

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 92
5597203

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	SUN 2 MOON LIMITED First Respondent
AND	A TO Z CLEANERS LIMITED Second Respondent
AND	LUV KUMAR KHATTAR Prospective Third Respondent

Member of Authority:	James Crichton
Representatives:	Ella Tait, Counsel for Applicant David Patten, Counsel for Respondents
Investigation Meeting:	14 July 2016 at Wellington
Determination:	29 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Labour Inspector (Mr Smith or the Labour Inspector), alleges that the first respondent (Sun 2 Moon) sought and received premiums from an employee (Mr Jaspreet Singh), failed to pay Mr Singh the minimum wage, failed to pay Mr Singh holiday pay and public holiday pay and failed to keep proper wage and time records respecting Mr Singh's employment.

[2] In addition, the Labour Inspector alleges that the second respondent (A to Z) failed to pay Mr Singh the minimum wage, failed to pay him annual holiday pay and failed to keep proper wage and time records.

[3] Because of Mr Smith's conviction that A to Z was unlikely to be able to meet those obligations as it had ceased trading, authorisation is sought from me, under s.234 of the Employment Relations Act 2000 (the Act), to proceed against the proposed third respondent (Mr Khattar) to satisfy the obligations of A to Z.

[4] Sun 2 Moon denies extracting a premium from Mr Singh but accepts that it may have failed to pay Mr Singh "*strictly in accordance with the provisions of the Minimum Wage Act 1983 and the Holidays Act 2003*".

[5] Sun 2 Moon denies that it failed to keep proper wage and time records in terms of the Wages Protection Act 1983.

[6] A to Z denies that it was ever the employer of Mr Singh and therefore denies all of the allegations made against it, maintaining that Mr Singh was always employed only by Sun 2 Moon, either in terms of his work in the Sun 2 Moon retail premises or in respect of his cleaning work for which it is acknowledged A to Z had, at the relevant time, the cleaning contract.

[7] As a consequence of the position pleaded by A to Z, the request from Mr Smith that Mr Khattar be joined to these proceedings as a third respondent is resisted.

[8] Sun 2 Moon is a duly incorporated company which at the relevant time operated a grocery store in Willis Street, Wellington. Mr Khattar was a shareholder in Sun 2 Moon and had authority from the director (to whom he was married), to act for the company.

[9] A to Z was, at the relevant time, a duly incorporated company which held a contract to clean two Wellington bars. A to Z ceased trading some little time ago and was removed from the Companies Register on 18 March 2016.

[10] Mr Khattar is the sole director of A to Z.

[11] Mr Jaspreet Singh was employed by Sun 2 Moon in its grocery store for two distinct periods, namely 18 November 2012 to 20 December 2013 and 20 January 2014 to 14 November 2014.

[12] In addition, for the period 25 February 2013 to 5 September 2013, Mr Singh carried out cleaning duties at the two Wellington bars that A to Z had a contract to clean.

[13] While Mr Smith maintains that Mr Singh was employed in that third period of time just referred to by A to Z, Sun 2 Moon maintains that it employed Mr Singh for each of the three periods in question including the period when Mr Singh was cleaning the two Wellington bars.

[14] It is self-evident that I will need to establish whether Mr Singh was employed at any time by A to Z or whether the totality of his employment rested with Sun 2 Moon. That decision will drive the next question which is whether I should consider if Mr Khattar ought to be joined to these proceedings and further, whether he ought to respond to the question of potential liability in terms of s.234 of the Act.

[15] Those questions aside, it is common cause that Mr Singh was employed for the first two periods identified by Sun 2 Moon and the Labour Inspector maintains that during those periods of employment, Mr Singh was first made to pay a premium for that employment in breach of s.12A(1) of the Wages Protection Act 1983 (WPA), that Mr Singh was not paid the minimum wage during the employment in breach of s.6 of the Minimum Wage Act 1983 (MWA), that Mr Singh was not paid the holiday pay and other entitlements he was due pursuant to the Holidays Act 2003 (HA) and that Sun 2 Moon failed to keep proper wage and time records as required by s.8A of the WPA.

[16] Penalties are sought for all of these alleged breaches.

[17] Assuming that the Labour Inspector is correct and that Mr Singh was employed in the third discrete period of employment by A to Z, then similar remedies are sought in regard to that employment as well. In the alternative, if the Authority were to find that Mr Singh was employed in the third discrete period of employment by Sun 2 Moon, again, penalties are sought for the third period of employment.

Issues

[18] Looked at in a practical way, it is sensible if the Authority considers first of all whether Mr Singh was ever employed by A to Z Cleaners Limited and if so, whether Mr Khattar ought to be joined to the proceeding in order that he can answer the allegations which would be made against him pursuant to s.234 of the Act. In the alternative, if I were to find that Mr Singh was employed for the third discrete period of employment not by A to Z Cleaners Limited at all but by Sun 2 Moon, then the question of joining Mr Khattar to the proceeding falls away.

