IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 214
3006811

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	AVONDALE COMMUNITY PHARMACY LIMITED FAMILY CARE 7 DAY PHARMACY LIMITED MANGERE COMMUNITY PHARMACY LIMITED OTARA COMMUNITY PHARMACY LIMITED RATANUI COMMUNITY PHARMACY LIMITED TAKANINI COMMUNITY PHARMACY LIMITED WAIORA COMMUNITY PHARMACY LIMITED BROWNS ROAD COMMUNITY PHARMACY LIMITED MANUKAU COMMUNITY PHAMACY LIMITED PUKEKOHE PHAMACY (2005) LIMITED Respondents

Member of Authority:	Eleanor Robinson
Representatives:	Alistair Dumbleton, Counsel for the Applicant Philip Skelton QC, Counsel for the Respondent
Investigation Meeting:	8 April 2019
Determination:	11 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, a Labour Inspector, seeks penalties against seven of the named Respondents for breaches of the Minimum Wages Act 1983 (MWA) and the Holidays Act 2003 (HA).

[2] The seven Respondents against whom penalties are sought are:

1. Avondale Community Pharmacy Ltd
2. Family Care 7 Day Pharmacy Ltd
3. Mangere Community Pharmacy Ltd
4. Otara Community Pharmacy Ltd
5. Ratanui Community Pharmacy Ltd
6. Takanini Community Pharmacy Ltd
7. Waiora Community Pharmacy Ltd

[3] The Respondents accept liability for penalties.

Issues

[4] The issue for determination is the quantum of penalty in respect of the MWA and HA breaches.

[5] In order to assist the Authority Counsel for the Parties have filed documents including an Agreed Statement of Facts dated 29 May 2018.

Background

[6] The Respondents are registered companies licensed by the Ministry of Health to operate pharmacies under the Medicines Act 1981. The Respondent directors have, at all material times, comprised of two registered pharmacists, Mr Kerry Oxenham and Mr Nathan Bhikha and one healthcare management professional who resigned in July 2017.

[7] The Respondents operate within the regulatory regime established by the Medicines Act 1981 and Medicines Regulations 1984. Each pharmacy operates under the direct supervision and control of a registered pharmacist. The pharmacies are audited for quality by

the Ministry of Health (medicines Control) and the District Health Boards (DHBs). The audits assess compliance with regulatory requirements, and with the quality requirements of the Pharmacy Services Agreement.

[8] None of the pharmacies, directors, or any related companies have any record of breaches of employment legislation, or complaints to the Labour Inspectorate.

[9] The Respondents all belonged to a consortium of companies, each respondent was a separate legal entity and as such an employer party to one or more individual employment relationships.

[10] The Respondents share 'back office' functions including human resources, accounting, payroll, IT and office support. These functions are delivered from a central office in East Tamaki, which also services a number of other healthcare companies.

[11] During the relevant period (5 April 2014 – 5 April 2016) the Respondents employed a total of approximately 90 people including casual employees in roles as (i) pharmacists; (ii) pharmacy technicians; (iii) Trainee pharmacy technicians; (iv) intern pharmacists; (v) retail managers; and (vi) retail assistants.

[12] The annual payroll for the Respondents was approximately $2,400,000.00.

[13] All employees in the claim had employment contracts, which were drafted and maintained by the human resources department. Each employee had an individual employment file which included the employee's CV, evidence of qualifications, immigration status, references, letter of offer, employment contracts, IRD related documentation, wage records, time and attendance records, leave, allowances, deductions, leave accruals and payments.

[14] The Respondents used the following systems to keep track of employee time, leave, salary and other records:

- MYOB Exo Payroll Fingerprint Scanners integrated with MYOB Exo Payroll for 6 sites;
- Manual time sheets for Avondale Community Pharmacy recording physical presence at that site;
- Approved leave forms for leave requested;
- MYOB Exo Payroll reports for all wages, allowances, deductions and leave payments;

- Toniq Dispensary software;
- Toniq Retail point of sale software.

[15] Employees received weekly pay slips showing hours worked, deductions, and year to date totals.

