IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 69
EMPC 37/2018

IN THE MATTER OF	a referral of questions of law from the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	SAMPAN RESTAURANT LIMITED First Defendant
AND	YU OUYANG Second Defendant

Hearing: On the papers filed on 23 February, 16 March and 9 April 2018

Appearances: R Garden and J Ongley, counsel for plaintiff
R Davidson, counsel for first and second defendants

Judgment: 21 June 2018

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This matter involves a referral to the Employment Court by the Employment Relations Authority (the Authority) of two questions of law. The reference is made pursuant to s 177 of the Employment Relations Act 2000 (the Act). In this judgment, the parties are referred to as plaintiff and defendants. In the Authority proceedings, they are applicant and respondents.

[2] For the purposes of the reference, a summary of the appropriate material facts is contained in the Authority's referral and is set out as follows:

> [2] The Labour Inspector (Ms Wendy Higgins) seeks the imposition of a penalty against the first respondent (the employer of around 13 employees and former employees) under s 75 of the Holidays Act 2003 for having breached

> s 81 of the Holidays Act. Ms Higgins also seeks the imposition of a penalty against the second respondent under s 75 of the Holidays Act in respect of the same breach of s 81 of the Holidays Act, on the basis that the second respondent is "a person involved in a failure to comply" as defined by s 75(3).
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> [3] The respondents admit that s 81 of the Holidays Act has been breached, and further admit that the second respondent, one of the two directors of the first respondent, is a 'person involved in a breach' in accordance with s 142W of the Act. He is, in effect, the controlling mind of the company. Both respondents accept that they each may be liable for the imposition of a penalty.
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> [4] Some evidence has been heard by the Authority from the parties about the extent of Mr Ouyang's cooperation and communication with Ms Higgins during her investigation, and about whether he and the first respondent were given a fair opportunity to rectify the breaches. Some limited evidence has also been given about the respective financial positions of the two respondents.

The questions of law referred to the Court

[3] Two questions are posed as follows:

(a) When the Labour Inspector seeks the imposition of a penalty against an employer for a breach of employment standards (as defined in s 5 of the Act) and also seeks the imposition of a penalty against a person involved in the same breach, should the Authority assess the respective liabilities of the employer and the person involved in the breach:

(i) Separately, by reference to their own separate liability and without reference to the liability of the other; or

(ii) By reference to the breach, then apportioning the resultant penalty between the employer and the person involved in the breach; or

(iii) In some other way?

(b) Whichever approach is to be taken, what factors should the Authority apply when carrying out the exercise?

[4] The matter is not uncomplicated by virtue of the fact that the decisions of the Authority in imposing penalties involve the exercise of discretions pursuant to ss 75,

76 and 76A of the Holidays Act 2003 (the Holidays Act). The second defendant is alleged to be (and has now admitted being) a person involved in the failure of the first defendant company to comply with the provisions of the Holidays Act. This allegation in turn introduces s 142W of the Act for the purposes only of definition. This section is contained in Part 9A of the Act introduced as from 1 April 2016. Part 9A, to be operative, requires a serious breach (as that is defined in the Act) of employment standards, but that is not being alleged in this case. It is assumed, however, for the purposes of the questions posed, that the breach occurred after 1 April 2016 when amendments to the Act and the Holidays Act came into effect. To make it clear, for the purposes of s 142W of the Act, a breach of employment standards includes a breach of s 81 of the Holidays Act.

The Court's jurisdiction to deal with the matter

[5] Section 177 of the Act provides as follows:

> **177 Referral of question of law**
> (1) The Authority may, where a question of law arises during an investigation, —
> (a) refer that question of law to the court for its opinion; and
> (b) delay the investigation until it receives the court's opinion on that question.
> (2) Every reference under subsection (1) must be made in the prescribed manner.
> (3) The court must provide the Authority with its opinion on the question of law and the Authority must then continue its investigation in accordance with that opinion.
> (4) Subsection (1) does not apply—
> (a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and
> (b) without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.

[6] As will be seen from sub-section (3), the Court is compelled to provide the Authority with its opinion on the question of law once it has established that the question can be so categorised. Once the opinion is provided, the Authority must then continue its investigation in accordance with that opinion.

[7] In considering any question, the Court needs to be careful not to interfere in the procedure that the Authority has followed, is following or is intending to follow in the matter. The Court is not compelled to answer a question about whether the

Authority may follow or adopt a particular procedure. This is a similar restriction on the Court's power to interfere with the Authority's procedural steps to that contained in s 178, which deals with removal of matters to the Court.

[8] Following receipt of the referral from the Authority, counsel were given the opportunity to make submissions. The submissions were to deal with the preliminary issue as to whether the questions posed by the Authority were indeed questions of law but also on the assumption that they were questions of law, their respective submissions on the points raised by the Authority. Counsel have now filed their submissions, which have been of considerable assistance to the Court in dealing with this matter.

