IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 127
5602246

	BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
	A N D	IKEDA SUISAN COMPANY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Catherine Milnes, Counsel for Applicant Justine Inns and Hamish Fletcher, Co-Counsel for Respondent
Investigation Meeting:	Determined on the papers
Submissions Received:	14 March, 20 June and 6 July 2017 from the Applicant 14 March, 30 May, and 6 July 2017 from the Respondent
Date of Determination:	17 July 2017

DETERMINATION OF THE AUTHORITY

A. A penalty in the sum of $40,000 is imposed upon the respondent, which is to be paid to the Crown.

B. Costs are reserved.

Employment relationship problem

[1] The Labour Inspector seeks the imposition of a penalty upon the respondent in relation to the respondent's failure to keep accurate time and wage records. The respondent accepts that the time records kept by the respondent were inaccurate and

has worked with the applicant to identify the extent of the inaccuracy and to rectify resulting under-payments of wages made to the affected employees. It does not deny that a penalty is appropriate but disputes the amount.

[2] This determination therefore addresses the amount of the penalty that should be imposed.

Background

[3] The respondent is a commercial fishing company registered in Japan which operated a fishing vessel called Hoshin Maru 77 in the New Zealand exclusive economic zone (EEZ) for 50 fishing days between 30 April 2015 and 23 June 2015, as part of a longer voyage of approximately 290 days. There were six Japanese officers aboard the vessel and 16 Indonesian crew members.

[4] Whilst the Hoshin Maru 77 was operating in New Zealand waters, a Ministry of Primary Industries (MPI) fisheries observer was on board. The observer became concerned that the hours he had recorded the crew as working were significantly longer than those which had been recorded by the respondent. Accordingly, on 1 July 2015, the MPI observer provided to the Labour Inspectorate a copy of his diary.

[5] On 6 August 2015 the applicant requested the payslips of the crew from the respondent's New Zealand authorised agent, which had been appointed pursuant to s.103 of the Fisheries Act 1996. Wage and time records were provided. A further request for additional timesheet records was made by the Labour Inspectorate on 15 December 2015, and these were also provided.

[6] On 5 January 2016 the Labour Inspectorate lodged a statement of problem in the Authority seeking the imposition of a penalty for a "failure to provide wage and time records". The respondent defended the application on the basis that it had not failed to provide records but, if the complaint was that the records supplied were inaccurate, that complaint stemmed from the fact that there was a misunderstanding on the part of the Labour Inspector as to the way that the crews worked.

[7] The MPI observer's diary records were provided to the respondent on 30 March 2016, and the parties worked together to establish what hours the crew had worked while they had been fishing in the New Zealand EEZ. On 7 October 2016 the

applicant received video evidence from the MPI observer who had taken footage of the activities on board the Hoshin Maru 77 as part of his duties.

[8] The video footage was provided to the respondent as part of the briefs of evidence lodged by the Labour Inspector on 26 October 2016. Upon receipt of the video evidence the respondent acknowledged that fewer crew hours had been recorded by the officers on board the vessel than was likely to have been worked by the 16 crew. It was eventually agreed between the Labour Inspector and the respondent that the 16 crew members had had their hours of work under-recorded by a total of 5,200 hours over the 50 fishing days in New Zealand EEZ waters. This worked out as an under payment of NZ$87,100, or NZ$82,252 after permissible deductions for food had been taken into account.

[9] An attempt was made to pay the short fall to the crew members in January 2017 but this attempt was unsuccessful for bank related reasons. The majority of the crew were finally paid their arrears by 22 February 2017. The Labour Inspector is satisfied that all under payments have now been properly made.

Submissions

[10] The parties agreed that it was appropriate to apply the principles laid out by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited & Ors*[1], and structured their submissions by reference to the four main steps set out in that judgement.

The Labour Inspector's submissions

[11] Under step 1 of *Preet,* the Labour Inspectorate submits that there was one type of breach, under s.8A[2] of the Minimum Wage Act 1983, being a failure to keep accurate time and wage records.

