in this case have been treated.

[71] As indicated, this is not the most serious case of its kind, even though the behaviour was reprehensible. I have already commented upon the moderate way in which the matter was pleaded and argued on behalf of the Labour Inspector. Even so, there is appropriate consistency between the penalties now imposed in this case and those imposed in the decision of *Preet*, but having regard to the fact that this case required the imposition of pecuniary penalty orders in addition to the penalties imposed in the proceedings removed to the Court. Employers need to be warned that failure to heed the message of deterrence now given will lead to greater penalties being imposed in future cases.

Banning orders

[72] As stated by Judge Corkill in the *Victoria 88* case:[21]

> [39] A banning order is a significant limitation on any potential employer; and it obviously affects the individual's reputation to his or her detriment. It should only be made where there is a serious breach or breaches of minimum standards. Such orders are likely to be rare ...

[73] A banning order is a particularly draconian measure. It was introduced into the Act as part of a suite of remedies to advance the objects of providing additional enforcement measures to promote the more effective enforcement of employment standards.[22] This in turn provides protection to employees from abuses by unscrupulous employers not willing to comply with civilised and humane standards of employment.

[74] A further purpose is to encourage employers to comply with minimum standards of employment of vulnerable workers by acting as a deterrence to such employers and others where there is serious breach of those standards. In *Victoria 88,* Judge Corkill referred to ministerial papers prepared as part of the introduction of the provision now contained in Part 9A of the Act.[23] He also referred to *First City Corporation Ltd v Downsview Nominees Ltd (No 2)* and *Davidson v Registrar of Companies*.[24] In both cases, the High Court considered the purpose of similar provisions in the Companies Act 1993 providing for the banning of directors from participating in the conduct of business. The ministerial papers and the High Court decisions are of assistance in considering when banning orders should be made in this Court.

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21 *Victoria 88*, above n 9.

22 Employment Relations Act 2000, s 142A(1)(a)(iv).

23 Office of the Minister of Workplace Relations and Safety "Strengthening enforcement of employment standards" (undated) at 30; see also MBIE "Employment Standards Bill: Departmental Report to the Transport and Industrial Relations Committee" (3 December 2015) at 45; referring to Companies Act 1993, ss 383 and 385 and Financial Markets Conduct Act 2013, ss 489-517. Office of the Minister of Workplace Relations and Safety "Strengthening enforcement of employment standards" (undated) at 41.

24 *First City Corporation Ltd v Downsview Nominees Ltd (No 2)* [1989] 3 NZLR 710, (1989) 4 NZCLC 65,192 (HC) at 130; *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC) at [91].

[75] There will be cases where the actions of the employer against its employees are so heinous and persistent that a banning order should be made on the first occasion that the breaches of standards are prosecuted. An example of this might be where a large number of vulnerable employees housed and employed in slave-like conditions are involved. Generally, however, a banning order is more likely to be imposed in prosecution of an employer for subsequent breaches of standards where it is clear the imposition of a penalty alone on the first occasion has not acted as a sufficient deterrence. Nevertheless, each case must be considered on a case by case basis and with regard to the principles and purposes enunciated at the time of the introduction of the provisions in the Act inserted with effect from 1 April 2016.

[76] The present case involves circumstances where the employer and its officers, the second and third defendants, have not previously come before the Court in this way. The penalties and pecuniary penalties imposed in this judgment are likely to provide a sufficient deterrence without the additional need of banning orders. The overall remedies imposed should not be so punitive as to mean that the employer would become insolvent and cease to exist or be such a discouragement to the second and third defendants that the same result would be effected. It is clear from the information which has been provided to the Court that, in already remedying the default to the employees concerned, the financial position of Prabh and its officers has been stretched to the limit but that they are nevertheless prepared presently to remain in business.

[77] I consider the added factor that Prabh still employs a workforce. That would be expected having regard to the nature of the stores it operates. Effectively putting Prabh out of business, as banning orders would be likely to do, would mean that the existing employees will lose their positions of employment. In addition to that consequence for them, this may have sequential effects on any dependents who may rely upon them for financial support. In this case, that does not seem to be a particularly sensible consequence to impose. That is not to say, however, that the downside effects on existing employees will invariably be a reason for not imposing a banning order. In a more serious case than the present, and with different circumstances, it might well be that the employer being unable to continue in business is a desirable outcome.

[78] Adding to the draconian effect that a banning order would have in the present case are the administrative consequences which may flow. A banning order on Prabh would mean that somehow the second and third defendants would, on their own, need to continue the business, if that was their intention, without employing a workforce. Banning orders on the second and third defendants as opposed to Prabh may mean the need to restructure the shareholding and directorships of Prabh. In the present case, a banning order for anything longer than a few months would not be tenable. Having regard to the overall consequences and the limited time they would have effect, this is not a justifiable or appropriate case for banning orders to be imposed.

Apportionment pursuant to s 136(2) of the Act

[79] Section 136 of the Act reads as follows:

> **136 Application of penalties recovered**
>
> (1) Subject to any order made under subsection (2), every penalty recovered in any penalty action, whether before the Authority or the court, must be paid into the Authority or the court, as the case requires, and not to the plaintiff, and must then be paid by the Authority or the court into the Crown Bank Account.
>
> (2) The Authority or the court may order that the whole or any part of any penalty recovered must be paid to any person.