Are the questions posed questions of law?

[9] The submissions of counsel have helpfully dealt with this matter. In a joint memorandum of counsel dated 22 January 2018 filed in preparation for a directions conference, counsel for all parties indicated that they considered that the questions posed by the Authority are questions of law. However, in the submissions subsequently filed on behalf of the first and second defendants, Mr Davidson, counsel for the defendants, has now submitted that the questions posed by the Authority have been misstated as questions of law. He argues that the relative legislative provisions (those which provide for the imposition of a penalty) only provide for the Authority to exercise its discretion in respect of determining the quantum of penalties to be imposed on both defendants once the breaches have been established. The breaches have, of course, been admitted by the defendants in this case.

[10] Ms Garden and Ms Ongley, counsel for the plaintiff, submit that the questions posed by the Authority are questions of law. Their submissions on the point, which are relatively brief, are as follows:[1]

> 9. The Authority's ability to impose penalties is contained within statute. The questions posed by the Authority aim to establish the principles the Authority (or Court) should apply when exercising its discretion to impose penalties. These are questions of law. For example, in *Grace Team Accounting Ltd v Brake*, leave to appeal to the Court of Appeal was

[1] (Footnotes omitted).

granted on (relevantly) the following question of law "Did the Employment Court apply the correct principles when exercising its discretion to award remedies to the respondent?".

10. In other words, this is a question as to what legal test should be applied when assessing penalties. As explained in *Canada (Director of Investigations and Research) v Southam Inc,* "[b]riefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and facts are questions about whether the facts satisfy the legal tests".

11. In addition, as recognised by this Court in *Preet,* "[t]here is little, including recent and authoritative guidance about how the [Authority] should approach penalties, particularly for multiple breaches of those minimum standards statutes, including in respect of multiple employees". The plaintiff acknowledges there is now a body of case law developing which uses *Preet* to assess penalties in respect of an employer. However, there remain fewer cases that consider how to assess penalties in respect of a person involved.

12. In *Labour Inspector v Golden Fleece and Bell,* the Authority assessed penalties by applying *Preet* to both the employer and the person involved (there, the director of the company). There remains a question, however, of whether this approach is correct and there are now a number of cases before the Authority which are currently on hold pending the outcome of the Court's decision in this case, before assessing penalties where there is a person involved.

13. In answering the Authority's question, this Court will be able to prevent further cases being decided (possibly) incorrectly and avoid unnecessary appeals.[2]

[11] Mr Davidson, in his submissions, stated that, the quantum of penalties being a matter of discretion, the questions are not questions of law. In his view, the questions here are questions of weighing factors in the context of balancing competing interests. He cites in support of this a journal article from Ferrere Rodriguez, which states:[3]

> The distinction between an exercise of discretion and a determination of fact and law is significant, because the Court must intervene and come to its own conclusion on issues of law and fact, but it must not intervene on issues of discretion, save in egregious circumstances. However, it is a distinction beset by confusion, acknowledged by the Supreme Court as "not altogether easy to describe in the abstract."[4]

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2 *Preet* referred to in submission 11 is *Borsboom v Preet PVT Ltd* and *Warrington Discount Tobacco Ltd* [2016] NZEmpC 143.

3 Rodriguez Ferrere "The Unnecessary Confusion in New Zealand's Appellate Jurisdictions" (2012) 12 Otago LR 4.

4 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

[12] Mr Davidson further cites from *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*, which stated that:[5]

> [43] ... The process of evaluating penalty options and deciding what penalty to impose involved an exercise of discretion by the Tribunal in the same way that a decision about bail or name suppression also involves the exercise of discretion by judicial officers. All involve the careful evaluation of options and the choosing of the most suitable option that is available. In this respect, the Tribunal's penalty decision can be distinguished from its role when interpreting the law, deciding facts and/or applying the law to established facts when determining if a practitioner has committed a disciplinary offence. That aspect of the Tribunal's role does not involve the exercise of discretion.

[13] While Mr Davidson has referred to *Roberts* that is one of a number of conflicting decisions of the High Court dealing with approaches to appeals when the appeal is against the exercise of a discretion. The stage of the proceedings in those cases is removed from that existing in the present case, where questions of law have been posed to assist with the hearing very much at first instance. Nevertheless, while the passage quoted by Mr Davidson from *Roberts*, although slightly out of context, does assist, it does not necessarily resolve the issue of whether the principles to be adopted in calculating and imposing a penalty are issues of law. More assistance in this respect is gained from a High Court decision delivered subsequently to *Roberts* by Downs J in *Emmerson v Professional Conduct Committee*.[6] The relevant passage reads as follows:

> [95] Categorisation of penalty appeals as appeals against discretion does not relieve the Tribunal of its duty to impose a penalty in accordance with principle. So, if a tribunal were to misdirect itself in terms of applicable principle or fail to take a relevant consideration into account, its decision would be amenable to successful challenge. Similarly, if a Tribunal were to reach a decision that is plainly wrong, that too would result in reversal. Equally, an appellate Court may interfere with the exercise of a discretion that has led to a substantial disparity between penalties for equivalent conduct.