[12] The applicant says that there were 16 employees affected and that the failure occurred across all of the respondent's time record documentation. The applicant submits that the breach, in relation to each employee, was one ongoing breach on the basis that each repeated instance of inaccurate time recording amounted to a substantially identical action. Therefore, there were 16 breaches of s.8A in total.

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1 [2016] NZEmpC 143

2 Repealed on 1 April 2016

[13] The applicant submits that the respondent is liable to one penalty per employee and that, pursuant to s.10 of the Minimum Wage Act, whereby the maximum penalty available to be imposed is $20,000 per breach, the total maximum penalty is $320,000.

[14] With reference to globalisation, the applicant submits that partial globalisation of penalties in respect of the repeated identical elements of the breach is appropriate but that there should be no globalisation across employees to reflect the fact that the failure occurred across and impacted all crew member employees that were working for the respondent whilst the respondent was liable to comply with New Zealand legislation.

[15] Assessing the severity of the breach under step 2 of *Preet*, the applicant submits that the failure was serious, so that the starting point in relation to that failure should be assessed as 70% of the maximum penalty amount. The basis for this submission is that the Labour Inspector accepts that the inaccuracies and incompleteness of records were not inadvertent, but were negligent, and that the failure caused the Labour Inspectorate difficulty in establishing whether minimum code breaches had occurred. The failings also meant that employees would not have known and were unable to determine whether they were receiving an entitlement and what their entitlements were.

[16] The Labour Inspectorate submits that having partial records makes it more difficult to establish whether any breaches have occurred because, prima facie, they look correct. But for the intervention of the MPI observer, the breach would not have been detected.

[17] The applicant also submits that the arrears accrued over a short period of just 50 days but were, nonetheless, significant amounting to 6.5 under recorded hours per employee per day, translating to a total under payment of NZ$87,100, before permissible deductions. What that meant in practice was that, on average, the employees were paid at less than half the hours they actually worked. The time recording was performed by the Japanese officers, according to the applicant.

[18] The applicant also states that the employees were all low waged Indonesian nationals in vulnerable positions and that none of the six Japanese officers on board were affected, with no errors having been identified in their time records.

[19] The Labour Inspectorate also submits that the under payment would have been comparatively small for the respondent, which would have sold the tuna catch from the April to June 2015 voyage for between NZ$1.55m and NZ$2.3m. The Labour Inspectorate says that this does not include the value of the by-catch which cannot be estimated as it tends to be off-loaded and sold at various ports around the world. It should be stated at this point that the respondent lodged an affidavit, sworn by the managing director of the respondent company, which deposed that the total voyage profit had been NZ$73,775 with the profit for the New Zealand element being only NZ$11,438. I shall say more about this affidavit below.

[20] The Labour Inspectorate further submits that the crew's vulnerability stemmed from them being unfamiliar with New Zealand employment law and their entitlements under employment legislation, and how to access the information. The Labour Inspector also submits that the need for deterrence is important and that the respondent's obligation to ensure that it maintained an adequate system of keeping records was basic and fundamental.

[21] Turning to mitigating or ameliorating factors under step 2, the Labour Inspector acknowledges that the respondent demonstrated remorse and apologised by making payment of the arrears to the affected crew. This was despite the difficulty in doing so for the respondent given that the vessel in question had subsequently sunk and that the crew no longer worked for the respondent.

[22] The Labour Inspectorate also acknowledges that the respondent and its agent cooperated with it in its investigation and in the subsequent Employment Relations Authority proceedings. The parties cooperated in the creation of agreed statements of fact which dispensed with the need for an investigation meeting. The applicant also acknowledges that the respondent has not previously had matters before the Authority in New Zealand and concedes that the breach was not deliberate, but was rather negligent.

[23] Taking these factors into account, the applicant submits that a 50% reduction for mitigation would be appropriate. After the application of step 2, the potential penalty is reduced from $320,000 to $112,000.

