

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 48
5597181

BETWEEN A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 (RICHARD LEWIS)
 Applicant

AND ONE WORLD RESOURCING
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Aaron McIlroy, Claire English and Melinda Geary,
 Counsel for the Applicant
 Robert Thompson, Advocate for the Respondent

Investigation meeting: Determination completed on the papers
 Submissions received from the applicant on 10 February, 8
 March and 28 March 2017.
 Submissions from the respondent on 24 February and 3
 March 2017 and further evidence received from the
 respondent on 27 March 2017.

Determination: 31 March 2017

DETERMINATION OF THE AUTHORITY

Within 28 days of the date of this determination One World Resourcing Limited must pay the Labour Inspector \$9,000 in penalties for breaching s 12A of the Wages Protection Act 1983. \$1,500 of the penalties must be paid to each of the two employees, with the balance of the penalty (\$6,000) to be credited to a Crown Bank Account.

Employment relationship problem

[1] The Labour Inspector claims penalties for two breaches of s 12A of the Wages Protection Act 1983 (the WPA).

[2] The matter was first raised by the Engineers, Printers and Manufacturers Union (EPMU) on behalf of two former employees of One World.¹ The complaint was that the two employees were being prevented from leaving their employment due to an agreement requiring them to pay a bond if they left before the expiry of their employment agreement. They began working for One World in Christchurch on 11 May 2015 and 18 May 2015.

[3] The Labour Inspector investigated the complaint and on 28 July and 18 August 2015 he met with the CEO of One World, Declan Clancy.

[4] On 21 August 2015, the two employees attended One World's office with a representative of the EPMU and tendered their immediate resignation, having obtained a visa variation and employment elsewhere.

[5] On 7 September 2015, the Labour Inspector informed Mr Clancy he considered the bond agreements to be in breach of s 12A of the WPA and therefore, unlawful.

[6] On 15 September 2015, One World wrote to its remaining employees formally withdrawing the bond requirement.

[7] I stayed this matter until after the Full Court of the Employment Court decided *Labour inspector of the Ministry of Business, Innovation and Employment v Tech 5 Recruitment Limited*.² After that decision came out, I convened a teleconference at which Mr Thompson accepted that One World had unlawfully sought a premium.

[8] The parties agreed that I could determine the matter without an investigation meeting, after receiving written submissions. I set a timetable and have received submissions from both parties and financial records from One World.

¹ The two employees have been named in the application and there is a signed statement from one of them. However, since no evidence has been tested and with the concession that One World sought a premium I have decided not to name the former employees.

² [2016] NZEmpC 167

What happened?

[9] One World is a labour hire company that was set up in 2012 to assist with supplying skilled labour for the post-earthquake Christchurch rebuild. It recruits world-wide for permanent placement as well as for labour hire purposes.

[10] In 2015, it recruited five specialist glaziers from the Philippines, as part of its labour hire business. One World contracted the glaziers to its client on a project, for which the client would be penalised for late completion.

[11] On arrival in New Zealand One World assisted the glaziers to set up a bank account, and to get a bank loan. The glaziers then paid One World \$3,247.99 for immigration services provide by a related company, visa costs, flights to Christchurch from Manila, a bicycle, a week's rent and a wage advance of \$160.00.

[12] In June 2015 Mr Clancy was told that two out of the five glaziers were intending to leave to work for another employer. He and One World's client became very worried that if the two glaziers left they would not be able to replace them in time to complete the project.

[13] The client asked Mr Clancy to meet with the glaziers on-site that day. Mr Clancy contacted One World's operations manager and asked her to set up a meeting with the glaziers and to contact One World's solicitors to ask if it was:

acceptable to create a Bond document for these Filipinos to sign at the meeting that evening. It is noted that we had already discussed bond documents with the Filipinos before they left the Philippines but had not got around to creating any since they had arrived in new Zealand. I was checking if we could still ask them to sign bond documents *after* they had started employment.

[14] Mr Clancy's evidence is that the operations manager told him the solicitors said it was acceptable and then handed him an envelope with five bond documents inside it. Mr Clancy said he did not read the documents and assumed they had been drafted by the solicitors that afternoon. However, the operations manager had merely copied a bond document used by another New Zealand labour hire company and had created the second page which itemised the costs associated with One World's recruitment of the glaziers.

[15] The document reads:

You have been offered a fixed term employment agreement under the New Zealand skilled migrant visa scheme.

