

[2] A number of witnesses in this case have the same surname and some have nicknames or are known by more than one name. For the purposes of this determination I will refer to witnesses using the first name that was mainly used for each person during the Authority's investigation meetings.

[3] The reference in this determination to "*the material period*" means the period 01 October 2012 to 07 December 2013.

[4] The FR for the material period owned and operated four pubs, namely:

- (a) Bellbird Tavern;
- (b) Papakura Tavern;
- (c) Tainui Tavern;
- (d) Oaks Tavern (acquired in December 2012).

[5] The Second Respondent, Sharmas & Sons Limited (referred to in this Determination "*SR*") was registered in 2003. The directors and shareholders of SR are currently Sanjesh Sharma and Abinesh Sharma.

[6] During the material time SR owned and operated the following two liquor shops:

- (a) Happy Liquor Store – Manurewa;
- (b) Happy Liquor Store – Penrose.

[7] The businesses identified above were described by Mr Sanjay Sharma (counsel and no relation to the Sharma brothers) as family businesses.

[8] On 12 December 2013 the Ministry of Business Innovation and Employment (MBIE) contact centre at Auckland received a call from Mr Hardeep Singh (Hardeep) who complained about various issues regarding his employment at several licensed establishments or premises run by FR and/or SR.

[9] The matter was referred to Labour Inspector Katherine (Kate) Feeney. Hardeep claimed he had worked for the Sharma brothers and had been moved

[10] Hardeep claimed that he was not paid for the first six weeks of his employment. He then claims that after he had worked for six weeks he was only paid \$300 per week in cash.

[11] There is no dispute that Hardeep was not given a written employment agreement, payslips or paid any holiday pay, either while employed or when his employment ended.

[12] When the Labour Inspector visited the Oaks Tavern/Happy Liquor Store in Penrose in February 2014 she was told that FR had nine staff in total and it operated a total of four pubs and retail shops.

[13] The Labour Inspector was told by FR that it had employed Hardeep for one week in “*early 2013*” in the Happy Liquor Store Manurewa. FR says Hardeep was dismissed after only working at the Manurewa shop for a few days when he was allegedly found drinking in the store. An allegation was also made that Hardeep was dismissed because he had taken promotional items from the liquor store without permission. Hardeep strongly denies these allegations.

[14] FR acknowledged there was no employment documentation regarding Hardeep’s employment and that it was unable to identify specific dates for his employment because it had not kept any wage and time records under the Employment Relations Act 2000 (the Act) or holiday and leave records under the HA03 for Hardeep.

[15] As a result of the Labour Inspector’s investigation she concluded that Hardeep had been employed by FR and/or SR but had not received employment agreements from either entity, had not been paid the minimum wage for all of the hours he worked, and had not been paid the minimum statutory entitlements owed under the Holidays Act 2000 (HA03).

[16] The Labour Inspector seeks an order requiring FR to Hardeep total wage arrears of \$24,776.50 consisting of:

- Minimum wage arrears of \$21,786.38;
- Annual holiday pay arrears of \$1,630.12;
- Public and alternative holiday pay arrears of \$1,260.

[17] The Labour Inspector also seeks an order requiring SR to pay Hardeep total wage arrears of \$20,556.63 consisting of:

- Minimum wage arrears of \$17,244.38;
- Annual holiday pay arrears of \$2,054.76;
- Public holiday entitlement arrears of \$1,257.50.

[18] The Labour Inspector also seeks that penalties be imposed on FR and SR for the following breaches:

- (a) Failure to comply with s.65 of the Act for the failure to provide Hardeep with written employment agreements;
- (b) Failure to pay Hardeep the minimum wage rate as required by s.6 Minimum Wage Act 1983 (MWA);
- (c) Failure to pay Hardeep any annual holiday pay in breach of sections 23 and 24 HA03;
- (d) Failure to pay Hardeep his minimum public holiday entitlements in breach of ss.49, 50 and 56 of HA03.

Relevant legislation

[19] Section 63A of the Act deals with bargaining for an individual employment agreement or individual terms and conditions in an employment agreement.

