IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 145
EMPC 106/2018
EMPC 130/2018

IN THE MATTER OF	an application for the exercise of powers under Part 9A of the Employment Relations Act 2000
AND IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	PARAMJEET SINGH PARIHAR IN PARTNERSHIP WITH KULDIP KAUR PARIHAR TRADING AS SUPER LIQUOR FLAGSTAFF AND SUPER LIQUOR HILLCREST First Defendant
AND	KULDIP KAUR PARIHAR IN PARTNERSHIP WITH PARAMJEET SINGH PARIHAR TRADING AS SUPER LIQUOR FLAGSTAFF AND SUPER LIQUOR HILLCREST Second Defendant

Hearing:	28 March 2019 (Heard at Hamilton) 1 October 2019 (by telephone)
Appearances:	R Denmead and S Carr, counsel for plaintiff M Hammond and K McLuskie, counsel for defendants
Judgment:	16 October 2019

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This case arises as a result of an investigation by the Labour Inspectorate into the behaviour of the defendants in partnership as the employer of six employees. The employer's business operated two liquor stores in Hamilton. While other employees were also employed, the six employees involved in the investigation were migrant workers from India. The defendants themselves are of Indian descent.

[2] Two sets of proceedings were commenced in this matter. Proceedings were filed directly with the Court, seeking penalties and other remedies against the defendants pursuant to Part 9A of the Employment Relations Act 2000 (the Act) claiming the alleged breaches of minimum standards of employment were serious. Another set of proceedings, filed directly with the Employment Relations Authority (the Authority), involved an action against the defendants to recover arrears of wages and holiday pay, together with penalties pursuant to Part 9 of the Act and s 75 of the Holidays Act 2003. Following negotiations between the parties, the Labour Inspectorate, on behalf of the employees it represented, procured agreement by the defendants to pay the arrears of wages and holiday pay, leaving outstanding the issue of penalties.

[3] It should be mentioned that, in respect of the proceedings which were filed with the Authority, the breaches of minimum standards of employment occurred prior to 1 April 2016 when the Legislature introduced Part 9A to the Act. Once the issues of arrears of wages and holiday pay were settled, the Authority, upon an application by the parties, removed the proceedings to the Court so that the Court could consider, on what was basically the same matrix of facts, what penalties should be imposed for the behaviour of the employers prior to 1 April 2016 and following that date.[1] The level of penalties under Part 9A of the Act is substantially greater than the level of penalties under Part 9.

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1 *A Labour Inspector v Parihar* [2018] NZERA Auckland 143.

[4] At the hearing, I was considerably assisted by the submissions presented by Ms Denmead, counsel for the plaintiff, and Mr Hammond and Ms McLuskie, counsel for the defendants.

Factual outline

[5] Following a directions conference, the remaining issue of the quantum of penalties, and other remedies sought under Part 9A of the Act, was set down for hearing with appropriate timetabling. In preparation for the hearing, counsel helpfully arranged for the preparation and filing of an agreed summary of facts. This is set out as follows with anonymisation of the employees involved, which is appropriate in the circumstances of this case.

> 1. The plaintiff is a Labour Inspector employed by the Ministry of Business, Innovation and Employment at Hamilton.
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> 2. The first and second defendants trade as a partnership and owned and operated two liquor stores in Hamilton namely Super Liquor Flagstaff and Super Liquor Hillcrest. They owned and operated the liquor stores since 2005.
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> 3. Super Liquor Flagstaff was sold by the defendants on 2 October 2017.
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> 4. The first defendant oversees the operation, recruitment, finances and general management of the liquor stores. The second defendant helps with the retail side of the businesses as and when required.
>
> 5. The liquor stores operate with a mix of the defendants' family members and migrant workers from India on temporary visas.
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> 6. The defendants employed the six employees in question in the liquor stores. Three employees were employed as Store Manager. The remainder were employed as Staff Members.
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> 7. At the time the defendants owned Super Liquor Flagstaff it was open seven days a week, from approximately 10 am to between 8pm and 9.30pm. It is open on all public holidays except Good Friday, Easter Sunday, Christmas Day and half a day on ANZAC Day.
>
> 8. Super Liquor Flagstaff is a large store that operates at the Flagstaff shopping mall in Hamilton.
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> 9. Super Liquor Hillcrest is open seven days a week, from approximately 10 am to between 8pm and 10 pm. It is open on all public holidays except Good Friday, Easter Sunday, Christmas Day and half a day on ANZAC Day.

10. Super Liquor Hillcrest is a large store situated at 132 Cambridge Road, Hamilton.

11. The first and second defendants employed a number of staff for the liquor stores, six are the subject of these proceedings.

12. Those employees are:

    a) B
    b) T
    c) K
    d) M
    e) V
    f) G

13. The workers B, T and K are the subject of the claim prior to and post 1 April 2016. The workers M, V and G are only subject to the claim post 1 April 2016.

14. All workers in question were Indian Nationals, in New Zealand on temporary visas.

15. The defendants sold the Hillcrest business to their son, Sunny Parihar, on 2 December 2018.

B

16. B was initially employed as a salesperson/staff member by the defendants, he later became a duty manager and then store manager. He held a liquor licence. B was employed from 15 March 2011 to 23 July 2017. He worked full time from December 2011 until his departure in July 2017.

17. B predominately worked at Super Liquor Hillcrest and occasionally filled in at Super Liquor Flagstaff.

18. B had four employment agreements during his employment. The first was signed in 2012 was as a duty manager, working 40 hours a week at $18 per hour. The second was signed in 2013 as a store manager, working 40 hours a week at $20 per hour. The two subsequent agreements were signed for residence and work visa applications on the same terms and conditions as the 2013 agreement.

19. B was paid $8 per hour from 2011 to 2015. His pay gradually increased from $8.50 per hour to $11 per hour from 2015 to 2017.

