

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 172
5647319

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Applicant

A N D DAI'S FOOD LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Jodi Ongley, Counsel for Applicant
 Tim Twomey, Counsel for Respondent

Investigation Meeting: 10 August 2017 at Christchurch

Submissions Received: 25 August 2017 for Applicant
 31 August 2017, for Respondent

Date of Determination: 9 October 2017

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Dai's Food Limited is ordered to pay penalties to the Authority totalling \$14,400.00.**
- B. Within 28 days of the date of this determination Dai's Food Limited is to pay to the Labour Inspector for Dai Bing the sum of \$653.81.**
- C. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] In March 2016 through to November 2016, a Labour Inspector of the Ministry of Business, Innovation and Employment carried out an investigation into Dai's Food Limited's compliance with minimum employment standards.

[2] This investigation involved site visits, interviews with employees, interviews and meetings with a director of Dai's Food, Zhao Qilong, and the review of various documents provided by Dai's Food in response to notices served by the Labour Inspector.

[3] The Labour Inspector concluded that Dai's Food Limited had failed to:

- (a) Provide and retain a copy of an individual employment agreement for two employees, in breach of ss 63A and 64 of the Employment Relations Act 2000 (the Act);
- (b) Keep wage and time records for two employees in breach of s 130 of the Act;
- (c) Pay one employee for holiday pay owing to her at the end of her employment in breach of ss 23 and 27(1)(b) of the Holidays Act;
- (d) Obtain the appropriate written consent before making a deduction from one employee's wages in breach of s 13 of the Wages Protection Act 1983;
- (e) Pay one employee minimum wage for every hour she worked in breach of s 6 of the Minimum Wage Act 1983;
- (f) Keep holiday and leave records for eight employees in breach of s 81 of the Holidays Act 2003;
- (g) Pay eight employees for public holidays that they did not work on, which were otherwise working days for them, in breach of s 49 of the Holidays Act.

[4] The Labour Inspector seeks penalties for these alleged breaches and he seeks payment of holiday pay owed to the one employee.

[5] In respect of the penalties sought by the Labour Inspector I must consider firstly whether there have been breaches as alleged by the Labour Inspector. Once I have identified any breaches I must then consider whether penalties are appropriate. If I determine that penalties are appropriate I must then calculate quantum of those penalties and will do so based on *Borsboom v Preet PVT Ltd*¹.

Failure to provide and retain a copy of an employment agreement

[6] This allegation relates to two individuals, Dai Bing and Shen Hui Quing. Dai's Food says that given the circumstances for each it has not failed to have an employment agreement as alleged.

Ms Shen

[7] Ms Shen commenced work with Dai's Food on 2 March 2016. Ms Shen had told Dai's Food she had a valid work visa and Dai's Food did not check this.

[8] Mr Zhao said he had a standard employment agreement that he completed with all employees shortly after they commenced work. He would print off the draft agreement, go through it with the employee, filling in any details relevant to that employee and then he would let them take it away to review and sign.

[9] Mr Zhao had not done this with Ms Shen by 9 March 2016 when the Labour Inspector conducted his first site visit. During that visit, a member of the Labour Inspector's team interviewed Ms Shen and she advised she was living in New Zealand on a visitor's visa, not a work visa. Ms Shen left Dai's Food shortly after the interview and never returned.

[10] Dai's Food says its only wrongdoing in respect of Ms Shen was relying on her assurance she was allowed to work in New Zealand. It says the failure to have an employment agreement is a product of timing – it would have been completed around the time of the Labour Inspector's site visit but this did not happen because of the visit and Ms Shen's sudden departure.

[11] I accept Dai's Food's explanation for not having an employment agreement for Ms Shen and I also accept that it would have put one in place had Ms Shen not left as she did – noting here that all other employees had employment agreements and

¹ [2016] NZEmpC 143

there was a draft template agreement that Dai's Food use. However, the reality is, it did not have an employment agreement for Ms Shen and this is a breach of s 64 of the Employment Relations Act 2000.

Ms Dai

[12] The circumstances surrounding Ms Dai are more complicated. Mr Zhao and Ms Dai were in a de facto relationship for a number of years. Ms Dai and Mr Zhao had ended their relationship and reconciled on different occasions over a period of time. The detail of their personal relationship is not relevant to my determination, the fact that they were in a de facto relationship during April 2015 to October 2015 is, as the Labour Inspector says during this period Ms Dai was an employee of Dai's Food. And Dai's Food did not have an employment agreement in place for Ms Dai during this period.

[13] Dai's Food accepts that it did not have an employment agreement for Ms Dai but says that Ms Dai was not an employee during this period.

[14] Mr Zhao says that Ms Dai was paid money by Dai's Food but this was not remuneration for work done but rather a method to formalise, for accounting purposes as much as anything, the money Ms Dai was receiving from the company to cover expenses and spending on personal and family needs.