You accept that One World Resourcing Ltd and Orion Site Medlink (OSM) offices have incurred time and expense in your recruitment and employment. These expenses are outlined in Addendum 1.

This bond is designed to give both One World Resourcing and their agent, ... OSM, confidence in ensuring that you will remain in your employment for the duration of your employment agreement.

You agree to give One World ... a minimum of 4 weeks notice of your intention to terminate your employment. Failure to observe this condition will give One World ... the right to refuse payment of your accrued wages and to take further action to recoup any administrative expense of client contractual penalties as a consequence of a breach of your contractual obligations.

You agreed to personally guarantee a fixed term bond of NZ\$4,967.75 to cover the period of your employment agreement and defray the cost of your recruitment and employment. This bond and the personal guarantee attached therewith will cease at the expiration of your employment agreement. This bond is chargeable **only** in the event that you terminate your employment within the agreed term and breach your contractual agreement. One World ... will pursue you for immediate payment of this bond in the event that there is a breach in the longevity of your agreed term of employment.

You accept that you will be bound by the conditions of this addendum and that any breach of the said conditions, if not remedied immediately, could result in an action being taken against you. Such action could impact on your credit rating in New Zealand and your ability to borrow money or rent property.

It may also impact on your visa opportunities should you wish to return to New Zealand in the future.

[16] Mr Clancy told the five glaziers that he had heard two of them were planning to leave One World's employment.

[17] He told them the time, effort and cost to One World of bringing them to New Zealand and told them:

I felt they had a moral duty to be ethical employees as much as we had a duty to be an ethical employer. I informed them OWR had contractual responsibilities to our client and that it was likely we would be penalised if they were to leave and so I told them I felt they had a moral duty to our client to remain for the length of this contract.

We reminded them we had gone to a lot of trouble to find accommodation for these employees, collecting them from the airport, setting up New Zealand bank accounts for them so they didn't have to

use loan sharks, buying bikes for them to get around the city so they didn't have to borrow money to buy cars.

[18] The costs per employee set out in Addendum 1 is \$4,967.75, consisting of costs to One World for recruiting the five glaziers and dividing that by five. The costs included:

- Notary Public signing fee
- Postal fee
- Department of Internal Affairs authentication fee
- Courier fees
- Philippine Embassy authentication fee
- Orion agency fee, tools and a handling fee
- Bank fees
- Site Safe – travel and construction passports
- One World wages
- Philippine Culture and Sport fees

[19] Mr Clancy presented a copy of the document to all five glaziers. Two of them admitted that they had been intending to leave:

... but on further consideration would prefer to honour their commitment to OWR and to our client.

The meeting ended very amicably, we all shook hands and I thought that was the end of it...

Our client was very happy with my feedback of that meeting and within a couple of days thereof and before any bonds were signed, asked us to significantly increase the wage rate of all 5 Filipinos by 10% to 25%.

A week later on 30th June 2015, 4 of the Filipinos visited our offices and brought with them signed copies of the bond document...

The 5th employee handed me a signed bond document on 14th August 2015, 7 weeks after our meeting. This confirmed the fact that no pressure was put on any of the Filipinos to sign these documents.

[20] One of the affected glaziers, gave a written statement to the Labour Inspector:

I signed an Individual Employment Agreement on 17 April 2015.

I obtained a loan of \$3,500 from ANZ bank on 5 June 2015. On the same day I transferred \$3,247.99 into the account of One World Resourcing Limited. This money was to pay for immigration advice from One World Immigration Limited, visa servicing, bank fees, my flight from Manila to Christchurch, a cash advance of \$160, one week's rent and the purchase of a bicycle.

I was not happy working for One World Resourcing Limited, and planned to leave. Someone must have told Declan Clancy about this, because he held a meeting and told us all that we would be in trouble if we left. Several days later, on 30 June 2015, I was shown a document by Declan Clancy entitled "Employee Bond Conditions." He told me that if I did not sign this document my visa would be cancelled and I would have to go back to the Philippines. This made me feel afraid for my family, which is the reason I signed the bond. Before I arrived in New Zealand no-one had told me that I might have to sign a bond.

[21] One World presented an affidavit from Mary Grace G Osorio who was the Corporate General Manager for Orio Site Medlink International Resourcing Inc. at the time the glaziers were recruited. It is her evidence:

That all persons seeking employment were informed they would be required to sign a Bond in New Zealand to reflect the real cost of the OWR investment and give confidence that the person will remain in their employment for the duration of their employment agreement.