[20] Section 63A(2) requires an employer to:

- a. provide a prospective employee with a copy of the intended employment agreement,
- b. advise the employee that they have the right to take advice on the proposed terms of employment;
- c. give the employee a reasonable opportunity to seek independent advice about the intended agreement;

- d. consider any issues that the employee raises about the proposed employment agreement and respond to them.

[21] Section 65(1) of the Act requires an employer to provide a written employment agreement which sets out the basic mandatory information identified in s.65(2)(a) of the Act.

[22] Non-compliance by an employer with its obligations under s.65 of the Act does not mean there is no employment relationship. An oral employment agreement is still valid and enforceable.¹ Section 65(4) of the Act provides that a Labour Inspector may bring a penalty action for a breach of s.65 of the Act.

[23] Section 228 of the Act allows a Labour Inspector to pursue non-payment or under payment of wages or other money as arrears under s.131 of the Act. As a matter of policy, recovery for wage arrears due to underpayment may nevertheless proceed despite the acceptance by an employee of payment at a rate lower than the minimum wage rate.

[24] Section 130(1) of the Act requires an employer to keep wage and time records for each employee.

[25] The wage and time record must show the items set out in s.130 (1) of the Act which includes (among other things) the hours between which the employee was employed on each day, the days the employee was employed during each pay period, the wages paid to the employee for each pay period and the method of calculation of the wages paid.

[26] Section 8A of the MWA creates a similar obligation on an employer to keep accurate wage and time records for each employee and these must be produced upon request.

[27] Where a wage arrears recovery action is brought under s.131 of the Act, and an employer has failed to keep or produce an employee's wage and time records, then if that failure prejudiced the employee's ability to bring an accurate wage arrears claim under s.131 of the Act, then s.132(2) of the Act allows the Authority to accept as proved all claims made by the employee in respect of the wages paid and

¹ *Warwick Henderson Gallery Ltd v. Weston* [2005] ERNZ 921 (CA).

the hours, days and time worked, unless the employer has proved the employee's claims are incorrect.

[28] This means that under s.132(2) the burden of proof shifts from the employee to the employer. This means the employer must discharge the onus of proving on the balance of probabilities that the employee's evidence about the wages paid and the hours, days and time they worked is incorrect. If the employer does not discharge the burden of establishing on the balance of probabilities that the employee's claims are incorrect then the Authority may accept the employee's claims as proved.

[29] Section 6 of MWA provides that every employee is entitled to be paid the minimum rate of wages as prescribed under the MWA. Section 10 of MWA allows a Labour Inspector to pursue penalty proceedings against an employer who does not pay the minimum wage rate.

[30] Section 16 HA03 provides an employee who has completed 12 months of continuous employment with four weeks' paid annual holiday. Section 27 of HA03 requires an employer to pay an employee any annual holiday pay owing upon termination of the employment. Payment must be made in the pay that relates to the employee's final period of employment.

[31] Under s.23 HA03 where an employee's employment ends before they have become entitled to four weeks' annual holidays, then the employee is to be paid a sum equal to 8% of the employee's gross earnings since the commencement of employment.

[32] Hardeep claims he did not take any paid annual holiday while employed by FR or SR. Because Hardeep claims to have worked for 14 months, there are two separate calculations that need to be made to establish his alleged holiday pay entitlements for his alleged employment by FR.

[33] The first calculation for FR relates to the 12 month period 01 October 2012 to 01 October 2013 and the second calculation for FR is from 01 October 2013 to 07 December 2013.

[34] The first period is calculated in accordance with s.24 HA03 based on Hardeep's weekly pay as per s.21 HA03. The second period is calculated under s.25

HA03 at the rate of 8% of Hardeep's gross earnings from his anniversary date (being 01 October 2014) to the date of termination (being 07 December 2014).

[35] Both these amounts must then be added together to get the total holiday pay arrears Hardeep claims he is owed by FR.

[36] Because Hardeep claims he was employed by SR from 01 April 2014 to 01 December 2014 he worked for less than 12 months so his holiday pay arrears are to be calculated as per s.25 HA03 (i.e. at the rate of 8% of his alleged total gross earnings with SR).

[37] Section 49 of the HA03 requires an employee to be paid not less than their relevant daily pay or average daily pay if they do not work on a public holiday that would otherwise be a working day for the employee. Section 55 of the HA03 requires an employer to pay an employee for a public holiday in the pay that relates to the pay period in which the public holiday occurs.

[38] Section 50 of the HA03 requires an employee who works on a public holiday to be paid at least time and a half for the hours actually worked and, if the public holiday falls on a day that the employee would normally work, the employee is also entitled to an alternative paid holiday under s.56 of the HA03.

[39] If an employee has accrued alternative holiday entitlements which they have not used before their employment ends, then they must be paid for the alternative day holiday(s) at the rate of the employee's relevant daily pay or average daily pay on the last day of their employment.

[40] The employee is to be paid for outstanding alternative day holiday entitlement(s) in the pay period that relates to their final pay as per s.60 of the HA03.

[41] An employer company which fails to comply with its legal obligations in relation to annual holidays as per the HA03 and is potentially liable to a penalty not exceeding \$20,000 per breach in accordance with s.75 of the HA03.

[42] Section 83 HA03 also addresses the failure by an employer to keep holiday and leave records.

[43] This is similar to the provision in s.131 of the Act. If the Authority is satisfied that the employer's failure to comply with its obligations under s.81 and/or

s.82 HA03 (regarding the keeping of holiday and leave records) prevented an employee from bringing an accurate claim, then the Authority may accept as proven, in the absence of evidence to the contrary, statements made by the employee about the holiday pay or leave pay actually paid to them and about the annual holidays, public holidays, sick leave or bereavement leave actually taken by the employee.

Credibility

[44] The Authority heard from a number of witnesses, some of whom were summonsed to give evidence and one of whom gave evidence from India via telephone conference.

[45] Two witnesses attended the Authority's investigation meeting with their own lawyer and declined to answer questions on the grounds it may incriminate them. One of the witnesses required an interpreter. Some witnesses gave evidence in August 2015 and again in April this year.

[46] Hardeep claims he was employed for 14 months by FR and for approximately 8 months by SR. FR says it only employed Hardeep for one week and SR says it never employed him at all. Given the diametrically opposed accounts of what occurred in terms of Hardeep's employment credibility is a critical issue in this case.

[47] I need to point out that this is one of those cases in which there was a conflict in the evidence regarding everything that was put before the Authority. I further find that (with the exception of the Labour Inspector) every witness had reasons to give partisan evidence.

[48] There were no witnesses (other than the Labour Inspector) whom I considered to be truly neutral, independent or objective. I consider that every witness had compelling self-interests in terms of the evidence they gave.

[49] The Authority is left to assess what is more likely than not to be correct.

[50] I wish to record that I have carefully considered and evaluated what each witness said and how they said it. I have taken a broad based assessment to credibility given the significant credibility issues and conflicts that arose not only between witnesses but sometimes internally within a witness's own evidence.

[51] I appreciate that Hardeep's claim dates back a number of years and that the passage of time since then and even between the first day of the Authority's investigation and the final investigation meeting may understandably make memories more unreliable.

[52] I have carefully considered how reasonable, plausible and probable the evidence given by each witness is. As part of that assessment I have also taken into account the various personal motivations that each witness may have.

[53] I have applied logic and objectivity to my assessment of the evidence to determine what is more likely than not to have occurred. I have considered whether the evidence given by a particular witness on critical points has been supported or not by other witnesses and more importantly what evidence is corroborated or undermined by relevant documentary evidence.

[54] I have also carefully reflected on whether the evidence given has a ring of truth about it and whether or not I was persuaded by what I heard.

[55] I acknowledge that a witness who may be giving evidence to the best of their recollection may still be mistaken or confused, or possibly even influenced by discussions that they subsequently have had with others regarding the issues that they gave evidence about.