[19] Consequent upon the determination of who the employer was in the third discrete period of employment, I need to decide what outcomes flow from that.

[20] Having addressed that issue, I then need to consider the following matters pertaining to the employment by Sun 2 Moon:

- (a) Was a premium extracted by Sun 2 Moon from Mr Singh;
- (b) Was the minimum wage paid to Mr Singh;
- (c) Was Mr Singh paid holiday pay in terms of the HA;
- (d) Was Mr Singh correctly paid for working public holidays;
- (e) Did Sun 2 Moon maintain proper wage and time records as required by s.8A of the WPA
- (f) Should penalties apply and if so, by what amount?

Was A to Z ever Mr Singh's employer?

[21] The Labour Inspector formed the view, after a proper inquiry, that Mr Singh was employed by A to Z Cleaners Limited for the period from 25 February 2013 to 5 September 2013.

[22] There is no doubt that Mr Singh provided the physical labour to clean the two bars that appeared to be the only contract that A to Z held. What is in issue is whether he was ever actually employed by A to Z, as the Labour Inspector concluded, or whether it was part of his employment with Sun 2 Moon, as Sun 2 Moon maintains.

[23] There is no separate employment agreement between Mr Singh and A to Z and indeed the only documentary evidence at all pertaining to A to Z seems to be email correspondence from the franchisor to Mr Khattar concerning the franchisor's complaints about the standard of the cleaning.

[24] Mr Smith's evidence is that when he interviewed Mr Khattar, Mr Khattar confirmed that Mr Singh was A to Z's only source of labour.

[25] As a further impediment to identifying the true position, Mr Singh says he was never paid by A to Z, and, more than that, he was never paid at all for his cleaning work. It is certainly true that there are no lodgements to his bank account from A to Z Cleaners Limited.

[26] While the evidence for Sun 2 Moon is that Mr Singh was paid for his cleaning duties, it agrees that he was never paid by A to Z and always by Sun 2 Moon.

[27] I leave the question of whether Mr Singh was paid or not to a later section of this determination but for present purposes simply observe that the only documentary evidence which links Mr Singh to A to Z is the complaints from the franchisor's manager about Mr Singh's cleaning ability.

[28] Although I think the matter is finely balanced, I have reached the conclusion that Mr Singh was never employed by A to Z and that a proper construction of the relationship was that the cleaning that he performed was effectively subsumed within the existing employment relationship he had with Sun 2 Moon.

[29] This conclusion is supported, it seems to me, by the fact the only examples of employment agreements are between Mr Singh and Sun 2 Moon, the fact that there is no evidence that A to Z ever paid Mr Singh, and the commonality of the directors and shareholders as between A to Z on the one hand and Sun 2 Moon on the other.

[30] Assuming that Mr Singh was paid for his work cleaning, there is no differentiation in Mr Singh's bank statements between payments made to him for cleaning work on the one hand and payments made for retail shop work on the other, but of course his evidence was that he was never paid for the cleaning work.

[31] While both parties agree that Mr Singh did cleaning work, that the quality of that work was in dispute and the hours that he worked and/or needed to work was in

dispute, there is no agreement about whether there was an employment relationship between Mr Singh and A to Z or not.

[32] As I say, I have concluded that the better view is that Mr Singh was not ever separately employed by A to Z and that the cleaning work that he performed was work that he was directed to perform by Mr Khattar who was his direct supervisor at Sun 2 Moon but who also had a directorial and shareholder involvement with A to Z Cleaners Limited.

[33] Having reached that conclusion, the question of whether Mr Khattar himself needs to be a party to this proceeding rather falls away; however, in the event that any orders I were to make against Sun 2 Moon Limited are not satisfied within a reasonable time, leave is reserved for the Labour Inspector to revert to me for further consideration of the putative application to join Mr Khattar.

Was a premium paid?

[34] Mr Singh's evidence is that he was required to pay a premium of \$11,727.22 which was made up of a cash payment of \$5,000 paid over very soon after the employment commenced, and then further cash payments which his brief of evidence maintained amounted to \$4,400 (although his oral evidence rather tended to resile from some of that) and then a final collection of payments made against his credit card totalling \$2,327.22.

[35] It will be convenient if I look at the three component parts to the claimed premium payments and analyse each in turn. First of all, I consider the evidence for and against the payment of the cash sum of \$5,000. Mr Singh's evidence is that he responded to an advertisement on Trade Me in September of 2012 seeking an acting store manager and that he had an initial interview with Mr Khattar and Ms Ghandhi (Mr Khattar's wife), that he made some suggestions to the employer about enhancements to their business at that interview but that there was a second and subsequent interview some days later at which only Mr Khattar was present for the employer. Mr Singh's evidence is that in this second interview, Mr Khattar told him that he would have to "*invest*" in the business Sun 2 Moon, that the amount would be \$8,000 as a first payment and later a further \$15,000.