That One World Resourcing has made it very clear to me that all loans originating in New Zealand and were to be repaid in New Zealand. This message was passed on to my staff in (OSM) and to all candidates and can confirm that all candidates were fully informed and has accepted and acknowledge the same...

That all persons seeking employment accepted that they are required to pay their third party costs in form of a loan once they arrive in New Zealand.

[22] I do not find Ms Osorio's statement to be of assistance in clarifying what the employees knew and accepted before they left the Philippines because although she uses the word "bond" she mostly discusses the fact that the employees were told they would have to take out a loan to repay the third party costs. That sounds more like the bank loan the employees gained to pay One World for their travel and visa costs etc.

[23] I note that there is no complaint about the loans the glaziers obtained to repay One World their travel and other related costs.

Did One World unlawfully seek or receive a premium?

[24] Section 12A of the WPA prevents an employer from seeking or receiving “any premium in respect of the employment of any person”.

[25] Section 13 of the WPA provides that if an employer fails to comply with any provision of the WPA it is liable to a penalty under the Employment Relations Act 2000 (the Act).

[26] Section 135 of the Act provides that a company is liable to penalty not exceeding \$20,000, for each breach. In this case, the Labour Inspector is pursuing penalties for two breaches.

[27] Penalties are quasi-criminal and are imposed to punish the wrongdoer and to prevent others from committing the same breach.

[28] The Court in *Tech 5* described s 12A as:

... part of a suite of provisions designed to prevent exploitation of vulnerable employees or potential employees.³

[29] The Court further defined what the word “premium” in s 12A covers:

“premium” ... being used as a compendium to apply to straightforward cases of payment being sought or received to purchase a job, or to more subtle or ingenious arrangements.

... naturally captures paying to acquire a job (that is, consideration over and above the wage paid for the work performed in the wage/work bargain) However, we consider “premium” extends beyond those situations to apply to an employer recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer. Given the ingenuity with which agreements can be drafted each case will be fact-specific. However, the feature that stands out in this case is the lack of a benefit to the employee in meeting the trade testing costs ... an inference arising strongly ... is that obtaining the job was conditional on agreeing to pay those costs.⁴

[30] I consider that in presenting the bond forms to the five glaziers One World was seeking a premium, in breach of s 12A. That is the case despite the bond document being presented during the employment and not being a price to acquire a job.

³ Ibid, at [50].

⁴ Ibid, at [53] – [54].

[31] One World had already required the five employees to pay it \$3,247.99. That was for the kind of costs an employee would normally bear, such as the cost of getting to New Zealand and getting the appropriate visa to work here.

[32] The further bond requirement was not presented for the purpose of recouping further costs of the kind that naturally sit with an employee. The Addendum included costs incurred in One World recruiting the glaziers overseas. Its only purpose was to put pressure on the employees to remain bound to work for One World's client until the end of their fixed-term employment agreements.

[33] I agree with the Labour Inspector's Investigation Report, which concluded that all of the advantages of signing the bond fell to the employer. The bond also restricted the glaziers' employment opportunities.

Imposition of a penalty

Should I impose a penalty at all?

[34] Generally, when minimum employment standards are breached a penalty is imposed to punish the wrongdoer, to deter any further breaches and to signify the damage that is done to the public interest when such standards are breached. The prohibition on seeking a premium is a long-standing aspect of New Zealand law.

[35] On 23 February 2017, Immigration NZ issued a press release about a new policy, to apply from 1 April 2017, to employers that had incurred a penalty for a breach of employment standards. Immigration NZ will impose a stand-down period on the ability of such employers to prevent them from recruiting migrant labour for a period of time. The size of the penalty will determine the length of the stand-down period. The press release reads:

The stand-down period will be proportionate to the seriousness of the breach, and therefore the penalty amount. There will be a fixed gradation aligned with the level of the penalty. For example, when a penalty is issued to a company:

- a 6 month stand-down will apply for a penalty up to and including \$1000
- a 12 month stand-down will apply for a penalty over \$1000 but less than \$20,000
- an 18 month stand-down will apply for a penalty over \$20,000 but less than \$50,000

- a 24 month stand-down will apply for a penalty of \$50,000 and above

[36] One World originally submitted that it should pay a penalty of no more than \$2,500. One World now submits that I need to take the new Immigration NZ policy into account when considering whether any penalty is just in all the circumstances. Mr Thompson submits:

The Respondent's business is completely predicated on the sourcing of immigrant labour. A penalty of any amount may result in INZ enforcing a 6-24 month stand down which will not just cripple the business, it will put it out of business. The Respondents currently employs approximately 40 staff who will consequently lose their jobs should the Respondent close down.