[14] Therefore, while the Authority in this case will be exercising a discretion when deciding on penalties, this does not mean that no question of law can arise from that exercise. Potentially, the questions referred by the Authority are questions of law, questions of fact, or mixed questions of fact and law. To determine the proper

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5 *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

6 *Emmerson v Professional Conduct Committee* [2017] NZHC 2847 (footnotes omitted).

categorisation, the full quote from *Canada (Director of Investigation and Research) v Southam Inc*[7], referred to in the submission of Ms Garden and Ms Ongley, is helpful. The full paragraph is as follows:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognise, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa.*

[15] What is being posed in the present case relates to what are the settled legal principles to be considered in exercising the discretion to quantify and impose penalties for breaches of minimum standards of employment; in this case breaches of the Holidays Act. Those principles will then be applied to the overall factual matrix existing, and to that extent, the posed questions may involve mixed questions of law and fact. Nevertheless, at this stage of the proceedings, no facts are at issue, only the principles. Applying the authorities referred to, and the statements in *Emmerson*, the questions posed by the Authority are questions of law.

Matters to be considered in answering the questions posed

[16] In answering these questions, it is necessary to consider the statutory provisions under which each of the employer and the person involved become liable for the imposition of a penalty. Also of assistance in this exercise are the previous decisions of the courts, similar legislative provisions imposing liability for penalties, and the parliamentary and Law Commission materials.

(a) The statutory provisions

[17] In considering the respective positions of the employer and the person involved under the legislation, it is a mistake to conclude that their actions for which penalties

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[7] *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 (SCC) at [35].

may be levied are the same. In this case, the penalties are sought pursuant to s 75 of the Holidays Act for non-compliance with s 81 of that Act, which relates to an employer's obligation to keep a holiday and leave record.

[18] Section 75 of the Holidays Act, so far as it is relevant to this matter, reads as follows:

> **75 Penalty for non-compliance**
>
> (1) An employer who fails to comply with any of the provisions listed in subsection (2), and every person who is involved in the failure to comply, is liable, —
>
> (a) if the employer is an individual, to a penalty not exceeding $10,000:
>
> (b) if the employer is a company or other body corporate, to a penalty not exceeding $20,000.
>
> (2) The provisions are—
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> …
>
> (e) section 81 (which relates to an employer's obligation to keep a holiday and leave record):
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> …
>
> (3) For the purposes of subsection (1), a person is **involved in a failure to comply** if the person would be treated as a person involved in a breach within the meaning of section 142W of the Employment Relations Act 2000.

[19] Section 142W of the Act reads as follows:

> **142W Involvement in breaches**
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> (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
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> (a) has aided, abetted, counselled, or procured the breach; or
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> (b) has induced, whether by threats or promises or otherwise, the breach; or
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> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
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> (d) has conspired with others to effect the breach.
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> (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
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> (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
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> (a) a person occupying the position of a director of a company if the entity is a company:
>
> (b) a partner if the entity is a partnership:
>
> (c) a general partner if the entity is a limited partnership:

(d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:

(e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

(4) This section does not apply to proceedings for offences.

[20] Section 142W of the Act is inserted in s 75 of the Holidays Act merely for the purposes of definition. In this case, no claim is made for a penalty under the Employment Relations Act against either the employer or the person who was involved in the failure by the employer to comply.

[21] The legislation shows that the action for which the employer is liable is the breach of the employment standard itself. The actions for which the person involved becomes liable to a penalty, as set out in s 142W(1)(a) to (d), are collateral to the breach. This would imply that the imposition of a penalty would need to be considered separately against each to reflect differentiation in their actions giving rise to liability.

[22] Because of the descriptions of persons involved contained in s 142W of the Act, the person who is involved in the failure to comply will invariably be an individual. An anomalous position therefore arises under s 75 of the Holidays Act because either of two maximum penalty regimes will apply to that individual. If the employer is an individual, then the person who is involved will be liable to a penalty of $10,000. However, if the employer is a company or other body corporate, then the individual who is involved will then be liable to a maximum penalty of $20,000. Whether that was the intention of the legislation when amended, that is the effect of the wording contained in s 75(1) of the Holidays Act. The Employment Relations Act does not contain similar wording in those sections of that Act dealing with imposition of penalties.

