Burning Issues in Employment Law Forum

Auckland, 19 September 2019

Presentation by Judge ME Perkins

There is a trend occurring of cases coming before the Employment Relations Authority and the Employment Court following the introduction of Part 9A into the Employment Relations Act 2000. This results from recently increased activities of the Labour Inspectors in investigating abuses of employees by way of breaches of the Minimum Wage Act 1983, the Wages Protection Act 1983 and the Holidays Act 2003 committed by their employers.

Part 9A was inserted into the Act on 1 April 2016. Actions by Labour Inspectors for breaches of minimum entitlements in some cases presently span claims for penalties and other remedies under Part 9 of the Act and the more draconian remedies under Part 9A. Actions commenced under Part 9 must be commenced in the Authority. Only the Court can receive claims originating under Part 9A. As will be seen from the series of decisions I intend to refer to, the process generally adopted when claims are concurrently commenced in the Authority and the Court for penalties and other remedies is that the Authority defers to the Court by removing the proceedings. This enables the Court to deal with claims under both parts of the Act where the factual matrix is the same. This process also ensures that the one decision-maker has the opportunity of balancing all penalties and remedies so that the overall interests of justice prevail. As time passes, the need for removal to the Court of Part 9 applications filed in the Authority will diminish.

The introduction of Part 9A followed the concern of the law-makers at the plethora of cases involving abuse of migrant workers by employers ignoring their obligations to pay minimum wages and provide minimum entitlements under the Holidays Act and comply with the Wages Protection Act 1983.[1] Not all cases, however, involve abuse of migrant workers as will be seen from a review of the decisions so far. Actions brought into the Court under Part 9A must be for breaches of minimum entitlements which are serious. Whether a breach of a minimum entitlement provision is serious is a matter of fact. Part 9A allows applications for declarations of breach, pecuniary penalty orders, compensation orders and banning orders. Whereas the

---

[1] See Employment Standards Legislation Bill 2015 (53-1) (explanatory note) at 2.

maximum penalties under Part 9 are $10,000 in the case of an individual, and $20,000 in the case of a corporation, the maximum pecuniary penalties under Part 9A are $50,000 - in the case of an individual - and the greater of $100,000 or three times the financial gain made - in the case of a corporation. Actions may be commenced against persons involved in the breach. This is designed to ensure company directors and officers, partners and the like are linked into the action.

The object of Part 9A gives some insight into the intent of the lawmakers in introducing this legislation. Section 142A(1) of the Employment Relations Act 2000 states:

> **142A Object of this Part**
>
> (1) The object of this Part is to provide additional enforcement measures to promote the more effective enforcement of employment standards (especially minimum entitlement provisions) by—
>
> (a) providing for a Labour Inspector to apply to the court for—
>
> (i) declarations of breach in relation to breaches of minimum entitlement provisions that are serious:
>
> (ii) pecuniary penalty orders for breaches of minimum entitlement provisions that are serious:
>
> (iii) compensation orders for serious breaches of minimum entitlement provisions to compensate employees who have suffered or are likely to suffer loss or damage as a result:
>
> (iv) banning orders based on certain grounds, including persistent breach of employment standards; and
>
> (b) making insurance for pecuniary penalties unlawful; and
>
> (c) providing for—
>
> (i) what is meant by being involved in a breach of employment standards; and
>
> (ii) when states of mind or conduct by certain persons are to be attributed to bodies corporate and principals; and
>
> (d) providing certain defences to breaches of minimum entitlement provisions.

Deterrence is a significant factor. This was made plain by the legislature and this can be seen from a reading of the Parliamentary debates when the amendment was introduced.[2]

The Authority and the Court have now established a reasonable number of precedents as to how these abuses will be considered and dealt with. Following the introduction of Part 9A, but in a case that could only be concerned with Part 9 penalties, the full Court set out a series of principles to be applied. The Court specifically stated that the principles set out would apply to both actions in the Authority and claims in the Court. This was the case of *Labour Inspector*

---

[2] See (8 September 2015) 708 NZPD 6352.

v Preet PVT Ltd.[3] The full Court sat, knowing that guidance would be needed, particularly in view of the pending effect of Part 9A.

Considerable assistance is given in the Act to the factors to be taken into account in setting penalties. Section 133A in Part 9 and s 142F in Part 9A set out the factors which the Court is required to take into account in assessing penalties. The factors in each section are identical. They are not exclusive. The Court in *Preet* considered these statutory factors and added further factors. It then set out a four-stage process to arrive at final quantification of penalty.

The first case to be heard solely under Part 9A by the Court was *Labour Inspector v Victoria 88 Ltd*.[4] This was an unusual case in which the employer company ceased business and directors and shareholders consented to banning orders and penalties against the persons involved in the admitted breaches in addition to penalties levelled against the company itself. A declaration of serious breach was consented to. The Court needed to be satisfied that the orders being consented to were appropriate and Judge Corkill made a review of the factors needing to be considered before agreeing to the orders sought.