20. He worked part-time for the majority of 2011, approximately 17 hours per week. He worked approximately 55.5 hours in December 2011.

21. From 2012 B worked at least 6 days a week, approximately 63 hours a week. From August 2013 to April 2014 and then again from October 2014 to February 2015 he worked 7 days a week, approximately 73.5 hours a week.

22. From 2012 to 2016 B commenced work at the time the store opened and finished work when the store closed. In 2017 B commenced work half an hour after the store opened and finished work when the store closed.

23. B worked on public holidays when the store was open. He did not receive time and a half for working on a public holiday and did not receive an alternative day off.

24. B did not take any sick leave during his employment. Even if he was sick, he did not take leave as he knew he would not get paid.

25. B took leave during his employment with the defendants. In particular he was out of New Zealand from 2 October 2015 to 23 November 2015 and again from 7 January 2016 to 29 May 2016. He was not paid during any period of leave.

26. B did not receive any annual holiday pay on termination of his employment.

27. B was owed $59,257.88 in minimum wage arrears and $37,401.78 in arrears of holiday pay by the defendants. The defendants paid those arrears in full on 8 November 2018.

T

28. T was initially employed as a salesperson/staff member by the defendants and later became a store manager. He held a liquor licence.

29. T was employed by the defendants from approximately 4 December 2010 to 10 September 2017. He commenced full time work in 2011 until his departure in September 2017.

30. T worked at Bottlemart Grey Store (another liquor store previously owned by the defendants), Super Liquor Hillcrest and Super Liquor Flagstaff. At the end of 2013 he was appointed store manager at Super Liquor Flagstaff.

31. T signed an employment agreement during his employment with the defendants. Pursuant to that agreement he was to work 40 hours a week at $20 per hour. He signed the agreement in 2013 prior to applying for a work visa from Immigration New Zealand.

32. T was paid $8 per hour from 2010 until the end of 2014. His pay then gradually increased from $9 per hour to $11 per hour from the end of 2014 to 2017.

33. For the majority of his employment T worked 6 days a week, approximately 60 hours a week. At times he worked 7 days a week and his hours increased accordingly. For a period during his employment he studied. During that time his hours fluctuated however he would always finish work when the store closed.

34. T worked on public holidays when the store was open. He did not receive time and a half for working on a public holiday and did not receive an alternative day off.

35. T took time off when he injured his back and dislocated his shoulder. He was not paid for those days.

36. T took leave in 2013 and again in 2015. He was paid for his leave in 2013 however upon his return to work those payments were deducted from his wages and he was paid the balance. T was not paid for his leave in 2015.

37. T did not receive his full annual holiday pay entitlement on termination of his employment.

38. T was owed $83,829.88 in minimum wage arrears and $32,870.65 in arrears of holiday pay by the defendants. The defendants paid those arrears in full on 8 November 2018.

K

39. K was employed by the defendants from March 2016 to March 2017 to work at Super Liquor Hillcrest.

40. He was on a student visa and primarily worked as a staff member. K had signed an individual employment agreement dated 19 May 2016 showing that he was offered a position as a staff member to work 40 hours a week at a rate of $16 per hour. K was paid $9 per hour for the duration of his employment.

41. He worked four days a week and was paid in cash from March to May 2016. From that time he worked five days a week from Wednesday to Sunday and was paid by internet banking. K started at 11am and worked until closing. He worked longer hours during the summer holidays and was paid for the extra hours in cash.

42. K worked on public holidays when the store was open. He did not receive time and a half for working on a public holiday and did not receive an alternative day off.

43. K did not take any leave and did not receive annual holiday pay on termination of his employment.

44. In total K was owed $9,648.57 in minimum wage arrears and $4,421.72 in arrears of holiday pay by the defendants. The defendants paid those arrears in full on 8 November 2018.

M

45. M was employed by the defendants from 3 January 2017 to 23 July 2017 to work at Super Liquor Hillcrest.

46. He was on an open work visa and primarily worked as a staff member. He was assigned an operator number and served customers at the counter when the store was busy.

47. M signed an undated employment agreement with the defendants which provided he was to work 40 hours a week at a rate of $16 per hour.

48. M actually worked 61 hours a week and was paid $9 per hour for the majority of his employment apart from the last two weeks when he was paid $10.

49. He was paid in cash for the first couple of weeks of his employment and was then paid by internet banking.

50. M worked on public holidays. He did not receive time and a half for working on a public holiday and did not receive an alternative day off.

51. M took one and a half days sick leave during his employment. He had to pay cash back to the first defendant that week as he had not worked his full 61 hours.

52. M did not receive annual holiday pay on termination of his employment. He did not take any annual leave during his employment.

53. In total M was owed $7,279.13 in minimum wage arrears and $2,734.96 in arrears of holiday pay by the defendants. The defendants paid those arrears in full on 8 November 2018.

V

54. V was employed by the defendants from 14 April 2016 to 5 February 2017 at Super Liquor Flagstaff.

55. He was on a student visa and primarily worked at the back of the store filling stock.

56. V signed an employment agreement with the defendants dated 14 April 2016 which provided he was to work 20 hours a week at a rate of $16 per hour.

57. V actually worked 31 hours per week on average during his employment and was paid $9 per hour after tax.

58. V worked full time on Saturdays and Sundays. He also worked on Thursdays and Fridays from 3pm until closing.

59. If V was sick he had to work extra hours in the following weeks to make up the time as he was not paid if he was sick.

60. If V was not able to complete his required hours he was required to give cash back to his employer.

61. V was paid for time he took off prior to his mid-year and end of year exams in 2016 and was told by the first defendant to work extra hours without pay to make up that time during the school holidays.

62. V did not receive any annual holiday pay on termination of his employment.

63. V worked on some public holidays when the store was open. He did not receive time and a half for working on a public holiday and did not receive an alternative day off.