[36] Mr Singh told me that he thought that he was paying:

\$8,000 to secure the position at Sun 2 Moon Limited. I decided I need a job to get a visa and Mr Khattar had offered to help with my residency application so I decided to work for Sun 2 Moon Limited.

[37] Mr Singh's evidence is that he then contacted two overseas relations and caused them to wire him money. Each of the overseas relations wired him approximately \$2,500 and Mr Singh's evidence is that he made up the shortfall from his own resources and then paid a total cash sum of \$5,000 to Mr Khattar. He says he did this on 23 October 2012, that the money was paid to Mr Khattar in cash and was in denominations of \$100 and \$50 notes and that he paid this sum to Mr Khattar in the back of the store at 189 Willis Street, Wellington.

[38] What gives credence to this evidence is that the employment agreement was due to be signed by the parties together on the same day (23 October 2012). The offer of employment from Mr Khattar is dated the 22 October 2012, and is expressed to be required to be signed the following day when it was expected that Mr Singh would attend on Mr Khattar and sign the employment agreement.

[39] The employment commenced a little over a calendar month later.

[40] Mr Khattar's evidence is that he was not paid a premium; Mr Khattar denies receiving the \$5,000 in cash on 23 October 2012, denies asking for the money in the first place and denies receiving it.

[41] Since the evidence is clear enough that Mr Singh sought these not insignificant sums from overseas-based relations (the Money Gram orders for both transactions are before the Authority), the question has to be what was the money for if Mr Khattar's evidence is to be believed? Mr Khattar offered a variety of explanations for what the money was for if it was not to pay him a premium. He suggested that Mr Singh may have sought to send money overseas using the Western Union money transfer system that he had himself proposed to the employers at the initial interview. But that explanation seems a trifle implausible given that the money had already come from overseas and it is difficult to see why Mr Singh would have sent it back overseas having just received it from overseas sources.

[42] Mr Khattar also advanced the proposition that he had loaned money to Mr Singh and, while he could not be sure, it may be that this money was in repayment of a sum that he had lent to Mr Singh. But again this explanation does not seem plausible; according to Mr Singh, the payment that he made to Mr Khattar was on

23 October 2012 and we know from the evidence before the Authority that it was that very day that the money was received from his overseas relations in two separate amounts and that that date was fully a month and two days before Mr Singh actually started his employment so there can have been little time for Mr Khattar to lend Mr Singh money, particularly a sum of \$5,000.

[43] Mr Khattar's evidence also suggested that Mr Singh may have engaged with him about the prospect of Mr Singh investing in Mr Khattar's business, or one of them. Mr Khattar's evidence suggested that Mr Singh may have sought to invest in the cleaning business, rather than Sun 2 Moon, and that it was Mr Singh who suggested this prospect rather than Mr Khattar himself. But again that explanation does not ring true either because, by common consent, the period of time when Mr Singh was undertaking the cleaning duties was between 25 February 2013 and 5 September 2013, well after the date that this money was received in New Zealand from Mr Singh's relations.

[44] Mr Khattar draws attention to the fact that in seeking to obtain funds from his relations, Mr Singh represents that he is unemployed and that is true; the emails Mr Singh sent to his overseas-based relations each refer to him being unemployed. Mr Singh agreed that he had misrepresented the position to his relations in order to encourage them to send him money.

[45] Conversely, the Labour Inspector and Mr Singh invited me to draw adverse conclusions against Mr Khattar by the transcription of a covert recording Mr Singh had made of a discussion he had held with Mr Khattar in which it seems clear that Mr Singh tried to entrap Mr Khattar into making admissions concerning the premium amounts.

[46] That said, it has to be stated that the transcription is not a "*smoking gun*" as the Labour Inspector accepted in response to a question from me. While it seems apparent from a proper construction of the transcription that Mr Singh tried to get Mr Khattar to confirm the payment of the \$5,000 cash sum and other subsequent payments, Mr Khattar does not confirm that he accepted those payments but what he does is not deny receipt of the payments.

[47] In cross-examination, Mr Khattar conceded that he did not deny receipt of the payments and the inference I draw from that, as suggested by counsel for the Labour

Inspector, is that an honest person confronted with an allegation that they had taken money from another when they had not, would have protested the allegation when the opportunity presented itself.

[48] Quite clearly, Mr Khattar does not do this despite the issue being raised on more than one occasion during the course of the transcription of this covert recording. Nor does Mr Khattar have any plausible explanation for some of the exchanges in the transcription referring to sums of money which are consistent with the sums of money involved in the alleged premium payment. One such explanation is that Mr Khattar was referring to losses sustained by Mr Singh in a Rotorua business venture, but Mr Singh's evidence is there was no such business venture and given Mr Singh's age and apparent circumstances I find his evidence more credible than Mr Khattar's.