[15] Mr Zhao also says, Ms Dai did not work for Dai's Food, she did come to the factory during school hours but that was social and not for work purposes. And Ms Dai did accompany him sometimes when he did deliveries but again this was social and not work related. All of this was just a product of the relationship between Mr Zhao and Ms Dai.

[16] In order to determine if Dai's Food has failed to have an employment agreement for Ms Dai I must decide if she was an employee of Dai's Food.

[17] The legal test for ascertaining whether a person is an employee is set out in s 6 of the Employment Relations Act 2000 (the Act). Section 6 provides:

- (1) In this Act, unless the context otherwise requires, **employee** –
 - (a) Means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) Includes –

- (i) A home worker; or
- (ii) A person intending to work; but
- (c) Excludes a volunteer who –
 - (i) Does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) Receives no reward for work performed as a volunteer; and
- (d) ...
- (1A) ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the Court or the Authority –
 - (a) Must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) Is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.
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[18] From the relevant case law², the steps I should take to apply s 6 and the relevant circumstances I should consider in this assessment are:

- (a) First, I must consider the terms of engagement in any contract between the parties. From this contract, I can establish if there is a common intention, which may indicate the nature of the relationship but will not be determinative.
- (b) I must then consider any divergences in the agreed terms by assessing how the work was carried out in practice.
- (c) Once I have assessed how the work was carried out in practice I can then apply the three relevant common law tests:
 - (i) Control, being an analysis of who decides what work is done and how it is done;
 - (ii) Integration, being an analysis of how integrated the individual is into the business of the alleged employer; and

² *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC) and *Bryson v. Three Foot Six Ltd (No 2)* [2005] NZSC 34, *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 and *Narinder Singh v Eric James & Associates Ltd* [2010] NZEmpC 1.

- (iii) The fundamental test, being an analysis of whether the individual is in business on his own account.
- (d) I should consider industry practice as this remains relevant but it is not determinative.
- (e) Similarly, I should consider the tax treatment on any payments noting however that it is not determinative and that the tax treatment may be misapplied based on the intention of one of the parties such that the tax treatment is merely a mistake and not indicative of what the relationship is.

Intention and how the work was carried out

[19] I am satisfied that Ms Dai's interaction with Dai's Food during April 2015 to October 2015 was a result of her de facto relationship with Mr Zhao, this includes the payment she received and her attendance at the factory. The common intention at the commencement of the relationship (between Dai's Food and Ms Dai) was not that it would be an employment relationship.

[20] There was insufficient evidence provided regarding Ms Dai's regular activities at Dai's Food for me to conclude that this common intention was displaced by the way she carried out any work for Dai's Food.

[21] I accept that her attendance at the factory was mostly motivated for social interaction, primarily stemming from her de facto relationship with Mr Zhao and was not about undertaking work for Dai's Food. I also accept that the payment Ms Dai received was a product of formalising the money she received from the company for living expenses for her, Mr Zhao and their family.

[22] The common intention both at the beginning and from how the relationship operated indicates that Ms Dai was not an employee.

Control test

[23] There was insufficient evidence to show that Dai's Food controlled what Ms Dai did on a day to day basis when she was at the factory or accompanying Mr Zhao on deliveries. In fact the evidence suggested she was largely free to do as she pleased.

[24] The lack of control over Ms Dai's day to day activities indicates she was not an employee.

Integration test

[25] Ms Dai was not integrated into the business as an employee would be. She did not have an employment agreement, she was not subject to any reviews or assessments, she did not have training, she was not required to attend for set shifts nor was she required to fill out time sheets as employees did.

[26] The lack of integration into the Dai's Food business indicates Ms Dai was not an employee.

Fundamental test

[27] Ms Dai was not in business on her own account. She bore no financial risk in terms of the payment she received.

[28] The fundamental test indicates that Ms Dai was an employee.

Industry practice

[29] Industry practice does not assist my assessment.

Tax treatment

[30] Ms Dai was paid a salary from which PAYE was deducted. This indicates she was an employee. However, I accept this was a product of advice Dai's Food received from its accountant to formalise the money being paid to Ms Dai from the company – it was not done because Ms Dai was considered an employee.

Conclusion

[31] On balance the analysis I have conducted indicates Ms Dai was not an employee.

[32] When I stand back and consider all of the evidence I accept this is the right conclusion. Ms Dai did attend at the factory and did accompany Mr Zhao on deliveries but this was not a formal role with job requirements or expectations. Ms Dai did receive a salary but as I have indicated I believe this was a product of

accounting requirements not reflective of the actual relationship. Overall Ms Dai did not operate as an employee nor was she treated as one by Dai's Food.