[24] Turning to the third step required under *Preet,* whereby the respondent's financial circumstances need to be taken into account, the Labour Inspectorate

submits that the respondent's business is still operational and that the catch effort during the trip was below the ordinary amount of fish that would usually have been caught so that the respondent's revenue from the fish catch was lower than normal.

[25] The Labour Inspectorate also submits that the respondent's failures to fully record amounts owing to employees, and to pay them, reduce the respondent's costs, thereby inflating its own financial gain substantially over the course of the complete fishing operation. Therefore, the applicant submits that any deduction in step 3 should be modest as penalties should be sufficiently substantial to ensure that employers do not benefit from under paying their employees minimum entitlements, and should act as a meaningful deterrent that dissuades non-compliant actions.

[26] The applicant says that, although the Hoshin Maru 77 was later lost at sea in Japanese territorial waters[3], it understands that the respondent operates several other fishing vessels and is carrying on its commercial operations as usual. It concludes by submitting that the financial position of the respondent is neutral based on the information currently at hand so that no reduction should be made to take into account the respondent's financial circumstances.

[27] Turning to the final stage under *Preet*, whereby the Authority must consider whether the provisional penalty reached under the first three steps is proportionate to the seriousness of the breaches, and harm occasioned by them, the applicant submits that the penalty amount needs to be proportionate to the amount of money withheld, as well as recognising that the respondent is a major foreign national commercial fishing company. The penalty should also need to perform the role of maximum deterrence, whilst still ensuring a realistic and genuine prospect that compliance can occur.

[28] The applicant submits that, in assessing the proportionality of the outcome, the appropriate global figure for penalties is in the range of $40,000 - $60,000.

The respondent's submissions

[29] In responding, Ms Inns on behalf of the respondent submits that the legal framework within which the vessel operated in the New Zealand EEZ is relevant to the matter before the Authority, as it differs from the usual New Zealand employment

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3 On 11 November 2016, with no loss of life.

law framework in key respects. In particular, the employment relationship between the respondent and the crew who worked on the vessel had few, if any, of the indicia of a New Zealand employment relationship. The respondent asserts, in particular, that:

(a) The respondent is a company registered in Japan;

(b) The crew are citizens of, and usually resident in, the Republic of Indonesia;

(c) The vessel was, at all material times, flagged in Japan;

(d) During the period in question, the great majority of the crew's work aboard was carried out in New Zealand's EEZ; that is, beyond New Zealand's territorial limits.

[30] The respondent submits that, while there was no suggestion that the standards should be relaxed or lowered in their application to the respondent, the unique short-term nature and legal framework of the vessel's short-term operation are factors relevant to the setting of penalties in this case.

[31] Addressing the Labour Inspector's submissions in relation to the application of *Preet*, the respondent submits that there was only one breach by the respondent. The respondent asserts that the breach arises from a single request to provide records and that the records in question form a single document. This was the request made on 15 December 2015 to provide "the timesheet records of the Hoshin Maru 77".

[32] The respondent refers to the decision of the Authority in *Labour Inspector v Dreamz Global Limited*[4] which concerned a failure to provide documents requested by a Labour Inspector pursuant to a 'Notice to Produce' issued under s.229(1)(c) of the Employment Relations Act 2000. This was regarded by the Authority as a single breach without reference to the number of employees whose employment records were involved.

[33] The respondent submits in the alternative that the breach in question falls squarely within the terms of s.557(1) of the Australian Fair Work Act 2009 which the court in *Preet* described itself "attracted by"[5], namely:

> 2 or more contraventions of a civil remedy provision … are … taken to constitute a single contravention if:

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4 [2017] NZERA Auckland 13, 564459

5 *Preet* at paragraph [139]

(a) the contraventions are committed by the same persons; and
(b) the contraventions arose out of a course of conduct by the person.

[34] According to the respondent, in the present case it is apparent on the face of the timesheet records that the records were completed by the same individual, the same approach was taken to each entry with the same number of work hours being attributed to each in three work teams on each day, and the same misunderstanding or misapplication of New Zealand employment law was applied to all entries.

[35] Therefore, according to the respondent, the maximum penalty available for the breach is $20,000.