[49] A further attempt by Mr Khattar to advance his view is that the reference to numbers related to the possible purchase by Mr Singh of an interest in A to Z but that cannot be right; the recording is of a conversation in November 2014 and A to Z lost its two cleaning contracts in 2013 so it would have been valueless or near enough to it by November 2014. Moreover, Mr Khattar's claim that he lent money to Mr Singh and this money was just the repayment has an air of unreality about it; Mr Singh had not even commenced in the employment at the time this payment was made and Mr Singh was adamant he had borrowed nothing from Mr Khattar.

[50] Having reflected on the matter and reviewed again all of the documentary evidence before me, I must conclude that Mr Khattar did receive the payment from Mr Singh and that the payment was received as a premium in terms of s.12A of the WPA and was not explicable as an investment, or a payment to be sent overseas via Western Union or indeed as a return of loans previously advanced.

[51] I have been through the alternative scenarios postulated by Mr Khattar in his evidence and, as I have indicated already, I have not found any of his alternative scenarios plausible. Indeed the very fact that Mr Khattar, rather than rest on one explanation, has advanced a variety of possible explanations, both as to whether he received the money and as to what the money was for if he received it, suggests implausibility.

[52] Accordingly, I conclude that in respect of the sum of \$5,000 which Mr Singh maintains he was required to pay to Mr Khattar to secure his position, that claim is

made out and I am satisfied that that sum does represent the payment by Mr Singh of a premium to Mr Khattar received by the latter on behalf of the employer, Sun 2 Moon, for the purposes of securing to Mr Singh employment by Sun 2 Moon Limited.

[53] The next component of the premium amounts is the sum of \$4,400 which Mr Singh says he paid to Mr Khattar during the employment. In his evidence to the Authority, Mr Singh details these amounts ranging in size from \$20 at the low end to \$800 at the high end, and in date range starting on 3 December 2012 and going through to the final payment being made on 23 July 2014.

[54] What Mr Singh told me was that he used the Bank of New Zealand money machine which was reasonably close to the workplace, on Manners Street, Wellington, and that whenever he withdrew money from that money machine, it was money that he paid on to Mr Khattar. There was also one payment from a Bank of New Zealand money machine in Courtenay Place, Wellington, which was included within this total sum of \$4,400.

[55] Mr Singh said that Mr Khattar:

... frequently asked me to withdraw money from my bank account ... (and) told me how much money to withdraw ... [and] this money was then paid to Mr Khattar. I believed the money I repaid from my wages was contributing towards the \$3,000 Mr Khattar demanded.

[56] That \$3,000 that Mr Khattar demanded, according to Mr Singh, was demanded by Mr Khattar the day after Mr Singh commenced the employment which was 25 November 2012.

[57] Mr Singh says that he explained to Mr Khattar his financial position, which was not strong, and presumably this is why the relatively modest individual amounts were withdrawn from time to time.

[58] I also mention at this point that the evidence from Mr Singh is that in addition to Mr Khattar demanding that Mr Singh make regular withdrawals from his bank account and pay those sums to Mr Khattar, Mr Singh was also required to work additional hours without any pay, presumably to compensate for the fact that he was unable to make a payment of the quantum that Mr Khattar sought in one lump sum.

[59] Put shortly then, Mr Singh's evidence is simply that he withdrew from his bank account a total of \$4,400 over a period of some 18 months and that the totality of

that amount was paid to Mr Khattar in dribs and drabs as those individual withdrawals were made and on the days that those withdrawals were made.

[60] Mr Singh has provided me with copies of his bank statements which make clear that the sums he claims to have withdrawn on the dates he claims to have withdrawn them have been withdrawn from his account but of course, given that the amounts in question were amounts of cash, and he says that he paid those various amounts directly to Mr Khattar, there is no documentary trail that will assist me to decide whether or not Mr Singh's evidence on the point is to be preferred, or not.

[61] Mr Khattar denies asking Mr Singh to withdraw these moneys from his bank account and denies receiving them. He accepts of course, as he must, that the evidence is that the amounts were withdrawn but he says that they were withdrawn for Mr Singh's own private purposes, as they might have been.

[62] Furthermore, Mr Khattar's evidence is that, for the first two payments totalling \$360, these payments being made on 3 and 6 December 2012, he was travelling in India and therefore could not have received those sums. The evidence of Mr Khattar being out of the country for that period is before the Authority and I accept it.

[63] Moreover, Mr Khattar maintains that some of the withdrawals may have tallied to payments that Mr Singh made to overseas parties using the Western Union money transfer system. While Mr Khattar maintained that there were two such examples of this, on the evidence before me, I have only been able to verify one and that amounts to the sum of \$800 only.

[64] So even if I were to remove that single amount from the totality of the claim made by Mr Singh, and also remove the first two amounts when it is clear that Mr Khattar was not physically in the country and so could not have had the money handed to him, that only reduces the total amount in question by a total of \$1,160 which is a fraction more than a quarter of the total amount claimed.

[65] While it seems to me self-evident that if Mr Khattar has proved he was not in the country, the first two payments totalling \$360 could not have been passed to Mr Khattar, the argument for the third payment being excluded, that of \$800, is less strong. Mr Khattar says that the payment may have been included in a sum remitted overseas via Western Union and that could be the explanation, but equally those funds may have come from somewhere else.

