

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 51
5547551

BETWEEN A LABOUR INSPECTOR of the
 MINISTRY OF BUSINESS
 INNOVATION AND
 EMPLOYMENT
 Applicant

A N D TECH 5 RECRUITMENT
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Greg La Hood, Counsel for Applicant
 Stephanie Dyhrberg and Mo Al Obaidi, Counsel for
 Respondent

Investigation Meeting: 7 and 8 April 2016 at Christchurch

Submissions Received: 8 April 2016 for both parties

Date of Determination: 20 April 2016

DETERMINATION OF THE AUTHORITY

- A Clauses 6 and 7 of Addendum 1 which are bond clauses do not amount to the seeking of a premium for the purpose of s 12A of the Wages Protection Act 1983 because there was no evidence of an attempt by Tech 5 Recruitment Limited to enforce the clauses and/or no evidence that any payment was received in reliance on the clauses.**
- B The payments received by Tech 5 Recruitment Limited by way of deductions from the employees' wages for trade testing (testing**

centre and accommodation and salary costs for skills testers) were premiums under s 12A of the Wages Protection Act 1983.

C The payments received by Tech 5 Recruitment Limited by way of deductions from the employees' wages for transport in excess of \$250 were not a premium under s 12A of the Wages Protection Act 1983.

D The Authority declines in the exercise of its discretion in weighing all matters to make an order for a penalty for the breach found.

E Costs are reserved.

Employment relationship problem

[1] Kim Baldwin, Labour Inspector, seeks penalties against Tech 5 Recruitment Limited (Tech 5) for breaches of s 12A(1) of the Wages Protection Act 1983 (WPA) for seeking or receiving premiums in respect of the employment of 25 employees it recruited from the Philippines prior to August 2013.

[2] Tech 5 says that it has neither sought nor received a premium for employment and therefore has not breached s 12A(1) of the WPA and no penalty should be awarded.

[3] There is some urgency in determining this matter. John Wyatt, a director, shareholder, and Chief Executive Officer of Tech 5, said in his evidence that recently Immigration New Zealand (INZ) declined Tech 5's Labour Hire Employer Accreditation Application. The effect of that is that Tech 5 is barred from bringing in 26 new employees from the Philippines into Christchurch.

[4] There were a number of issues for INZ but Mr Wyatt said in evidence that the main issue was the Authority investigation into this employment relationship problem. I was provided with an email from the INZ Manager in Manila to Tech 5 dated 18 March 2016. There is reference to the outcome of the *Employment Relations Authority case* amongst the mix of issues in determining whether Tech 5 is in a position to support migrant labour.

[5] If Tech 5 does not apply again for accreditation as a labour on-hire company for the Canterbury region all of their employees' work permits may not be renewed

and the 150 employees would have to move to other agencies. If accreditation is not obtained there could be a real risk that Tech 5 may lose the entire workforce. Additionally, employees who need to extend work permits want to know what is happening and this in turn is placing pressure on Tech 5 staff dealing with those queries to the extent Mr Wyatt considered it to be a health and safety issue.

The relevant background

[6] The following facts were provided to the Authority by way of agreed statement of facts. These are set out below with minor changes for ease of reading.

[7] Tech 5 is a labour on-hire business with offices in Auckland, Wellington and Christchurch. Its operation in Christchurch includes supplying labour for the Christchurch Rebuild.

[8] In 2013, Tech 5 began recruiting employees from the Philippines to work in the construction industry in Christchurch. The names of the first 25 employees recruited by Tech 5 from the Philippines are set out in Schedule A attached to this determination. The employees listed in Schedule A will be referred to as *the employees*. The employees are referred to in the Labour Inspector's statement of problem dated 6 March 2016 as migrant employees.

[9] Once selected for employment, each candidate was made an offer of employment formalised via an Individual Employment Agreement, which consists of a letter of offer outlining personalised terms and conditions of employment together with a generalised terms agreement.

[10] In May 2014 the Labour Inspectorate (Inspectorate) commenced a *proactive audit* of Tech 5 as part of its audit programme into the practices of Christchurch based labour on-hire and construction companies.

[11] On or about 20 May 2014, Ms Baldwin and two other Labour Inspectors met with company representatives, John Wyatt, Benjamin Allen and Brett Bothma. Tech 5's recruitment coordinator Katrina Armstrong was also present.

[12] The Authority heard evidence from Ms Baldwin, Mr Wyatt, Mr Allen who is also a director and shareholder of Tech 5, and Mr Bothma who is a shareholder of Tech 5.

[13] As part of its process, the Inspectorate requested and was granted access to various documents relating to the employment of the employees. These included employment agreements, time and wage records, and holidays and leave records of the employees.

The Agreements

[14] The respondent provided the employees with letters headed *Confirmation of Fixed Term Employment* dated 30 September 2013. These letters, together with standard terms of employment, contained the terms and conditions of employment for the employees. These documents will be referred to as *the agreements*.

[15] With one exception, the terms and conditions in the agreements are the same for each of the employees.

[16] The agreements were for fixed-terms of 3 years from October 2013 to October 2016. These dates varied slightly depending on each employee's agreed start and finish dates.

[17] The employees were employed by Tech 5 as carpenters on dates set out in schedule A in the column headed start date. Schedule A is attached to this determination.