64. In total V was owed $6,110.00 in minimum wage arrears and $2,294.27 in arrears of holiday pay by the defendants. The defendants paid those arrears in full on 8 November 2018.

G

65. G was employed by the defendants from May 2017 to July 2017 at Super Liquor Hillcrest.

66. He was on a student visa and primarily worked at Super Liquor Hillcrest.

67. G signed an employment agreement with the defendants dated 8 May 2017 which provided he was to work 20 hours a week at a rate of $16 per hour.

68. He was actually paid $9 per hour for the duration of his employment.

69. [G's] hours varied during his employment. He initially worked 25 hours per week, he then increased to 31/32 hours and then around 48 hours a week for the majority of his employment.

70. When G worked 25 hours per week he was required by the first defendant to withdraw $55 cash to return to the first defendant. Once he started working 31 hours per week he was no longer required to pay cash back.

71. G was shown some employment records provided by the defendants that holiday pay of $400 was recorded against his name. G confirmed that he had never received a holiday payment from the defendants.

72. G was also shown the employment records provided by the Defendants that recorded 10 hours per week worked for his last 3 weeks; G said he worked around 48 hours a week except the last week of his employment. He has provided bank statements to show that the payments received from the defendants were different from the wage records provided by the defendants.

73. In total G was owed $3,811.25 in minimum wage arrears and $809.96 in arrears of holiday pay by the defendants. The defendants paid those arrears in full on 8 November 2018.

<u>Applicable Minimum Wage Rates</u>

74. The Minimum Wage Rate applicable under the Minimum Wage Act 1983 during the employment of workers was $15.75 per hour from 1 April 2017 to July 2017; $15.25 per hour from 1 April 2016 to 31 March 2017; $14.75 per hour from 1 April 2015 to 31 March 2016;

$14.25 per hour from 1 April 2014 to 31 March 2015; $13.75 per hour from 1 April 2013 to 31 March 2014; $13.50 per hour from 1 April 2012 to 31 March 2013; $13 per hour from 1 April 2011 to 31 March 2012.

Wages and Time Records

75. The defendants failed to keep a wages and time record for the employees in accordance with s 130 of the Act and s 8A of the MWA.

76. The defendants kept a record outlining the hours allegedly worked for each worker each week however that record was not a wages and time record in accordance with s 130(1)(g) of the Act or s 8A of the MWA, as it did not record the hours worked for each employee each day. In addition, the plaintiff concluded those records were not reliable as they did not accurately record all the hours worked by the employees.

77. The defendants failed to keep a holiday and leave record for the employees in accordance with s 81 of the HA.

78. The defendants kept some holiday and leave records however those records were not a holiday and leave record in accordance with s 81 of the HA. They did not accurately record all matters required by s 81 including the detail around the public holidays worked by the employees and the annual leave owing to the employees. In addition, the plaintiff concluded those records were not reliable as not all hours worked by the employees were recorded.

79. Prior to September 2017 the defendants did not maintain timesheets or a roster of the hours worked by their employees.

80. No accurate record of hours of work was kept by the defendants. Accordingly, the plaintiff calculated arrears of minimum wages owing to the employees on the basis of their statements, bank statements and other supporting information gathered during the investigation including checkout till receipts, salesperson reports, photos, and text messages.

81. As there was lack of detail about start and finish times the plaintiff has estimated the hours worked by each employee on each day using the available information for example the salesperson reports, audit reports, and photos provided by the employees.

82. From that information the plaintiff calculated the monies owed to the employees in accordance with their entitlements under the MWA. The plaintiff then deducted the monies that had been paid to the employees by the defendants and calculated the shortfall.

83. The plaintiff calculated that the employees were owed minimum wages of:

	Arrears from commencement of employment to 31 March 2016	Arrears from 1 April 2016 to termination of employment	Total arrears of minimum wage
B	$45,805.50	$13,452.38	**$59,257.88**
T	$75,619.13	$8,210.75	**$83,829.88**
K	$851.84	$8,796.73	**$9,648.57**
M		$7,279.13	**$7,279.13**
V		$6,110.00	**$6,110.00**
G		$3,811.25	**$3,811.25**

84. In total, the first and second defendants failed to pay the employees minimum wages of **$169,936.71**.

85. The first and second defendants breached the minimum entitlement provisions of the MWA by not paying minimum wages each week from the commencement of the employees' employment until the termination of their employment.

Entitlements under the Holidays Act 2003

86. From her investigation the plaintiff concluded that the defendants had failed to pay or provide to the employees their entitlements to annual and public holidays owing under the HA.

87. The plaintiff concluded from her investigation that for the period of their employment the defendants had not paid or provided to the employees:

a) Holiday pay when their employment was terminated within 12 months of service in respect of M, V and G.

b) Holiday pay for B, T and K.

c) Holiday pay and an alternative day whenever work was performed on a public holiday.

d) Holiday pay where the public holiday was not worked but was an otherwise working day.

88. The plaintiff calculated the employees were owed holiday pay of:

	Arrears of public holiday pay from commencement of employment to 31 March 2016	**Arrears of public holiday pay from 1 April 2016 to termination**	**Total arrears of public holiday pay**	**Total arrears of annual holiday pay** (owing at termination – post 1 April 2016)
B	$5,298.50	$8,188.57	**$13,487.07**	**$23,914.71**
T	$4,613.50	$6,011.03	**$10,624.53**	**$22,246.12**
K	$160.13	$894.50	**$1,054.63**	**$3,367.09**
M	N/A	$618.36	**$618.36**	**$2,116.60**
V	N/A	$723.58	**$723.58**	**$1,570.69**
G	N/A	$212.83	**$212.83**	**$597.13**

89. In total the defendants failed to pay the employees annual holiday pay of **$53,812.34** and public holiday pay of **$26,721**. The total sum owing by the defendants to the employees under the HA was **$80,533.34**.