[66] I am inclined to give Mr Khattar the benefit of the doubt in respect of that third payment of \$800 and accept his contention that it probably contributed to the overseas remittance made by Mr Singh on that same day but, as I have already noted, the combination of those three items being taken out of the calculation, still leaves three quarters of the original claim unexplained.

[67] Of course, Mr Khattar maintained that the other amounts were simply drawings for normal living expenses and were not explicable by the route which Mr Singh urges upon me.

[68] Moreover, the effect of cross-examination of Mr Khattar's very experienced counsel failed to disturb Mr Singh's stout defence of his position and the analysis during that cross-examination of Mr Singh's bank statements actually tend to evidence normal living expenses being transacted through the account rather than allow of the possibility that these sums detailed in Mr Singh's evidence were simply cash withdrawals for his own purposes.

[69] Accordingly, I have concluded that the sum of \$3,240 is also a premium paid by Mr Singh to Mr Khattar to secure Mr Singh's position with Sun 2 Moon.

[70] In reaching the conclusion that I do, I have deducted from the totality of the claims made for Mr Singh the three items that I consider are in doubt as a consequence of the proper assessment of Mr Khattar's evidence but I have not been persuaded that the balance of the amount claimed by Mr Singh as a premium has been disturbed by the evidence given by Mr Khattar.

[71] For the avoidance of doubt, I prefer Mr Singh's evidence on the point, save for the three payments identified, consider he has demonstrated a scheme which is logically consistent within itself by which the various payments contributed to the totality of the premium demanded, and believe that a proper analysis of the bank statements provided by Mr Singh suggest that normal living costs are already deducted from the account, before considering the subject payments.

[72] The third element of the claimed premium is the payments made by Mr Singh via his credit card for the purposes of the business Sun 2 Moon. It is common ground that the first of those payments was made by Mr Singh's credit card but the rest are denied.

[73] The first payment is for an amount of \$160 on 15 February 2014 and relates to an advertisement concerning Mr Singh's visa extension application.

[74] Mr Khattar says that the application was directly:

... for the benefit of Mr Singh who raised no objection with the request to pay and offered to pay the cost of the ad from his credit card.

[75] Conversely, Mr Singh's evidence is simply that Mr Khattar instructed him to make the payment and he did so. I find that in relation to this payment, it is difficult to escape the conclusion that there may have been some form of tacit agreement between the parties that Mr Singh should make the payment and in any event, it is axiomatic that the advertisement benefitted Mr Singh. Accordingly I decline to include that amount of \$160 in the premium argument.

[76] The position is otherwise, however, in relation to the other three payments which are payments to suppliers of stock to Sun 2 Moon; plainly these payments ought to be made from the company's resources and not from the personal resources of an employee.

[77] Mr Khattar says that Mr Singh was asked to make these payments to contribute to repaying a debt owed by Mr Singh to Western Union (and presumably underwritten by Sun 2 Moon).

[78] Mr Singh denied borrowing any money from Mr Khattar or the business and I believed him. It seems to me incredible that an employer would lend an employee money and not keep proper records of that loan and in the absence of those records I decline to accept Mr Khattar's evidence that any loan or loans were made and I prefer the evidence of Mr Singh that there were no such loans. A consequence of that line of reasoning is that the totality of the three stock payments amounting to \$2,167.88 is also accepted by me as a premium to secure Mr Singh's position with Sun 2 Moon.

Was the minimum wage paid to Mr Singh?

[79] I am satisfied on the evidence I heard that Mr Singh was not paid the minimum wage during any of the relevant three discrete periods of employment. This position appears, at least to some extent, to be conceded by the evidence for Sun 2 Moon who refer to Mr Singh being paid a "*training wage*" which of course falls well short of the minimum wage applying at the relevant time.

[80] In the submissions for the Labour Inspector, counsel has helpfully set out the relevant minimum wage for the three years or part thereof during which the employment was undertaken.

[81] Moreover, in addition to the rate of pay being wrong in that it did not comply with the MWA, the hours that Mr Singh worked were also not properly accounted for. I mention at this point, in advance of a succeeding section of this determination, that Sun 2 Moon, despite its attempts to persuade me otherwise, did not keep proper wage and time records in accordance with the law and the only wage and time records that are available to me to review are those provided to me by Mr Singh himself.

[82] Sun 2 Moon protests that those records are or may be partial and that they are incomplete. Both those allegations are understandable but they do not avoid the plain effect of the law. Section 132 of the Act broadly covers this situation and provides that where the employer fails to keep or produce wage and time records and that failure prejudiced the ability to lodge a proper claim for unpaid wages, the Authority may accept as proved all claims based on the employee's records unless the employer can prove that the claims are incorrect.