The next case was my own decision in *Labour Inspector v Prabh Ltd*[5] although it was preceded by the *Sampan Restaurant* case I shall refer to shortly. *Prabh* considered Parts 9 and 9A remedies at length and reviewed similar cases involving fines and penalties in other New Zealand civil and criminal jurisdictions.

Two further important decisions which followed are *Nicholson v Ford*[6] and *A Labour Inspector v Daleson Investment Ltd*.[7] Both decisions are of Chief Judge Christina Inglis.

It is not possible to examine these decisions at length in the short time available. *Nicholson* is slightly unusual in view of the point that it departs from the more usual fact situation involving abuse of migrant workers and involves a claim for penalty pursuant to s 134 of the Act for aiding and abetting a breach. This section appears in Part 9 of the Act. *Daleson* is a case involving the more usual scenario under Part 9 but is unusual because of the grounds of appeal where the Authority had imposed what was clearly a manifestly inadequate penalty of $220.

---

3 *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.
4 *Labour Inspector v Victoria 88 Ltd t/as Watershed Bar and Restaurant* [2018] NZEmpC 26, (2018) 15 NZELR 906.
5 *Labour Inspector v Prabh Ltd* [2018] NZEmpC 110, (2018) 15 NZELR 117.
6 *Nicholson v Ford* [2018] NZEmpC 132.
7 *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

These two cases are important because they introduce what I regard as a more streamlined approach to the consideration of the factors the Court takes into account in reaching appropriate penalty levels but without departing from the factors statutorily required to be taken into account. It will be seen that the approach of Chief Judge Christina Inglis in these two decisions is slightly different from the methodology adopted in *Preet* and *Prabh* although she still adopted the statutory criteria and the additional criteria set out in *Preet*.

With the cases involving migrant workers, the facts usually disclose the employer in a disproportionate position of power over the employees and the abuse can occur over a lengthy period. Usually the employees have a link between tied employment and immigration status. In most, but not all of the cases which have come before the Court, the employer agrees, after the facts uncovered by the Labour Inspector become glaringly apparent, to pay the arrears of wages and remedy the breaches of the Holidays Act. The case then usually proceeds on the basis of an assessment of appropriate penalties. *Prabh* in particular shows that one of the factors taken into account by the Court is the need to ensure that beyond the remedial action taken by the employer in reimbursing the employees, the penalty then imposed is sufficiently punitive. Otherwise defaulting employers will see a risk worth taking and treat the penalty as just another overhead.

If I could sum up this topic with the following comments:

(a) Banning orders will rarely be granted for first time offending, unless the breaches are very serious and persistent. One reason for this is that if a business is stopped from operating by a banning order on its proprietors, other employees still in employment will suffer.

(b) As with sentencing in the criminal Courts, where Authority Members and Judges are exercising a discretion there will be differences in opinion as to the appropriate levels of penalty. The levels will accordingly vary even though there is an aim of consistency.

(c) Ranges within the discretions have probably now been established but will develop further as more cases come before the Authority and the Court.

(d) The concepts of manifestly excessive and manifestly inadequate penalties will probably enable grounds for review by Courts of higher jurisdiction where penalties imposed are outside these parameters. *Nicholson* is an example of this.

(e) The process is not without difficulty where each case needs to be determined on its own set of facts.

(f) As time elapses from 1 April 2016, the process of combining penalty claims brought before the Authority with claims in the Court will cease to be the norm and claims will be confined within the Authority or the Court dependent on how the penalty action has to originate and on the level of seriousness of the breaches.

(g) By virtue of the principle of deterrence, and with no sign of the abuses diminishing, penalties imposed will increase and banning orders may become more prevalent.

(h) As both *Prabh* and *Nicholson* show, where the actual employer is insolvent or impecunious remedies remain against persons involved in the breach. The provisions in part 9A to this effect are an extension of the aiding and abetting provision in Part 9, which featured in *Nicholson.*

(i) On the methodology of calculating penalties, the cases are specific. The issue of globalisation arises where it is plain that setting penalties for each and every breach would lead to grossly disproportionate amounts being imposed as penalties. The cases that I have referred to already deal with this issue. In addition, in the case of *Labour Inspector v Sampan Restaurant Ltd*[8] the Authority referred a case to the Court for an opinion on a question of law pursuant to s 177 of the Act. The decision of the Court giving the opinion covered factors in Parts 9 and 9A to be taken into account in assessing penalties as between a corporate employer and its officers. It should be noted that this was a case which involved considerations solely under the Holidays Act.

---

8 *Labour Inspector v Sampan Restaurant Ltd* [2018] NZEmpC 69, (2018) 15 NZELR 1152.