[56] When forming my view about what was more likely than not to have occurred, I have relied heavily on documentary evidence because I consider that is the most objective and neutral way of assessing the veracity of some of the evidence that I heard.

[57] I find that the documentation tends to support Hardeep's version of events more than either of the Respondents' evidence. I also consider that the documents produced to the Authority raised issues about veracity of the Respondents' version of events that could not be satisfactorily explained by their evidence.

[58] Overall after making a careful and considered assessment of all of the evidence I have preferred Hardeep's version of events as more likely to be correct than the evidence given on behalf of FR and SR.

[59] My credibility findings on the material conflicts in the evidence therefore favour Hardeep.

Factual findings

[60] Under s.174E of the Act I make the following factual findings on the basis each of the specific matters set out in paragraphs [61-87] of this determination (see below) either:

- a. at least met the applicable evidential standard of being proved on the balance of probabilities to the Authority's satisfaction; or
- b. have been accepted as proven in accordance with s.132(2) of the Act on the basis neither FR nor SR proved (to the required standard) that Hardeep's evidence about the wages he was paid or the hours, days and times he worked was incorrect.

[61] Accordingly I find that:

- a. Hardeep was not employed by and did not work for Bhav Enterprises Limited from April to August 2013;
- b. Hardeep was not employed by and did not work for RK Petrol Limited over the period September to November 2013;
- c. SR employed Hardeep from 01 October 2012 to 07 December 2013;
- d. Hardeep was not paid anything by SR for the first 6 weeks SR employed him;
- e. Hardeep did not agree to work for free for SR for the first 6 weeks it employed him so he is owed wage arrears (at the minimum wage rate) for the hours he worked over this 6 week period;
- f. The trial period provisions in s.67A of the Act do not apply to SR's employment of Hardeep;
- g. Hardeep's evidence about the hours, days, and times he worked for SR is proven under s.132(2) of the Act;

- h. Hardeep's evidence about the wages he was actually paid by SR is proven under s.132(2) of the Act;
- i. SR did not deduct or pay PAYE to Inland Revenue Department (IRD) on the wages (cash) it paid Hardeep;
- j. SR did not provide Hardeep with a written employment agreement in breach of s.65 of the Act;
- k. Hardeep did not take any paid annual holiday while employed by SR;
- l. SR did not pay Hardeep his annual holiday entitlements upon termination in breach of s.27(2) of the HA03;
- m. SR did not pay Hardeep his public holiday entitlements in breach of ss.46 – 50 of the HA03;
- n. SR did not pay Hardeep the applicable minimum wage rate for the hours he worked in breach of s6 of the MWA;
- o. The Labour Inspector's evidence about what SR owes Hardeep in wage arrears is accepted as proven under s.132(2) of the Act;
- p. FR employed Hardeep from 01 April 2014 to 07 December 2014;
- q. Hardeep's evidence about the hours, days and times he worked for FR is accepted as proven under s.132(2) of the Act;
- r. FR did not pay Hardeep anything for the work he did for it;
- s. The Labour Inspector's evidence about how much wage arrears FR owes Hardeep is accepted as proven under s.132(2) of the Act.

[62] I have also found the following facts in paragraphs [63-87] proven on the balance of probabilities and note that these specific factual findings have influenced my findings about credibility.

[63] Mr Scott is FR's and SR's Liquor Licensing Consultant. Mr Scott's evidence that his company did not apply for or pay for Hardeep's Duty Manager licence is not accepted. Hardeep's application states it was filed by Mr Scott and the

receipt from Auckland Council shows Mr Scott's company paid for Hardeep's Duty Manager application.

[64] Mr Scott told FR and SR that it should only pay for Duty Manager licences for permanent employees who they were certain would remain employed because the Duty Manager licence is personal to the person who obtains it which means the Duty Manager is not restricted to working on FR's or SR's licenced premises.

[65] On 22 October 2013 SR paid for Hardeep to obtain his Duty Manager licence. This strongly indicates that Hardeep was considered to be a permanent ongoing employee because SR invested money in obtaining his Duty Manager licence. It made no sense for it to have done that if he was someone who had been employed for a week only and dismissed for misconduct during his trial week.