[83] I have not been persuaded that Mr Singh's claims are incorrect; I accept that he has only completed partial records and has not undertaken a record of the total period of any of the three discrete periods of employment. He says this is because he became anxious during each period of employment about the apparent failure of Sun 2 Moon to pay him correctly and so he decided to make his own record.

[84] In any event, it is the only record that we have and I have no alternative but to rely on it.

[85] I observe also that the evidence given by Mr Khattar suggested that Sun 2 Moon adopted what he called an overs and unders method of payment but which employment lawyers would probably know by the label of averaging. Either way, the arrangement does not conform with the law. It is against the law to pay an employee a fixed weekly sum and then effectively set off the underpayments by reference to the overpayments.

[86] Nor is it a requirement that, in maintaining a de facto wage book as Mr Singh did, he had to take account of the supposed overpayments.

[87] The position at law is simply that Mr Singh was employed pursuant to an hourly rate and the law requires that he receive payment of that hourly rate (in his case correctly increased to comply with the minimum wage rate required by law), for each hour that is actually worked.

[88] What Sun 2 Moon did was it chose to pay a rounded amount fixed each week despite the employment agreement contemplating an hourly rate.

[89] There are a number of decisions around these kinds of errors, the most recent being relied upon by the Labour Inspector: *Idea Services v Dickson* [2011] NZCA 14, paras.[26]-[52].

[90] I have reviewed the calculations made by the Labour Inspector in respect of each of the three periods of employment and agree with those calculations. The effect of accepting those calculations is that Sun 2 Moon Limited must pay to the Labour Inspector for the use of Mr Singh the total sum of \$13,437.28 gross in respect to the failure to pay the minimum wage.

Was Mr Singh paid holiday pay correctly?

[91] There appears to be an acknowledgment by Sun 2 Moon that some payment of holiday pay is due and owing although the contention made in Mr Khattar's evidence to the Authority is that on Mr Singh's final resignation from the employment, Sun 2 Moon tried to engage with Mr Singh about the quantum of holiday pay due and owing to him but could not get Mr Singh to engage.

[92] Whatever the actual position at the end of the final period of employment, the short point is that on the evidence before me, I accept Mr Smith's evidence, based on his inquiries, that Mr Singh took no annual leave whatever during any of the three periods of employment and that in consequence, he is entitled to be paid holiday pay in respect of those three periods of employment.

[93] That is a relatively straightforward exercise as I have already decided the hours of work that Mr Singh undertook and therefore the wages that he was entitled to.

[94] The total paid holiday leave owing to Mr Singh by Sun 2 Moon Limited from the three discrete periods of employment is \$4,447.61 gross.

Was Mr Singh correctly paid for working on public holidays?

[95] There is a dispute between the parties about this matter with Sun 2 Moon maintaining that Mr Singh never worked on public holidays and that if the Sun 2 Moon shop was open at all on public holidays, it was staffed by the working proprietors, either Mr Khattar himself or Ms Ghandhi or both and not by Mr Singh.

[96] The Labour Inspector does not accept that evidence and on his inquiries, Mr Singh did work a modest amount of time in respect to one of the three discrete periods of employment.

[97] The public holiday in question is Easter 2014 when Mr Smith is satisfied that Mr Singh worked time on Good Friday, Easter Monday and also on Anzac Day that year.

[98] There is a conflict in the evidence about the hours that Mr Singh worked on Anzac Day. His brief of evidence claims 4½ hours were worked on that day in 2014; his handwritten worksheets, on which the Labour Inspector based the calculation, claims only 2½ hours while the Labour Inspector's calculation is actually for 3 hours.

[99] After the recalculation I have just referred to, the total amount of public holiday pay arrears owing by Sun 2 Moon for Mr Singh is \$488.46.

Did Sun 2 Moon maintain proper wage and time records?

[100] It will be apparent already from the preceding sections of this determination that there were no viable wage and time records whatever from Sun 2 Moon.

[101] Mr Khattar maintained that this was part of Mr Singh's responsibilities and therefore, that insofar as there was any perceived deficit, that deficit was to be sheeted home to Mr Singh.

[102] But the legal position is clear that it is the employer's responsibility to maintain a proper wage and time record and the evidence I heard was that there were actually no business records of the employment at all save for the existence of three separate employment agreements. Mr Singh told me in unchallenged evidence that he never saw, let alone signed, a wage book, that he never got a payslip and that the nearest thing to a timesheet was a board that was kept in the store on which staff were

supposed to record their hours. It seemed to be accepted by both sides that when that board was full, it was erased and the process started again.

[103] So, I have to conclude that there was never a continuing permanent wage and time record as required by law. I took the opportunity of making the point to Mr Khattar that he had managed to get him and his business into a great deal of difficulty in this proceeding by failing this basic requirement.

[104] I have observed in previous determinations on this subject matter that small business owners often make the point in defence of their failure to keep proper records that it is an onerous obligation. I do not agree. The requirement in New Zealand law that a wage and time record be maintained by the employer is no more onerous an obligation than the practical requirement that businesses keep proper records of debtors and creditors or indeed proper records of their commercial transactions for the purposes of accounting to the Inland Revenue Department for the goods and services tax.