[18] There were three addenda to the agreements. Addendum 1 is headed *Philippines Relocation and Prepaid Expenses Agreement for Carpenters* and states:

1. *Tech 5 Recruitment Ltd has committed to paying for Relocation Costs from the Philippines and Tool and Clothing Kits for Employee's recruited from the Philippines. It is also providing a salary advance of \$300.00 upon arriving in New Zealand.*

The above is considered a remuneration advance on the related Employee's income derived from future hours worked by the Employee for Tech 5 when under contract to it. Tech 5 shall pay (at its cost) costs associated with recruitment, immigration (except specialist medical appointments) and training.

2. *Recruitment of employee's from the Philippines involves a significant investment on the part of Tech 5 and includes direct costs such as testing, medicals, mandatory insurance, immigration fees, agency fees and flights. There are also significant indirect costs such as the recruitment team travel,*

of engagement. If any outstanding amount is not paid, the Employee understands that Tech 5 will be entitled to recover such amount as a debt owed by Contractor.

[19] All of the employees with the exception of one entered into agreements with clauses set out above.

[20] On 23 June 2014, the Inspectorate explained that it had concerns about the clause 6 bond of the original agreement.

[21] The Inspectorate also sought clarification in respect of deductions for the relocation costs in terms of clauses 8 and 9 of Addendum 1 of the agreement.

[22] On 14 July 2014 Tech 5 provided further information on the deductions with invoices showing costs it had incurred. Tech 5 also provided information on the deductions made in respect of transport costs by email dated 29 October 2014. Transportation was provided for new employees, for at least the first 12 weeks of employment.

[23] On 25 November 2014, Tech 5 advised the Inspectorate that it had not attempted to enforce clauses 6 and 7 bonds against any of its employees who left before the end of the three year term.

Weekly deductions

[24] Weekly deductions of \$125 were initially taken from the employees' weekly wages by Tech 5 pursuant to clause 9 of Addendum 1 of the agreement.

[25] The employees authorised deductions in writing at page 6 of the letter of confirmation of the original Agreement's.

[26] The last column of Schedule A shows the portion of the employee's weekly wages that the deduction of \$125 represents. This percentage has been calculated using the average hours the employee worked in the pay periods the Inspectorate has access to, as the employees worked variable hours each week.

Reimbursement to employees

[27] In or around June 2014, Tech 5 voluntarily reduced the total amount it recovered from the employees pursuant to clause 9 of Addendum 1 of the agreement (Schedule B) from NZ\$6,650 to NZ\$5,619 (which was then reduced down to

NZ\$5,499). Tech 5 also adjusted the amount it deducted from the employees' weekly wages to \$100.

[28] Schedule B is attached to this determination. Schedule B shows the reimbursements made to the employees. The column headed *Expenses reimbursement* shows amounts paid back to the employees in the pay period ending 1 June 2014 for any amount paid in excess of NZ\$5,619. These reimbursements were made by Tech 5 on a voluntary basis.

[29] Schedule B also shows the reimbursement Tech 5 made to the employees in the pay period ending 28 September 2014 for costs it had recovered from the employee for Site Safe testing.

[30] Reimbursement of each employee's payment for Site Safe testing of \$120 resulted in a figure of \$5,499 in the *new agreements* which were adjusted down from \$5,619.

New agreements

[31] On 22 September 2014, Tech 5 presented the employees with new terms and conditions of employment. These new terms and conditions of employment are referred to as *the new agreements*. These new agreements were reviewed by Immigration NZ (INZ) as part of the Ministry of Business Innovation and Employment and INZ confirmed that it was satisfied that the new agreements now met MBIE's requirements from an employment standards perspective and that they were consistent with INZ instructions.

[32] Clauses 6 and 7 of Addendum 1 of the agreements have been removed from the new agreements. Addendum 1 of the new agreements records that the Total Relocation Costs and Employee Expenses are \$5,499.00 and that the amount that will be deducted from the employee's weekly wage will be \$100.

[33] Schedule C, attached to this determination, sets out the original calculations provided by Tech 5 and the adjusted calculations as at June 2014. This information was provided by Tech 5 by emails in July 2014 to the Labour Inspector.

[34] Tech 5 was cooperative with the Inspectorate throughout the audit process.

The issues

[35] The Authority was assisted by evidence and careful submissions over two days of investigation. I am in a position therefore to clearly identify the issues for determination as follows:

- Are the bonds in clauses 6 and 7 of Addendum 1 agreed between Tech 5 and the employees' premiums for the purposes of s 12A of the Wages Protection Act 1983?
- Were the following payments by way of deductions from the employees' wages premiums:
 - (i) Testing Centre costs in skills testing prospective employees;
 - (ii) Accommodation costs for a team of four people sent to skill test prospective employees;
 - (iii) Transportation costs including the costs of purchasing a vehicle.
- If there was a breach of s 12A(1) of the Wages Protection Act 1983 then should a penalty or penalties be awarded.

Premiums

[36] Section 12A(1) of the Wages Protection Act 1983 (WPA) provides as follows:

No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[37] Judge Colgan, as Chief Judge Colgan was then, considered the history of s 12A of the WPA in *Mehta v Elliott (Labour Inspector)*¹ and an analysis was undertaken of the earlier legislation containing a prohibition on premiums and the rationale for the same. Judge Colgan referred to some insight into the provisions from *Hansard*² at the time of the introduction of the Shops and Offices Amendment Act 1936 and reference to the hairdressing trade where premiums were paid for tuition by

¹ [2003] 1 ERNZ 451

² Pg. 376 of Vol 245

parents of girls but where no training was provided. This practice was described by the Minister as *exploitation*.