Training hours

[16] Pharmacy technicians hold tertiary qualifications and are an integral part of all pharmacies. By law, pharmacy technicians may dispense prescription medicines under the supervision of a pharmacist.[1] They assist the pharmacist to prepare prescriptions, dispense medication under supervision, maintain prescription and patient records, and maintain a dispensary and dispensary equipment.[2] Pharmacy technicians are professional and trusted positions in any pharmacy.

[17] Tertiary courses for trainee pharmacy technicians are offered by four training providers, including two polytechnics and two private institutes.[3] Those studying through the Open Polytechnic are expected to complete approximately 1,150 hours of study for the level 4 qualification and 650 hours of study for the level 5 qualification, while also working in a pharmacy. The Open Polytechnic requires trainees to work in a pharmacy for a minimum of 20 hours per week while also studying towards their qualifications by distance education.[4]

[18] Currently the Open Polytechnic model is delivered 100 per cent online, and students are required to download and submit assessments through the internet. Students are assessed on work-based tasks by the pharmacist under whose supervision they work.

[19] During the relevant period, the pharmacies employ trainee pharmacy technicians studying in Open Polytechnic courses. These included the 12 employers named in the statement of problem.

[20] All trainee pharmacy technicians had employment contracts and records were kept of their work time using the systems described above in paragraph [14].

[21] The trainee technicians agreed they would not be paid for time spent studying towards the Open Polytechnic qualifications which was described as "training hours". In each case the employment contract stated (with emphasis added):

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1 Medicines Regulations 1984, R42

2 See the description on the website of the Pharmaceuticals Society of New Zealand: https://www.psnz.org.nz/Category?Action=View&Category_id=254

3 See: https://www.psnz.org.nz/Category?Action=View&Category_id=126

4 https://www.openpolytechnic.ac.nz/assets/a-Fact-Sheets/New-Zealand-Certificate-in-Pharmacy-Technician-Level-4.pdf

> 6.3 Your remuneration will be paid as shown in Schedule B for all work performed, including overtime. Continuing education or training hours will not be paid.

[22] Trainee pharmacy technicians were able to spend up to approximately 20 training hours per week working on the Open Polytechnic courses. The expectation was that trainees would use down time while physically present in the pharmacy as training hours, often using pharmacy computers and equipment to complete their training. Pharmacists employed by the pharmacies carried out assessment and preceptor functions for the employees.

[23] In the absence of specific time records of training hours, the Respondents made deductions of approximately 10 to 20 hours per week for training hours. Trainees were trusted and expected to spend these hours studying or working on assignments, but they were not prevented from working instead if they wanted to. The deductions were carried out transparently and specifically itemised on employees' payslips.

[24] While in many cases employees studied towards the Open Polytechnic courses during work hours as contemplated in the agreements, the Respondents did not systematically verify that this occurred, or quantify the actual number of hours spent studying, and in the case of the employees named in paragraph [37], they spent either no time or fewer than 20 hours studying. Despite this, the Respondents regularly deducted approximately 10 to 20 hours per week from all trainees. That had the effect of deducting hours worked from employee's pay calculations.

[25] The Respondents accept that these practices did not meet the requirements of employment legislation, in particular:

a. The blanket deduction of training hours brought the effective hourly rate below minimum wage for the 12 employees in the claim in breach of the Minimum Wage Act 1983 if the training hours are treated as hours worked;

b. There was a constant under-payment of holiday pay under the Holidays Act 2003.

[26] The agreed amounts of arrears take into account a 20% allowance for the fact that some employees did carry out training hours as agreed. The agreed totals are:

Training hours	$105,814.65
Holiday pay	$1,848.39
Total	$107,663.04

[27] The Respondents have paid this sum, plus interest at 3%, to the Labour Inspectorate for payment to the named employees.

[28] The Labour Inspector now seeks the following 14 penalties:

(a) 12 penalties (one for each worker), in relation to the Minimum Wage Act 1983 arrears

(b) Two penalties for breach of the Holidays Act 2003 for failing to pay holiday pay or allow for holidays on pay.

[29] The Statement of Problem filed with the Authority on 21 June 2018 alleged that 10 Respondent companies including the Pharmacies, while in employment relationships with 19 workers, had breached the MWA, the HA and the Employment Relations Act 2000 (the Act).