[105] The requirement to maintain wage and time records is not a stipulation designed exclusively to benefit the employee or indeed to facilitate the inquiries of the Labour Inspector should an issue arise; it is at least as much a protection to the employer to evidence the hours that staff have worked and the wages that they have been paid for that work.

[106] As I have already observed, the failure by an employer to produce wage and time records in a proceeding such as this reduces the Authority to placing exclusive reliance on any records kept by the employee and provided the test in s.132 of the Act is made out, entitles the Authority to rely only on the evidence from the employee.

[107] The only proper way that an employer can resist those outcomes is by keeping proper wage and time records as the law mandates.

[108] There is no proper basis on which Mr Khattar can suggest that it was Mr Singh's obligation to keep the records; it is the employer's responsibility under the law and there is no evidence before me, other than Mr Khattar's oral evidence, to suggest that it was Mr Singh's responsibility. In particular, I note that there is nothing in Mr Singh's position description to suggest that he was somehow responsible for an obligation that must rest on the employer and not on the employee.

[109] Accordingly, I am satisfied that Sun 2 Moon did not maintain proper wage and time records in accordance with the law. Moreover, had it done so, it is arguable that this proceeding might never have been required or if it was, it would be reduced in scope, magnitude and confusion.

Should penalties apply?

[110] Because I have concluded that Sun 2 Moon Limited has failed to comply with minimum standards legislation, the employer is liable to a claim for penalties in respect of each and every one of the breaches proved against the employer.

[111] A useful starting point in the assessment of the penalties regime is the decision of Her Honour Judge Inglis in *Tan v Yang & Zhang* [2014] NZEmpC where Her Honour sets out a list of non-exclusive factors which could usefully be considered in determining the level at which a penalty should be set.

[112] A further issue for determination in respect of the imposition of a penalty is the question whether, given there has been a series of breaches of the minimum code, a penalty should be fixed in respect of each breach and then aggregated or whether a global sum may be appropriate. In the present case, penalties are sought in respect of the finding of a premium being extracted, the failure to pay minimum wage, the failure to pay holiday pay, the failure to pay statutory holiday pay correctly and the failure to keep proper wage and time records.

[113] Turning then to the factors identified in *Tan*, the first of those relates to the seriousness of the breach. In my opinion, all the breaches are serious. The extracting of a penalty payment, or more accurately a series of penalty payments, from Mr Singh by Sun 2 Moon is a serious breach of the sanctity of the employment relationship. Significant sums of money were involved for a low paid worker and Mr Singh was forced to borrow much of the money for the first payment, from relations overseas.

[114] It is apparent on the evidence that Mr Singh knew that the payment was wrong, knew that it was in breach of New Zealand law, but felt that he had little choice because he needed the job because he needed to work.

[115] It is difficult not to see this sort of behaviour as an abuse of the power imbalance between employer and employee, particularly where the employer is

effectively taking advantage of a migrant worker. Accordingly, I view the breach of s.12A of the MWA as a serious breach.

[116] But the breaches of the failure to pay minimum wage, and the failures to pay holiday pay and statutory holiday pay are also serious, amounting as they do to a very significant sum, especially for a low paid worker. The submissions for the Labour Inspector rely on *Macrury v Cypress Villas Ltd* [2015] NZEmpC 157 where the Court said that the minimum employment code was “*sacrosanct*”. It follows that minimum code payments may not be abrogated or compromised in any way and the failure to make those payments at the appropriate time is a fundamental breach of the employment relationship.

[117] Finally, I refer again to the failure by Sun 2 Moon Limited to keep proper wage and time records. This is absolutely at the core of the obligations of a good and fair employer acting in conformity with the good faith principle which overarches our statutory framework for employment relations. The failure to keep those records, as I have already observed, puts both parties at risk, makes the enforcement of statutory obligations more difficult, both for statutory officers such as the Labour Inspector and for this Authority, and effectively encourage proceedings which, but for the absence of proper wage and time records, might actually not actually be required at all.

[118] The second factor identified in *Tan* is whether the breach is one-off or repeated. In the present case, the breaches were mostly continuing during the employment (certainly that is the case in relation to the minimum wage and the claimed premium), and arguably the failure to attend properly to annual and public holiday pay at the end of the various periods of engagement fall into the same category.

[119] The third factor is the impact on the employee. It is apparent to me from the evidence I heard in this matter that Mr Singh, while composed and tranquil in giving his evidence to the Authority, was nonetheless deeply affected by the breaches, especially because of the large amount of money involved for a low paid worker. In addition, it is fair to observe that Mr Singh had to spend a significant amount of time with the Labour Inspector in the preparation for the Authority’s investigation and that all of that time was effectively lost to him as potential work time where he might be able to recoup some of the losses he sustained by the behaviour of Sun 2 Moon.