[36] In the further alternative, the respondent submits that, if the Authority does not agree that there was only a single breach of the requirement to provide records in response to the applicant's request and instead takes the view that there were 16 separate breaches of s.8A of the Minimum Wage Act, as submitted by the Labour Inspector, then this is a case where it is appropriate to consider globalising the penalty across those employees. In support of this argument Ms Inns refers to paragraph [141] of *Preet*; namely, that this is a "case where the breaches are part of a consistent pattern of breach or a particular statutory requirement".

[37] In respect of step 2, where the severity of the breach is assessed, the respondent says that the inaccurate recording of time was not deliberate, that the vessel operated in the New Zealand EEZ for only 50 days, where it was only during this period that timesheet records were kept with crew being paid a flat monthly wage for the balance of the year, irrespective of the hours worked. In addition, the vessel only took one voyage in New Zealand waters in 2015.

[38] The respondent also asserts that the crew were paid at the New Zealand statutory minimum wage during the New Zealand leg of their voyage for all of their recorded hours, which resulted in them receiving almost ten times the monthly wage they received in fishing in other parts of the world.

[39] The respondent also submits that, although the degree of inaccuracy in timesheet records was considerable, it did not result in any hardship to the crew. Ms Inns submits that the absence of any ulterior or unlawful intent must put the case in a quite different category to that of *Preet*. Therefore, the respondent argues that the

breaches should be classified as moderately serious, and a starting point of 40% of the maximum penalty should therefore be appropriate.

[40] Turning to mitigating factors, the respondent states that there was no concealment of the inaccurate recording, and that the respondent fully cooperated with the applicant from the time of his initial request for records. She also states that the respondent took all possible steps to rectify the breach, including apologising for it and paying all resulting wage arrears in full.

[41] Finally, the respondent's cooperation also avoided the need for an investigation meeting in the Authority. On this basis, Ms Inns submits that a 60% reduction in the starting point would be appropriate. This leads to a provisional penalty of 16% of the statutory maximum; namely $3,200.

[42] The respondent does not seek to argue that any penalty imposed should be adjusted downwards as a result of financial or other hardship it would suffer but does point out that the company is a "modest sized family owned and operated firm" which now operates just two tuna long-line vessels. She also points out that the respondent no longer operates in New Zealand waters, given the requirement now to re-flag its vessels as a New Zealand one, which would be impracticable given the short season. It also suffered the loss of the Hoshin Maru 77 on 11 November 2016.

[43] Turning to the final step of proportionality, Ms Inns says that if the Authority agrees that only one breach was incurred, then the resulting provisional penalty of $3,200 would appear to be appropriate.

[44] However, if the Authority does not agree that there was only one breach, but that there were 16, the resulting provisional penalty prior to step 4 after applying the discounts it argues for would be $51,200. Ms Inns states that this would come close to equating to $1,000 for each day the vessel operated in New Zealand waters and such a penalty would be disproportionate, especially given that a total of $87,100 in wage arrears was incurred by the breach. Ms Inns therefore submits that a proportionate penalty in the range of $35,000 - $45,000 would be appropriate.

Discussion

[45] First, s.103A(7)(g) of the Fisheries Act 1996 gives the Authority jurisdiction in respect of the employment relationship that arose between the 16 crew members

and the respondent company by virtue of paragraphs (a) and (b) of s.103A(7)(a) and (b). Those paragraphs provide that the 16 crew members were employees for the purposes of the Minimum Wage Act 1983 and the Wages Protection Act 1983.

[46] Section 8A of the Minimum Wage Act materially provided, prior to the repeal of that section, that every employer who employs any worker whose wages or rates of wages are prescribed or paid pursuant to that Act shall keep a wages and time record for each such worker showing, inter alia, the hours between which the worker is employed on each day. Section 10 of the Minimum Wage Act provided at the material time that:

> Every person who makes default in the full payment of any wages payable by that person under this Act and every person who fails to otherwise comply with the requirements of this Act is liable to a penalty recoverable by a Labour Inspector, and imposed by the Employment Relations Authority, under the Employment Relations Act 2000

[47] Although the factual background to this matter is somewhat unusual, the facts themselves are relatively simple and are largely agreed between the parties. The best approach in analysing the appropriate level of penalty is to follow the four steps set out in *Preet*.