[30] The breaches were alleged to have arisen as a result of the Respondents failing or omitting to:

- Pay minimum wages and holiday pay,
- Provide written employment agreements,
- Keep wage and time records, and
- Keep holiday and leave records.

[31] The Labour Inspector claimed to recover unpaid wages, holiday pay and penalties for the breaches.

[32] Following mediation the parties reached a partial settlement of the claims for minimum wages and holiday pay and a Record of Settlement was agreed between the parties and recorded by a mediator under s 148 of the Act on 19 July 2018.

[33] The Records of Settlement did not resolve the remaining arrears of wage claims in relation to Anish Beemanapally, Nirmal Singh, Sandeep Padam and Meet Acharya. These remaining claims were referred to by the parties as the 'volunteer claims'.

[34] The volunteer claims were set down for a multi-day hearing in February 2019 but were subsequently resolved on 19 December 2918 as recorded in a second Record of Settlement agreed between the parties and recorded by a mediator under s 149 of the Act.

[35] The Respondents have since paid the relevant sum, plus interest at 3%, in accordance with the second Record of Settlement.

[36] The Labour Inspector agreed not to seek any additional penalties in respect of the volunteer claims, but is seeking penalties in respect of 14 breaches; 13 under the MWA and 1, as agreed by Counsel for the parties, under the HA.

[37] Counsel for the parties are agreed the MWA penalties were intended to be one for each of the 13 named workers. One penalty is therefore sought for breaches of the HA, not two. The 14 breaches arise from the employment by the Respondents of 13 particular individuals, who are:

Anish Beemanapally	Avondale Community Pharmacy Ltd
Varunkumar Patoliya Soni Navneetala Meet Acharya	Family Care 7 Day Pharmacy Ltd
Sahil Patel Riteshkumar Patel	Mangere Community Pharmacy Ltd
Ketankumar Vora Paraskumar Savaliya	Otara Community Pharmacy Ltd
Nirmal Singh	Ratanui Community Pharmacy Ltd
Chirag Bhalala Anil Shinde	Takanini Community Pharmacy Ltd
Sandeep Panam Komal Patel	Waiora Community Pharmacy Ltd

Submissions of the Labour Inspector

[38] Counsel for the Labour Inspector submits that there is a strong undercurrent in this case of the trainee pharmacists being misused with the purpose of providing a commercial advantage to the Respondents' business.

[39] It is submitted that all the affected employees were migrant workers who wanted to achieve recognition and the Pharmacies' failures to pay the minimum wages and holiday pay deprived the employees of 'minimum' entitlements which have been enshrined by the Employment Relations Act 2000 (the Act) as 'standards'.

[40] Where employees are migrants it is submitted that an employer can be expected to exercise even greater care not to, even unintentionally, take advantage of this particular circumstance which may increase, in the employer's favour, the inherent imbalance of power identified in s 3 of the Act.

[41] As observed by the Full Court in *Borsboom v Preet PVT Limited* (*Preet*) it is a matter of common knowledge within the community generally, and the commercial and small business community in particular, that minimum wages, minimum holiday entitlements and other statutory minima are applicable to all employment.[5]

[42] It is submitted that it was foreseeable that the trainees would 'lend a hand' in the Respondents pharmacies and the absence of adequate monitoring by the Respondents assisted in this aspect which contributed to the profitability of the Respondents.

Submission of the Respondents

[43] Counsel for the Respondents submits that while there was a high degree of trust involved in the operation of the relationship between the employees and the Respondents, the allegation that the Respondents exploited the employees is not warranted, pointing out that the employees were not vulnerable employees but all tertiary qualified and well able to understand the nature of the agreements into which they were entering.

[44] Far from exploiting the employees, it is submitted that the Respondents were providing them with the opportunity to train and enter the New Zealand pharmaceutical profession.