[38] It was stated in *Mehta*:³

Section 12A does not only impose restrictions upon persons seeking the payment of a premium for employment. Its countervailing purpose is to provide a benefit to vulnerable potential employees to relieve them of the pressures of such demands. Section 12A acts both as a prohibition upon persons connected with (or being) a prospective employer and for the benefit of a prospective employee.

[39] There is no statutory definition of a premium. *Sears v Attorney-General*⁴ is a judgment of the Employment Court. The judgment of the Employment Court was subsequently overturned by the Court of Appeal⁵ but the definition of a premium was not altered on appeal and has been relied on in subsequent cases about premiums.

[40] The issue in *Sears* was whether the employer was entitled to deduct from Mr Sears remuneration an additional percentage as the defendant's liability for Government Superannuation Fund contributions. Chief Judge Goddard considered in *Sears* whether the deductions were a premium within the meaning of s 12A of the WPA. He stated⁶ by way of definition of a premium *In the normal understanding of the term a premium imports some consideration paid or demanded as a price of the contract.*

[41] Ms Dyhrberg referred me to a determination of the Chief of the Authority James Crichton in *Zonneveld v Maudaara Limited*.⁷ Member Crichton relied on the definition of a premium in *Sears* and he was not satisfied that payments which were found to be in the nature of a loan to the employer from the employee satisfied the consideration element necessary for reaching a conclusion that a premium was sought or paid.

[42] There have been determinations of the Authority where an employer has sought a training bond from an employee – *LJS Employment Limited v Matthews* and *LJS Employment Limited v Mitchell*.⁸ In both of these cases the Authority held that

³ At [52]

⁴ [1994] 2 ERNZ 39

⁵ (1995) 4 NZELR 98,351, [1995] 1 ERNZ 627

⁶ N 5 at [12]

⁷ [2015] NZERA Christchurch 99

⁸ *LJS Employment Limited v Matthews* AA 125/06 Member Vicki Campbell
LJS Employment Limited v Mitchell AA 251/07 Member Robin Arthur

extracting money for normal on the job training that the employee would otherwise receive would be like extracting a premium and there was a determination that the bond was unenforceable in each case although no penalty was awarded in either case.

[43] Counsel referred the Authority to another determination of the Authority, *CTC Aviation (NZ) Limited v Holman*⁹ where a training bond was found not to be a premium because the employee accepted employment conditional on him taking the training course for which he was bonded. He wanted to become a flight instructor and to do that required him to pay to complete his training. He chose to undertake his training with CTC. The request from CTC to him for a training fee to cover the costs associated with him achieving his *C Cat rating* was not found to be a request for a premium to secure employment.

Are the bonds in clauses 6 and 7 agreed between Tech 5 and the employees' premiums for the purposes of s 12A of the Wages Protection Act 1983?

[44] Mr La Hood submits that s 12A of the WPA prohibits an employer from seeking a premium in respect of employment and that both clauses 6 and 7 of Addendum 1 put vulnerable migrant employees working in another country in an onerous bonding arrangement with the prospect of several thousands of dollars debt owing if they were to leave employment within the three years period for any reason.

[45] Mr La Hood submits that by virtue of the bond clauses 6 and 7, Tech 5 have sought a premium and are therefore in breach of s12A of the Act. He submits that the relationship between clause 6 and clause 7 is confusing and the plain words suggest that an employee will be liable for both USD10,729.25 in clause 6 and \$6,650 in clause 7 if leaving before completing 3 years of employment. Further, he submits that it is not clear whether the amounts already paid as set out in clause 8 and consented to by way of deduction in clause 9 in Addendum 1 would be deducted from the amount sought in clause 7.

[46] I heard evidence from Mr Allen that the reason for the bond clauses and the amount in clause 6 of USD10,729.25 was to impress on employees how much it was actually costing the company to bring them to New Zealand and get them prepared, tooled up, housed and ready to start work. The model that Tech 5 used, Mr Allen said, only made financial sense for Tech 5 if employees stayed with the company for

⁹ [2015] NZERA Auckland 297 Member Campbell

three years. Tech 5 removed clauses 6 and 7 in September 2014 when it prepared a new agreement for existing and new employees to sign after the involvement of the Labour Inspector.

[47] There is no evidence to support that clauses 6 and 7 had been relied on by Tech 5 to attempt to recover money from employees who have departed within the three year time frame. Mr Bothma gave evidence that an employee with similar terms to the 25 employees left employment within the three year term but Tech 5 did not seek to recover any amounts under clause 6 or 7 of Addendum 1. The Inspectorate was advised about the identity of that employee when concerns were raised about the bond clauses. Mr Bothma also referred in his evidence to other employees leaving within the three year period, some as he put it *in the dead of night* and one with his tool box. He said there was no attempt by Tech 5 to recover money from those employees under the bond clauses and Mr Wyatt and Mr Allen gave evidence it was not the intention of the company to do so.

[48] I accept Ms Dyrberg's submission that the Authority needs to determine firstly whether the bonds, and the deductions from employees when I come to that issue, are premiums and secondly whether they have been sought or received by Tech 5.

[49] Ms Dyrberg submits that the bonds at clauses 6 and 7 are not premiums. She directs me to the wording in the clauses supporting that the bonds were regarded as discretionary and submits the amounts were a maximum rather than a set amount and do not read like the parties are agreeing to a premium. Ms Dyrberg refers to the language in clause 6 and clause 10 that Tech 5 *will be entitled to recover costs* and clause 7 that *the employee also undertakes to repay*.