90. The defendants breached the minimum entitlement provisions of the HA when they failed to pay the employees annual holiday pay on termination, time and a half for working on a public holiday, payment at termination for an alternative holiday (for working on a public holiday) and failed to pay the employees for not working on a public holiday when that day would otherwise be a working day for them.

91. The total arrears owing to the employees by the defendants was **$250,470.05**.

92. The defendants paid the arrears owing into the plaintiff's trust account on 8 November 2018. Those sums were then distributed to the employees by the plaintiff.

93. The defendants have not previously been before the Employment Institutions in respect of claims involving the Labour Inspectorate.

[6] As can be seen from this factual summary, six employees were subject to considerable abuse at the hands of the defendants as their employer over a reasonably substantial period, and, in fact, over six years in the case of those two employees who accumulated wages and holiday pay prior to 1 April 2016. At the hearing, the employees gave evidence as to the hardship and emotional consequences they suffered. They gave evidence also indicating the pressure they were under because of

their immigration status in New Zealand and the advantage which the defendants took of that situation.

Remedies sought

[7] In respect of the proceedings which were commenced in the Court, the Labour Inspector initially sought banning orders and compensation orders against the defendants pursuant to Part 9A of the Act in addition to the other remedies of declarations of breach, penalties, interest and costs. Prior to the hearing, the Labour Inspector indicated that the application for banning orders was withdrawn. The application for compensation orders was also withdrawn since the defendants had remedied their default by paying arrears of wages and holiday pay to the employees.

Labour Inspector's forensic research

[8] What is not mentioned in the agreed summary of facts, but needs to be mentioned in this judgment, is the very professional way that the Labour Inspector, Ya (Rachael) Tsui, approached this matter and the astute way she went about her task of gathering evidence. The process of forensic research she undertook is set out in her brief of evidence, and she is to be commended for the way she investigated the employer's records and the other investigations she undertook to uncover the extent of the breaches and the financial consequences inflicted upon the employees involved.

[9] As can be ascertained from the payment by the defendants of the substantial financial loss suffered by the employees, following the gathering of evidence of such quality by Ms Tsui, the defendants were led to concede their breaches and make reparation to the employees. As indicated at the hearing, the defendants conceded their liability for substantial penalties.

Partnership issue

[10] A point which is relevant to the assessment of penalties in this case is the question of whether the Court should impose penalties separately against each defendant.

[11] The approach which has been taken by the plaintiff is that the Court should consider the quantum of the penalties against each defendant separately as individuals but make some allowance, when considering the principle of globalisation and overall proportionality, for the fact that they were a partnership. Ms Denmead, in her submissions proposed this methodology and stated that it was on the basis that both defendants were proceeded against as the employer. This was an alternative to including the second defendant in the proceedings as a person involved in the breaches pursuant to s 142W of the Act and presumably pursuant to s 134 of the Act in respect of the pre-1 April 2016 breaches as a person who had aided and abetted the breaches by her husband, the first defendant. Ms Denmead, in her oral submissions, submitted as follows:

> Turning to proportionality and this issue of the partnership. I've already highlighted for the Court that my friend submitted in terms of paragraph 30 of *Prabh* that that is relevant. In my submission, it is not. It shouldn't apply because that was a situation where there was an entity and two persons involved. That test simply can't apply in this case. Mr and Mrs Parihar are the respective legal entities, relevantly in this case. And I don't even think that the plaintiff could have charged the partnership … The partnership itself is not a legal entity. Therefore, the pleadings had to be the way they are and that is the way they have chosen to structure it … I do, however, accept that culpability, of course, of Mrs Parihar is relevant.

[12] Mr Hammond, counsel for the defendants, also dealt with the complications which might arise from the fact that the employer was a partnership made up of the defendants as partners and what effect this had on calculating penalties. He submitted at paragraph 60 of his written submissions as follows:

> The defendants accept that as they operate as a partnership, they are in effect two separate legal identities and therefore liable to separate penalties. However, the effect of this is that as a husband and wife partnership, the result would be "double penalties". The second defendant's overall participation, or lack of, in the offending should also be taken into consideration.

[13] Mr Hammond agreed with the approach adopted by the plaintiff but submitted that the second defendant's lesser involvement in the day-to-day management and running of the business meant that she should face substantially lower penalties.

[14] I agree with Ms Denmead's submission that a partnership is not a legal entity. I also accept as correct Mr Hammond's statement that, as the defendants operate as a partnership, they are in effect two separate legal entities and therefore liable to separate

penalties. I also agree that care needs to be taken to ensure the result of the Court's assessment does not incur 'double penalties'.

[15] The parties in this case confirm, by the way their business accounts were prepared, that there was equal division between them of net profits from the businesses they ran. This also provided the basis upon which they then accounted for income tax. Their tax return for the year ended 31 March 2018 shows they each earned $109,749.82 for that year. If it has not already been done, the payment subsequently made to the employees concerned in this case for arrears of wages and holiday pay will need to be treated as a business overhead and tax liabilities adjusted accordingly.

[16] The provisions of the Act make this partnership issue at first glance not easy to resolve. The sections specifying maximum penalties per breach under Parts 9 and 9A of the Act (ss 135 and 142G) and s 75(1) of the Holidays Act make distinctions as to liability for maximum penalties and maximum pecuniary penalty orders. Section 135(2) of the Act makes the distinction between an individual and "a company or other corporation". Section 142G of the Act makes a distinction between an individual and "a body corporate". Section 75(1) of the Holidays Act makes a distinction between an individual and "a company or other body corporate". This lack of consistency in terminology does not assist either. A partnership, however, as already stated is not a company, other corporation or body corporate. Under s 135(2)(a) of the Act, and s 75(1)(a) of the Holidays Act, the maximum penalty that can be imposed upon an individual for a breach is $10,000 and $20,000 upon a company or corporation. Under s 142G(a) of the Act, the maximum pecuniary penalty order that can be imposed upon an individual for a breach is $50,000. In the case of a body corporate the maximum is the greater of $100,000 or three times the amount of financial gain made by the body corporate from the breach.

