

Phianya Tiwsuwanbavorn

Wages pursuant to the Minimum Wage Act 1983 (s 6)	\$75,412 .00
Public holiday pay pursuant to the Holidays Act 1981/2003 (ss 7A, 50, 40 and 49)	\$6,430.50
Alternative holiday pay pursuant to the Holidays Act 2003 (s 60)	\$7,134.00
Annual holiday pay pursuant to the Holidays Act 2003 (ss 24, 25 and 26)	\$14,324.58
Subtotal:	\$103,301.08
Less board and lodgings pursuant to Minimum Wage Act 1983 (s 7)	\$29,824.40
Total Claimed (gross):	<u>\$73,476.68</u>

Manas Tiwsuwanbavorn

Wages pursuant to the Minimum Wage Act 1983 (s 6)	\$75,412 .00
Public holiday pay pursuant to the Holidays Act 1981/2003 (ss 7A, 50, 40 and 49)	\$6,430.50
Alternative holiday pay pursuant to the Holidays Act 2003 (s 60)	\$7,134.00
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Kowin Tiwsuwanbavorn

Wages pursuant to the Minimum Wage Act 1983 (s 6)	\$82,712 .00
Public holiday pay pursuant to the Holidays Act 1981/2003 (ss 7A, 50, 40 and 49)	\$6,430.50
Alternative holiday pay pursuant to the Holidays Act 2003 (s 60)	\$4,920.00
Annual holiday pay pursuant to the Holidays Act 2003 (ss 24, 25 and 26)	\$9,741.60

Subtotal:	\$103,804.10
Less board and lodgings pursuant to Minimum Wage Act 1983 (s 7)	\$29,824.40
Total Claimed (gross):	<u>\$73,979.90</u>

Interest is sought on the above sums. For completeness I record that the Labour Inspector has not sought any penalties against the respondent.

Failure to attend the investigation meeting

[3] While the respondent did not attend and was not represented at the investigation meeting, Mr Ly has been represented on earlier occasions. The first tangible evidence of Mr Ly being represented is a letter dated 4th December 2007 and a further letter dated 11th February 2008, from Mr Frank Deliu, Solicitor, to the Labour Inspector. Mr Ly appears to have then sought assistance from an immigration consultant, Mr Delamere, TDA Immigration and Student Services Limited.¹ However, the *Statement in Reply* was filed by Mr Deliu. In this, a number of issues have been raised including a challenge to the legal right of the Labour Inspector to pursue statutory claims on behalf of the employees and whether the Authority has jurisdiction.²

[4] The Authority has convened several conference calls and issued two directions to mediation.³ Following a conference call convened by the Authority on 27th May 2010, with Ms Blick representing the applicant and Mr Deliu for the respondent, the Authority issued the following minute:

Further to the conference call convened by the Authority today, attached to this minute is a Notice of Investigation Meeting along with a timetable for the parties to provide witness statements and any supporting documents, along with a date for Mr Deliu, for the respondent, to provide a synopsis of the issues relevant to the matters that the respondent wishes the Authority to consider.

I note that there has been some difficulty regarding Mr Ly participating in the due process pertaining to the matters at issue. This means it has not been possible to have the parties attend mediation in an attempt to resolve the issues. As a consequence, the Authority is now required to decide matters based on the evidence that will be provided at the investigation meeting in due course.

¹ Mr Ly signed an *Authority to Represent* document on 30th July 2009 that authorised TDA Immigration and Student Services Limited to represent his interests albeit Mr Delemere “strongly advised” Mr Ly to engage the services of a lawyer. It would appear that Mr Ly did not reveal to Mr Delemere that he had already done this.

² The Authority does not accept that there is any merit to these arguments. But in any event they have not been pursued by the respondent.

³ 2nd November 2009 and 9th March 2010.

Given the unavailability of Mr Ly to date, I respectfully advise him that it is important that he participate in the investigation meeting as a failure to do so will leave the Authority to decide matters solely on the evidence presented by the Labour Inspector and associated witnesses, with a possible substantial disadvantage to Mr Ly, given the nature of the claims being pursued.

