

EMPLOYMENT LAW

FEBRUARY 2019

The Labour Inspectorate has announced a renewed focus on breaches of minimum employment standards for employees. Towards the end of last year the Inspectorate announced that Antares Restaurant Group (operator of Burger King New restaurants in New Zealand) had been placed on MBIE's stand-down list of employers who have breached employment legislation and are not allowed to recruit migrant workers or support working VISA applications. The Burger King case should serve as a timely reminder for businesses to ensure they are complying with employment laws and are not knowingly or unknowingly breaching (or involved in breaching) an employee's minimum entitlements.

1

MINIMUM WAGE

Since 1 April 2018, our adult minimum wage has increased to \$16.50 per hour. Failing to pay employees this can expose employers to liability under the Minimum Wage Act and Wages Protection Act. The Inspectorate seems particularly interested in cases where vulnerable or migrant workers may have been exploited.

Minimum wage breaches can occur even in relation to salaried workers. Burger King, for example, failed to ensure a manager on a salary of \$39,000 was actually receiving the minimum wage, based on her actual hours worked. She had worked overtime during weekends and, as a result, her remuneration had fallen to below the minimum wage. As a consequence, Burger King are now banned from hiring any migrant workers for a year and supporting VISA renewals from existing workers. An employer's brand can be significantly harmed if they fall foul of the Inspectorate.

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HOLIDAY PAY

Holiday pay is also under the spotlight like never before and many businesses have contravened of the Holidays Act by not paying employees their correct holiday pay entitlements, unwittingly in many cases. Employers must pay employee's holiday pay at the greater rate of their ordinarily weekly pay at the time the holiday is taken or the employee's average weekly earnings over the preceding 12 month period. This can cause confusion when an employee's remuneration changes and an employer's payroll system does not take this into account for holiday pay. Last year, 17 Caltex franchises were discovered to have unwittingly underpaid 232 current and former employees a combined total of \$125,000. These errors stemmed from Caltex's payroll system miscalculating holiday pay. The failure to properly pay holiday pay can attract penalties under the Holidays Act of up to \$20,000 per breach in the case of employers.

3

"DISCRETIONARY" PAYMENTS - PART OF HOLIDAY PAY OR NOT?

Also under the microscope are so-called discretionary payments provided to certain employees. Often employers may want to incentivise employees to perform well by offering bonuses in certain circumstances. If the description of the payment is not worded carefully in the relevant employment agreement then the employer may discover they are actually required to include the payment as part of an employee's gross earnings for the purpose of calculating holiday pay. This is in spite of the employer having a discretion over the amount of the bonus. A bonus that an employer is bound by the employment agreement to pay but which is dependent on the employee meeting certain targets or quotas is unlikely to be discretionary.

We recommend employers seek advice before establishing any bonus or incentive scheme to ensure the payments do not attract holiday pay.

4

DIRECTOR'S LIABILITY

As is the case with the Health and Safety at Work Act, directors cannot escape the reach of the law. Any director or officer of a company that has committed a breach of minimum standards or of the Employment Relations Act can be deemed to be "involved" in the breach and can be personally liable for any payments owed by the employer that the employer is unable to pay. "Involvement" can be by aiding and abetting a breach or even by being knowingly concerned in the breach either directly or indirectly. The Court may make a declaration of a breach of minimum standards not just against an employer but against any person involved in a breach. Such declarations require the Court to be satisfied that the breach is serious, having regard to the total of money involved, whether the breach is a single instance or part of a series of breaches and whether the breach was intentional or reckless. This approach is a sign that the Employment Relations Authority and the Inspectorate will, in certain circumstances, look through the corporate veil and hold those underneath responsible for a company's breaches.



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BANNING ORDERS

The Employment Relations Act enables a person involved in an intentional and persistent breach of employment standards to be banned from employing staff and even from being an officer (e.g. director, partner or even senior manager) of an employer entity for up to 10 years. Directors or anyone else considered to be involved in a breach of minimum standards can also be liable for penalties unless they can show they took reasonable precautions and exercised due diligence to avoid the breach. These penalties can be as high as \$25,000 (under the Holidays Act) or the greater of \$100,000 or three times the financial gain made by the company (under the Employment Relations Act) depending on the severity of the breach.

Last year a prominent businessman and former Christchurch mayoral candidate was declared to have been a person involved in a breach of minimum employment standards and is now prohibited from entering into any employment agreement as an officer of an employer, or even being involved in the hiring of employees, for a period of three years. The man was a director of a hospitality company and the Employment Court determined he knowingly allowed the company to withhold holiday pay owing to two employees upon the termination of their employment. The company had not released the money because they did not think the employees had given the required notice of resignation.



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TAKE ACTION NOW

We encourage businesses to take the following steps to ensure compliance with employment laws.

- Ensure all employees are being paid at least the minimum wage and for all hours worked;
- Ensure payroll systems/staff are correctly calculating holiday pay;
- Seek advice on bonuses and incentive payments if you do not wish to pay holiday pay on these payments; and
- If you are a director or officer, know what is happening at your business and that the law is being properly complied with in order to avoid personal liability.

Please contact us if you would like to discuss this.



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