[17] While a partnership is not included in these provisions, further inconsistency arises from the provisions of s 142W, which is in that part of the Act dealing with liability for penalties of persons involved in a breach. The section speaks of "breach by an entity such as a … partnership…".

[18] It also states:

> (3) … the following persons are to be treated as officers of an entity:
>
> …
>
> (b) a partner if the entity is a partnership:
>
> …

[19] Section 142W of the Act provides a conundrum. It is difficult to see, however, when the provisions relating to a partner and a partnership would ever have application when considering the liability for a penalty of an individual person involved in a breach. Taking a principled approach to the sections of the Act and the Holidays Act referred to, an individual person in partnership, as opposed to being a company or corporate entity partner, must be treated as an individual for the purposes of assessing penalties. A partner in a partnership would invariably be facing a penalty as a perpetrator of the breach itself rather than being pursued as a person involved in the breach. While the relationship between these provisions is not entirely satisfactory, as I have already discussed, the only logical approach I can take for the purposes of the imposition of penalties is to regard the defendants in partnership as individuals.

[20] I arranged for a further hearing by telephone with counsel for further discussion on these provisions to clarify the effect of their submissions presented at the close of evidence. Ms Carr represented the plaintiff as counsel at this further hearing. The comments made by counsel at that further hearing were most helpful. I indicated that I would proceed based on treating the defendants as individuals, and maximum penalties would apply accordingly. Nevertheless, in exercising the ultimate discretion on proportionality and globalisation, the relationship between the defendants as partners and the way they apportioned their duties in running the business needs to be considered, as this affects their respective culpability and the question of deterrence. This particularly applies to Mrs Parihar, who, it is conceded, played a far lesser role in the breaches than Mr Parihar. This discretion would also need to be exercised where a partnership consisted of many partners. The maximum penalties imposed upon a partnership in such circumstances could be for a substantially higher total than would be imposed upon a company or corporation. The total factual matrix in each case therefore becomes important.

Assessment of quantum

[21] In similar cases to the present, the Authority and the Court have now established a body of precedents as to the way penalties in cases such as this are to be assessed.[2] There is no need to carry out an elaborate analysis of those decisions. The principles are now well known, and I simply proceed from this point in the judgment to consider the mandatory considerations contained in ss 133A and 142F of the Act, together with the additional considerations which the full Court in *Preet* required be taken into account. In assessing the evidence and calculating the penalties which I consider are appropriate in this case, I follow the four-stage process specified as appropriate in *Preet*.[3]

[22] Counsel, in their submissions following evidence, agree that five issues remain for determination in this matter. These are:

(a) Whether penalties should be imposed for breaches occurring prior to 1 April 2016 and, if so, the quantum of such penalties;

(b) whether declarations of breach should be made for those breaches occurring after 1 April 2016 when Part 9A of the Act came into force;

(c) if declarations of breach are made, whether pecuniary penalties should be awarded in respect of the declared breaches and the quantum of such penalties;

(d) whether a portion of any of the penalties awarded should be payable to the employees concerned and, if so, the apportionment of the penalties between the employees and the Crown; and

(e) what costs should be payable by the defendants.

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2 *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514; *Labour Inspector v Victoria 88 Ltd t/a Watershed Bar and Restaurant* [2018] NZEmpC 26, (2018) 15 NZELR 906; *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110, (2018) 15 NZELR 1171; *Labour Inspector v Sampan Restaurant Ltd* [2018] NZEmpC 69, (2018) 15 NZELR 1152; *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

3 *Labour Inspector v Preet PVT Ltd*, above n 2, at [138]-[151].

[23] The defendants accept that breaches have occurred and do not oppose declarations of breach being made for the period following 1 April 2016. They also accept that, for those employees affected prior to 1 April 2016, the statutory factors should be considered in assessing penalties for that period. They do not dispute that the entire periods of employment may be taken into account in the assessments. They accept that, for assessing remedies under Part 9A of the Act, the breaches were serious. The defendants do not have any firm view on the issue of whether a portion of the penalties should be awarded to the affected employees. They accept that the employees have been affected by their actions to varying degrees in each case. They consider it appropriate that the employees receive some portion of the penalties in recognition of the effects but leave that issue for the Court to decide.

[24] Assessed against the objects of the legislation involved, the actions of the defendants can hardly be said to have complied with good faith in all aspects of the employment relationship. The defendants took advantage of a substantial inequality of power in their relationship with the employees concerned, primarily arising from the employees' financial and immigration status insecurity. The affront to the employees' entitlements is particularly apparent in this case when considering the primary object of the Holidays Act, which is to promote a balance between work and other aspects of an employee's life.

[25] The breaches themselves in this case span all the minimum entitlements and involve considerable periods of employment for all the employees; many years in the case of two of them. Many breaches over that time are involved. I accept, however, Ms Denmead's methodology of consolidating the breaches into categories for each employee. This is the approach adopted in previous cases and is not opposed by Mr Hammond. I agree with Ms Denmead's outline of the number of breaches and maximum penalties arising which she set out as follows:

> 52. Identifying the number of breaches. There are six employees affected by the defendants' breaches. Three of the workers are affected for the entire period (both pre and post 1 April 2016) and six workers are affected for the period post 1 April 2016. All six workers were affected by the failure to keep wages and time and holiday and leave records. This is broken down as follows:
>
> Number of breaches pre-1 April 2016

1.12 Three failures to pay minimum wage relating to B, T and K; and

1.13 Three failures to pay public holiday pay relating to B, T and K; and

1.14 Six failures to keep wages and time and holiday and leave records, relating to all six employees namely B, T and K, M, V and G.