The Respondent submits that its breach was entirely inadvertent and should not be the demise of its business.

[37] One World's situation at the time it lodged its statement in reply on 24 December 2015, was that Immigration NZ had declined to certify One World under its Labour Hire Accreditation scheme on the grounds it was "not satisfied the company has good workplace practices, including a history of compliance with all immigration and employment laws."⁵

[38] In addition, Immigration NZ was not satisfied the company was in a "sound financial position." From financial documents I have seen the company seems to now be in a strong financial position.

[39] Mr Clancy's witness statement read that if One World did not get Labour Hire Employment Accreditation for the Canterbury region "there is a real risk we will lose all our employees and our business may fold." That did not happen. However, I accept that the imposition of a stand-down period would adversely affect the labour hire aspect of One World's business.

[40] Ms English for the Labour Inspector submits that it had not been decided whether the new policy would apply to employers who incurred penalties before 1 April 2017. However, she submits that possibility is not a relevant consideration because:

- Employers wishing to employ migrant labour already have to show they comply with minimum employment standards and all employment law.

⁵ Declan Clancy's statement.

- Immigration NZ already has an ability to consider whether an employer has been subject to a penalty or other sanction and takes that into account. However, that has been a discretionary decision and from 1 April 2017 the decision to decline to approve the sponsorship of a work-visa application by a non-complying employer will disappear because a set stand-down period will apply.
- It is unfair to have a two-tier standard of justice for determining a penalty with a higher standard applying “to employers of local labour, and a lower standard for actual and potential employers of migrant labour. If anything, the use of vulnerable migrant labour and the failure to comply with employment law warrants a greater sanction rather than a discount.”

[41] I accept that my determination may have a consequence for One World beyond the mere payment of money. However, that is a decision yet to be taken by a government agency applying government policy. My decisions must not be affected by government policy. Instead, I must use my discretion to determine whether to impose a penalty and, if so, how much, by assessing the factors set down in the Employment Relations Act 2000 and relevant Employment Court decisions.

[42] The factors I need to consider when determining whether to impose penalties have been usefully summarised in the recent Employment Court case of *Lumsden v SkyCity Management Limited*⁶

Section 133A⁷ sets out a number of factors which the Court must have regard to in determining an appropriate penalty. It is a non-exhaustive list and was not in force at the time the breaches in this case occurred. However, as a full Court has recently confirmed, the provision essentially confirms earlier case law and may be applied as a useful guide in the present case. The factors are:

- The object stated in s 3;
- the nature and extent of the breach or involvement in the breach;
- whether the breach was intentional, inadvertent, or negligent;
- the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;
- whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution or has

⁶ [2017] NZEmpC 30.

⁷ Of the Employment Relations Act 2000.

taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;

- the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

As I have said, the above list is not exhaustive. In the present case I consider that two other matters are relevantly considered in terms of assessing the appropriateness of a penalty, and its quantum. The first is the need for general and particular deterrence. The second is the desirability of broad consistency with other penalties imposed in similar cases.⁸

[43] In addition, the Full Court of the Employment Court's decision in *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited*⁹ sets out a four-step method for assessing how to set penalties at the appropriate level.

[44] I consider a penalty is warranted in this case, as it involves a breach of a minimum standard, and involves migrant workers who were in New Zealand on temporary work visas tying them to One World. There is a need for general deterrence so that other employers know that seeking or receiving premiums is a breach which will be taken seriously and will have negative consequences for them. I will take the fact that the breach was inadvertent into account in considering the size of the penalty.

Assessing the quantum of the penalty

Step 1 - what is the nature and number of breaches for statutory penalty purposes?

[45] One of the discretionary decisions I need to make in determining penalties is whether to globalise penalties for some breaches, or treat them as part of a single course of conduct.¹⁰

[46] Although the five employees were presented with the same document, I do not consider it reasonable to consider the breach to be a single course of conduct. It had an individual effect on each of the employees. It particularly affected the two employees who had offers of alternative employment. I consider there were two separate breaches. Therefore, I consider the starting point for the amount of the penalty to be \$40,000.