Step 1 – how many breaches?

[48] Unusually, there is disagreement in this relatively simple case as to how many breaches occurred. The respondent's position that there was only one breach seems to be based upon the fact that the statement of problem lodged by the Labour Inspectorate stated that the problem that the Authority was to resolve was "a failure to provide wage and time records pursuant to section 8A of the Minimum Wage Act 1983 or section 130 of the Employment Relations Act 2000". This, of course, was not a correct description of the problem, or was at least ambiguously worded because the failing was the respondent not keeping records showing, in the case of each worker, the hours between which the worker was employed on each day, as was required by s.8A(1)(g) of the Minimum Wage Act.

[49] The respondent argues that the breach arises from a single request to provide the records and the records in question formed a single document.

[50] This submission is, with respect, misconceived. It is absolutely clear from the wording of s.8A(1) that the record needed to be kept in respect of each worker. Therefore, the records in question cannot in any non-artificial sense be viewed as a "single document".

[51] The mischief that the Labour Inspector's action seeks to address is the failing to keep accurate records of the hours worked by each crew member. In other words, the statutory obligation related to each worker, and there was a breach in respect of each worker. Therefore, as there were 16 crew members affected by the failing, I am satisfied that there were 16 breaches of the requirement. Therefore, *Dreamz Global Limited* can be distinguished. I accept the applicant's characterisation of these breaches in respect of each worker as ongoing breaches.

Step 1 –globalisation

[52] Turning to globalisation, the respondent argues briefly in the alternative that the penalties that are liable to be imposed in respect of the 16 breaches should be globalised across those employees.

[53] The only argument I can see for supporting this proposition is that the breaches all stemmed from a single negligent misunderstanding of the respondent's obligations under New Zealand employment law to record each hour worked. This is similar to an argument that one should globalise across employees affected by a failure to provide a compliant individual employment agreement where each employee is given a copy of an agreement derived from a flawed and unlawful master agreement.

[54] However, I can see two countervailing arguments against globalising that convinces me that it is not appropriate. The first is that each crew member was potentially affected differently by the breaches in that it is not likely that there would all have worked exactly the same hours as each other for the entire 50 days. The effect of that differing impact argues against globalising.

[55] The second argument is that, if I were to globalise across all employees, then the starting point would be a maximum penalty of $20,000, which would then be reduced by virtue of the other steps under *Preet*. This is illustrated by the final penalty arrived at under the respondent's analysis of $3,200. This would be clearly

inadequate given the impact of the breaches upon the crew members; namely wage arrears of $87,000 over 50 fishing days.

[56] In conclusion, I do not agree that it is appropriate to globalise across the 16 crew members. Therefore, the starting point is a maximum possible penalty of $320,000.

Step 2 - severity

[57] I do not disagree with many of the points with respect to severity made by either party. I would comment that, as far as deterrence is concerned, the deterrent effect of the penalty will be less important for this particular respondent as it has no current intention to fish in New Zealand waters again.

[58] Balancing the different factors as to severity highlighted by the respective parties, I believe that it is appropriate to assess the penalty at 50% of the maximum. That gives a maximum potential penalty of $160,000.

Step 2 – ameliorating factors

[59] Turning to ameliorating factors, again, I believe both parties have raised relevant issues that should be taken into account. However, it is not quite correct for the respondent to say that it fully cooperated with the applicant from the time of the initial request for records, as the respondent denied in its statement in reply that there was a significant discrepancy between the recorded hours of work on the Hoshin Maru 77 and the actual hours of work. The respondent put forward a defence that the allegation that there had been a failure to record hours of work accurately could be based on differing views of what constituted working hours on the Hoshin Maru 77.

[60] Furthermore, it was not until the provision of video evidence from the MPI observer in October 2016 that the respondent acknowledged that fewer hours were recorded by the officers than were actually worked by the crew.