Number of breaches post-1 April 2016

1.15 Six failures to pay minimum wage relating to the employees; and

1.16 Six failures to pay annual holiday pay relating to the employees; and

1.17 Six failures to pay public holiday pay relating to the employees.

53. Identifying the maximum penalty available in respect of the breaches of statute committed by the defendants:

1.18 The maximum penalty available in respect of the ordinary breaches of the Minimum Wage Act 1983, Holidays Act 2003 and Employment Relations Act is $10,000 per breach for each defendant, awardable against an individual in accordance with s 10 of the Minimum Wage Act 1983, s 75(1)(a) of the Holiday Act 2003 and section 135(2)(a) of the Act.

1.19 The maximum pecuniary penalty available in respect of each serious breach of a minimum entitlement provision in respect of which a declaration of breach has been made is $50,000 per breach for each defendant, awardable against an individual in accordance with s 142G(a) of the Act.

54. Identifying the maximum penalties available in respect of each identified breach:

Maximum penalty against each defendant for each identified breach pre-1 April 2016

1.20 The maximum penalties available against each defendant for failure to pay minimum wage is $30,000 (being a breach for each of three identified employees x $10,000 per breach).

1.21 The maximum penalties available against each defendant for failure to pay public holiday pay is $30,000 (being a breach for each of three identified employees x $10,000 per breach).

1.22 The maximum penalties available against each defendant for the failure to keep wages and time records and holiday and leave records is $60,000 (being a breach for each of six identified employees x $10,000 per breach).

Maximum penalty against each defendant for each identified breach post-1 April 2016

1.23 The maximum pecuniary penalties available against each defendant for the failure to pay minimum wage is $300,000 (being a breach for each of six identified employees x $50,000 per breach).

1.24 The maximum pecuniary penalties available against each defendant for the failure to pay annual holiday pay is $300,000 (being a breach for each of six identified employees x $50,000 per breach).

1.25 The maximum pecuniary penalties available against each defendant for the failure to pay public holiday pay is $300,000 (being a breach for each of six identified employees x $50,000 per breach).

[26] There could really be no other inference to be drawn in this case than that the breaches were intentional. This is probably more the case with Mr Parihar, but Mrs Parihar must bear some measure of culpability. She had contact with the employees over a lengthy period and would have observed what was going on from her own periods working in the liquor stores. While written employment agreements were entered into, Mr Parihar in many instances did not offer or pay the agreed rates. It must be inferred from this that he not only knew the required standards but required employees to sign documents as a subterfuge for covering up the true position. A failure to keep wage and time and holiday and leave records was part of this attempt to cover the abuse. The defendants had been in the business of operating liquor stores, taking advantage of valuable licences since 2005. That they did not know the minimum standards of employment required for their employees is hardly tenable. In addition, they appeared to have employed other less vulnerable employees, including members of their own family, upon lawful and indeed, at times, favourable terms.

[27] As to the nature and extent of any loss or damage, the employees concerned, in combination, have suffered substantial detriment and loss of money they would otherwise have received at the time it was earned. They speak in their evidence also of the debilitating effects from fear of losing immigration status, which the defendants cynically manipulated for their own advantage. The loss of sick leave entitlements, stress of working long hours, financial pressures and general consequences to their social lives and student responsibilities all meant the loss and damage were substantial.

[28] Mr Hammond submitted that the employees, despite these claimed effects, remained in employment for significant periods without raising any issue in respect of pay or treatment. He submitted they could also, at any stage, have left employment. This submission somewhat begs the question and does not do the defendants much credit when employees are tied to employment by the pressure of immigration policies if they wish to remain in New Zealand and where borderline financial viability fetters their ability to gain independence.

[29] The mitigating steps taken in this case must be regarded as an inadequate response from the Parihars. It is to their credit, however, that they remedied the breaches by paying the established arrears. That was, however, only after the evidence gathered by Ms Tsui became so overwhelming that further denial was not tenable. There was little real remorse or contrition shown and no attempt to pay interest on the money from which they had benefited. Mr Parihar somewhat belatedly acknowledged the consequences of his actions when he gave evidence at the hearing. I detected no real expression of empathy for the personal circumstances of the victims of his behaviour. To make payment of the arrears, I was informed by counsel that the defendants sold personally owned real estate. They retain a substantial asset totalling in excess of $1.6 million from the Hillcrest store being sold. This involved a transfer of the business to their son on commercially unrealistic and extremely generous repayment arrangements for the debt. The price they received for sale of the business is disclosed as a partnership asset in the accounts. They also own other real estate. When one considers the employees were deprived of more than one quarter of a million dollars, those assets now owned were partially funded but to a substantial degree by the unpaid efforts of their employees. Any mitigation has been begrudgingly provided and diminishes the extent of discounting to be applied in the assessment of penalties.

[30] This was a situation where the defendants had been in business for over 10 years and would have been aware of legal requirements of minimum standards of employment. The employees affected were migrant workers with precarious immigration status. They were vulnerable to abuse by the defendants not only because of this but also their ignorance of requirements placed upon the defendants by New Zealand employment law. Mr Parihar had sponsored renewal of work visas for the

two long-standing employees and would have been aware of their vulnerability. Mr Hammond submitted that the employees were intelligent individuals with several studying at tertiary level. He further submitted that the defendants were assisting the employees as associate migrants to secure gainful employment in New Zealand. They also assisted with personal and financial matters, and their sons had formed personal friendships with the employees. While I accept that there are some cultural factors behind this, in a way, factors as submitted by Mr Hammond make the treatment by Mr Parihar of his fellow countrymen, even more inexplicable and heinous.