(b) Authorities and commentary which assist

[23] As stated by Downs J in *Emmerson v Professional Conduct Committee* referred to earlier, the sentencing analogy is pertinent.[8] However, while Downs J was using

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8 *Emmerson v Professional Conduct Committee*, above n 6, at [93].

the sentencing analogy for the purposes of his discussion in respect of the approach to an appeal against the imposition of a penalty, the sentencing analogy is also of assistance in the present case. The approach to the imposition of fines when corporations are involved in criminal or quasi-criminal offending gives some assistance to the approach which should be adopted in response to the questions posed by the Authority in the present case.

[24] Both *Adams on Criminal Law*[9] and *Hall's Sentencing*[10] contain statements of a similar nature as to the types of considerations involved when a discretion to impose a fine upon a corporation is being considered. Adams states as follows:[11]

> **Corporations**
> The principle in subs (1) that the amount of the fine should be proportionate to the offending and to the means of the offender applies equally to corporate offenders: *East Bay Heli Services Ltd v R* 13/11/03, Baragwanath J, HC Rotorua AP53/03; *R v F Howe and Son (Engineers) Ltd* [1999] 2 Cr App R (S) 37, at p 44. In imposing a fine on a company that is a husband and wife business, where the directors also face charges, it is sensible to look at the economic realities by lifting the corporate veil as far as necessary to ensure justice is done: *East Bay Heli Services Ltd* (above). In some circumstances it may be appropriate to allow a longer time for a company to pay a substantial fine than would be appropriate for an individual: *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr App R (S) 436, especially where the size of the fine imposed might impose risks for the viability of the defendant: *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492; (1993) 2 NZRMA 661, at 509; 678.

[25] *Hall's Sentencing* contains a lengthier analysis but nevertheless of considerable relevance to the question which has been posed. Hall states as follows:[12]

> **SA39.7 Corporation** Where a corporation is convicted of an offence punishable only by imprisonment the Court may impose a fine. There is no longer a specific provision to this effect, as was to be found in a predecessor to s 39, s 44(3) of the 1954 Act, but subs (1) is no less applicable to a corporate offender than an individual offender.
>
> Substantial fines are imposed on corporations. The amount of the fine often may be determined by the need to enforce regulatory standards by general deterrence: *R v Ford Motor Co of Canada Ltd* (1979) 49 CCC (2d) 1 (Ont, CA). A fine must not appear to be a mere licence fee for illegal activity: *R v Cotton Felts Ltd* (1982) 2 CCC (3d) 287 (Ont, CA); *Hanham & Philp*

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9 *Adams on Criminal Law* (loose-leaf ed, Brookers).
10 Geoffrey G Hall and Timothy Vaughan-Sanders *Hall's Sentencing* (online loose-leaf ed, LexisNexis).
11 *Adams*, above n 9, at [SA40.07].
12 At [SA39.7].

> *Contractors Ltd* (HC, Christchurch, CRI 2008-409-000002, 18 December 2008, Randerson and Panckhurst JJ) [ACTS-HSA 002] at para [56], endorsing comments in *Department of Labour v Street Smart Ltd* (HC, Hamilton CRI 2008-419-26, 8 August 2008, Duffy J). …

[26] Hall then considers the judgment of Chisholm J in *Moir Farms (Maimai) Ltd v Department of Conservation*[13] in context with *East Bay Heli Services Ltd v R*[14] and an Australian decision, *R v Wattle Gully Gold Mine*.[15] Hall's analysis of these three cases reads as follows:

> It has been held in Australia that in fining corporations a sentencing Judge, as when sentencing an individual, should consider the detriment which might flow to innocent persons (eg, shareholders), who have not been the principal beneficiaries of the exercise. In *R v Wattle Gully Gold Mine* [1980] VR 622 the Supreme Court of Victoria reduced a fine imposed on a count of disseminating with fraudulent intent misleading information which was likely to have the effect of raising the market price of shares in the company, and commented that the common practice of imposing a heavy fine on a corporation for the commission of a criminal offence was often not justified. Weight was given to the effect of the fine on the shareholders, the absence of gain or benefit to the company from the offence, and the fact that a director had been imprisoned for the same offence. The Court (above at 622-623) quoted at length from Glanville Williams, *Criminal Law* (2nd ed) 862-865:
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> > If the directors of corporations were the sole shareholders, a fine levied on the corporation could be justified as an indirect way of fining the directors for their own offences. But then, this end could be achieved with greater precision by fining the directors, who by hypothesis would be men of substance because they would possess the shares. In most large concerns directors are not the sole shareholders, and a fine imposed on the corporation is in reality aimed against shareholders who are not directors or responsible for the crime, ie, is aimed against innocent persons. The theory that shareholders whose purses are thus lightened will be moved to dismiss the directors is unrealistic, because it is now a commonplace that shareholders in large public companies have practically no control over the management. … There are occasions when a corporation may legitimately be fined; but no valid argument exists for imposing on a large corporation the sort of swinging fine that would be thought appropriate to an errant millionaire, treating the corporation as though it were a human being. For the punishment does not fall upon those who are really responsible.
> >
> > ...
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> Where a company of which the offender and his wife were the sole shareholders was jointly charged with the offender, it was said to be appropriate to examine economic realities by lifting the corporate veil when determining the quantum of the fine to be imposed upon the offender: *East Bay Heli Services Ltd & Matthews v R* (HC, Rotorua AP 53/03, 13 November