[5] The Authority did not receive any further material from the respondent and on or about 1st September 2010 Mr Deliu sought leave to withdraw from the proceedings. This was accepted by the Authority with a request being made for the contact details of Mr Ly, via an email dated 1st September 2010. And:

Also, can Mr Deliu confirm that Mr Ly is aware that the investigation meeting is taking place from 14-17 September 2010? Can Mr Deliu also confirm that Mr Ly is aware of the substantial nature of the claims being pursued by the applicant?

Mr Deliu promptly replied the same day providing some possible contact details for Mr Ly (via family members) and confirmed that Mr Ly was aware of the investigation meeting and the nature of the substantive claims that have been made against him.

[6] Given all of the above and the failure of the respondent to appear or be represented at the investigation meeting on 14th September 2010, pursuant to clause 12 of Schedule 2 to the Employment Relations Act 2000, the investigation meeting proceeded with the Authority acting [*“... as fully in the matter before it as if that party had duly attended or been represented.”*]

Background to the claims

[7] Following information received, compliance officers from Immigration New Zealand accompanied by Police Officers, visited the Taumarunui Bakery on 15th February 2007. The three employees were found to be working at the bakery illegally. They had entered New Zealand from Thailand on visitor permits in the year 2000 and had not applied for any additional permit to remain in New Zealand, beyond the term of their visitor permits. The employees were deported from New Zealand on 20th April 2007. During the process pertaining to the role of the immigration officers, the employees informed that they began working at the bakery soon after their arrival in New Zealand in 2000, and had worked there 6 days each week without any holidays for approximately 6 years. The employees were subsequently interviewed by the Labour Inspector and based on those interviews, she came to the conclusion that the employees had probably not been paid their entitlements under the Minimum Wage

Act 1983 or the Holidays Act 2003. On 2nd March 2007, the Labour Inspector forwarded written requests to Mr Ly for payment of the employee's entitlements under the Holidays Act. The Labour Inspector also sought payment of the current outstanding wages due to the three employees, prior to their sudden removal from the bakery. In the event that Mr Ly did not agree with the information provided, the Labour Inspector asked to be provided with copies of the wage and time records for each employee.

[8] The Labour Inspector subsequently spoke to Mr Ly's daughter and son on 21st March 2007 and then visited the bakery on 28th March 2007. It appears that Mr Ly does not speak English but his son informed the Labour Inspector that the employees had only worked at the bakery for two weeks and at other times they had been fruit picking. He informed that the employees had now been paid wages for the two weeks worked.

[9] On 11th May 2007, pursuant to s 229(1)(c) of the Employment Relations Act 2000, the Labour Inspector issued a notice requiring the respondent to provide wages, time and holiday records for the employees. No response was forthcoming.

[10] While the employees were working at the bakery, they were befriended by Mr Anthony Churton and Ms Dianne Judson and following the return of the employees to Thailand, Mr Churton acted as their authorised representative/advocate. On behalf of the employees, Mr Churton agreed with the Labour Inspector that; "the trio would be happy to receive their entitlement to annual holidays as per the Holidays Act 2003."⁴ Via a letter dated 4th December 2007 from Mr Deliu to the Labour Inspector, the annual holiday pay claims were rebutted and he informed that Mr Ly would be; "defending this matter."

The further investigation by the Labour Inspector

[11] Following some further correspondence between the Labour Inspector and Mr Deliu, the Labour Inspector continued with her investigation into the circumstances surrounding the employees working at the bakery. This included interviewing various people regarding the operation of the bakery and the hours it was open. The Labour Inspector has provided signed statements from a number of individuals including an

⁴ As set out in a letter from the Labour Inspector to Mr Ly dated 27th November 2007.

unsigned affidavit from a local Police Constable, also a customer of the bakery. The content of the statements provided to the Authority largely confirm that the bakery was open from very early in the morning until around 5:00p.m, seven days each week and that the employees, after closing the shop, would visit the local supermarket to purchase new supplies. These statements largely corroborate the information provided to the Labour Inspector by the three employees.

[12] The Labour Inspector also obtained information relating to the premises of the bakery from the Ruapehu District Council, including copies of Premise Registration certificates. The majority of the Council documents identify Mr Hon Ly as the licensee of the Taumarunui Bakery, but I note that on 15th July 2007, Mr Ly provided "Licensee details" being: *Sun Hien Ly and Tas Ly*, and the Premise Registration issued by the Council on 19th July 2007, shows the licensee as being *Sun Hen LY And Ta LY*. However, all the other evidence available to the Authority, including a *NOTICE OF CHANGE OF OWNERSHIP OR OCCUPANCY* document, indicates that Hon Ly is the name commonly used by the respondent and that for all intents and purposes he was the employer of the three employees and that the liability for any expenses incurred by the business rested with him. I am satisfied that it is more probable than not that Mr Hon Ly has been correctly cited as the respondent party to these proceedings.

[13] On 7th April 2008, the Labour Inspector travelled to Thailand and interviewed the three employees and took signed statements from them. The interview sheets/signed statements show that Ms Phianya Tiwsuwanbavorn has a good understanding of English and did not require an interpreter. Mr Manas Tiwsuwanbavorn and Mr Kowin Tiwsuwanbavorn did require an interpreter and this person has signed the statements also. From the statements it can be ascertained that the employees worked very long hours at the bakery, from 4:00a.m. to 5:00p.m, seven days each week. Ms Phianya Tiwsuwanbavorn and Mr Manas Tiwsuwanbavorn had been doing so from within days after arriving in New Zealand in November 2000. Mr Kowin Tiwsuwanbavorn came to work at the bakery (most probably) sometime in May 2003. The employees lived in a house provided by Mr Hon Ly with very little in the way of chattels. A car was provided after about a year of the first two employees commencing work at the bakery. Apart from a short break at around New Year each year, the employees had no holidays apart from Christmas Day and Boxing Day and

were paid less than the minimum pay. Tax forms were not signed nor were wage and time records kept. There were no employment agreements entered into and the employees worked every day even if they were sick.

[14] Via a letter dated 7th November 2008, the Labour Inspector advised the respondent that she had completed her investigation pertaining to the statutory entitlements of the employees. Attached to the letter is a schedule setting out her calculations in regard to the entitlements due to the three employees. The total sum owing being \$305,109.74. The Labour Inspector informed the respondent that:

Despite numerous requests to meet with you and discuss the matter and for you to provide wage and time and holiday records no information has been forthcoming. Accordingly, I have formed a view on the information provided by the workers.

The Labour Inspector also informed that:

Where an employee provides evidence that the employer failed to keep or produce a wages and time record as required, and that consequently the employee had difficulty in making an accurate claim, the Employment Relations Authority may, unless the employer proves those claims are incorrect, accept the claims made by the employee/s (pursuant to section 132 of the Employment Relations Act 2000).

In addition, section 83 of the Holidays Act 2003 contains a similar provision with respect to holiday and leave records.

[15] Via a letter dated 1st December 2008, Mr Deliu replied for the respondent. Mr Deliu sought a variety of information from the Labour Inspector; including: “Confirmation of your authority to enforce an illegal work agreement, i.e., why the Illegal Contracts Act 1980 does not apply.” Mr Deliu also made a cynical reference to other matters that the Labour Inspector had been (allegedly) involved with pertaining to a business apparently operated by Mr Ly’s daughter. In conclusion, Mr Deliu informed:

I lastly note that the amount allegedly owed increased from some \$29,000 in late 2007 to some \$305,000 in late 2008 – you have not adequately explained why you are now seeking an over ten-fold increase – it appears that my client’s defence has caused you to punitively seek a substantially higher amount. This is highly inappropriate and **the Department is put on notice that we are instructed to file civil proceedings seeking damages, including exemplary**, for *inter alia*, abuse of legal procedure, abuse of public office, breach of statutory duty and the like as *prima facie*, it appears that you have materially altered your 2007 findings simply on the basis that our client is defending the claim. [Existing emphasis.]

[16] Clearly the parties were unable to have any further constructive interaction and given the subsequent disappearance of Mr Ly,⁵ mediation was not possible. The Authority is now left to determine the claims before it based on the comprehensive evidence produced by the Labour Inspector.

Determination

[17] It is regrettable that Mr Ly (and his lawyer at the time) did not see fit to engage in a constructive manner with the Labour Inspector when she first sought payment of holiday payments (only) in November 2007. It does not assist the respondent to object later, when the Labour Inspector, appropriately, sought payment of the total statutory entitlements due to the employees following her more comprehensive investigation of the circumstances. Nor does it assist the respondent to rely on the Illegal Contracts Act 1970 by advancing an argument that the employees were working in New Zealand illegally. This argument is even more specious given that Mr Ly must have been well aware of the immigration status of the employees and that he was most likely to have been committing an offence under section 142(1)(f) of the Immigration Act 1987⁶ by allowing the employees to continue to work for him without an appropriate permit to do so. On the evidence before the Authority, it appears that the employees were vulnerable and grossly exploited by Mr Ly, most probably in the full knowledge that they were unlikely to complain due to their immigration status. While there is no evidence available, nor is it a matter for the Authority, it could be reasonably expected that Immigration New Zealand would have conducted a vigorous investigation into Mr Ly's actions as to whether he has committed an offence, particularly given the swift deportation of the hard working and unfortunate, but nevertheless, offending, employees.

[18] As the Labour Inspector has informed the respondent, section 132 of the Employment Relations Act 2000 applies in circumstances where the employer fails to keep or produce records, as follows:

- (1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that-

⁵ It appears that Mr Ly left New Zealand for a period of time. It is unclear if he ever returned.

⁶ The 1987 Act has been repealed and there are now more specific provisions applying to employers under section 350 of the Immigration Act 2009.

- (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
 - (b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.
- (2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of-
- (a) the wages actually paid to the employee:
 - (b) the hours, days, and time worked by the employee.

There is a similar provision at section 83 of the Holidays Act 2003 applying to claims for unpaid holiday pay.

[19] The Authority is obliged to be cautious when determining matters if there is only the evidence of one party to the proceedings, particularly where, as in this case, substantial sums of money are involved. But given that the respondent has failed to prove that the claims advanced by the Labour Inspector on behalf of the employees are incorrect,⁷ and applying the above provisions of section 132 of the Employment Relations Act 2000 and section 83 of the Holidays Act 2003, I accept as proved the evidence provided by the Labour Inspector in regard to the claims under investigation and that the claims, as now modified by the Labour Inspector, fall within the appropriate limitation periods.⁸

Orders of the Authority

[20] Mr Hon Ly is ordered to pay to the Labour Inspector, for the use of the respective employees, the sums set out below:

Phianya Tiwsuwanbavorn

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Public holiday pay pursuant to the Holidays Act 1981/2003 (ss 7A, 50, 40 and 49)	\$6,430.50
Alternative holiday pay pursuant to the Holidays Act 2003 (s 60)	\$7,134.00
Annual holiday pay pursuant to the Holidays Act 2003 (ss 24, 25 and 26)	\$14,324.58

⁷ No information has been made available by the respondent.

⁸ *Napier Aero Club Inc v Tayler* [1998] 1 ERNZ 241.

Subtotal:	\$103,301.08
Less board and lodgings pursuant to Minimum Wage Act 1983 (s 7)	\$29,824.40
Total Payment Due (gross):	<u>\$73,476.68</u>

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Interest:

[21] Pursuant to clause 11 of Schedule 2 to the Employment Relations Act 2000, the respondent is ordered to pay interest on the above payments at the rate of 4.89%⁹ from 6th July 2009 until full payment is made to the Labour Inspector.

Costs:

[22] The Labour Inspector seeks an order for a “reasonable contribution” of \$10,000 towards the costs incurred in pursuing this matter. It is submitted that the costs incurred amounted to \$22,028 and details have been provided, all of which appear to be reasonable in the circumstances. The investigation meeting took considerably less than a day and normally the Authority would apply a tariff of around \$3,000 per day. The matter was not defended and hence the hearing time required was considerably reduced from the four days that had previously set down. However, because of the substantial preparation required in order to present relevant probative evidence to the Authority, I accept that \$10,000 would be a reasonable contribution to the applicant’s costs. A further cost of \$4,333 was incurred for air fares involving a return flight to Thailand for the Labour Inspector to interview the three employees, as part of the more substantial investigation into the overall circumstances involved with preparing the claims. I accept that given the overall, and relatively unusual circumstances, this cost was reasonably incurred. The respondent is ordered to pay to the Labour Inspector the total sum of \$14,333.00.

K J Anderson
Member of the Employment Relations Authority

⁹ 90 day bill rate plus 2%