[50] There is usually, if not always, a level of discretion for an employer in deciding whether to enforce and/or recover payments under a bond clause. Clause 6 and 7 support that Tech 5 could enforce and recover monetary sums from an employee if the employee left within the three year fixed term. Whilst I accept that Tech 5 regarded the amounts in clause 6 and 7 as maximum rather than set amounts there is still reference to specific amounts that could be recoverable.

[51] The bonds in this case have not come before the Authority by way of enforcement or recovery of money paid. I do not know therefore what amount may

have been sought so I cannot undertake the analysis that Judge Colgan did in *Mehta*¹⁰ where he considered whether the whole sum in issue which had been paid, 300,000 Indian rupees receipted as an amount against advance payment for an offer of employment in New Zealand, was a premium for employment. It was concluded in that matter that only INR190,000 was a premium for employment because the balance paid was for migration assistance.

[52] Clauses 6 and 7 contain amounts Tech 5 was entitled to recover if the employee did not complete the three year term of employment. The amounts in clause 7 were expressed to be payable in the event that the employee's contract was terminated for any reason other than a redundancy situation.

[53] The amounts sought in clause 6 were expressed to be for the recovery of costs related to recruitment, immigration, relocation and training. There was no evidence that training, aside from the usual on the job training, was provided. Recruitment costs would not normally be required to be reimbursed by an employee. In that regard clause 1 of Addendum 1 states amongst other matters that Tech 5 shall pay at its cost any costs related to recruitment, immigration, except specialist medical appointments, and training.

[54] I find the bonds in clause 6 and 7, if sought in the amounts set out in those clauses, are capable of being seen as a premium and could be unenforceable. They set a price for the employees entering into the employment agreements with Tech 5 if the employee did not complete the three year fixed term of employment beyond and in excess what was reasonable. Although Tech 5 said this was not its intention, clauses 6 and 7 read together could support a potential recovery or debt if employment was terminated for any reason other than a lack of work of USD10,729.25 and \$6,650. It was unclear from reading the clauses if already deducted monies would be taken into account under clause 7.

[55] The next issue is whether in fact Tech 5 has sought a premium under clauses 6 and 7 of Addendum 1 in contravention of the prohibition in s 12A of the WPA. There is no evidence that payments have been received under clause 6 and 7 from employees departing before the expiry of the three year period. There is no evidence of an attempt to enforce the bond clauses by, for example, an approach to a debt

¹⁰ At [76]

collection agency. In those circumstances the Inspectorate relies simply on the inclusion of clause 6 and clause 7 in the employment agreements as the seeking of a premium.

[56] Ms Dyhrberg provided a definition for the word *seek* from the Merriam-Webster dictionary. I have also had regard to The New Zealand Oxford Dictionary and the meaning of seek accords with the definition provided by Ms Dyhrberg. It includes try; want to find or get; ask for or request.

[57] I accept Ms Dyhrberg's submission that the Authority in the *LJS* determinations concluded the application for a bond was not appropriate and/or was excessive so that if enforced it would be a premium under s 12A of the WPA. The determination did not go further to the extent that having the clause in the agreement was in breach of s 12A of the WPA.

[58] I find that the prohibition against seeking a premium in respect of the employment of a person for the purposes of s 12A of the WPA requires a step to be taken to seek a premium beyond simply having a clause in the employment agreement. There was no evidence to support such a step was taken by Tech 5 to seek a premium from its employees. I do not find for the above reasons there is a breach of s 12A(1) of the WPA Act 1983 in respect of the bonds in clauses 6 and 7 of Addendum 1.

[59] In reaching that conclusion the concern of the Inspectorate about the inclusion of the bond clauses in the employment agreements is understandable because workers can be concerned or confused about the possibility of excessive amounts being claimed from them if they leave their employment for any reason except for a redundancy situation. Migrant workers can be more vulnerable in this respect to what is reasonable for an employer to seek by way of a bond. Appropriately Tech 5 removed clauses 6 and 7 from the employment agreements.

Were payments by way of deductions from the employees for trade testing and related accommodation expenses premiums?

[60] Ms Dyhrberg submits for payments by way of deduction for trade testing, accommodation expenses and transport that the Inspectorate is attempting to expand

the usual definition of a premium to include agreed deductions based on costs actually incurred by Tech 5.

[61] Ms Baldwin in her evidence said that the information provided by Tech 5 to support the recovery of trade testing and testing centre costs included the costs paid for the use of a skill testing centre in the Philippines PHP 447,710 or NZ \$11,166 and the costs of accommodation for the team of four people Tech 5 sent to the Philippines to recruit/test workers for the Canterbury rebuild. Receipts were provided for both items of expenditure. Mr Wyatt in an email dated 14 July to John Taylor, the Labour Inspector involved at that time, referred to the testing team from New Zealand, two Tech 5 staff and two master builders flying to the Philippines for varying periods of time. He wrote that taking into account salary costs of \$30,000 plus \$11,166 [for the testing centre costs] plus accommodation of PHP5,500 per night or \$7,562 which he concluded was a grand total of \$48,728 it costs significantly more than the \$586 charged to each employee. What is clear when a mathematical calculation is undertaken is that the \$48,728 comprises three components; the testing centre costs, the salary and the accommodation for the Tech 5 staff and the builders whilst testing is undertaken in Manila.

[62] Ms Baldwin said that she concluded expenses relating to skills testing or trade testing prospective employees were not expenses that had been incurred directly on behalf of the employee but were in the nature of business expenses which Tech 5 should not seek to pass on. She concluded that if an employee pays for costs that are costs an employer would ordinarily incur in the course of its business then they are paying a premium for consideration for their employment.

