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EMPLOYMENT LAW

Increased penalties for minimum standards breaches

By Catherine Stewart, Barrister and Convenor of ADLS' Employment Law Committee, and Ellen Taylor, staff barrister for Catherine Stewart

Since the recent legislative changes regarding increased penalties for breaches of minimum standards came into force on 1 April 2016, there has been an increased attention from employment law practitioners regarding how the Employment Court would interpret the new legislation.

A special sitting of the Waitakere District Court was recently held (on Friday 3 March) for his Honour Judge David Mather of the Waitakere District Court, to mark his retirement after 20 years on the District Court Bench. Judge Mather is pictured here in the Waitakere District Court at his final sitting on the bench, flanked by their Honours Chief District Court Judge Jan-Marie Doogue and Principal Family Court Judge Laurence Ryan. ADLS President Brian Keene QC was amongst those to speak in recognition of Judge Mather's service to the District Courts and about how he will be missed by the profession. ADLS and LawNews *wish his Honour all the best for the future.*

Pursuant to the changes to the *Employment Relations Act 2000*, pecuniary penalties are now set at up to $50,000 per breach by an individual and up to $100,000 per breach by a body corporate (or three times the unlawful financial gain made by the body corporate from the breach, whichever is greater). There are also other sanctions such as "banning orders" which can go so far as to prohibit people in breach from becoming employers. Clearly, the stakes are high.

A recent decision of the full Court of the Employment Court, *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, has provided practitioners, labour inspectors and employers with greater clarity and guidance on the application of penalties for breaches of minimum standards, especially in respect of multiple breaches for multiple employees. Although the case was not subject to the specific April 2016 legislative changes, the full Court clearly set out the methodology in principle that should be followed by the Court and Authority in claims for penalties.

The Court noted that, as stated in the explanatory section in the Bill, "the intention of increasing penalties is to signal to the Courts that breaches are significant and warrant a higher penalty". The Court outlined four reasons for increased penalties:

1. punishment of those who breach statutory minimum standards;
2. deterrence – persons will be deterred from deliberate breaches by the knowledge that they will or may be punished;
3. compensation of a victim; and
4. eliminating unfair competition in business.

The Court prescribed a four-stage test to establish the nature and severity of breaches and the proportionality of a final penalty to adopt a framework which will be "transparent and predictable but still also allow to be taken into account relevant case specific factors". The intention of the Court's methodology was to allow a "uniform reasonably predictable result". The four stages are as follows:

1. identify the nature and number of breaches separately, then consider whether global penalties should apply;

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2. assess the severity of each breach to establish a provisional starting point;
3. consider the means and the ability of the person in breach to pay the penalty arrived at in stage 2; and
4. apply the proportionality or totality test to ensure the amount of each final penalty is just in all the circumstances.

In *Borsboom*, five young Indian nationals on temporary work visas were working in liquor and retail dairy outlets for the first and second defendant companies (having the same shareholders and directors) where they were paid $8.00 or $8.50 an hour (substantially less than minimum wage), if they were paid at all. The employees generally worked in sole charge positions and were not able to take meal or rest breaks. Holiday pay was not paid and there were no or inadequate wage and time records kept for the employees. The employees worked up to 95 hours per week and one worked in excess of 100 hours. The employers attempted to conceal the underpayment of wages and made overt and implied threats of adverse immigration consequences if the employees raised concerns about their employment conditions.

Following complaints, the Labour Inspector commenced an investigation and found multiple breaches of section 6 of the *Minimum Wage Act 1983*, multiple breaches of the payment provisions of the *Holidays Act 2003*, failure to keep wage and time records under section 130 of the *Employment Relations Act*, failure to produce holiday and leave records under section 81 of the *Holidays Act* and failure to comply with section 65 of the *Employment Relations Act* to provide employees with employment agreements.

In applying the four-stage test, the Court determined that the first defendant should have a global penalty of $40,000 awarded against it and the second defendant $60,000. Thus overall the two defendants were ordered to pay a total of $100,000 for breaches in respect of five employees. The penalties arrived at were four times greater than those arrived at by the Authority in its decision at first instance.

The Court also recognised that it was appropriate in the circumstances to award compensation to the employees which was "analogous to an unjustified disadvantage personal grievance" and "would have been compensated for had a claim been brought". Therefore, the five employees received $7,500 each out of the penalties awarded, with the balance being paid to the Crown.

Since *Borsboom*, the Employment Relations Authority has demonstrated a trend towards awarding large penalties for breaches of minimum standards. In *A Labour Inspector v Just Kebab Ltd*, the Authority, applying the four-stage Borsboom test, imposed a penalty of $40,000 in respect of breaches of the *Minimum Wage Act*, *Holidays Act* and *Employment Relations Act*.

Subsequently, in *A Labour Inspector v Binde Enterprises Ltd* [2016] NZERA Auckland 399, the Authority imposed a total of $220,000 in penalties for numerous breaches of the *Holidays Act*, *Minimum Wage Act* and *Wages Protection Act* in relation to 75 employees, as well as $208,000 in arrears to staff.

However, in the recent case of *Labour Inspector v Gujarat Cuisine 2012 Ltd* [2017] NZERA Auckland 37, the Authority demonstrated that the trend towards greater penalties will not outweigh a robust assessment of the merits of such a claim. In that case, the defendant successfully defended multiple claims brought by the Labour Inspector and the Authority declined to award any penalties. The arguments that persuaded the Authority were that breaches of the *Employment Relations Act* and *Holidays Act* were minor, the respondent had relied on template employment agreements from a former advisor, and the respondent had acted quickly to rectify the deficiencies highlighted by the Labour Inspector.

Catherine Stewart

Ellen Taylor

> The Court and the legislature are taking a hard-line approach in relation to penalties for breaches of minimum standards. Now more than ever, employers need to ensure that they comply with the legislation and, if in doubt, seek proper advice in order to remain compliant with the law.

A key theme of the case law is the "clampdown" regarding the lack of employment standards for migrant workers. An important point for both practitioners and employers to note is that, from 1 April 2017, the risk of breaching minimum standards may not only result in penalties. Immigration Minister Michael Woodhouse recently announced that stand-down periods will be introduced whereby those employers who are found guilty of a breach may be banned from recruiting migrant labour workers for a period ranging from six months to two years, depending on the severity of the breach.

Overall, it is clear that the Court and the legislature are taking a hard-line approach in relation to penalties for breaches of minimum standards. Now more than ever, employers need to ensure that they comply with the legislation and, if in doubt, seek proper advice in order to remain compliant with the law.

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