

Employment Court casts spotlight on “systemic and deliberate exploitation of migrant workers”, 23 February 2023

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In a recent judgment, the Employment Court considered a “high-water mark” case concerning penalties for extensive breaches of several migrant workers’ minimum employment standards by their employers: *Labour Inspector v Samra Holdings Ltd t/a Te Puna Liquor Centre* [2022] NZEmpC 234.

The Labour Inspectorate, which brought the proceedings on behalf of the migrant workers in question, described the conditions in which the employees worked as “modern-day slavery”. In view of the significant number, scope and duration of the breaches, the Court ordered a record total of over \$1.5 million in penalties.

Background

The case involved 5 defendants: 4 companies which operated liquor stores in the Tauranga/Bay of Plenty region, and Sukhdev Singh who exercised significant influence over the management and administration of those companies. The issues concerned 5 employees, each of whom were migrant workers on temporary visas tied to their respective employment with the defendant companies.

The Court had previously determined there were 71 discrete breaches of employment standards by the defendant companies, with the sum of arrears for those breaches totalling over \$516,000. Those breaches included, over a 4-year period:

- Failure to pay the employees their minimum entitlements under the Minimum Wage Act 1983 and the Holidays Act 2003;
- Charging and receiving payments from each of the employees (unlawful premiums for employment), in breach of the Wages Protection Act 1983;
- Failure to keep proper records reflecting the true number of hours worked; and
- Failure to provide compliant individual employment agreements to the employees, in particular by not specifying agreed hours of work or arrangements relating to the days and times the employees were to work.

The Court also previously determined that Mr Singh was involved in those breaches, and was personally liable for a further 49 breaches, thus bringing the total number of breaches to 120.

Having previously resolved those matters, this decision concerned whether any penalties should be imposed (and, if so, whether a portion of penalties should be apportioned between the employees and the Crown) and whether banning orders should be made against the defendants.

Should penalties be awarded?

The Labour Inspector sought total penalties of approximately \$3.2 million against the defendants for alleged “sustained, systemic and serious breaches of minimum entitlement provisions and other employment standards”.

In the first instance, the defendants claimed that the breaches did not require the Court to impose penalties at all. The defendants pointed to the fact that all of the arrears had been paid in full and that the defendant companies either had been sold, or would be sold, because they were unable to renew their liquor licences. The defendants further claimed that all the employees were highly educated, had made false declarations to Immigration New Zealand and “*came to New Zealand under the false pretence of intending to study while always intending to work and/or apply for residence*”.

The Court rejected the defendants’ initial arguments. The Court noted that the factors raised by the defendants went to the issue of quantum of any penalty rather than the question of whether a penalty should be imposed at all. The Court further observed that any acquiescence by the employees to the breaches (in circumstances where they relied on the defendants for their employment and work visas) did not mitigate or reduce the effect of the breaches. In view of the scale and gravity of the breaches, the Court held it was clear that the breaches in this case were deserving of penalties.

On that basis, the Court proceeded to utilise the standard legal tests relating to an assessment of the quantum of penalties by applying the standard 4-step approach.

Assessment of penalties

The first step required the Court to identify the nature and number of the breaches, identify the maximum penalty available for each breach and consider whether penalties could be “globalised”. On an analysis of the maximum pecuniary penalties available for all identified breaches, the Court noted the total possible maximum amount was over \$7.4 million. However, the parties agreed that some element of globalisation of penalties was appropriate to reflect a single course of conduct by each of the defendants that gave rise to the breaches. Accordingly, the Court considered that the breaches should be grouped into 4 globalised categories: breaches of the Minimum Wage Act; breaches of the Holidays Act; breaches of the Wages Protection Act; and record keeping breaches under the Employment Relations Act 2000 and Holidays Act.

At the second step, the Court assessed the severity of the breaches, taking into account both aggravating and mitigating factors, to establish a starting point for penalties. That assessment required the Court to apply several considerations set out in the Employment Relations Act and case law.

The nature and extent of the breaches were of particular importance in assessing severity. The Court agreed this was a “*high-water mark*” case involving serious and sustained breaches. For instance, the Court referred to the fact that the employees worked on average between 65.5 to 70 hours per week with up to 30 hours of those being unpaid. The Court said this was “*by any measure excessive*” and that strong penalties are appropriate.

In considering whether the breaches were intentional, the Court found that Mr Singh was likely aware of the relevant legal obligations on employers (being an experienced businessman who had previously received an improvement notice from the Labour Inspector in relation to another business he owned), knew the hours the employees worked and the wages they were paid, and that he personally sought out and received the premiums for employment from the employees. The Court therefore concluded the breaches were the result of a deliberate course of conduct.

The Court considered the nature and extent of loss or damage to the employees themselves was substantial and “*[t]he amounts speak for themselves*”. Further, the Court criticised the defendants’ failure to keep proper records and specify fundamental matters regarding hours of work in the employment agreements, noting that these failures “*may facilitate an employment relationship in which hours are excessive (as they were here) or unpredictable, and may enhance an employee’s vulnerability*”.

The Court noted there was minimal evidence of remorse or understanding by Mr Singh. Rather, he exhibited “*a troubling lack of insight into the effects of these breaches on the employees*”. The Court also stated that Mr Singh’s payment of the sums owed by way of arrears was not by itself evidence of contrition.

In assessing the circumstances of the breaches, the Court outlined each of the employee’s personal circumstances. The Court concluded the employees were clearly unfamiliar with New Zealand laws and regulations, had visas which relied on their continued employment, and the defendants had taken advantage of the employees’ vulnerability.

The Court was not persuaded by Mr Singh's claim that culpability regarding the record keeping breaches was shared with the employees because the employees prepared false wage and time records. Notwithstanding the employees' evidence that Mr Singh had directed them to do so, the Court found the defendants were at least aware of the false information being used. Furthermore, Court did not accept that the effects of the breaches were reduced because the employees entered New Zealand on lawful student visas with the intention of obtaining qualifications and attempting to gain residency or work visas, noting that the employees' approach was not unusual and had no relevance to the severity of the breaches.

Applying those factors, the Court concluded the "starting points" for penalties were \$1,264,750 for the defendant companies and \$462,000 for Mr Singh — a total of \$1,726,750.

Turning to the third step, the defendants accepted there was no issue as to the ability to pay any penalties.

The fourth and final step required an assessment of proportionality. In view of the fact that Mr Singh was the "*controlling mind*" behind the defendant companies, the Court concluded a 10% discount was appropriate to acknowledge his overlapping responsibilities and primary responsibility for the premium breaches.

As a result, the total penalties ordered amounted to \$1,554,075.

Apportionment of penalties

Having assessed the amount of penalties to be awarded, the Court turned to consider how the penalties should be apportioned between the employees and the Crown.

The Court said it was clear from the employees' evidence that they had suffered "*significant hurt and humiliation as a result of the defendants' conduct*" and that an apportionment of penalties to each employee was appropriate as compensation over and above the sum of arrears paid.

On that basis, the Court ordered that penalties should be apportioned so that the five employees would each receive between \$50,000 and \$55,000 in total. In effect, this meant that approximately 15% of the total penalties awarded was payable directly to the employees and the remainder to the Crown.

Banning Orders

The Labour Inspector sought banning orders of between 4 to 6 years. The defendants argued that banning orders were unnecessary because the businesses had been sold and were unable to obtain liquor licences (and therefore were effectively already banned).

The Court first noted that banning orders could be made for "*egregious breaches, particularly where the complainants were dealt with badly over an extended period of time, there was a lack of insight and the need for a message to be sent about the conduct in question*". The Court went on to observe that Mr Singh was not prevented from operating a business simply because of the inability to obtain a liquor licence. On that basis, the Court stated:

"This is a case involving systemic and deliberate exploitation of migrant workers. The defendants have shown no remorse or insight into their actions. I have little confidence that [Mr] Singh will not repeat the behaviour which has brought him before the Court. Prospective employees should be protected from the defendants. In light of the severity of the breaches in this case and the risk of repetition, I consider that this is a case where banning orders are appropriate".

Accordingly, the Court imposed banning orders of 2 years in relation to the defendant companies and 3 years in relation to Mr Singh. Under those orders, the companies were banned from entering into any employment agreements as employers and Mr Singh from entering into an employment agreement as an employer, being an officer of an employer, or being involved in the hiring or employment of employees.

Comment

This case represents the new "high-water mark" for penalties awarded for breach of minimum employment standards in the context of migrant worker exploitation. In its decision, the Court emphasised the vulnerability of the employees, their dependence on their employer in view of their visa status, and the power imbalance that existed in the relationships. The conditions of work were also of particular significance, including the "excessive" amount of unpaid additional hours the employees were required to work each week. It is also

notable that the Court focused on Mr Singh as the “controlling mind” of the defendant companies, who held primary responsibility in circumstances where the breaches overlapped across different employing entities.

The Court did not use the terminology of “*modern slavery*” in its judgment. However, this decision arrives at a time when there is increased attention on a potential legislative response to modern slavery, worker exploitation and forced labour (particularly following MBIE’s public consultation on the subject in 2022). In that context, this case sends a strong signal as to the consequences for severe breaches of minimum employment standards and could well influence legislative developments in the near future.