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13 *Moir Farms (Maimai) Ltd v Department of Conservation* [2011] NZAR 694 (HC).
14 *East Bay Heli Services v R* HC Rotorua AP 53/03, 13 November 2003.
15 *R v Wattle Gully Gold Mine* [1980] VR 622 (SC).

2003, Baragwanath J) (unlawful hunting — company and M sentenced to fines totalling $11,000 for offences against the Wild Animal Control Act 1977 and the Civil Aviation Regulations — penalty appropriate in interests of deterrence).

Wattle Gully Gold Mine (above) and *East Bay Heli Services* (above) were considered in *Moir Farms (Maimai) Ltd v Department of Conservation* [2011] NZAR 694 (HC) where counsel for the appellant argued that in cases where the directors of a company are its sole shareholders, fining both the company and the director for the same conduct constituted double punishment, because both penalties fell on the same people. Moir Farms and Moir were convicted of four charges under the National Parks Act 1980 which related to a 2.5 hectare encroachment into a National Park. Moir, together with his wife, were the two directors of Moir Farms, which operated a dairy farm on adjoining land and their actions were described as bordering on reckless in that they had failed to check the boundaries. The activity was noted to be for a commercial purpose. Counsel submitted unsuccessfully that if a fine was found to be appropriate for Moir rather than sentences further up the sentencing hierarchy, then the fine for the company should not exceed that figure. The maximum fine for an individual was $2,500 and for a company $25,000 and counsel further submitted that this difference was explained, at least in part, by the fact that a company was not liable to imprisonment. His Honour approached the issue by regarding the maximum fine as only one factor that was to be considered. Given that the offending by the company and Moir arose from precisely the same acts, with the company effectively acting through Moir, the principles in s 8(a) and (e) of the Sentencing Act were noted to be particularly relevant. In terms of gravity it was difficult to see how there could be any difference between the defendants and, in terms of culpability, there was strength in counsel's argument that to the extent that the company was acting through Moir, his culpability should be higher. It was difficult to differentiate between the two offenders. This indicated that similar penalties were appropriate. The only counterbalancing factor was that the maximum fine for the company was ten times that for an individual. Over emphasis on this factor by the sentencer had effectively blocked out consideration of the other relevant matters and had produced a disparity, which was unjustifiable and gross. A principled approach to sentencing did not require the company's fines to be capped, as counsel had submitted, as this would effectively require the court to ignore that there were different maximum penalties for individuals and bodies corporate. The appropriate solution was to reduce the total fines to a level that fairly reflected all matters, including the offending, the relative culpability of the co-offenders, and the higher maximum fine for the company. The fines imposed upon the company were reduced from $23,500 to $10,000.

[27] The analysis of these cases, while lengthy, raises valuable points to be considered in the overall consideration of the questions posed by the Authority and how they should be answered in a way that will assist. As indicated in submissions from counsel for the plaintiff, there are a number of cases pending in the Authority awaiting the outcome of the Court's opinion. The approach adopted by Chisholm J

in *Moir Farms*, and his comments in [73] of his judgment set out in Hall's analysis, are particularly of assistance.[16]

(c) The approach to imposition of penalties in other legislation

[28] While the approaches taken by courts under other legislation imposing liability for fines or penalties is not conclusive, assistance can be gained for the present case by a consideration of the various approaches adopted.

[29] The Commerce Act 1986 had two distinct methods of attaching liability for pecuniary penalties to the director of a company in conjunction with the company itself.[17] The initial version on enactment used very similar language to s 142W of the Act, in creating liability for any person who aided, abetted, or committed other similar acts in the breach. In 2001, the Commerce Amendment Act 2001 was passed, substituting s 80(2) so that it now provides:

> The Court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.

[30] Parliament's Commerce Committee explained that this amendment was in place to increase deterrence by promoting punishment of individuals, putting them at personal risk of penalties.[18] This was stated to be because:[19]

> Even though companies tend to gain the most from breaching the Act, remuneration structures and wider career aspirations can create incentives for individuals to breach the Act in order to directly benefit themselves.