[120] In the same general connection, the fourth factor invites me to reflect on the vulnerability of the employee and I simply observe that as a migrant worker, Mr Singh is sadly a member of a cohort that is all too often taken advantage of by unscrupulous or incompetent employers.

[121] The next factor is the need for deterrence and it is important that this Authority sends a clear signal to employers, including of course the first respondent in this proceeding, that the sort of behaviour evidenced here will be subject to punishment by this Authority and the Employment Court if only to deter similar behaviour in the future, either by the subject employer or indeed by other employers.

[122] Finally, the question of remorse must be considered. It is true that Mr Khattar has acknowledged that there is money owing. He accepted that he had not paid the minimum wage in respect of any of the hours worked by Mr Singh and he also accepted that, because there was dispute about the number of hours that were worked, the quantum of holiday pay had not been arrived at and therefore had not been paid. It is also true that Mr Khattar assisted the Labour Inspector in his inquiries and was cooperative throughout.

[123] However, the remedy for those perceived acknowledgments by Sun 2 Moon was always in its own hands; if it had kept proper wage and time records and ensured that staff were paid in accordance with New Zealand law, there would have been significantly less in dispute. Moreover, Sun 2 Moon has never acknowledged that a premium was extracted from Mr Singh, despite the evidence that I found supported that very conclusion.

[124] Having considered all of those factors, I need now to decide whether a global sum ought to apply or whether individual breaches should each be the subject of a penalty. In all the circumstances, I think the proper course in this case is to identify a penalty for each of the breaches I have found proved.

[125] Dealing first with the issue of the payment of a premium, I am satisfied that the penalty for this breach ought to be in the sum of \$8,000. In fixing the penalty at that level, I am mindful of the recent changes to the law increasing the maximum amount of penalty that may be levied in respect of a breach and the observations made by the proposing Minister in supporting the introduction of the amendment Bill. Put shortly, advocacy for the increase in individual penalty amount was justified on the

footing that society needed to condemn breaches of the minimum standards code and the Parliament had to send a clear message to this Authority in particular to increase the level of penalties awarded against errant employers.

[126] Concerning the breaches of the requirement to pay the minimum wage and the breaches of the Holidays Act, I fix penalties at \$5,000 each, that is \$5,000 for a breach of the Minimum Wage Act and another \$5,000 for a breach of the Holidays Act.

[127] Finally, in respect to the failure to keep wage and time records in accordance with the law, I determine that a further penalty of \$7,000 should apply to that fundamental breach of the employer's obligations.

Determination

[128] I am satisfied that Labour Inspector Smith has proved on the balance of probabilities that:

- (a) Sun 2 Moon Limited has demanded from and received a premium from Jaspreet Singh to secure his employment; and
- (b) Sun 2 Moon Limited has not paid Mr Singh the minimum wage in respect to the work the latter performed; and
- (c) Mr Singh was not paid holiday pay in accordance with the Holidays Act 2003; and
- (d) Mr Singh was not correctly paid for working public holidays in terms of the 2003 Act; and
- (e) Sun 2 Moon Limited has failed to keep wage and time records in accordance with the law.

[129] I have concluded that A to Z Cleaning Limited was never Mr Singh's employer and that while Mr Singh did perform cleaning duties during the third discrete period of the employment, he did that under the direction of Mr Khattar and within the terms of his employment with Sun 2 Moon Limited. It follows from that conclusion that it was unnecessary for me to join to the proceedings the prospective third respondent, Luv Kumar Khattar, but that leave was reserved for the Labour

Inspector to revert to me for further orders if he considered it necessary or practical to do so concerning the orders that I have made against Sun 2 Moon Limited.

[130] Concerning the premium paid by Mr Singh to Mr Khattar for the securing of his employment in terms of s.12A of the Minimum Wage Act, I direct that Sun 2 Moon Limited is to pay to Mr Singh the sum of \$10,407.88 in reimbursement of that premium amount.

[131] Concerning the failure to pay the minimum wage to Mr Singh during the employment, I have found that a total payment due to him by Sun 2 Moon Limited of \$13,437.28 gross is due.

[132] The sum of \$4,447.61 gross is owed by Sun 2 Moon Limited to Mr Singh in respect of holiday pay and a further sum of \$488.46 is owed to Mr Singh by Sun 2 Moon Limited in regard to the correct payment for his working on public holidays.

[133] A total payment of \$25,000 in penalties is levied against Sun 2 Moon Limited to penalise that company for its absolute failure to comply with New Zealand employment law minimum standards legislation, that sum being the totality of the individual penalties that I have determined should be imposed in respect of the various breaches by Sun 2 Moon Limited of our employment standards legislation. That penalty payment is to be paid into the Authority and will be remitted by the Authority to the Crown Bank Account.

[134] Pursuant to s. 135 (4A) of the Act, leave is reserved for the first respondent to revert to the Authority to seek agreement to payment of the penalty by instalments.

Costs

[135] Costs are sought by the Labour Inspector but are reserved.

James Crichton
Chief of the Employment Relations Authority