[45] It is further submitted that the Respondents were all located in areas of high need in Auckland, and that the employees were under the direct supervision of a qualified pharmacist

Quantum of Penalty

[46] In *Nicholson v Ford* Chief Judge Inglis summarised a comprehensive list of relevant penalty consideration as being:[6]

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[5] *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

[6] *Nickolson v Ford* [2018] NZEmpC at [18]

(a) The object stated in s.3; and

(b) The nature and extent of the breach or involvement in breach;

(c) Whether the breach was intentional, inadvertent or negligent;

(d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;

(e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, and has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;

(f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;

(g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or the Court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct;

(h) Deterrence, both particular and general;

(i) Culpability;

(j) Consistency of penalty awards in similar cases;

(k) Ability to pay; and

(l) Proportionality of outcome to breach.

[47] In *Preet* the Full Court of the Employment Court set out a four step process as helpful when addressing penalties:

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
>
> Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.
>
> Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.

[48] Counsel are agreed that the four step approach as set out in *Preet* is appropriate in this case.

Step 1: Identify the nature and number of the breaches and the maximum penalty available

[49] It is agreed by Counsel that there are 14 breaches comprising 13 breaches of the MWA (one for each of the named employees) and 1 breach of the HA. The breach of the HA may be regarded as a global one since it was a consequence flowing from the MWA breaches.

[50] Counsel also agreed that the circumstances of this case reinforce the need to promote the effect enforcement of employment standards.[7]

[51] Each breach incurs a penalty of a maximum of $20,000.00 because the Respondents are an employer.

[52] The Labour Inspector submits that potential maximum penalties are $260,000.00 for 13 breaches of the MWA and $20,000.00 for 1 breach of the HA, therefore the starting point for penalties should be a total of $280,000.00 for the seven Respondents.

[53] The Respondents disagree with the Labour Inspector's assessment of the nature and extent of the breaches as well as the appropriate starting point in respect of the breaches.

[54] The Respondents submit that it is not unreasonable to agree to a clause in an employment agreement which provides that an employee will not receive payment for any time in training for a tertiary qualification, drawing an analogy with students seeking to obtain teaching qualifications wo undertake unpaid practicums working onsite at schools who are not paid as such work is considered as part of their training.

[55] It is submitted that the employees were not: "underpaid deliberately and knowingly" as in *Preet.*[8] Nor were the employees: "deliberately exploited" for the benefit of the employers.[9]

[56] Accordingly the Respondents submit that the appropriately starting point in respect of all breaches would be $168,000.00.

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[7] s3 of the Employment Relations Act 2003
[8] See n 7 at [161] – [164]
[9] *Labour Inspector v LA Wheat Ltd v Ors* [2019] NZERA 50 at 114

Step 2: Assessment of the severity of the breaches

(i) Aggravating factors

[57] The factors the Court must have regard to in determining the appropriate penalty under s.133A of the Act have been summarised in the recent Employment Court case of *Lumsden v Sky City Management Ltd*[10] as including whether the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.

[58] The Labour Inspector submits that the culpability of the Respondents was medium to high. Accordingly the MWA breaches should be 80% of the Step 1 maxima of $208,000.000 which is set at that level to reflect the seriousness of the breaches and the Respondents culpability.

[59] Whilst the HA breach should be set at 70% of the step 1 maxima, a total of $14,000.00 to reflect a less serious breach of a consequential nature and correspondingly lower culpability. A sub-total of $222,000.00.

[60] The Respondents submit that culpability is low to medium because the Respondents considered they were acting in accordance with the terms of the employees employment agreements. There was no intention to exploit the employees on the basis that the training hours' clause in the employment agreement was intended to make it clear that hours spent at work completing assignments would not be paid.

[61] It is submitted that rather the Respondents' fault lies in the failure to have sufficient monitoring and record keeping systems in place to properly differentiate between time spent at work which was spent on course assignments and time which was actually work for the Respondents which should have been paid. As such, although the deduction on the payslips was intentional, it was premised on a belief, reasonably held, that both parties consented to the arrangement.

(ii) Ameliorating Factors

[62] The Labour Inspector submits that the sub-total of $222,000.00 may be appropriately reduced by 50% to allow for the payments including interest the Respondents have made to the 13 workers, and for the level of co-operation the Respondents have shown towards the

[10] *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

Labour Inspector during the investigation of the claims. This would result in a new sub-total of $111,000.00.