[66] Hardeep's Duty Manager application dated 11 September 2013 (filed by Mr Scott) records that Hardeep had been employed as "*a Bar person at Happy Liquor, Manurewa for 11 months*".

[67] Abinesh Sharma signed a letter dated 12 September 2013 to support Hardeep's Duty Manager licence which stated that Hardeep was to be employed by FR as Duty Manager at the Happy Liquor Store – Manurewa.

[68] Hardeep attend Duty Manager training along with other FR and SR employees in September 2013. It is implausible that FR or SR would have arranged for that to occur if SR had dismissed Hardeep in early 2013 for theft, as the Sharma brothers alleged.

[69] Hardeep's Duty Manager licence was applied for by FR's and SR's Liquor Licensing Consultant Mr Scott. It is highly unlikely that would have occurred if Hardeep had not been employed by FR and/or SR.

[70] FR's managers Ms May Mcioce and Jatinder Singh both signed Hardeep's Duty Manager application stating he was a fit and proper person to hold a Duty Manager licence which suggests that FR had actual knowledge of Hardeep's application.

[71] FR and SR effectively operated as one entity in terms of staffing because their employees (including Cyd, Kate and Hena) were shifted around to different

work locations operated by each party without the corresponding changes in employer (from SR to FR and visa versa) appearing in any of the associated employment records.

[72] FR employed staff 'off the books' (i.e. under the table) meaning these employees (referred to by FR witnesses as 'volunteers') did not appear in FR's IRD Employer Monthly Schedule. Nor was there any employment documentation for these individuals. There was nothing to show that these individuals had agreed to work on a voluntary basis.

[73] FR paid at least some staff in cash or partly in cash and such payments do not appear to have been adequately recorded in FR's IRD documentation.

[74] Some employees (Varinderjit Singh, Amandeep Singh, Narinder Singh, Mantu (Sukhdeep) Singh) appear to have started work for SR before they appear in SR's IRD employment documentation strongly suggesting these individuals were employed for at least some of the time 'off the books'.

[75] SR's IRD records identify that Varinderjit Singh was first employed on 08 July 2012 but the information SR provided to Immigration New Zealand (INZ) in support of Mr Singh's work permit application says it had employed him from May 2012 (SR signed the INZ information on 22 May 12).

[76] Varinderjit's evidence that he had been paid \$300 cash in hand by the Sharma brothers regardless of the number of hours he worked before he was formally employed 'on the books' by SR is accepted. Other witnesses spoke about being paid in cash that did not appear to have recorded in the books.

[77] Sanjesh claimed that Shilviya Kumar was employed by FR at the Oaks Tavern in 2013 but she does not appear in FR's payroll records for the period she was apparently employed.

[78] FR and SR employed staff to work in their respective businesses for more hours than were recorded in their employment records (such as EMS and payroll records).

[79] FR employed Hera under the table for a number of months (meaning she was paid in cash and had no PAYE deducted).

[80] Sanjesh's evidence that the approximate 100 hours per week shortfall in staff cover across the FR and SR businesses was covered by him, his wife and his brother and their wives is not accepted. That explanation could and should have been given when the Labour Inspector first asked Sanjay about staffing arrangements in the businesses. However it was only proffered after the Labour Inspector had drawn the significant discrepancy between the hours the businesses were open and the hours that staff were employed to the Authority's attention.

[81] Text messages between FR and SR employees and Hardeep suggest he was employed because these texts involved work matters.

[82] Text messages between Anish and Aju indicate Hardeep was an employee around the period such messages were exchanged (11 September to 07 October 2013).

[83] Hardeep was working alone as the manager of SR's Manurewa Liquor store when two incidents occurred (25 March and 18 May 2013) which involved the police.

[84] Sanjay's evidence that Hardeep just happened to be passing by at the time of both incidents and was on each occasion incorrectly recorded by police as the Store Manager is not accepted.

[85] The 25 March incident resulted in a criminal conviction for robbery for the perpetrator. Hardeep was identified by the police and Court as the victim of the robbery and the only person in the Store (as Manager) when it was robbed.

[86] The 18 May incident record states Hardeep was working in the Manurewa Store at the time the wilful trespass incident occurred.

[87] I have preferred the police records which record that Hardeep was working as the Store Manager at the time of both incidents over Sanjesh's evidence that Hardeep was on the premises as a customer or bystander only.

The issues

[88] Prior to the Authority's investigation meeting the parties agreed with the Authority on the specific issues that need to be determined. These include:

- (a) Did the respondents provide Hardeep with a written employment agreement as required by s.65 of the Act?
- (b) Did the respondents keep or produce wage and time records for Hardeep as required by s.130 of the Act?
- (c) If not, has this failure prejudiced Hardeep's ability to bring an accurate claim?
- (d) If so, have the respondents proved that Hardeep's evidence about his wages, hours, days and times of work are incorrect?
- (e) If not, does the Authority accept as proved to the required standard the Labour Inspector's claims regarding the wages actually paid to Hardeep and the hours, days and times worked by him under s.132(2)(a) and (b) of the Act?
- (f) If yes, should penalties be imposed on one or both respondents for any breaches that they are found to have made in respect of the payment of minimum wages, and Holidays Act entitlements?
- (g) If so, what penalties should be imposed on FR?
- (h) If so, what penalties should be imposed on SR?
- (i) If the Authority does not accept all claims as proven under s.132(2) of the Act, what, if any minimum wages, wage arrears and/or holiday and leave entitlements is Hardeep owed by one or both respondents?
- (j) What, if any, costs should be awarded?

Was Hardeep provided with written employment agreement which complied with s.65 of the Act?

[89] FR and SR were both required to provide Hardeep with a written employment because they both employed him. Neither FR nor SR gave Hardeep a written employment agreement so they both breached s.65 of the Act.

Did the respondents keep and produce the wage and time records for Hardeep as required by s.130 of the Act?

[90] Neither FR nor SR kept wage and time records for Hardeep so FR and SR have both breached s.130 of the Act.

Has the failure to keep wage and time records for Hardeep prejudiced his ability to bring a recovery of wages claim against FR and/or SR?

[91] It is clear that FRs and SRs failure to keep wage and time records for Hardeep has seriously prejudiced his ability to bring wage arrears claims against each respondent.

[92] The Authority heard five days of evidence. It heard from 16 witnesses in person and it has reviewed 1,278 pages of documentation produced by the parties.

[93] Notwithstanding these efforts, the Authority is still not satisfied that it has clarity on who SR and/or FR actually employed to work at each location on what days or even what times each person they employed started or finished work. Nor is the Authority satisfied that it heard full or accurate evidence about what each person was paid by FR and SR for the days and hours they worked for each respondent.

[94] The Authority considers this lack of clarity is due to the failure by FR and SR to keep accurate employment records that are expected and required of all employers. The minimum code requirements under the Act and the HA03 to keep wage and time records and holiday and leave records is precisely to avoid this sort of problem arising.

[95] Despite extensive efforts by the Labour Inspector to review the documentation which was available and despite the Authority closely questioning all of the witnesses who presented during its investigation, I am left without the expected clarity over basic essential matters such as the terms and conditions on which employees were employed, which days they worked, where they worked, what they were employed to do and where, and how and what each employee was paid.

[96] It is evident to me that although there may be written employment agreements for some staff and although some staff may have had some of their hours recorded on the Employer's Monthly Schedule (the EMS is provided to Inland Revenue Department each month). I consider that this still not give the full picture

about exactly how FR and SR were being operated and in particular staffed or how staff were being paid.

[97] The whole purpose of the minimum code legislation is to avoid this level of confusion and complexity arising regarding an employee's minimum entitlements. I find that FR's and SR's failure to keep appropriate and accurate employment records has prejudiced Hardeep's ability to pursue his wage arrears claim.

[98] Section 132(2) of the Act therefore applies.

Have the respondents proved that Hardeep's claims about his wages, hours, days and times worked are incorrect?

[99] The onus of proving Hardeep's evidence was incorrect shifted to the respondents under s.132(2) of the Act after I was satisfied that FR and SR had not kept the required records under the Act or HA03.

[100] I find that FR and SR have fallen well short of proving on the balance of probabilities that Hardeep's evidence about the amount he was paid and his days and hours worked and the time he worked for each respondent is incorrect.

[101] This view is influenced by the documentary evidence which I find overall tends to support Hardeep's evidence but tends to undermine the evidence given on behalf of FR and SR.

[102] In accordance with s.132(2) of the Act I find that FR and SR have not proved Hardeep's claims about his days, hours and times worked or the wages he was paid are incorrect.

[103] The Authority therefore relies on s.132(2) of the Act to accept as proved to the required standard all claims made by Hardeep in respect of the wages he was actually paid and the hours, days and times he worked.

Should penalties be imposed on FR and/or SR for failing to pay minimum wages, annual holiday pay and public holiday pay?

[104] Section 136 of the Act and s.76 of HA03 gives the Authority the discretion to impose penalties for certain specified breaches of the Act and/or of HA03.

[105] I accept the Labour Inspector's submission that penalties are appropriate for the breaches that have occurred in this case. A penalty is imposed to punish

wrongdoing. I consider penalties are necessary in this case because they relate to the failure to comply with minimum code legislation.

[106] These breaches give FR and SR an unfair advantage over others in the labour market because they have not paid the same entitlements that other employers who are complying with the minimum code have done. The minimum code legislation is also there to protect all employees and employers need to expect that they will have penalties imposed on them if they do not comply with their legal obligations.

What level of penalties should be imposed on each respondent?

[107] I find that FR and SR both breached the requirement to keep accurate wage and time records and holiday and leave records for Hardeep. Both respondents breached the obligation to pay him at least the minimum wage for all hours worked.

[108] Hardeep was also not paid holiday pay upon termination and did not receive his public holiday entitlements or an alternative day's holiday for the public holidays that he worked. His annual holiday and public holiday (including alternative day entitlements) should have been paid to Hardeep upon termination.

[109] I find that Hardeep was employed by SR from 01 October 2012 to 07 December 2013 so the multiple breaches occurred over that entire period. I accept, under s.132(2) of the Act, Hardeep's evidence that he was employed by SR from 01 April to 07 December 2013. SR therefore engaged in multiple breaches over that period.

[110] The Employment Court in *Xu v McIntosh*² has given guidance to the Authority around its penalty jurisdiction. The Employment Court identified that the Authority should ask itself when assessing penalties:

- (a) How much harm has been occasioned by the breach?
- (b) How important is it to use penalties as a deterrent?
- (c) Was the breach technical and inadvertent or was it flagrant and deliberate?

² 2 ERNZ 448

[111] The Employment Court in *Tang v Yang & Zhang*³ provided a non-exhaustive list of factors which may be usefully considered by the Authority when determining applications for penalties. These include:

- (a) The seriousness of the breach;
- (b) Whether the breach was one-off or repeated;
- (c) The impact, if any, on the employee/prospective employee;
- (d) The vulnerability of the employee/prospective employee;
- (e) The need for deterrence;
- (f) Remorse shown by the party in breach; and
- (g) The range of penalties imposed in comparable cases.

Seriousness of the breaches

[112] The breaches to the Act and HA03 involved breaches of longstanding fundamental provisions of New Zealand employment law. The breaches cover a range of obligations including the failure to provide compliant written employment agreements, to pay the minimum wage and to pay annual and public holiday entitlements.

[113] I consider these breaches are serious as they apply to minimum code legislation.

One off or repeated breach

[114] The obligation to provide a written employment agreement continued throughout Hardeep's employment. Likewise the failure to pay him the minimum wage lasted for the duration of his employment which was approximately, on his evidence, 14 months. This involved multiple breaches because Hardeep should have been paid correctly at the end of every weekly pay period. The fact that that did not occur resulted in multiple ongoing repeated breaches.