[31] This is the first time that the defendants have appeared before the Court (or Authority) for similar conduct. There is no suggestion that there has been other conduct of a similar nature but not having come before the Court.

[32] The culpability of the defendants, and Mr Parihar in particular, is high in this case. There are a significant number of employees who have been abused. The total sum withheld was substantial. The breaches occurred over a lengthy period. The defendants took advantage of vulnerable migrant workers for their own financial gain. When faced with investigation by the Labour Inspectorate, Mr Parihar initially denied not paying minimum wages and maintained that only his family worked on public holidays, which was not true.

[33] Mr Hammond submitted that the degree of culpability is mitigated by:

(a) The payment of arrears, in full, from personal funds.

(b) Co-operation with the Labour Inspector during investigations.

(c) No attempt to conceal breaches.

(d) Immediately undertaking to remedy future practices.

(e) Early admission and acceptance of responsibility for penalties. This has resulted in a reduction of Court time if the matter had continued to proceed on a fully defended basis.

(f) Genuine remorse.

[34] Mr Hammond also submitted that Mrs Parihar's position is mitigated by the fact that she is an employer in name only and was not directly involved with and had no knowledge of the breaches. There was some acceptance of this position by the plaintiff.

[35] On the issue of deterrence, the defendants submit that the investigation has caused enormous stress to them and their families. They have come under significant financial pressure and have had to realise assets to meet the financial obligations now arising. They, however, recognise their shortcomings toward the employees. They have sold the two liquor stores and do not propose becoming employers again. These factors, they submit, have been a sufficient deterrence to them.

[36] The defendants, however, have brought the consequences they have suffered upon themselves. I agree with the submissions of Ms Denmead that there needs to be sufficient deterrence to send an indication not only to the defendants, but other employers, that, if they choose to embark upon such behaviour towards their employees, substantial financial consequences will follow. This is a case where such deterrence is an important factor for the Court to communicate.

[37] In reaching appropriate levels of penalties in this case, I am mindful of the need to maintain consistency in the way these defendants are penalised compared with similar cases. Accordingly, I have regard to the level of penalties imposed in cases already dealt with by the Court and the Authority. There is now no assertion that the defendants are unable to pay penalties to be imposed. Indeed, the evidence discloses the substantial assets owned by them arising from sale of the Hillcrest store, quite apart from realty owned.

[38] Finally, there is the need to ensure proportionality of the penalties imposed. This requires the Court to take account of the comparative positions of the defendants in perpetrating the breaches upon the employees, the respective positions under Parts 9 and 9A of the Act between ordinary penalties and pecuniary penalties for serious breach, taking account of the overall gravity of the breaches and ensuring that

a final position is reached of some parity with the amount the employees were deprived of as a result of the breaches. There nevertheless needs to be meaningful deterrence. This means that penalties are not left at such a low level that employers would be encouraged to take the risk of committing breaches where financial gain was significant and financial consequences might be treated as a merely inconvenient business overhead.

The calculation of penalties

[39] Having regard to the positions each take on the factors to be considered, counsel for the Labour Inspector and the Parihars have submitted schedules setting out calculations to arrive at final proposed totals for penalties. Both counsel agreed to elements of globalisation by relating maximum penalties to the number of employees affected. If the maximum penalty is related to each breach, an enormous total is reached, requiring an artificial approach to discounting to reach a realistic level of eventual penalties. I agree with the approach adopted by counsel, even though, with the globalisation adopted, calculating the maximum penalties which would apply still results in very substantial sums.

[40] I have carefully considered the respective calculations submitted by both Ms Denmead and Mr Hammond. I have taken care in considering the penalties to be imposed to ensure that where periods of employment cover both pre-1 April 2016 and post-2016 that the penalties are not imposed twice for the same breach of employment standards. For the breaches occurring prior to 1 April 2016, where Part 9 of the Act applies, counsel are in agreement as to maximum penalties, adopting the globalisation approach. The failure to keep wages and time records and holiday and leave records applies to all six employees over the entire periods of employment. This is not a head of penalty which can apply under Part 9A. The maximum is calculated at $60,000 for each defendant, being $10,000 for each category of breach. For the failure to pay public holiday pay and failure to pay minimum wages, three employees are involved in each category, meaning maximum penalties of $30,000 for each, totalling $60,000. The total maximum penalty for each defendant for pre-1 April 2016 breaches is therefore $120,000. This means that the total maximum penalty for both Mr and Mrs Parihar is the sum of $240,000.

[41] For the breaches after 1 April 2016, where Part 9A of the Act applies, all six employees are involved. For each of the defendant's breaches, failure to pay annual holiday pay, public holiday pay and minimum wages results in $300,000 in each category, leading to a total for each defendant of $900,000. For both Mr and Mrs Parihar, the total would therefore be $1,800,000.

[42] The total maximum penalties, even using the globalisation approach, therefore amounts to a sum more than $2 million. The facts which have been established in this case make it not too dissimilar from the case of *Prabh*,[4] although the total number of employees involved in the present case is twice that in *Prabh.* Nevertheless, the type of abuse involved is, as Mr Hammond submitted, not as extreme as that inflicted on the employees in *Prabh*. Accordingly, some parity can be applied to ensure consistency is maintained.

[43] Any calculation involved is somewhat artificial and arbitrary, but, as the full Court held in the *Preet*[5] decision, the Court has an ultimate discretion to ensure that the final penalty imposed is in proportion to the circumstances existing in each case.