[63] The Respondents submit that the deduction suggested by the Labour Inspector is appropriate and submit that there is an additional mitigating factor which serves to reinforce the Labour Inspector's submission that a 50% reduction is warranted, namely that this is the first occasion that the Respondents have been found to have breached the employment law minimum standards.

[64] It is submitted that applying a 50% discount to the provisional starting point proposed by the Respondents ($168,000.00) the resulting figure is $84,000.00.

Step 3: financial circumstances of the Respondent Employer

[65] The Respondents are not seeking any discount in the quantum of the penalties based on an inability to pay.

[66] There is no adjustment made to the provisional penalties at this stage of the process.

Step 4: Proportionality or totality test

[67] The parties acknowledge that in accordance with *Preet*, penalties imposed should be in proportion to the amounts of money unlawfully withheld from the employees as a result of 2CC's breaches and, in accordance with s.133A of the Act, the circumstances in which the breach took place.

[68] Additionally that the final penalties set should not be at such a level that the liable employer either has an incentive for not paying or cannot pay them. [11]

[69] The Labour Inspector submits that a reduction to $105,000.00 is appropriate.

[70] The total arrears paid were $124,281.00 not including interest. It is submitted that the ratio of arrears to penalties may provide a convenient cross check.[12] In this case the ratio is less than 1:1 as total proposed penalties of $105,000.00 are less than total arrears.

[71] The Pharmacies submit that a ratio of 1:0.7 does not indicate disproportionality of outcome to the breach.

[11] N 7 at [190] and [191]
[12] *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 at [62]

[72] In addition, another relevant consideration is for the Authority to assess the 'optimum deterrent effect' of the penalties imposed.[13] Whilst there is a need to enforce to employers the employment standards they are required to meet and that minimum entitlements are non-negotiable, in this case as soon as the Respondents were notified of the breaches, they immediately too steps to ensure compliance and sought to co-operate with the Labour Inspector. As such the need for particular deterrence for the employers in this case is low,

[73] Accordingly the Respondents submit that a just penalty in all the circumstances is $84,000.00.

[74] In considering this matter I accept that the Respondents did not have a deliberate intention of exploiting the employees in order to benefit their businesses. However I find that it was foreseeable that in the circumstances, which were those of migrant employees keen to qualify within the New Zealand pharmaceutical area and further their employment opportunities, that the employees would have been influenced by those considerations to "lend a hand' with the normal business operation of the Respondents, during the time intended for training.

[75] Had the Respondents utilised a better system of monitoring the trainee employees time, it is most unlikely the issue would have arisen. Therefore the failure to ensure monitoring by the Respondents was the major factor in the situation which subsequently arose of non-compliance with minimum employment law standards.

[76] I accept that the Respondents have been speedy in resolving the breaches as soon as they were notified of them, and that there was no deliberate intention of exploitation or of gaining a commercial benefit from the trainee employees.

[77] Deterrence is a major consideration in ensuring that employers are aware of the necessity of maintaining minimum standards in regard to employment law, and I find that the imposition of a penalty coupled with the public nature of these proceedings will be a deterrent to the Respondents.

[78] Having fully considered all the circumstances and carefully balancing the competing factors, I determine that a just penalty and one in proportion to the amounts of money unlawfully withheld from the employees of $92,500.00 is appropriate.

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[13] n 7 at [192]

Apportioning the penalty to each respondent

[79] Counsel agree that it is appropriate to divide the total penalty by the number of employees (13) and apportion the penalty according to the number of employees each Pharmacy employed. Dividing $92,500.00 by 13 gives $7,115.38 to be assigned as follows:

Respondent Pharmacy	Penalty Imposed
Family Care 7 Day Pharmacy Ltd	3 x $7,115.38 = $21,346.15
Mangere Community Pharmacy Ltd	2 x $7,115.38 = $14,230.76
Otara Community Pharmacy Ltd	2 x $7,115.38 = $14,230.76
Takanini Community Pharmacy Ltd	2 x $7,115.38 = $14,230.76
Waiora Community Pharmacy Ltd	2 x $7,115.38 = $14,230.76
Avondale Community Pharmacy Ltd	1 x $7,115.38 = $7,115.38
Ratanui Community Pharmacy Ltd	1 x $7,115.38 = $7,115.38

Costs

[80] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority