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Xie v Taufa [2023] NZERA 251 (17 May 2023)

Last Updated: 31 May 2023

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

I TE RATONGA AHUMANA TAIMAHI

TĀMAKI MAKĀURAU ROHE

[\[2023\] NZERA 251](#)

3086052

BETWEEN FIE XIE, HONG WEI WANG, PINGYAN ZHAO, SHUAI ZHANG, JIN SHOU HONG and ZHU GUO XI

Applicants

AND MARILYN TAUFA

Respondent

Member of Authority: Alastair Dumbleton

Representatives: Karen Keat, advocate for the Applicants

Peter Verschaffelt, advocate for the Respondent

Investigation meeting:

Further information received:

29 and 30 August, and 4 October 2022

1 December 2022

Determination: 17 May 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated employment relationships of the applicants, six men who were recruited from China to work in New Zealand in the building and construction industry as carpenters and scaffolders.

[2] In written individual employment agreements signed in 2017, their employer is named as Shalom Scaffolds & Renovations Ltd (SS&RL).

Shalom Scaffolds and Renovations Ltd

[3] The company was incorporated in 2014. Marilyn Taufa the respondent was its sole director and shareholder

until December 2018, when the company was put into liquidation and removed from the register.

Dylan Solutions Ltd

[4] While it existed and was trading SS&RL had connections with Dylan Solutions Ltd (DSL). That company was incorporated in 2005 and its director currently is Taani Taufa, who is also known as Danny Taufa. DSL and SS&RL had the same registered office, an address at which Marilyn Taufa and Taani Taufa resided. Marilyn Taufa transferred a shareholding she had in DSL to Taani Taufa on 10 December 2018, when SS&RL was placed in receivership prior to liquidation.

[5] Business cards of SS&RL and DSL are of very similar design. They show the name Marilyn Vineeta Taufa and give the same street address, cell phone number, and email address, dylansolutions@gmail.com, for the companies.

[6] For the applicants a submission was made that SS&RL was used to employ the applicants exploitatively, before it was sacrificed to liquidation to avoid liability for underpaying the applicants, and at the same time passing company business across to DSL. Marilyn Taufa and Danny Taufa strongly deny they operated their companies on that basis.

[7] Ms Taufa claimed that some of the jobs on which the applicants worked were carried out under contract between SS&RL and DSL. Three of the applicants have claimed they became employed by DSL just before the liquidation of SS&RL. Hong Wei Wang has produced a written employment agreement he entered into with DSL on 1 December 2018.

[8] The Authority has investigated an application brought against DSL by three of the present applicants. A separate determination is to be issued for that matter.

[9] In November 2018, under the letterhead of SS&RL, Marilyn Taufa wrote to each applicant employed by the company and advised that it would be closing on 11 December 2018, the date of the liquidation. She gave the reason for the closure as business decline.

[10] It is clear that SS&RL was not capable of being the employer of the applicants after 10 December 2018.

[11] An application to the Authority made against SS&RL as the employer of the applicants, was stayed by the liquidation of the company.

Person involved in a breach of employment standards by SS&RL

[12] Although Ms Taufa was not the employer of the six applicants, she could become liable for certain minimum payments due to them and for meeting employment standards set by law, if she was a person involved in a breach of employment standards as defined by the [Employment Relations Act 2000](#) (the ER Act).

[13] A person involved in a breach is a person who is in any way knowingly concerned in or party to a failure to observe and apply minimum employment standards. If she was such a person, Ms Taufa could become liable to a penalty and for the payment of wages or other money including holiday pay owing to the applicants, if their employer SS&RL had not paid or provided minimum entitlements.

[14] The liability for the payment of wages or other money is created by s 142Y of the ER Act.

[15] The Authority has granted leave as required by s 142Y(2), for the applicants to bring their claims against Ms Taufa, in circumstances where SS&RL was unable to meet its liability for payment once it went into liquidation.

[16] The claims against Ms Taufa are to recover wages of \$101,169.00 and annual and public holiday pay of \$50,860.00 for periods of employment in 2017 and 2018.

Investigation

[17] An application was first made against Ms Taufa by the six workers in January 2021. It was amended in February 2021 and on 20 April 2022.

[18] The application alleged the workers had not been paid public holidays or annual leave and had worked about 49 hours a week at a pay rate of about \$18.00 per hour, in breach of their contractual entitlement to \$24.00 per hour for 38 to 40 hours work each week.

[19] Ms Taufa lodged a statement in reply to the January 2021 application and signed it on 9 May 2021. She had been given leave by the Authority to provide the document by 7 May 2021. Although received late, the document has been considered by the Authority and Ms Taufa has been able to fully participate in the investigation meeting.

[20] In her statement in reply, Ms Taufa accused the applicants of bad workmanship leading to loss of business and eventual liquidation of SS&RL. During the Authority's investigation she accused them of fraudulently obtaining their work visas and forging their employment agreements.

[21] Ms Taufa said the contract provided to the applicants in China for acceptance by their signature was for \$18 per hour, but when it was returned to her it had been altered to \$24.00 per hour, so she had not signed it. When it was pointed out to her that her signature, witnessed by a JP, was on the document, she did not pursue that line of response further.

[22] Ms Taufa claimed the applicants owed her a total of \$69,100 for unpaid rent, power, internet use and airline tickets from China. She said the applicants owed SS&RL further unspecified amounts for transport to jobs, furniture, immigration fees and advisor fees.

Wage and time records of SS&RL

[23] Ms Taufa was directed by the Authority in writing on 30 April 2021 to provide wage and time records in respect of each applicant, but she did not comply. During a case management conference on 14 May 2021 her then representative, Sajid Ali, told

the Authority the records were in a laptop which had crashed together with two other devices, and they needed to be taken to a data recovery centre. Ms Taufa was directed to provide the records by 28 May 2021. They have not been provided and consequently there is little more to go on than the applicants' evidence from memory and any personal records or notes they kept. Some records have been obtained from the IRD, but they are incomplete, as it appears there may not have been a full accounting for PAYE by SS&RL.

[24] At an investigation meeting on 30 August 2022, the Authority received evidence from the applicants Hong Wei Wang and Fei Xie, given with the aid of an interpreter. Other applicants were available to be heard by Zoom from China, if called upon. Marilyn Taufa also gave evidence and provided information.

Employment by SS&RL not in dispute

[25] Ms Taufa did not dispute that the six applicants had been employees of her company SS&RL between 2017 and the end of 2018 when it went into liquidation. They had written employment agreements for their jobs, and they worked on building sites around Auckland as scaffolders or carpenters.

[26] The applicants were recruited through an agent in China, and it appears they obtained the necessary Immigration permission to work in New Zealand. The passport of Fie Xie for example is stamped to show he was permitted to work in Auckland as a carpenter for SS&RL, and Jin Shou Hong was permitted to work as a scaffolder for the company. Even without work permits the applicant's employment agreements were enforceable.

[27] The employment agreements each stipulate either a commencement pay rate of \$24.00 per hour, or \$960 per week for a 40 hour week, equating to \$24.00 per hour.

[28] The Authority is satisfied that not less than \$24.00 per hour was the agreed pay rate throughout the employment of each applicant.

[29] The workers kept their own record of hours worked and claim they worked up to 49 or 50 hours a week,

including Saturday and Sunday sometimes. Arithmetically, their pay rate for 49 or 50 hours fell below \$24.00 per hour and was closer to \$18 or

\$19 per hour.

[30] The workers complained they had not received pay for public holidays not worked, or the alternative day when they did work on the holiday, and they did not receive their entitlements to annual holiday pay at termination of their employment, upon SS&RL going into liquidation.

[31] When Zhu Guo Xi asked for his annual holiday pay, Ms Taufa sent him the text message below

I told you none of our workers gets paid holiday pay as their tax code is self employed.

[32] His employment agreement clearly names SS&RL as his employer from April 2017 and provides that he was entitled to annual holidays in accordance with the [Holidays Act 2003](#). Clearly he was not a self-employed worker but an employee.

[33] At the investigation meeting, for Ms Taufa it was accepted that SS&RL had not discharged its liability under the [Holidays Act 2003](#) (the HA) to pay holiday pay due at the termination of the applicants' employment in December 2018.

Employment standards

[34] Section 5 of the ER Act defines the minimum entitlements and payment for those under the HA, as an employment standard.

[35] The employment agreement itself reproduced the substance of relevant HA provisions relating to public holidays and annual holidays.

[36] The failure by SS&RL to pay the applicants for public holidays and annual holidays was a breach of the HA and accordingly a breach of an employment standard.

[37] Section 5 of the ER Act also defines the provisions of the [Wages Protection Act 1983](#) (the WPA) as a minimum standard.

[38] [Section 4](#) of the WPA requires that when any wages become payable to a worker, the employer shall pay the entire amount of those wages to the employee without deduction.

When did wages become payable

[39] In *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc1*, the Court of Appeal expressly accepted the submission that whether wages are payable in terms of [s 4](#) of the WPA will depend on the employment agreements².

[40] The Court also accepted³

.... if wages were payable in terms of those agreements, then there will have been unlawful deductions in terms of [s 4](#) of the WPA. These may be recovered under [s 11](#) of the WPA.

[41] The wording of the employment agreement of each applicant is different in some respects in relation to the payment of wages.

Hong Wei Wang

[42] His agreement, entered into on 26 October 2017, provided that from commencement of employment he would receive \$24.00 per hour, to be paid to him weekly by electronic funds transfer.

[43] His full time hours were expressed to be 38 per week between 7am and 5.30pm, with overtime to be worked as reasonably required.

[44] There was a deduction clause allowing for a total of 8 deductions of \$20 (\$160) for the cost of personal tools.

[45] The written agreement was expressed to be the entire agreement.

Fie Xie

[46] His agreement was materially the same as that of Hong Wei Wang and was also entered into on 26 October 2017.

Zhu Guo Xi

1 [\[2008\] NZCA 580](#)

2 At [78]

3 At [78]

[47] His agreement, entered into on 12 April 2017, provided for wages of \$960 per week for 40 'Hours per week', Monday to Friday between 7am and 5pm, with a requirement to work extra hours if called upon. Payment was expressly to be made weekly.

Jin Shou Hong, Pingyan Zhao and Shuai Zhang

[48] Their agreements were materially the same as that of Zhu Guo Xi and they were entered into on the same date, 12 April 2017.

[49] The agreements are clear that if, as they have claimed, the applicants worked 49 hours a week or more, they were required to be paid those hours each week at \$24.00 per hour. No more than \$20 per week could be deducted per pay (eight times only) from the carpenters.

[50] Applying the *Spotless* decision of the Court of Appeal (above), if the applicants were not paid each week for all their hours of work (less any tool money deduction), an unlawful deduction had been made from their wages and the amounts deducted could be recovered under [s 11](#) of the WPA. A breach of the WPA is a breach of an employment standard.

[51] The facts for the Authority to establish are whether, as claimed, the applicants worked 49 hours each week and whether they were paid \$24.00 per hour for every hour worked.

[52] If they were not paid each week for their time as required by the WPA, the question is whether Ms Taufa was involved in that breach of an employment standard?

Failure to pay entire wages when due

[53] The applicants received no written pay advice with their pay packets. No record kept by SS&RL has been produced to the Authority, to show what the applicants were paid each week throughout their employment.

[54] Ms Taufa was given all reasonable opportunity to produce wage and time records and holiday and leave records of RR&FL, if any were kept. The Authority is sceptical of the claim that the records are in a crashed computer somewhere and cannot

be accessed. Credibility was an issue with Ms Taufa throughout the Authority's investigation.

[55] The applicants are clear about the hours they normally worked. They often worked as a group at the same sites and they resided together at Ms Taufa's address. They had come from China for work and some were experienced in working in other parts of the world, where employment laws may be less rigorous and compliance with those laws may be less strictly enforced.

[56] The applicant's had every reason to keep their own accurate records of their hours worked, to ensure they were fully paid for their work.

[57] For a long period during their employment with SS&RL in 2017 and 2018, the applicants were taken each day to a worksite in Greenlane, where Fletcher Construction appeared to be the head contractor. They were required to use a timecard to access this site and signage indicated Fletchers had contracted with DSL to provide scaffolding and carpentry work that the applicants performed. The applicants through their advocate Ms Keat have approached Fletchers to see if they have time records, but contact has not been made with anyone who may be able to help. The period in question is not a recent one and the nature of the construction industry and size of a company like Fletchers, may not make it easy to locate the personnel best placed to check whether the information exists and provide it.

[58] The failure by SS&RL to produce or even keep wage and time records does not increase the standard of proof required of the applicants to show what hours they worked each week, or whether they received their holiday pay entitlements. SS&RL should not be able to take advantage of its failure to keep or produce records, itself a breach of an employment standard. As an employer SS&RL had an obligation to calculate and pay the applicants' entitlements, using records properly and accurately kept.

[59] The Authority accepts the applicant's claim for public holiday and annual holiday pay due. The liability of SS&RL has been conceded and could not be avoided by the false assertion made by Ms Taufa to the applicants that they were self-employed. That assertion was contrary to the employment agreements and their express terms.

[60] The deductions from wages each week are less clearly made out. Each applicant gave the same written evidence of having worked about 49 hours per week including Saturdays and sometimes Sundays, and of having their paid hours written down to 38 or 40 to give the appearance of a pay rate of \$24.00 per hour.

[61] The applicants claim for deductions in total is about \$100,000. The Authority is required to establish matters of fact where they are in dispute, applying a standard of proof of the balance of probabilities.

[62] Unfortunately records have not been available to the Authority, although it does not doubt that there were occasions, perhaps many, when the applicants worked 49 hours a week but were paid only for 38 or 40. There is also some evidence showing that on occasion they worked 40 hours or less. There is no acceptable basis on which the Authority could deem them to have worked all the hours claimed. It is a matter of fact how long they worked each week and proof must be at a reasonable level.

[63] A reverse onus of proof such as that available under s 132 of the ER Act, does not assist and may not be available in a claim under s 11 of the WPA.

[64] The Authority finds it unlikely that each of the six applicants always worked not less than 49 hours a week throughout their employment of a year or more. Ms Taufa produced a note of hours made by one of the applicants for 41.5 hours. One applicant sent a text to her saying he had worked only one hour on a particular day and a PAYE document recorded 43 hours for each of four applicants in the week of 29 July 2018. It also showed the pay rate of \$24.00 per hour being applied to the actual hours, although

\$21.00 per hour was also recorded.

[65] In his evidence Hong Wei Wang acknowledged that the hours of work varied each week during his employment and sometimes he did work 40 hours, not 49.

[66] The claim under s 11 of the WPA must focus on the wages due each week and that depends on the hours worked in any week. While the Authority accepts that there were weeks when 49 hours or more were worked and that therefore the applicants were not paid at \$24.00 per hour, the Authority cannot simply extrapolate and find every week throughout the period of the claim was the same.

[67] The claim under the WPA for underpayments or deductions is not established.

Payments to be made by the applicants for accommodation

[68] The Authority takes no account of any money the applicant's may have agreed to pay SS&RL or Ms Taufa for transportation to the work site, food, accommodation, air fares, internet use or other expense.

[69] Any agreement to reimburse those costs or expenses was not part of the employment agreement whose terms were set out in the documents in their entirety. The applicants were required to be paid their wages in full without deduction, however they chose to spend their money after receiving it. Any enforcement action of non-employment terms is not an employment relationship problem and is now probably not available anyway because SS&RL no longer exists.

The minimum entitlements claimed against Ms Taufa

[70] The liability of a company director for default by the company as an employer to pay minimum entitlements under employment standards, arises under s 142Y of the ER Act.

[71] The Court of Appeal considered this provision (and s 142W - liability for penalty) in *A Labour Inspector v Southern Taxis Ltd and others*⁴, observing⁵

Sections 142W and 142Y allocate, as between directors and other officers on the one hand, and employees on the other hand, the risk that a company will be unable to meet its minimum obligations under employment legislation. The effect of these provisions is to impose the risk of non-performance of those obligations by the company on a director who knows all the primary facts relevant to the company's breach, unless the director has reasonably relied on information (for example, legal advice), or has taken all reasonable and proper steps to ensure the company complied with the relevant provisions.

[72] Accordingly, whether Ms Taufa was involved in breaches by SS&RL and is personally liable for the amount that SS&RL failed to pay the applicants, depends on

4 [\[2021\] NZCA 705](#)

5 At [50]

whether she knew the essential facts establishing the breaches. It is knowledge of the primary facts that matters⁶.

[73] The evidence points strongly to Ms Taufa as the hands-on manager of SS&RL, day-to-day and in all details including calculation and payment of the applicants' wages. Nobody else has been identified as having that control and knowledge of how SS&RL was operating its business.

[74] The Authority is satisfied that Ms Taufa at material times was a person involved in a breach for the purposes of s 142Y of the ER Act. In relation to the employment of the applicants by SS&RL while it was in business, she was knowingly concerned in or party to the failure of SS&RL to pay the applicants public and annual holiday pay when due at the termination of employment.

[75] Applying the *Southern Taxis* decision (above), it is irrelevant whether Ms Taufa believed the applicants were self-employed or whether she was aware of the requirements of the HA and WPA. The Court held⁷

A director cannot escape liability on the basis that they did not turn their mind to the legal consequences of what they knew.

[76] There was evidence that the applicant's performed their work at the direction of DSL at sites they were taken to. Given the ties between SS&RL and DSL, it seems likely there was some contracting between them. Regardless of such arrangements as there may have been, SS&RL retained legal responsibility as the employer of the applicants. It was responsible for observing all employment standards.

[77] Ms Taufa did not and could not suggest she was ignorant of all the arrangements under which the applicants had their pay calculated and given to them, or the hours they worked. The Authority is satisfied she was heavily involved in the employment and the failure of SS&RL to meet the employment standards flowed directly from her instructions and decisions, and from her conduct towards the applicants daily.

6 At [7]

7 At [50]

[78] As SS&RL is now unable to pay arrears of wages or other money including holiday pay required to be paid

Alastair Dumbleton

Member of the Employment Relations Authority

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