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THE ADVOCATE

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Recalculating Penalties

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

A judgment of the Full Court of the Employment Court, delivered in November 2016, considered applications for penalties arising from a series of serious multiple breaches of the minimum code. They took the opportunity to provide guidance to the Employment Relations Authority on the approach that the Authority should take to applications for penalties and, in particular, applications for multiple breaches.

In the case, ***Borsboom (Labour Inspector) v. Preet PVT Limited and Warrington Discount Tobacco Ltd*** the two defendant companies were both owned by the same two Directors. The claims were taken by the Labour Inspector on behalf of five employees, all of whom were foreign nationals in New Zealand on student visas. Two were employed by Preet and three by Warrington. The breaches against employees were multiple breaches of the minimum wage, multiple breaches of the minimum entitlements provisions of the Holidays Act, failure to keep wage and time records, failure to keep and produce holiday and leave records and failure to provide employees with employment agreements.

The breaches were largely accepted by the employer and reimbursement of lost earnings were awarded by consent of the parties in the Authority. No agreement was made with regards the award of penalties and ultimately this part of the matter was returned to the Authority for a decision. In March 2016 the Authority awarded identical separate penalties of $5,000 for each of the employees, a total of $25,000 to be split between the two employers. This decision was challenged by the Labour Inspector. The Inspector challenged both the global nature of the awards and the quantum awarded.

The Court considered fully the history and general principles of penalties. Penalties are essentially punitive rather than compensatory in their intent, with a focus on dissuading employers from breaches of minimum code standards.

The Court noted that in 2011 maximum penalties were doubled to $10,000 and $20,000 for individuals and corporates respectively.

It is noted (although not relevant for this case) that as of 1 April 2016, these were increased to $50,000 for individuals and the greater of $100,000 or three times the amount of the unlawful gain made by the body corporate.

Although they could not apply the 2016 amendments to the Employment Relations Act, the Court did reflect on the changes made on the application of penalties in s.133A.Firstly because they rightly regarded them as a reflection of previous Judge made law and secondly because the intention was to provide observations in the calculation of penalties that would apply to future cases.

In setting penalties in this case the Court adopted a multi-step approach:

"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."

Disclaimer:

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The Court identified breaches of three different Acts; the Minimum Wage Act, the Holidays Act and the Employment Relations Act. Some breaches (for example the Minimum Wage Act), were repeated weekly. The Court however determined that at maximum this amounted to a single breach for each employee (5 in total). Similarly the two breaches of the Holidays Act, (working on and payment for working on a Public Holiday) were so inter-related that they should be treated as one breach per employee. Jointly the two employers were theoretically liable for maximum penalties of $160,000 for Preet and $240,000 for Warrington Tobacco.

As part of Step 2 the Court then assessed the severity of each breach. It was determined that the applicants were deliberately and knowingly underpaid. In addition the employers attempted to conceal the breaches.

The failure to maintain time and holiday records and to have employment agreements were similarly deliberate but less harmful to the employees.

The minimum wage breaches were determined at 80% of maximum, the Holidays Act at 70% and the Employment Relations Act at 50%.

The Court then considered mitigating circumstances. Firstly, the employers had a total of 25 employees, and only breached the respective Acts with the 5 applicants:

"So, to put it in its best light for the defendants, they have not been shown to have treated all their employees in the same egregious ways as they did the five the subject of this proceeding."

Secondly, the employers co-operated with the Labour Inspector and thirdly, one of the Directors had committed himself to compensating the employees for their losses. The penalties were therefore discounted a further 50%.

The Court then moved to consider in Step 3 the financial circumstances of the defendants and on the basis of the information provided reduced the awards by a further 20%.

In the final step the Court considered the '*proportionality of outcome'* in several areas. Firstly because this was a test case, they were unable to compare with other cases. They went on to determine whether or not the penalties were '*justly proportionate to the seriousness of the breaches and the harm done by them'*. Theoretically this could result in either an increase or a decrease of the penalty. Firstly, the actual losses amounted to a little more than $73,000, therefore the penalties (which by this stage sat at $43,000 for Preet and $64,800 for Warrington Tobacco) were disproportionately larger than the losses.

The Court further determined that penalties should not be so great that the employer would take action to avoid paying them. With the above in mind the penalties were further reduced to $40,000 and $60,000 respectively, a significant increase from the Authority penalties of $10,000 and $15,000 respectively.