[63] Tech 5 say that they cannot see how claiming reasonable expenses is a premium. Whilst of this view Tech 5 voluntarily adjusted its deductions and made reimbursements to employees in or about June 2014 for trade testing after Inspectorate involvement from May 2014.

[64] Mr Wyatt and Mr Allen gave evidence about the *model* Tech 5 uses and its focus on obtaining the best skilled and trade certified workers for the Canterbury Rebuild. I accept, as did Ms Baldwin, that Tech 5 had incurred expenses in undertaking the trade testing.

[65] Tech 5 work alongside 2 recruitment agencies in Manila; PNI International and EDI Staff Builders International Inc. who provide an initial list of candidates for Tech 5 to interview and trade test. The initial recruitment and provision of a *long list* is paid for directly by Tech 5.

[66] Mr Allen explained that the trade tests follow the provision of the long list of prospective candidates by the recruitment agency. The first test where Tech 5 flies its directors and a site manager/qualified builder to Manila is to check English language ability and the undertaking of some skill saw tests to show understanding and safety. The site manager and the two Tech 5 directors observe and discuss who should go through to the final testing. About half of those tested at the first test go through to final testing.

[67] At this point another experienced master builder is flown to Manila from New Zealand for the second trade test which involves carrying out more comprehensive tasks and cuts with complex angles and time components. About half of the second test candidates pass.

[68] Tech 5 then offer the successful candidates a job in Christchurch and they undergo a medical test and lodge visa applications. This processing could take up to four months. A staff member of Tech 5, Stephen Matheson, then undertakes an induction process of about six hours duration about what to expect to Christchurch including wages, tax, banking, accommodation and travel, and deductions. The rationale for Tech 5 behind paying the upfront costs and recovering them by deduction was to help the candidates as Tech 5 did not want them to be exploited by loan sharks in the Philippines and then in a position of paying exorbitant interest rates.

[69] I accept that it is not a straightforward exercise to check qualifications of candidates in the Philippines in the way that it would be done in New Zealand and therefore there was a need for more rigorous trade testing by Tech 5 to ensure the recruitment of appropriately qualified employees.

[70] The Philippines Overseas Employment Administration (POEA) rules provide that documentation costs to be paid by the worker shall include, but are not limited to, expense for amongst other matters a *Trade Test, if necessary*. The rules do, however, make it clear that the worker shall pay only the actual costs of the document which shall be covered by official receipts. In other words the actual cost for each worker

should be clear and receipted rather than a global averaging of expenses in the way Tech 5 arrived at its figure of \$586.

[71] One of the recruitment agencies letters dated 22 March 2016 from PNI International suggests that the candidates will be the ones to *shoulder the trade test fee*. Mr Allen said in evidence that he was guided by the recruitment companies which he said were accredited by POEA.

[72] The costs for accommodation of those undertaking the testing and the hire of the trade centre with materials provided and an armed guard are costs Tech 5 incurred in the course of undertaking their business in accordance with their model. The costs were not individually invoiced to the worker. The cost of the testing centre was for testing unsuccessful candidates well as those who were successful and was not broken down. Further the skills testers tested at both stages other candidates who did not meet the standard required. There was no documentation provided as such to each worker following the trade test although it was undoubtedly a benefit for them in working for Tech 5 having passed rigorous testing if they were to work elsewhere. There is also a benefit for Tech 5 in having skilled workers for their clients.

[73] Mr Wyatt provided a more detailed analysis at the investigation meeting to break down the \$48,728 for the 25 successful candidates (the employees). I do not find that overcomes the difficulties about the need to individually account for the cost of the trade testing to each worker. That is because the starting figure of \$48,728 as set out clearly in the email Mr Wyatt sent to Mr Taylor dated 14 July includes accommodation and salary of the skill testers and the directors of Tech 5 at the testing for all possible candidates. There was, as Mr Wyatt stated in his email to Mr Taylor of 14 July 2014, an element of averaging.

[74] Payment for the trade testing, which included a component of accommodation and salary for the skills testers as well as the test centre cost, was a payment demanded of the 25 employees for their employment agreement with Tech 5. These costs were business costs and were not accounted for on the true cost individually for trade testing for each employee. Applying the definition in *Sears* of a premium I find payment for trade testing which included the testing centre, accommodation and salary for that period was consideration paid by the employees for an employment agreement with Tech 5 in breach of s 12A(1) of the WPA.

[75] As set out earlier when the Labour Inspector raised with Tech 5 that this cost was a business cost and a responsibility of Tech 5 it stopped deductions for trade testing and reimbursed employees for amounts deducted in reliance for costs associated with trade testing.

Were payments by way of deductions received from employees for transport premiums?

[76] It was not immediately apparent to the Labour Inspector at the start of the audit process with Tech 5 that employees were having deductions made from their wages for transport costs because transport was not referred to as an amount for which deductions would be sought from employees in Addendum 1 in clause 8.

[77] Mr Bothma said that transport was discussed at the induction in Manila with the employees after it became apparent to Tech 5 that for a period of 12 weeks transport to and from work would be advantageous and the omission from Addendum 1 was inadvertent. I accept that.

[78] The deductions were initially made from employees' wages as part of the \$125 deducted each week for a total sum of \$500 for the provision of transport from the airport and then to and from work for a period of 12 weeks and in some cases longer.

[79] One of the concerns of the Inspectorate in a letter to Tech 5 dated 23 June 2014 was that Tech 5 needed to provide clear communication as to the calculation of total reimbursement figures sought from employees. Mr Wyatt in an email dated 27 June 2014 attached a document with the deduction detail in which the transport cost was reduced to \$250 and stated those who had already paid in the amount of \$500 were reimbursed. Mr Wyatt on 14 July 2014 in his email to the Labour Inspector by way of explanation for the deduction attached an invoice for a van purchased by Tech 5 in the sum of \$24,285.44 and stated that a \$500 allowance for transport is made per person. Looking objectively at that the fact Tech 5 still retained ownership of the vehicle(s) after 12 weeks and depreciation of the vehicles for tax purposes would need to be taken into consideration.

[80] Ms Baldwin in an email of 24 October 2014 to Mr Bothma asked for further evidence about the way the amount is claimed for transport costs in both the original and amended agreement (\$500 and \$250 respectively) and noted in her email that the

only information provided to support a claim for the costs is a copy of an invoice to purchase a motor vehicle.

[81] Mr Bothma set out in an email to Ms Baldwin dated 29 October 2014 by way of response specifically to the issue of transport the following:

In terms of further evidence required about the way the amount claimed for transport costs (in both the original and amended agreement) has been calculated, I have attached our spread sheets which provides you with the value of our Filipino transport fleet and the temp drivers we use ----- Most of the men buy their own cars after this point [12 weeks] but some still use the transport we provide so the 12 weeks often stretches out quite a bit for some of our men.

We came to the \$250 per person transport deduction as follows.

\$4.17 per day x 5 days = \$20.85 x 12 weeks = \$250.20- This calculation was made on a one way bus ticket from Papanui to the city.

However the reality is Tech 5 has invested around \$52K in vehicles and a drivers wages to date at a total cost of \$464 per head and climbing. With a \$250 deduction x 112 Filipinos (equating to \$28K) we are, as a business, still significantly contributing to the transport costs.

[82] Ms Baldwin said in her evidence that she accepted that the reduced amount of \$250 was reasonable because of the explanation from Mr Bothma but that of the amount of \$500, \$250 was a premium. Ms Baldwin concluded that there was no explanation to substantiate the basis on which the money in excess of \$250 was sought for transport costs. Further information received in March 2015 from Mr Wyatt was to the effect that the direct costs to the company for transport meant that Tech 5 was providing a discount to the employees and not a premium.

[83] Ms Baldwin was not satisfied as to the original basis for charging \$500 for transport because there was no satisfactory explanation for it. The provision of transport though was advantageous to the employees for a period after they arrived in New Zealand and it was accepted by Ms Baldwin that it was reasonable to charge something for it.

[84] There is limited case law about premiums. I find looking at the issue of transport in the round and the case law to date it is a step too far to conclude that the

deduction made for transport over \$250 is a premium in the sense that it was consideration paid or demanded as a price of an employment agreement. Rather I find it was an amount agreed to and charged for the provision of transport in Christchurch by Tech 5. The Labour Inspector felt that sum was excessive and Tech 5 subsequently reduced the costs it charged for the provision of transport and the employees were reimbursed for the original costs. What was put forward to justify the original payment for transport was insufficient and inadequate for the Labour Inspector and the amount to be passed on to employees for the provision of transport was voluntarily reduced.

[85] I do not find that payments received from employees for transportation costs in excess of \$250 was a premium in breach of s 12A(1) of the WPA.

Conclusions on clauses 6, 7 and 9 of Addendum 1.

[86] I have found that the bonds in clauses 6 and 7 of Addendum 1 do not amount to the seeking of a premium in respect of employment of the 25 employees because Tech 5 took no steps to try to enforce the bonds.

[87] I have found that the payment received by way of deduction from the employees for trade tests was a premium in contravention of s 12A(1) of the WPA.

[88] I have not found that payments received from the employees by way of deduction in excess of \$250 for transportation costs was a premium in breach of s 12A(1) of the WPA.

Should a penalty be awarded?

[89] I have found one breach for the deductions of payments for trade test costs under clause 9. Of the original figure of \$6,650 for reimbursement of payments by employees \$586 of that sum is for the trade testing for each employee.

[90] Penalties are discretionary and the discretion should be exercised on a principled basis. A penalty is awarded to punish wrongdoing, express disapproval and to act as a deterrent to the party in question and to others.

[91] Mr La Hood and Ms Dyhrberg refer the Authority to the Employment Court judgment in *Tan v Yang & Zhang*¹¹ and the non-exhaustive factors in that case to be applied in determining whether a penalty should be awarded:

- (a) Seriousness of the breach;
- (b) whether breach is one-off or repeated;
- (c) the impact, if any, on the employee;
- (d) the vulnerability of the employee;
- (e) the need for deterrents;
- (f) remorse shown by the party;
- (g) range of penalties imposed in other comparable cases.

[92] I have considered those factors in this case. Mr La Hood submits that any situation where an employer seeks a premium will be serious.

[93] Tech 5 was fully co-operative with the Inspectorate when the concern about trade testing was identified and voluntarily addressed the concerns before it was known that proceedings would be issued. Tech 5 seemed genuinely appreciative of the advice and assistance offered by the Labour Inspector in circumstances where it was undertaking a new model of recruitment and there was an element of the unknown. The issue of concern about trade testing payments being taken by way of deduction was resolved in June 2014 and money was reimbursed to the employees.

[94] I accept the evidence of Mr Allen that reliance was placed on advice from the recruitment agencies in the Philippines that the cost for trade testing could be passed on to employees. Mr Bothma attended a recent MBIE/Canterbury Employment Chamber of Commerce (CECC) seminar in 2015 where a slide from CECC was to the effect that under the POEA policy the employee pays for a trade test if necessary. The POEA rules however limit the requirements to pay the costs of documentation related to the trade test which must be covered by official receipts.

¹¹ [2014] NZEmpC 65

[95] This is I accept in the nature of a one off breach - *Ahomiro v Toki*¹². Tech 5 has not appeared before the Authority or been investigated by the Inspectorate before the May 2014 audit commenced.

[96] There was some impact on the employees because they were charged for trade testing. They were reimbursed after the Inspectorate became involved and other employees recruited have not been charged for trade testing. I accept as Ms Dyrhberg submits that only a limited percentage of the original amount charged to employees was found to be a premium.

[97] I accept that the employees as migrant workers were vulnerable as they had little knowledge of the law in New Zealand and therefore little control over deductions. There was not in this case the level of exploitation that there has been in other cases. The evidence supports that Tech 5 has provided considerable support to the migrant workers and good pastoral care. Mr Bothma, for example, gave evidence about Tech 5 helping out other Filipino workers made redundant from a business in Auckland. Tech 5 flew the workers to Christchurch from Auckland and offered them employment. They were given a cash advance and free accommodation until they were paid and they were not asked to pay the money back. The carpenters were paid \$25 per hour which Mr Bothma said was a higher rate than some of their competitors.

[98] There is a need to deter employers from claiming payments from employees in contravention of s 12A of the WPA. I agree with Mr La Hood's submission that the general purpose of the WPA is to protect wages from unlawful deductions. In this case the submission from Ms Dyrhberg is persuasive that Tech 5 had reduced the amount to be deducted and issued refunds for trade testing to the employees who had paid the money some nine months before there was a decision by the Inspectorate to issue proceedings. Credit should be given for Tech 5 co-operating with the Inspectorate and fixing the areas of concern. My assessment of the correspondence is that Tech 5 provided any requested information to the Inspectorate in a timely fashion.

[99] Mr La Hood says that there has not been an acknowledgement of the breach but the remedial steps taken, I find, support that the Inspectorate's advice in that respect was accepted.

¹² [2015] NZERA Auckland 386

[100] Finally, I should have regard to the impact of Tech 5 if an order for a penalty is made against it and whether that would be disproportionate to the breach found. Standing back and weighing all matters the award of a penalty for a breach that was fixed very shortly after concerns were raised by the Inspectorate could impact on the ability of Tech 5 to bring migrant workers into New Zealand or renew work permits of existing employees which has already had as Mr Wyatt described it in his evidence *a paralysing effect on the business*. Looking at the matter in the round an award of a penalty could be unfairly disproportionate to the breach I have found.

[101] I decline to make an order that the respondent pay a penalty in respect of the breach I have found.

Costs

[102] I reserve the issue of costs. I would encourage the parties to reach an agreement on costs.

Helen Doyle
Member of the Employment Relations Authority

Schedule A - Deductions made per Clause 9 of Addendum 1

#	Employee	Arrival in NZ	Start Date	Total Initially recoverable by deduction*	Weekly deduction Initially agreed	Hourly Rate	Average hours worked per week**	Portion of pay taken by deduction***
1	Royland Nemenzo	30/05/2013	12/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	45	11%
2	Filos Bihag	30/05/2013	10/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	41	12%
3	Glenn Magallanes	13/06/2013	17/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	47	11%
4	Joseph Ordoñez	13/06/2013	17/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	51	10%
5	Marlon Cortez	13/06/2013	17/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	56	9%
6	Levi Cuenco	13/06/2013	17/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	53	9%
7	Roudini Briónes	13/06/2013	17/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	47	11%
8	Ramónchito Medel	20/06/2013	17/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	52	10%
9	Arsenio Ocier	20/06/2013	17/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	46	11%
10	Ricky Castroverde	20/06/2013	24/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	47	11%
11	Erik Mallari	20/06/2013	24/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	49	10%
12	Alfredo Bacani	20/06/2013	24/06/2013	\$6,650.00	\$ 125.00	\$ 25.00	56	9%
13	Abdon Ballguat	27/06/2013	8/07/2013	\$6,650.00	\$ 125.00	\$ 25.00	46	11%
14	Sonnie Villanueva	27/06/2013	2/07/2013	\$6,650.00	\$ 125.00	\$ 25.00	44	11%
15	Faustino Bascuguin	2/07/2013	8/07/2013	\$6,650.00	\$ 125.00	\$ 25.00	49	10%
16	Rolando Feliciano	2/07/2013	8/07/2013	\$6,650.00	\$ 125.00	\$ 25.00	50	10%
17	Espino Binwek	13/07/2013	20/07/2013	\$6,650.00	\$ 125.00	\$ 25.00	52	10%
18	Evo Compra	13/07/2013	20/07/2013	\$6,650.00	\$ 125.00	\$ 25.00	47	11%
19	Joel Ladrera	6/09/2013	9/09/2013	\$6,650.00	\$ 125.00	\$ 25.00	49	10%
20	Eddie Navarro	6/09/2013	10/09/2013	\$6,650.00	\$ 125.00	\$ 25.00	39	13%
21	Jessie Manarang	6/09/2013	9/09/2013	\$6,650.00	\$ 125.00	\$ 25.00	50	10%
22	Norlito Tigcal	25/09/2013	30/09/2013	\$6,650.00	\$ 125.00	\$ 25.00	43	12%
23	Vonn Palero	25/09/2013	7/10/2013	\$5,150.00	\$ 125.00	\$ 19.00	44	13%
24	Jupiter Yorac	2/10/2013	7/10/2013	\$6,650.00	\$ 125.00	\$ 25.00	41	12%
25	Erwil Amores	8/10/2013	14/10/2013	\$6,650.00	\$ 125.00	\$ 25.00	49	10%

Notes

* Amount recovered per Clause 9 of Addendum 1 of Letters of Offer dated 30 September 2013

** For first 19 employees (above) average hours have been calculated based on pay records from the pay period ending 13/4/14 to the pay period ending 28/9/14. These records were provided to Labour Inspector on 13/10/14

For last 6 employees (above) average hours have been calculated based on pay records from the pay period ending 2/3/14 to the pay period ending 28/9/14.