[44] In this case, the person primarily responsible for the breaches is Mr Parihar, even though he and his wife were in partnership in the business. As I have indicated, there is not too much dispute that Mrs Parihar played very much a secondary role in the running of the business, and, while she would have had some idea of what was going on, there are grounds to treat her on a different basis from Mr Parihar. Dealing with Mr Parihar's position, I adopt as a nominal starting point, 50 per cent of the maximum for the pre-1 April 2016 breaches. While Mr Hammond listed several mitigating circumstances, there is some overlap between the categories. The primary mitigating circumstance is that the defendants accepted responsibility and remedied the matter by paying the amounts they owed to the employees. In *Daleson*,[6] Chief Judge Inglis strongly suggested that this in itself should not be given too much weight as a mitigating factor. The Chief Judge suggested that 20 per cent, or thereabouts, would set the upper limit as a discount for this factor alone. In *Daleson*, the company

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4 *Labour Inspector v Prabh Ltd*, above n 2.
5 *Labour Inspector v Preet PVT Ltd*, above n 2.
6 *A Labour Inspector v Daleson Investment Ltd*, above n 2.

only paid what it owed after the Authority had already made orders but before penalties were set. In such a case, actual remorse was difficult to demonstrate. Having regard to the limited nature of the mitigating factors in this case, I consider the discount proposed by both counsel of 50 per cent as excessive. I accordingly allow a discount of 30 per cent. This leaves a total of $42,000 for the pre-1 April 2016 breaches.

[45] Adopting similar percentages of discounting for the post-1 April 2016 breaches, the total reached is $315,000 from the globalised maximum of $900,000. The total pecuniary penalties, therefore, for all the breaches is $357,000.

[46] There is no issue in this case of the defendants not being able to afford appropriate penalties. Applying, however, the ultimate consideration of proportionality and the factors to be taken into account under that head, I consider that the appropriate total penalties to be levelled against Mr Parihar should be $180,000. Having regard to the percentage discounting from the ultimate exercise of this discretion the division on a rounded basis between ordinary penalties and pecuniary penalties is:

(a) ordinary penalties $21,500; and

(b) pecuniary penalties $158,500.

[47] This is a proper reflection of his overall culpability having regard to the persistent and cynical way he treated this group of employees and the way that he endeavoured to conceal the true position. This result is not entirely in parity with penalties levelled in *Prabh*, where the penalty against the company was $100,000 with further penalties totalling $32,000 against the directors for their involvement in the breaches. As mentioned already, however, there were twice as many employees involved in this case, with the financial gain made by the employer being significantly higher. Here, also, there is no question of the employer's financial ability to pay. Finally, I note that, to ensure the purpose of deterrence is met, employers can expect to see a gradual increase in penalties awards over time. The penalties awarded here are, I consider, sufficient to provide a proper deterrence both to Mr Parihar and any

other employer who may be tempted to behave in a similar fashion towards vulnerable employees.

[48] Insofar as Mrs Parihar is concerned, I have considered whether I should impose any penalty at all upon her in view of the fact that the penalties imposed on Mr Parihar have consequences for her as well, they being in partnership. However, even though her involvement was minimal, she must have known from her contact with the employees some of what was going on. As a partner in the business, she had a responsibility to endeavour to cease her husband's continued exploitation of the employees over a lengthy period. I do not propose to go through the same calculation exercise as I have adopted with Mr Parihar. I consider that an appropriate combined penalty to impose on Mrs Parihar under Parts 9 and 9A of the Act, and to reflect some sanction, is $20,000. This total is reached by combining a nominal ordinary penalty of $5,000 and a nominal pecuniary penalty of $15,000. This means that the total penalties imposed amount to $200,000. Having regard to the circumstances of this case, I regard that as consistent with what has been imposed in other cases previously before the Court.

[49] The Labour Inspector has made an application that a proportion of the penalties recovered should be paid to the employees concerned. Such a division is authorised by s 136 of the Act. In a similar way to other cases which have come before the Court, the employees concerned have given evidence as to the humiliation and other personal detriment suffered by them beyond the loss of the monetary entitlements to wages and holiday pay withheld. While they have now received compensation in full for the loss of those monetary entitlements, it is also appropriate that they receive further compensation for the mental or emotional consequences they have suffered as well as the debilitating effect that the defendants' behaviour had on their lives over a substantial period. Accordingly, I order that, from the penalties ordered, the employees B and T are to receive $20,000 each. The employees K, M, V and G are to receive $10,000 each. The balance of the penalties, being $120,000, is then payable to the Crown.

Disposition

[50] In conclusion, the following decisions have been reached:

(a) Mr and Mrs Parihar have breached the minimum entitlement provisions contained in the Minimum Wage Act 1983 by failing to pay minimum wages to the six employees concerned in each week after 1 April 2016 until termination of their employment. They have further breached the minimum entitlements and payment for such entitlements under the Holidays Act 2003 for the six employees concerned, for holidays occurring on or after 1 April 2016 and for holiday pay owing at termination of employment for the entire periods of their employment. Declarations of breach are accordingly made for each breach.

(b) Penalties are ordered against Mr Parihar in the sum of $180,000 (a combination of both ordinary and pecuniary penalties) and against Mrs Parihar in the sum of $20,000 (also a combination of both ordinary and pecuniary penalties).

(c) Each of the employees B and T are to receive $20,000 from the penalties recovered. Each of the employees K, M, V and G are to receive $10,000 from the penalties recovered. The balance of $120,000 is to be received by the Crown.

(d) 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, but, apart from that, there will be an order prohibiting publication of their names.

[51] I make a final comment in respect of the penalties now imposed. The penalties are payable immediately. Enforcement, of course, will rest with the Labour Inspectorate. If the penalties are not met, then the matter will inevitably come back to the Court for compliance orders. If any evidence comes before the Court of the

defendants endeavouring to divert ownership of assets to avoid enforcement, they are reminded that one of the compliance remedies available to the Court is imprisonment.

Costs

[52] Finally, so far as costs are concerned, at the directions conference on 10 August 2018, 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 Direction 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 2 pm on 16 October 2019