[31] Prior to the amendment, the courts appeared to favour a collective liability approach, mostly due to the concern of double punishment. In *Commerce Commission v Wrightson NMA Ltd*, it was stated that: [20]

> The infliction of separate penalties would be to penalise twice … I resolve the problem for this case by penalising the one course of conduct, and dividing

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16 *Moir Farms (Maimai) Ltd v Department of Conservation*, above n 13, at [73].
17 Both were contained in s 80.
18 Commerce Amendment Bill 2001 (296-2) (explanatory note).
19 At 26.
20 *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 (HC) at 285.

> the penalty for this course of conduct between the company and the individual concerned.

[32] Following the amendment, while court decisions have been wary of imposing double punishment, it is now clear that the imposition of separately considered penalties is required.[21] As an example, the High Court decision in *Commerce Commission v Ophthalmological Society of New Zealand Inc* approached this by punishing members of the society at a much lower level than the society as a whole.[22] This was clearly seen as the just result. There was no suggestion that an overall penalty for the breach was to be apportioned between the society and its members.

[33] Section 534 of the Financial Markets Conducts Act 2013 is very clear as to the approach to be adopted. Under that section, a director is treated as liable for a pecuniary penalty for certain breaches by a company.[23] It is specifically stated that whatever penalty is applied to that director does not limit the liability of the company (or other entity) responsible for the breach.[24] This strongly suggests that the penalty should be decided separately against each. The reasoning would appear to be that to divide up the penalty between the company and the director could have the effect of unjustifiably reducing the liability of the company thereby reducing deterrence.

[34] However, where a company and a shareholder or director of that company are being fined for the same offence, the courts may still consider the issue of double punishment. In *East Bay Heli Services*, referred to earlier, a case involving unlawful hunting under the Wild Animal Control Act 1977, the company was owned by a husband and a wife.[25] The fact that the company was penalised $10,000 therefore had a bearing on the penalty then applied to the husband, as the $10,000 fine also had an effect on him.[26]

[35] The High Court's decision in *Moir Farms*, also referred to earlier, involved a charge under the Litter Act 1979 where fines were imposed. Conversely to *East Bay*

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21 See for example *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC).
22 At [44].
23 Financial Markets Conducts Act 2013, s 534(3).
24 Section 534(5).
25 *East Bay Heli Services v R*, above n 14.
26 At [45].

Heli Services, *Moir Farms* made clear that fining a company and its sole shareholder did not constitute double punishment. In *Moir Farms*, however, the company's fine was found to be excessive, and was reduced from $23,500 to $10,000 to provide better consistency and parity with the director's fine.

[36] Under Resource Management Act 1991 prosecutions, it seems the courts will take care to avoid double punishment, such that, in some cases, a collective approach to deciding on the quantum of a fine is appropriate.[27] In *Hardegger v Southland Regional Council*, the High Court allowed the appeal against the sentence imposed by the District Court. The District Court judge had erred in deciding not to take into account the fact that one of the defendants was a trustee of the other, and thus would be impacted by both fines. The District Court fined each defendant $37,500, which the High Court altered to a total fine of $37,500 divided on a 70/30 basis between the two. An equally valid approach, it was said, would be to calculate the fines individually but then make some adjustment to account for the relationship and achieve fairness.[28]

[37] Human rights legislation is perhaps less helpful. Section 68 of the Human Rights Act 1993 imputes liability on to an employer or a principal when done by an employee or agent.[29] It seems, however, that this section has never been applied in respect of an award of penalties under that Act.[30] In the case of s 92M, at least, which deals with damages and compensation, the approach has been to hold the agent and the company responsible jointly and severally.[31] This is of limited use, however, as different considerations must be said to apply for an award of compensation or damages as against a fine or penalty.

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27 *Hardegger v Southland Regional Council* [2017] NZHC 469, [2017] 2 NZLR 852 at [61]-[82].

28 At [73]. See also *Otago Regional Council v Dobbie Farms Ltd* DC Dunedin CRI-2009-005-244, 16 September 2009 at [14].

29 Human Rights Act 1993, s 68.

30 For example, under s 107(4).

31 See for example *EN v KIC* [2010] NZHRRT 9; *Singh v Singh* [2015] NZHRRT 8; *DML v Montgomery* [2014] NZHRRT 6.

(d) Parliamentary materials

[38] The strengthening of culpability of directors and the other persons defined in s 142W in the Act as persons involved was explained in the Cabinet Paper that led to the Employment Relations Amendment Act 2016.[32] Specifically, it was stated there that:

> [42] It is well recognised that deterrence is enhanced if individuals who aid and abet law-breaking can also be held accountable. When that law-breaking relates to the actions of a corporate entity, increasing individual accountability can also promote corporate compliance. There are currently only limited provisions in the Employment Relations Act that permit actions to be taken against a director or other individuals: under section 234, labour inspectors can (with the Authority's approval) seek arrears under the Minimum Wage and Holidays Acts from certain individuals when a company either has insufficient assets or is in liquidation or receivership
>
> [43] I propose that accessorial liability provisions be introduced into the employment legislation to hold persons other than the employer to account if they are found to be knowingly involved in a breach of employment standards. These provisions are found in the Australian employment legislation – the Fair Work Act 2009 – and in a number of pieces of New Zealand legislation, most recently the Financial Markets Conduct Act 2013.