[61] I accept the Labour Inspector's submission that a reduction of a further 50% to take into account ameliorating factors is appropriate. This reduces the provisional penalty to $80,000.

Step 3 – financial position of the respondent

[62] The respondent lodged and served an affidavit by Mr Hirohito Ikeda, the managing director of the respondent company, which set out details of the sales results and voyage costs in relation to the New Zealand portion of the 2015 voyage of the vessel in question, concluding that, as stated above, the profit for the New Zealand portion of the voyage was only $11,438. Mr Ikeda stated that the disappointing result could mostly be attributed to relatively low prices achieved for sales in the year.

[63] The Labour Inspectorate lodged submissions in reply to this affidavit, raising a number of questions about the accuracy of the financial information stated in the affidavit (in terms of revenue and expenses) and the methodologies used to calculate the profit of the New Zealand portion of the voyage. In other words, the Labour Inspectorate called into question the reliability of the conclusions drawn by the respondent based on the financial information provided.

[64] In response to these submissions the Authority invited the respondent to file a further affidavit to address the queries raised by the Labour Inspectorate. In response, the parties lodged a joint memorandum which advised the Authority that counsel for the parties had entered into discussions and had agreed that the parties were, in fact, not too dissimilar in their estimates of the value of the fish sold during the voyage. Counsel for the parties also agreed that further evidence about the expenses incurred by the respondent during the voyage would not necessarily assist the Authority in its *Preet* step 3 penalty analysis. They therefore agreed that, for the purposes of step 3, the financial position of the respondent should be treated as neutral.

[65] The Authority is not in a position to delve further into the matters that are the subject of Mr Ikeda's affidavit without further information being provided. I agree with the conclusions of the parties' counsel that it would not be cost-effective to require the respondent to provide for that further information. I therefore accept the parties' submissions, which are in agreement, that the respondent's financial position should be regarded as neutral for the purposes of stage 3 of the *Preet* analysis.

[66] Therefore, I make no deduction to the provisional penalty of $80,000 reached thus far.

Step 4 - proportionality

[67] The parties are not wildly apart with respect to what the penalty should be, putting aside the respondent's single breach and globalising approach. Indeed, the respective ranges overlap, with the Labour Inspectorate suggesting a penalty in the range of $40,000 - $60,000 and the respondent suggesting a penalty in the range of $35,000 - $45,000.

[68] When I step back it is clear that the provisional penalty reached after stages 1 – 3 of $80,000 is too high by reference to the breaches and the harm done. I take into account the fact that there was no wilfulness underlying the failure and that this is not a New Zealand based employer actively engaged in a business operation within New Zealand whose obligations should be clear and whose operations would be ongoing.

[69] However, I am also mindful of the fact that, whilst the deterrent effect is not particularly necessary for this particular respondent, it is necessary for international operators of fishing vessels who are subject to New Zealand legislation pursuant to the Fisheries Act.

[70] It is not particularly helpful to look comparatively at other cases of penalties imposed by the Authority or the court since *Preet* as the circumstances of this case is unique in my view.

[71] I believe that, taking into account all of the factors discussed in this determination, and standing back, a penalty in the sum of $40,000 is appropriate. This is less than the $1,000 per fishing day alluded to by the respondent, but still sufficiently significant to reflect the overall seriousness of the breach.

Order

[72] I order the respondent to pay to the Crown within 28 days of the date of this determination the sum of $40,000. This sum is to be paid to the Authority which will then pay the penalty into a Crown bank account.

Costs

[73] Costs are reserved. If the Labour Inspectorate wishes to seek a contribution to its legal costs from the respondent, it should first seek to agree those costs with the respondent. However, if it is unable to do so within 28 days of the date of this

determination, it will then have a further 14 days within which to serve and lodge a memorandum of counsel, setting out what contribution it is seeking from the respondent, and the basis for that. The respondent would then have a further 14 days within which to serve and lodge a memorandum of counsel in response.

David Appleton
Member of the Employment Relations Authority