³ [2014] NZEmpC 65

[115] The Authority heard evidence from other witnesses which tends to suggest that FR and SR were not fully complying with their tax and employment law obligations to other employees.

[116] I accept the Labour Inspector's submission that this is an aggravating factor because it indicates that the respondents have deliberately and consistently failed to comply with the obligations under law in relation to a number of employees over a significant period of time.

Impact on employee

[117] Hardeep has been significantly disadvantaged as a consequence of the ongoing breaches. On his evidence, he was paid well below the minimum wage (approximately \$4 an hour) which significantly hindered his ability to support himself and meet his living expenses.

Vulnerability of employee

[118] I accept the Labour Inspector's submission that Hardeep was a vulnerable employee. He was new to New Zealand and required a valid work visa to work. Hardeep's evidence was that he was offered support by the respondents in obtaining a work visa to encourage him to continue working.

[119] Hardeep says the Sharma brothers representations that they would support him to get a permanent visa influenced his reluctance to complain about the way he was being treated at work or about not receiving his employment entitlements. He only did so after his employment ended.

[120] I find that there was an imbalance of power between Hardeep and FR and SR. Hardeep was a 19 year old migrant to New Zealand with little or no knowledge of employment and taxation laws.

[121] I consider that the power imbalance is an aggravating factor which must be reflected when assessing the level of appropriate penalties.

Need for deterrents

[122] The Employment Court has recognised that the purpose of a penalty is not to compensate a party for a breach but is to punish wrongdoing and deter others from engaging in such conduct.

[123] The imposition of penalties must be at a level that significantly discourages FR and SR from breaching minimum code legislation in future. The penalties must also be set at a level high enough to deter other employers who may be tempted to employ staff under the table.

[124] The imposition of significant penalties will highlight non-compliant employers that there are consequences for not complying with minimum code legislation. The penalties imposed must send a strong message to employers that non-compliance is not acceptable.

Range of penalties

[125] The maximum penalty under s.135(2) of the Act and s.75 of HA03 is \$20,000 for a company or other corporation.

[126] I consider that a penalty of \$4,000 each is to be imposed on FR and SR for their breaches of s.65 of the Act (failure to provide a written employment agreement) is in line with other cases.

[127] I consider the breaches of the MWA to be serious and significant. Hardeep was paid significantly less than the applicable minimum wage and he was not paid for all of the hours that he worked each week.

[128] I consider these are serious breaches so a penalty of \$10,000 against FR and \$10,000 against SR is imposed to cover their MWA breaches.

[129] I consider that a penalty of \$7,000 each is to be imposed on FR and on SR for breaches of HA03 for failing to pay annual holiday pay upon termination and failing to pay public holiday and alternative holiday pay entitlements is appropriate.

Orders

[130] Within 28 days of the date of this determination FR is ordered to pay:

- a. Hardeep \$20,556.63 wage arrears;
- b. Total penalties of \$21,000;
- c. \$10,000 of the penalty imposed is to be paid directly into the Crown back account;
- d. \$11,000 of the penalty imposed is to be paid directly to Hardeep;

[131] Within 28 days of the date of this determination SR is ordered to pay:

- a. Hardeep \$24,776.50 wage arrears;
- b. Total penalties of \$21,000;
- c. \$10,000 of the penalty imposed is to be paid to the Crown bank account;
- d. \$11,000 of the penalty imposed is to be paid directly to Hardeep.

Costs

[132] The Labour Inspector, as the successful party, is entitled to a contribution towards her actual costs.

[133] The parties are encouraged to resolve costs by agreement. If that is not possible then the Labour Inspector has 14 days within which to file a costs application, FR and SR have 14 days thereafter to file their costs submissions with the Labour Inspector having a further seven days within which to file any reply.

[134] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are therefore invited to identify any factors which they say should warrant adjustments being made to the notional daily tariff which is currently \$3,500. Costs will be assessed on the basis of five days of investigation meeting time.

Rachel Larmer
Member of the Employment Relations Authority