[39] Section 234 of the Act was repealed and replaced with sections in Part 9A enacted in 2016. Whereas s 234 simply imposed upon the directors or other individuals involved, the same liability as faced by the insolvent company for reimbursement, the new provisions allow for additional penalties and punishment to be imposed on those individuals.

[40] Clearly, then, a major part of the purpose of accessorial liability is to increase deterrence. This is similar to the amendment made to the Commerce Act 1986, which was also stated to be for the purpose of increasing deterrence. That amendment prompted a change in the Courts' approach to consider liability individually rather than collectively. The Cabinet Paper is particularly relevant in considering the questions posed in the present case.

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[32] Michael Woodhouse *Strengthening enforcement of employment standards* (Ministry for Workplace Relations and Safety, 2015).

(e) New Zealand Law Commission's view

[41] The two approaches arising from the questions posed were briefly considered by the New Zealand Commission in a paper about civil penalties in general.[33] In a submission to the Commission, the New Zealand Bar Association argued that civil penalties should work in the same manner as in criminal law, where each perpetrator receives a separate penalty.[34] They felt that the higher punishment resulting would provide greater deterrence value.

[42] The Commission considered the situation to be "more nuanced"; that in some cases, the criminal approach might be favourable, but not in others. It stated that:[35]

> …it seems to us that the situation could be different where the individual is associated with the corporation, for instance, by being an employee. There, concurrent liability arises in relation to the same course of conduct, namely the conduct of the individual. The individual's contravening conduct is carried out on behalf of the corporation. In such a situation, we consider that it may be appropriate for the penalty to be split between the corporation and the individual, at the court's discretion.

[43] The Law Commission therefore suggests an approach where it is necessary to decide whether there is in fact one actual course of conduct, or more than one. If there is only one, it would be more appropriate to determine one penalty and divide it between the parties, or in other words, a collective approach.

[44] Nevertheless, the Law Commission overall favours leaving this to the court's discretion. This is clear from the statement quoted where the Commission only goes as far as to say that it "may be appropriate", leaving it open to the court to decide whether it is appropriate or not.

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33 Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [14.10]-[14.13].

34 At [14.12].

35 At [14.13] (footnotes omitted).

Conclusions

(a) The first question posed

[45] It is necessary to consider the structure of the legislation itself and read it in context with the materials discussed above. Overall, I am of the view that simply apportioning what is regarded as an appropriate overall penalty for the breach is not the correct approach. It is a misconception to say that there is a potential for double punishment or double jeopardy for the same acts. The employer in each case is liable for a penalty for the breach of the employment standard(s). The person involved is liable for a penalty for different actions collateral to the breach itself. These separate actions need to be proved separately if they are not already admitted as they are in this case and as they were in *Preet*.[36]

[46] The factors contained in s 142W of the Act require proof of intentional, purposeful actions on the part of the person accused of being involved in a breach. That refers to the breach committed by the employer, whether a company, partnership, individual, trust or some other entity. The purpose of the legislation is to ensure that primarily for the purpose of deterrence, not only is the employer punished by penalty for the breach, but if there were purposeful acts by a person categorised as involved in the breach, that person is to be punished by penalty as well. Each need to be separately considered for their involvement and individual culpability. There may be mitigating factors which mean that one should have a lesser penalty imposed than the other. This may not mean that the employer will always be liable for the greater penalty. Their respective culpability may, if having been so separately considered, be the same. Alternatively, one may have a greater claim to a reduced penalty because of financial inability to pay and so on. There will be many permutations. The factors required to be considered must be weighed against the employer and the person involved in the breach separately. Approaching the matter by setting a perceived overall penalty for the breach and other behaviour and then apportioning it based on the maximum penalties prescribed (as may be an option from the questions posed) would, for instance, be a wrong approach.

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[36] *Borsboom v Preet PVT Ltd* and *Warrington Discount Tobacco Ltd*, above n 2.