*** Portion of employees' pay that has been deducted pursuant to clause 9 of Addendum 1 based on average hours

Schedule B - Reimbursement of Deductions per clause 9

#	Employee	Expenses reimbursement	Amount reimbursed	Site Safe Reimbursement	Amount reimbursed
1	Royland Némenzo	1/06/2014	\$ 381.00	28/09/2014	\$ 120.00
2	Filos Bihag	1/06/2014	\$ 381.00	28/09/2014	\$ 120.00
3	Glenn Magallanes	1/06/2014	\$ 506.00	28/09/2014	\$ 120.00
4	Joseph Ordonez	1/06/2014	\$ 131.00	28/09/2014	\$ 120.00
5	Marlon Cortez	1/06/2014	\$ 256.00	28/09/2014	\$ 120.00
6	Levi Cuenco	1/06/2014	\$ 381.00	28/09/2014	\$ 120.00
7	Roudini Briones	1/06/2014	\$ 6.00	28/09/2014	\$ 120.00
8	Ramonchito ("Ching") Medel	1/06/2014	\$ 381.00	28/09/2014	\$ 120.00
9	Arsenio Ocler	1/06/2014	\$ 131.00	28/09/2014	\$ 120.00
10	Ricky Castroverde*			28/09/2014	\$ 120.00
11	Erik Mallari	1/06/2014	\$ 381.00	28/09/2014	\$ 120.00
12	Alfredo Bacani	1/06/2014	\$ 131.00	28/09/2014	\$ 120.00
13	Abdon Baliguat	1/06/2014	\$ 6.00	28/09/2014	\$ 120.00
14	Sonnie Villanueva	1/06/2014	\$ 256.00	28/09/2014	\$ 120.00
15	Faustino Bascuguin	1/06/2014	\$ 6.00	28/09/2014	\$ 120.00
16	Rolando Feliciano	1/06/2014	\$ 6.00	28/09/2014	\$ 120.00
17	Espino Binwek*			28/09/2014	\$ 120.00
18	Evo Compra*			28/09/2014	\$ 120.00
19	Joel Ladrera*			28/09/2014	\$ 120.00
20	Eddie Navarro*			28/09/2014	\$ 120.00
21	Jessie Manarang*			28/09/2014	\$ 120.00
22	Norlito Tigcal*			28/09/2014	\$ 120.00
23	Vonn Palero*			28/09/2014	\$ 120.00
24	Jupiter Yorac*			28/09/2014	\$ 120.00
25	Erwil Amores*			28/09/2014	\$ 120.00

Note

* Some employees did not receive reimbursements during June 2014 because the total amounts deducted from their pay at the time were under the readjusted amount for relocation costs (i.e. \$5,619 which was then adjusted to \$5,499 following repayment of Site Safe costs on 28/9/14)

Schedule C - Calculation of Total Reimbursements recovered per clause 9 of Addendum

Carpenters Deductions - original calculation¹	
Testing Centre*	\$ 586.00
Accommodation up front expense /Salary Advance	\$ 300.00
Air Fare	\$ 1,300.00
Mandatory Insurance Coverage	\$ 250.00
Visa Fee	\$ 300.00
Cost of Medical required by the Embassy of New Zealand	\$ 300.00
Tools at \$2,364 per person	\$ 2,364.00
Site safe	\$ 140.00
Boots	\$ 160.00
Clothing Allowance	\$ 500.00
Transport*	\$ 500.00
TOTAL	\$ 6,700.00²

Carpenters Deductions - adjusted as at June 2014¹	
Accommodation up front expense/salary advance	\$ 300.00
Air Fare	\$ 1,300.00
Mandatory Insurance Coverage Per Person	\$ 250.00
Visa Fee	\$ 300.00
Cost of Medical required by the Embassy of New Zealand	\$ 300.00
Tools at \$2,364 per person	\$ 2,364.00
Site safe ³	\$ 120.00
Clothing Allowance	\$ 435.00
Transport	\$ 250.00
	\$ 5,619.00⁴

Notes:

¹ Details provided by John Wyatt by email to Labour Inspector on 7/7/14

² The amount of \$6,700 was the amount the respondent originally intended to recover from its employees: it only recovered \$6,650 from its employees being the amount recorded in Clause 9 of Addendum 1 of Letters of Offer dated 30 September 2013

³ Site Safe costs of \$120 reimbursed to employees in pay period ending 28/9/14

⁴ The amount of \$5,499.00 recorded in the amended terms of employment dated 22/9/14 is \$5,619.00 less the amount of \$120.00 that has been reimbursed

⁵ In the applicant's view the amount of \$250 charged for transport costs as explained in Brett Bothma's email to Labour Inspector dated 29/10/14 is reasonable and that the amount originally charged in excess of \$250 was therefore a premium

Amounts viewed as Premiums by Labour Inspector	
Testing Centre	\$ 586.00
Transport ⁵	\$ 250.00
	\$ 836.00