The Court summarised the payment calculation in a Schedule attached to the decision:

	Preet PVT Ltd (2 employees)		**Warrington Discount Tobacco Ltd (3 employee)**	
Step 1: Nature and number of breaches – potential maximum penalties				
MWA		$40,000		$60,000
HA		$80,000		$120,000
ERA		$40,000		$60,000
	Subtotal	**$160,000**	**Subtotal**	**$240,000**
Step 2: Aggravating factors as a proportion of maxima in Step 1				
MWA (80%)		$32,000		$48,000
HA (70%)		$56,000		$84,000
ERA (50%)		$20,000		$30,000
	Subtotal	**$108,000**	**Subtotal**	**$162,000**
Step 2: Ameliorating factors (reducing aggravating factors subtotal)				
Less 50% of above subtotals	**Subtotal**	**$54,000**	**Subtotal**	**$81,000**
Step 3: Defendants' financial circumstances				
Less 20% of above subtotals	**Subtotal**	**$43,200**	**Subtotal**	**$64,800**
Step 4: Proportionality				
Reduce modestly	**TOTAL**	**$40,000**	**TOTAL**	**$60,000**

The Court's method of calculation of penalties has been adopted in a recent Employment Relations Authority decision, ***Bennett v. Langdon***. This was a personal grievance claim relating to a claimed constructive dismissal. In addition to this the applicant claimed penalties for three separate breaches:

Step 1:

a) A breach of the Wages Protection Act (WPA) in that $1250 of wages were unilaterally withheld from the final pay.

b) A breach of s.63A of the Employment Relations Act because no employment agreement was provided; and

c) A breach of s.4 of the Employment Relations Act because the employer breached good faith by not being communicative and not attending mediation. This last claim was not accepted.

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It was accepted that no employment agreement was provided. This was a breach of s.63A, a maximum penalty of $10,000 was therefore possible. Similarly it was accepted that wages were withheld from the final pay in breach of the WP Act, the employer was therefore also liable for a $10,000 penalty. These were separate breaches so no global penalty was considered.

Step 2:

a) The employer knew that an employment agreement was required, this breach was therefore intentional or negligent, there was no remorse shown. Because this was not a serious breach the penalty was reduced to 30% ($3,000). In mitigation the employer had provided agreements to other employees and the applicant was not a vulnerable worker. The penalty was decreased again to $2,000.

b) With regards the withholding of wages. This was serious; the employee suffered significant financial damage over Christmas. The starting point was therefore 60% at the maximum; $6,000. In mitigation some wages were later paid leaving only $261 outstanding. This reduced the maximum to $2,500.

Step 3:

There was no evidence of the employer's financial circumstances.

Step 4:

Proportionality looking at the seriousness of the breaches and harm done the penalties were again reduced by $500 for each penalty.

Step 1: Nature & number of breaches – potential maximum penalties		
WPA		$10,000
ERA		$10,000
	Subtotal	$20,000
Step 2: Aggravating factors as a proportion of maxima in Step 1		
WPA (60%)		$6,000
ERA (30)		$3,000
	Subtotal	$9,000
Step 2: Ameliorating factors (reducing aggravating factors subtotal)		
WPA Down to $2,500		$2,500
ERA Down to $2,000		$2,000
	Subtotal	$4,500
Step 3: Defendant's financial circumstances		
No reduction	**Subtotal**	$4,500
Step 4: Proportionality		
Reduce modestly	**TOTAL**	$3,500

In conclusion, there is now a structured methodology for the calculation of breaches. We are, in all likelihood going to see an increase in claims for breach as a normal part of personal grievances. It is clear that the Court and Authority will take a more robust approach to penalising breaches of the minimum code. Employers need to be aware of the minimum rights of their employees and ensure that these are not breached.

A Timely Reminder . . .

Increase to Minimum Wage Rates –

The Government has announced the adult minimum wage will go up by 50 cents an hour.

From 1 April 2017 the new adult minimum wage (before tax) that applies to employees aged 16 or over will be $15.75 an hour

The new minimum wage rates that apply to new entrants and employees on the training minimum wage (before tax) will increase to $12.60 an hour.

Time to Ensure Your Existing Employment Agreements are Compliant?

The amendments to the Employment Relations Act, introduced by the Employment Standards legislation may require changes to a number of provisions in existing individual employment agreements, including:

- Hours of Work
- Overtime
- Salaried Payments
- Conflict of Interest; and
- Deductions from Remuneration provisions.

For existing employees, you have until **1 April 2017**, to ensure that your individual employment agreements comply with the new legislation. The team at MGZ are available to undertake a review of your employment agreements to ensure compliance.