⁸ At paragraphs [53] – [55].

⁹ [2016] NZEmpC 143 at [137]-[148].

¹⁰ *Borsboom* at paragraph [139].

Step 2 – what are the aggravating and ameliorating factors?

[47] The relevant parts of object of the Act, set out in s 3, are that good faith must be promoted by acknowledging the inherent inequality of bargaining power in employment relationships, protecting the integrity of individual choice and promoting the effective enforcement of employment standards.

[48] I bear those objects in mind when weighing up which facts tend to aggravate the breaches and which facts tend to ameliorate them.

[49] The fact of the meeting in which Mr Clancy tried to persuade the glaziers to remain with One World through moral persuasion accompanied by the “bond” agreement, took advantage of the employer’s inherently greater bargaining power in the relationship. In reality, there was pressure put on the glaziers to sign the agreement and it sought to limit their individual choice.

[50] One World has also positively co-operated with the Labour Inspector. And, although ignorance of the law is no excuse, I accept that the breach was inadvertent. It also goes in One World’s favour that within a week of the Labour Inspector informing it the agreements represented unlawful premiums One World withdrew the agreements. In addition, One World had not sought to enforce the agreement against the two employees who resigned in August 2015.

[51] The employees did not suffer any financial loss. However, their migrant status on temporary work visas tied to One World made them particularly vulnerable to the kind of moral pressure exerted by Mr Clancy and actually expressed in the agreements, such as suggesting that if they left One World’s employment before the end of the fixed-term it “may also impact on your visa opportunities should you wish to return to New Zealand in the future.”

[52] I have undertaken research into cases in the Authority and Court where penalties have been imposed for breaches of s 12A. One World has not previously breached s 12A.

[53] On balance, I consider all of these factors should result in a reduction of 60% in the total amount of penalty, meaning an amount of \$16,000 is reasonable at this step in the process.

Step 3 – considering the respondent’s financial position

[54] One World’s accounts appear to be in a healthy state and I do not consider any deduction is necessary for financial reasons.

Step 4 - proportionality

[55] I have considered the six Authority cases, between 2012 and 2016, in which a penalty for breach of s 12A has been imposed. I have also considered the Employment Court case of *Tan v Yang*¹¹, which was a challenge from an Authority case, in which a premium of \$14,000 had been sought with \$7,000 paid. In that case, the employer was an individual, not a company, and the Court imposed a penalty of \$6,000.

[56] For some reason, in the Tech 5 case, the Labour Inspector did not seek penalties so I am not able to consider that case, which is more on all fours with this case factually, in assessing the appropriate level of penalties to impose.

[57] I do not consider this case to be as serious a breach as that in the Tan case. In assessing the appropriate level of the penalty I have taken the Tan case and the relevant Authority cases into account in order to keep this penalty broadly consistent with them. In addition, I need to look at the overall requirements of justice. In all the circumstances, I consider the appropriate penalty is \$4,500 for each breach; a total of \$9,000.

Who should the penalty be paid to?

[58] Section 136 of the Act makes every penalty recovered payable to the Authority for the benefit of a Crown Bank Account. However, I have discretion to order at least a part of the penalty to be paid to any person.

[59] The former employees have not been compensated for the stress and worry that being presented with the bond agreements must have caused them. I consider that they are due some reparation. When the penalty has been collected, the Labour Inspector must pay \$1,500 to each affected employee with the balance of \$6,000 to be paid to the credit of a Crown Bank Account.

¹¹ [2014] NZEmpC 65

Costs

[60] Costs are reserved. The parties should seek to agree on these. If that is not possible, the Labour Inspector may make a written claim for costs within 28 days of the date of this determination. One World will have a further 14 days to respond in writing.

Christine Hickey

Member of the Employment Relations Authority

Step 1: Nature and number of breaches		
WPA ¹² – seeking premiums	2 employees and 2 separate breaches	\$40,000
		Subtotal
		\$40,000
Step 2: Aggravating and ameliorating factors as a proportion of the maxima in Step 1		
WPA – reduce by 60%		
		Subtotal
		\$16,000
Step 3: Defendant’s financial circumstances		
No reduction		
		Subtotal
		\$16,000
Step 4: Proportionality		
Reduce modestly		
		TOTAL
		\$9,000

¹² Wages Protection Act 1983