[33] As a result there is no failure by Dai's Food to provide and keep an employment agreement for Ms Dai as it was not required to do so as Ms Dai was not an employee.

Failure to keep wage and time records

[34] This allegation also applies to Ms Shen and Ms Dai. The same analysis applies to both of them for this allegation as above. Based on this I conclude that Dai's Food did fail to keep wage and time records for Ms Shen but it did not fail to do so for Ms Dai as this was not required.

Failure to pay holiday at the end of employment

[35] This allegation applies to Ms Dai and relates to the period for which I have determined she was not an employee. Therefore, there can be no breach as there was no requirement to pay holiday pay.

Unauthorised deduction from wages

[36] This allegation relates to Ms Dai but is for a different period than that analysed above.

[37] Ms Dai was employed to manage Dai's Food's dumpling restaurant at the bus exchange in Christchurch from 28 December 2015 until 7 September 2016.

[38] During the course of this employment there was some confusion over expenses incurred by Ms Dai that Dai's Food paid. On reviewing invoices provided by Ms Dai, Mr Zhao concluded that she had spent \$653.81 on personal items and not business related expenses. He proceeded to deduct this amount from Ms Dai's pay in the weeks between 7 March 2016 and 20 March 2016.

[39] The Labour Inspector claims this is an unauthorised deduction. He had calculated the amount deducted as \$608.90. Ms Dai says the amount is higher than this.

[40] I accept Mr Zhao's calculation and accept his admission that Dai's Food made an unauthorised deduction from Ms Dai's wages of \$653.81.

Failure to pay minimum wage

[41] The labour Inspector says the unauthorised deduction means Ms Dai was not paid minimum wage for the week the deduction was made.

[42] I accept this is also a breach by Dai's Food.

Failure to keep holiday and leave records

[43] This allegation relates to eight employees, including Ms Dai (for the first period of work with Dai's Food) and Ms Shen. Dai's Food accepts it has failed to keep holiday and leave records for six of those employees. It denies the failure in respect of Ms Dai and Ms Shen.

[44] Again, for the same reasons set out in my analysis of the first alleged breach I determine there has been a breach in terms of Ms Shen's employment but not in relation to Ms Dai, as she was not an employee.

Failure to pay employees for public holidays

[45] This allegation relates to failures to pay employees for public holidays which they did not work but which were otherwise normal days of work for them.

[46] Dai's Food denies this allegation in respect of Ms Shen as she only worked one week and there was no public holiday in this period. I accept this.

[47] In relation to two other employees it says one was a casual employee and not entitled to payment and for the other there were no public holidays during the period she was employed. I accept this.

[48] Dai's Food accepts there are four employees who did not receive the correct pay for public holidays.

Conclusion on alleged breaches of minimum standards

[49] On the evidence given by the Labour Inspector and the admissions made by Dai's Food I am satisfied that Dai's Food has breached the following minimum standards:

- (a) Failure to provide and retain a copy of an individual employment agreement for one employee, Ms Shen;
- (b) Failure to keep wage and time records for one employee, Ms Shen;
- (c) An unauthorised deduction from wages for one employee, Ms Dai;
- (d) Failure to pay Ms Dai the minimum wage for every hour she worked for one week in March 2016;
- (e) Failure to keep holiday and leave records for seven employees;
- (f) Failure to pay four employees for public holidays that they did not work on, which were otherwise working days for them.

Should I impose penalties against Dai's Food?

[50] In determining whether I should award penalties for the breaches that I have established have occurred, I must consider s 133A of the Employment Relations Act as well as the other matters outlined by Judge Inglis in *David Lumsden v SkyCity Management Ltd*³. The factors that I must consider, therefore, include:

- (a) The object of the Act as stated in s 3.
- (b) The nature and extent of any breaches.
- (c) Whether any breaches were intentional, inadvertent or negligent.
- (d) The nature and extent of any loss or damage suffered by any employees.
- (e) Whether Dai's Food has paid any amount of compensation, reparation or restitution, or taken other steps to mitigate the effects of any of the breaches.
- (f) The circumstances in which the breach took place, including the vulnerability of the employees.
- (g) Whether Dai's Food has engaged in similar conduct previously.

³ [2017] NZEmpC 30

- (h) The need for general deterrence, and the desirability of broad consistency with other penalties.

[51] The failures in respect of Ms Shen arise because of the short period of time she was employed. Dai's Food had not collated the necessary records for the few days she worked and given her sudden departure it is logical that it did not do so retrospectively. It should have done this but given the circumstances I do not believe this warrants penalties being imposed. I will not impose any penalties for the breaches relating to Ms Shen.