[47] A consideration of various fact scenarios which may occur inform on the correct approach. It may well be, for instance, that the employer, whether an individual or one of the other variations prescribed in s 142W(3) of the Act, is primarily responsible for the breach whereas the person involved has acted in one of the ways prescribed in s 142W in a minor way. The opposite might be the case. There might be more than one person who fits within the definition in s 142W who has committed one or more of the prescribed actions. It may be decided that one of those persons may be more culpable than the other(s). These are the permutations considered by the commentators and referred to in cases such as *Moir Farms*, *East Bay Heli Services* and *R v Wattle Gully Goldmine*.[37] In keeping with the clear intent of the legislation leaning towards deterrence, these factors all need to be considered on an individual basis. In reaching that conclusion, I have carefully considered and weighed up all the materials discussed earlier in this judgment. I also have regard to which approach will best achieve the purposes and scheme set out in the Act and the Holidays Act for the protection of minimum standards of employment and recovery of entitlements by employees when those entitlements are breached or abused.

[48] Nevertheless, the answer to the first question does not necessarily require a narrow choice between two options. Indeed, the question itself asks whether there may be a third approach. The answer to the first part of the first question is that the Authority, in assessing the respective liabilities of the employer and the person involved, must commence the exercise by reference to their own separate level of culpability. However, regarding whether there should be no reference at all to the liability of the other, the authorities and materials considered earlier in this judgment show that the position is not black and white and is considerably nuanced. The New Zealand Law Commission's view points to this. Chisholm J in *Moir Farms*, while stating that individual culpability must be considered, nevertheless reduced the penalty imposed on the company because it was disproportionately high having regard to fairness and justice. Authority Members, when dealing at the same time with applications for the imposition of penalties against employers and persons involved, will obviously be aware of the respective positions of and consequences on both. This cannot be approached in a formulaic way, but by exercising the discretion having

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[37] *Moir Farms (Maimai) Ltd v Department of Conservation*, above n 13; *East Bay Heli Services v R*, above n 14 and *R v Wattle Gully Gold Mine*, above n 15.

regard to proportionality, fairness and justice. This would also be in keeping with the fourth step outlined in *Preet*. Hopefully, these comments will also assist the Authority with the second question posed, which I now turn to.

(b) The second question posed

[49] I find it difficult to answer this question without impinging inappropriately upon the discretion which is required to be exercised by the Authority. However, it is possible to direct the Authority to sources that will assist it in deciding what matters it needs to consider in the calculation and imposition of a penalty on the defendants. I do this keeping in mind that the full Court in *Preet* has already exhaustively considered the same issue now raised.

[50] As this case involves a breach of the Holidays Act 2003, the Authority is bound by s 76A of that Act which reads as follows:

> **76A Matters Authority to have regard to in determining amount of penalty**
>
> In determining an appropriate penalty under section 76, the Authority or the court (as the case may be) must have regard to all relevant matters, including—
>
> (a) the purpose stated in section 3 and, to the extent relevant, the object stated in section 3 of the Employment Relations Act 2000; and
>
> (b) the matters referred to in section 133A(b) to (g) of the Employment Relations Act 2000.

[51] Clearly, the Authority is required to have cognisance of the overall purposes stated in s 3 of the Holidays Act, and, to the extent relevant, those overarching objectives stated in s 3 of the Act. Section 3(ab) of the Act is to that extent particularly relevant. Section 76A of the Holidays Act also requires the Authority (and the Court) to have regard to those matters contained in s 133A of the Act.

[52] The approach to the calculation and imposition of penalties as considered in *Preet* will be of considerable assistance. This was a decision of the full Court not only to provide the basis for calculation of the penalty in that case but to provide assistance to the Authority for future cases of its kind. In addition, while it was a case involving consideration of the provisions of Part 9A of the Act, the Authority will also gain some

assistance in the present matter from the Court's decision in the *Labour Inspector v Victoria 88 Ltd t/a Watershed Bar and Restaurant*.[38]

[53] As can be seen from the references made earlier in this judgment to the commentaries discussing what are essentially sentencing analogies, consideration of the calculation and imposition of civil penalties also requires fair and just analysis and on a very fact specific basis. While some consistency in approach is desirable and necessary, the fact that the process in each case involves an exercise of a discretion by individual Authority Members will mean a varied range in the quantum of penalties being imposed. This occurs in the sentencing courts, and in that jurisdiction, aberrations are tempered by appellate courts considering what may be manifestly excessive or manifestly inadequate. Similar, although not the same considerations, may need to be applied by this Court when challenges are made, as they inevitably will be, to penalties imposed by the Authority.

[54] In conclusion, therefore, in answer to the second question, all the Court can do is direct the Authority to the legislative provisions and other materials available to assist it in the exercise of the discretion. Certainly, it would be inappropriate for the Court to try to impose any exhaustive list of what factors the Authority should apply in carrying out the exercise.

[55] Finally, it just needs to be added that as this was a referral by the Authority, it is not an appropriate case for there to be any consideration as to costs.

M E Perkins
Judge

Judgment signed at 11.30 am on 21 June 2018

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[38] *Labour Inspector v Victoria 88 Ltd t/a Watershed Bar and Restaurant* [2018] NZEmpC 26.