[80] Section 136 refers to "every penalty recovered in any penalty action," which I consider also relates to an action for a pecuniary penalty. In the present case, penalties have been awarded against Prabh under both Parts 9 and 9A of the Act. In respect of the second and third defendants, penalties have been awarded against them only under Part 9A as pecuniary penalties.

[81] Evidence in this case has been given by the three employees concerned as to the humiliation and other personal detriment suffered by them beyond the loss of monetary entitlements to wages and holiday pay withheld. They have now received compensation in full for the loss of those monetary entitlements, but it is also appropriate that they receive further compensation for the mental or emotional consequences suffered. Accordingly, I order that from the penalties ordered, each

employee is to receive $10,000. The balance of the penalties is then payable to the Crown.

Conclusion

[82] The following declarations of breach are made:

(a) That Prabh has breached the minimum entitlement provisions contained in the Minimum Wage Act 1983 by failing to pay minimum wages to the three employees concerned in each week after 1 April 2016 until termination of employment. It has further breached the minimum entitlements and payment for such entitlements under the Holidays Act 2003 for the three employees concerned for holidays occurring on or after 1 April 2016 and for holiday pay owing at termination of employment for the entire period of employment.

(b) That the second and third defendants, Rajwinder Kaur and Baljinder Singh, are persons involved in such breaches of minimum standards by Prabh by acting in one or more of the ways specified in s 142W(1)(a), (b) and (c) of the Act.

[83] No banning orders are made in the present case.

[84] The following penalties are ordered:

(a) against Prabh in the sum of $100,000 (a combination of both ordinary and pecuniary penalties);

(b) against Rajwinder Kaur in the sum of $16,000 (pecuniary penalty);

(c) against Baljinder Singh in the sum of $16,000 (pecuniary penalty).

[85] Each of the three employees concerned, whose names are referred to in the statement of claim but do not appear in this judgment, are to receive $10,000 from the penalties recovered. The balance is to be received by the Crown. In any certificate

of judgment issued for the purposes of enforcement the full names and contact details of the employees will need to be inserted.

Costs

[86] At the directions conference on 19 December 2017 when timetabling directions were made as to the hearing of this matter, agreement was reached that the proceedings were assigned Category 2B for costs purposes under the Practice Directions Guideline Scale. The plaintiff is therefore entitled to costs against the defendants based on Category 2B. If any dispute arises as to the calculation of these costs, the parties may apply to the Court for resolution of such dispute.

M E Perkins
Judge

Judgment signed at 3.15 pm on 24 September 2018

APPENDIX 1

Prabh Limited		
Step 1: Nature and number of breaches – potential starting point maximum penalties (following globalisation)		
Pre-1 April 2016		
Failure to keep a wages and time record and retain copies of employment agreements	3 x 20,000	$60,000
Failure to pay annual and public holiday pay and keep a holiday and leave record	3 x 20,000	$60,000
Failure to pay minimum wage	3 x 20,000	$60,000
Post-1 April 2016		
Pecuniary Penalties	3 x financial gain	$201,225.96
	Subtotal	$381,225.96
Step 2(a): Aggravating factors as a proportion of maxima in Step 1 to establish a provisional starting point		
Failure to keep a wages and time record and retain copies of employment agreements	**30%**	$18,000
Failure to pay annual and public holiday pay and keep a holiday and leave record	**60%**	$36,000
Failure to pay minimum wage	**70%**	$42,000
Pecuniary Penalties	**80%**	$160,980.76
	Subtotal	$256,980.76
Step 2(b): Ameliorating factors (reducing aggravating factors subtotal)		
Less 50% of the above total		
	Subtotal	$128,490.38

Step 3: Employer's Financial Circumstances		
Less 20% of above subtotals		
	Subtotal	$102,792.30
Step 4: Proportionality		
Rounding only		
	TOTAL	$100,000

Name of Defendant: Rajwinder Kaur **Number of Employee(s):** 3		
Step 1: Nature and number of breaches – potential starting point maximum penalties (following globalisation)		
Person Involved (Rajwinder Kaur)	1 x 50,000	$50,000
	Subtotal	$50,000
Step 2(a): Aggravating factors as a proportion of maxima in Step 1 to establish a provisional starting point		
Person Involved (Rajwinder Kaur)	80%	$40,000
	Subtotal	$40,000
Step 2(b): Ameliorating factors (reducing aggravating factors subtotal)		
Less 50% of the above subtotal		
	Subtotal	$20,000
Step 3: Financial Circumstances		
Less 20% of above subtotal		
	Subtotal	$16,000
Step 4: Proportionality		
No further adjustment		
	TOTAL	$16,000

Name of Defendant: Baljinder Singh **Number of Employee(s):** 3		
Step 1: Nature and number of breaches – potential starting point maximum penalties (following globalisation)		
Person Involved (Baljinder Singh)	1 x 50,000	$50,000
	Subtotal	$50,000
Step 2(a): Aggravating factors as a proportion of maxima in Step 1 to establish a provisional starting point		
Person Involved (Baljinder Singh)	80%	$40,000
	Subtotal	$40,000
Step2(b): Ameliorating factors (reducing aggravating factors subtotal)		
Less 50% of the above subtotal		
	Subtotal	$20,000
Step 3: Financial Circumstances		
Less 20% of above subtotal		
	Subtotal	$16,000
Step 4: Proportionality		
No further adjustment		
	TOTAL	$16,000