[52] I also conclude that it is appropriate to impose only one penalty for the two breaches relating to the deduction from Ms Dai's wages in March 2016. Both breaches occurred from the same event and to be penalised twice for one action is not appropriate - on one analysis it could be argued Ms Dai was paid minimum wage it was simply then deducted (albeit without authorisation). I will not impose a penalty for the breach of the Minimum Wage Act.

[53] I will now consider the quantum of penalties to be imposed for the remaining breaches based upon the four step process in *Preet*.

Quantum of penalties

Step 1 – Nature and number of breaches

[54] In summary, I am satisfied that the following breaches have occurred and penalties should be imposed for them:

- (a) Not obtaining the appropriate written consent before making a deduction from Ms Dai's wages in breach of s 13 of the Wages Protection Act 1983;
- (b) Not keeping holiday and leave records for six employees in breach of s 81 of the Holidays Act;
- (c) Failing to pay four employees for public holidays that they did not work on, which were otherwise working days for them, in breach of s 49 of the Holidays Act.

[55] In total there are 11 breaches.

[56] I believe it is appropriate to globalise the failure to keep holiday and leave records for six employees. This is because the same mistake occurred for each employee and there was no detriment suffered by the employees. The breaches had exactly the same effect across the board and were really only one breach repeated due to a misunderstanding by Dai's Food as to what was required.

[57] In contrast, as the breaches in connection with the failure to pay employees for public holidays had a different effect on each employee I do not consider it appropriate to globalise the penalties. Each breach had a different impact and should be penalised separately.

[58] So I now have:

- (a) One breach relating to the unauthorised deduction from Ms Dai's wages;
- (b) One globalised breach relating to a failure to keep holiday and leave records;
- (c) Four breaches relating to failures to pay employees for public holidays.

[59] The total possible quantum of penalties is \$120,000.00.

Step 2 – Severity of breaches

[60] All of the breaches that occurred, excluding the unauthorised deduction, were as a result of Dai's Food misunderstanding its obligations regarding records and payments for public holidays. Mr Zhao said a Labour Inspector had previously visited Dai's Food and reviewed its records. On the basis of that visit he believed Dai's Food was keeping adequate records and was not required to pay employees for public holidays.

[61] Dai's Food did keep records that could be used for holiday calculations but the records did not meet the statutory requirements.

[62] There was no intention to exploit any employees and any shortfall in payment has been identified and paid.

[63] I also accept that Dai's Food is otherwise a complying employer meeting other requirements in terms of statutory minimums and in many cases exceeding the requirements significantly.

[64] Dai's Food has cooperated with the Labour Inspector to resolve this matter. It made appropriate concessions but also opposed other matters appropriately.

[65] The incident in relation to the unauthorised deduction arose from a genuine belief that Dai's Food was owed the money deducted and entitled to deduct it. Whilst it has not been repaid to date Dai's Food has now acknowledged that it could not take the money and it will repay it.

[66] Given the low severity of the breaches I reduce the quantum by 60% to \$48,000.00. And given the mitigating factors I then reduce that quantum by 70% to \$14,400.00.

Step 3 – Means and ability of Dai's Food to pay

[67] The financial accounts provided by Dai's Food indicate it has the means to pay a fine and this has no effect on my assessment of quantum.

Step 4 – Proportionality

[68] It is clear from *Preet* that the penalties imposed should be proportionate to the amount of money unlawfully withheld⁴. It is also clear from *Preet* that proportionality requires me to assess the penalties imposed in similar cases to ensure that there is some consistency.

[69] Considering proportionality with cases with similar circumstances, including the number of breaches and the nature of the conduct⁵ and contrasting this with the seriousness of the offending, including the number of breaches I am satisfied that no further adjustment to the quantum of penalties is required. The total amount of penalties to be imposed in this case is \$14,400.00.

⁴ *Preet* at [190]

⁵ See *A Labour Inspector of the Ministry of Business, Innovation and Employment v Direct Auto Importer (NZ) Ltd* [2017] NZERA Auckland 195, *A Labour Inspector of the Ministry of Business, Innovation and Employment v Kings Curry House Ltd* [2017] NZERA Christchurch 105, *A Labour Inspector of the Ministry of Business, Innovation and Employment v Wyatt Farms Ltd* [2017] NZERA Christchurch 100, and *A Labour Inspector of the Ministry of Business, Innovation and Employment v White Developments Limited* [2017] NZERA Christchurch 87.

Payment of the unauthorised deduction

[70] Dai's Food did not have authorisation to deduct \$653.81 from Ms Dai's wages as it did in March 2016. This must be paid to her.

Determination

[71] Within 28 days of the date of this determination, Dai's Food Limited is ordered to pay penalties to the Authority totalling \$14,400.00 which will then be paid into a Crown back account.

[72] Within 28 days of the date of this determination, Dai's Food Limited is to pay to the Labour Inspector for Dai Bing the sum of \$653.81.

Costs

[73] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[74] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority