

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 175  
5467271

BETWEEN JEANIE MAY BORSBOOM  
(LABOUR INSPECTOR)  
Applicant

A N D JOHN AND JOY BOWDEN  
trading as JP & JD BOWDEN  
PARTNERSHIP  
Joint Respondents

Member of Authority: David Appleton

Representatives: Greg Gimblett, Counsel, for the Applicant  
Joy Bowden for the respondents

Investigation Meeting: Determined on the papers by consent of the parties

Submissions Received: 24 September and 4 November 2014 from Applicant  
8 and 30 October 2014 from Respondent

Date of Determination: 5 November 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. The respondents breached s 12A of the Wages Protection Act 1983, and a penalty of \$5,000 is imposed upon them as a consequence.**
- B. The financial position of the respondents requires that the Authority order payment of the penalty by instalments. The payment regime is set out in this determination at paragraph 49.**
- C. If any recoverable costs have been incurred by the Labour Inspector in making her application and she seeks a contribution towards those costs, she is to make an application to the Authority within 14 days of the date of this determination.**

### **Employment relationship problem**

[1] The Labour Inspector seeks a penalty to be imposed upon the respondents pursuant to s.13 of the Wages Protection Act 1983 (the 1983 Act), following the respondents admitting to receiving unlawful premiums from an employee (Ms Savita Saharan) contrary to s.12A of the 1983 Act.

[2] The respondents (Bowdens) do not expressly oppose the imposition of a penalty but state that their financial position would necessitate payment in small weekly instalments.

### **Background**

[3] Unless otherwise stated, these facts are taken from the statement of problem, documents attached to it, and the submissions lodged by and on behalf of the Labour Inspector. These stated facts have not been disputed by the respondents, and I therefore accept them as true and accurate.

[4] Mr and Mrs Bowden operated a milk distribution business in Christchurch and employed Ms Saharan, who required a work visa to work in New Zealand, to deliver milk. Her job title in her individual employment agreement was that of *Stock and Distribution Manager*, although this was not the work she actually carried out. The employment agreement also stated that she was to work 35 hours a week and receive \$20 an hour.

[5] However, it appears that these elements of her employment agreement were drafted in order to mislead Immigration New Zealand (INZ) into granting Ms Saharan a work visa. In addition, Ms Saharan was required to pay directly to the respondents the sum of \$7,000, in monthly instalments of \$1,000, together with an additional \$284.45 a week to cover her tax. Ms Saharan ultimately paid the sum of \$8,260 to the respondents between 10 May and 13 August 2013.

[6] Ms Saharan's employment was terminated by the respondents on 31 August 2013. The Labour Inspector states that Ms Saharan worked a total of 669 hours for the respondents and should have earned the gross sum of \$13,380 in accordance with her contractual hourly rate of \$20. However, taking into account PAYE accounted for to the Inland Revenue Department, Ms Saharan only retained \$2,924.59 of her wages, which equates to a net payment of \$4.37 an hour.

[7] Ms Saharan also paid a further \$13,000 to a third party to arrange her employment with the respondents, although the Labour Inspector accepts that there is no evidence that the respondents benefitted from any of this payment.

[8] Counsel for the Labour Inspector submits that the respondents breached minimum pay entitlements in an egregious way, and gained competitive advantage through unlawfully employing Ms Saharan on such a cheap rate.

[9] The Labour Inspector agrees that the \$8,260 paid by Ms Saharan to the respondents has now been repaid to her by them in full.

### **The issues**

[10] First, it is necessary to determine whether there has indeed been a breach of s.12A of the 1983 Act. If there has been, it will then be necessary to determine whether a penalty should be imposed and if so, in what amount.

### **Was there a breach of s.12A of the 1983 Act?**

[11] Section 12A of the 1983 Act provides as follows:

***12A No premium to be charged for employment***

*(1) 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.*

*(2) Where an employer receives any amount of money in contravention of subsection (1), whether by way of deduction from wages or otherwise, then, irrespective of any penalty to which the employer thereby becomes liable, the person by whom the money was paid or, as the case may be, from whose wages it was deducted, may recover that amount from the employer as a debt due to the person; and civil proceedings for the recovery of the amount may be instituted in the Employment Relations Authority by the person or, notwithstanding any disability to which the person is subject, by a Labour Inspector designated under section 223 of the Employment Relations Act 2000 on behalf of the person.*

*(3) Any such proceedings instituted by any Labour Inspector may be continued or conducted by the same or any other Labour Inspector.*

[12] Although the Bowdens effectively admit to a breach, they are not legally represented, and the Authority must be objectively satisfied that there was a breach of s.12A of the 1983 Act as asserted by the Labour Inspector.

[13] In *Sears v Attorney-General* [1994] 2 ERNZ 39 (EmpC) the Employment Court held, at [61] that:

*In the normal understanding of the term a premium imports some consideration paid or demanded as a price of a contract.*

[14] Mr Gimblett submits that the premium was charged by the Bowdens in exchange for providing a false job, in order to deceive the INZ authorities. Ms Bowden states in her submission that she and her husband were at fault for *not understanding how immigration worked for getting a Work Visa*. She effectively states that Ms Saharan took the initiative for misleading the immigration authorities but concedes that they were at fault for going along with the deception.

[15] I did not take any evidence from Ms Saharan so cannot judge whether what Ms Bowden says is true about Ms Saharan effectively taking the initiative. However, it is clear that the Bowdens signed an employment agreement bearing incorrect details as to job title and hourly rate, knowing that the agreement was to be used to assist Ms Saharan obtain a work visa.

[16] Ms Bowden admits that they could not afford to pay Ms Saharan \$20 an hour. It appears that at least some of the payments made by Ms Saharan to the Bowdens was to pay them back the difference between the agreed hourly rate of \$20 and what they could afford to pay her; namely \$17 an hour. However, that only accounts for \$2,007.

[17] I believe that, on balance, given the fact that the Bowdens charged Ms Saharan more than four times the difference between the \$20 per hour rate and the rate they say they could afford to pay, it is more likely than not that Ms Saharan was being charged in return for them agreeing to assist in deceiving the immigration authorities as to her role and hourly pay rate, and also for employing her despite her real role not meeting the minimum requirements for obtaining a work visa.

[18] This conduct meets the definition of *premium* referred to in *Sears* in my view and so I am satisfied that there has been a breach of s.12A of the 1983 Act.

### **Should a penalty be imposed upon the respondents?**

[19] Section 13 of the 1983 Act provides:

#### ***13 Penalties***

*Where—*

*(a) any payment is made by or on behalf of any employer in contravention of this Act; or*

*(b) any employer or any person on that employer's behalf contravenes or fails to comply with any of the provisions of this Act,—*

*that employer is liable, at the suit of the worker or of a Labour Inspector designated under section 223 of the Employment Relations Act 2000, to a penalty imposed under that Act by the Employment Relations Authority.*

[20] Section 161(1) of the Employment Relations Act 2000 (the Act) provides that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including (at s.161(1)(m)(v)) actions for the recovery of penalties under s.13 of the 1983 Act.

[21] Section 135 of the Act provides:

***135 Recovery of penalties***

*(1) Any action for the recovery of a penalty may be brought,—*

*(a) in the case of a breach of an employment agreement, at the suit of any party to the employment agreement who is affected by the breach; or*

*(b) in the case of a breach of this Act, at the suit of any person in relation to whom the breach is alleged to have taken place; or*

*(c) if permitted in the particular penalty provision, by a Labour Inspector.*

*(2) Every person who is liable to a penalty under this Act is liable,—*

*(a) in the case of an individual, to a penalty not exceeding \$10,000;*

*(b) in the case of a company or other corporation, to a penalty not exceeding \$20,000.*

*(3) A claim for 2 or more penalties against the same person may be joined in the same action.*

*(4) In any claim for a penalty the Authority or the court may give judgment for the total amount claimed, or any amount, not exceeding the maximum specified in subsection (2), or the Authority or the court may dismiss the action.*

*(4A) The Authority or the court may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it.*

*(4B) In determining whether to give judgment for a penalty, and the amount of that penalty, the Authority or the court must consider whether the person against whom the penalty is sought has previously failed to comply with an improvement notice issued under section 223D.*

*(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—*

*(a) the date when the cause of action first became known to the person bringing the action; or*

*(b) the date when the cause of action should reasonably have become known to the person bringing the action.*

[22] Mr Gimblett refers me to the Employment Court case of *Tan v Yang & Zhang* [2014] NZEmpC 65, in which Her Honour Judge Inglis stated, at [31] and [32] the following:

[31] I turn now to consider whether this is an appropriate case to award a penalty pursuant to s 13 of the WPA, and if so, what the quantum of it should be. The Court is given a broad discretion to decide on the amount of the penalty that should be awarded as there are no guidelines set out in the Act. It is however generally accepted that a penalty should only be imposed for the purpose of punishment and should not be used as an alternative route for increasing compensation.<sup>1</sup>

[32] The following non-exhaustive list of factors may usefully be considered:

- the seriousness of the breach;
- whether the breach is one-off or repeated;
- the impact, if any, on the employee/prospective employee;
- the vulnerability of the employee/prospective employee;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.

[23] In *Xu v McIntosh*, the Employment Court gave this guidance on the imposition of penalties:

[47] *The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*

[48] *The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*

[24] In order to determine whether a penalty should be imposed, I will adopt the elements identified in *Tan*.

#### *The seriousness of the breach*

[25] I agree with Mr Gimblett that the actions of the Bowdens seriously undermined the integrity of the New Zealand immigration scheme generally and the work visa regime specifically. However, I am not convinced that this is a matter that I can take into account in respect of the imposition of a penalty under the 1983 Act, as separate legislation beyond the jurisdiction of the Authority (such as the Immigration Act 2009) addresses the conduct of the respondents complained of by the Labour Inspector insofar as it impacts upon immigration laws.

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<sup>1</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC).

[26] However, I can take into account the amount of the premium levied upon Ms Saharan, which was significant relative to her earnings. I also take into account the fact that the Bowdens are more likely than not to have known that what they were doing was unlawful. Even if they did not, ignorance of the law is no excuse. I certainly do not believe that the Bowdens committed a mere technical and inadvertent breach of the 1983 Act.

[27] All in all, I accept that the breach of the 1983 Act by the Bowdens was a serious breach, although not at the top of the scale.

*One-off or repeated?*

[28] Only one employee was affected it appears. The breach did continue over the whole of the employee's employment however. Five separate breaches occurred because five separate payments were made by Ms Saharan to the Bowdens. This was not a one-off event therefore.

*The impact on Ms Saharan*

[29] No direct evidence was given by Ms Saharan and so I am unable to assess this. However, it can generally be inferred from the situation under investigation that there would have been at least an adverse financial impact upon Ms Saharan.

*The vulnerability of Ms Saharan*

[30] Again, no direct evidence was heard from Ms Saharan, but I can infer that, as a migrant worker, Ms Saharan was vulnerable to pressure from the Bowdens. As Her Honour Judge Inglis stated in *Tan*, at [1]:

*Migrant and would-be migrant workers are vulnerable to exploitation. There has been a discernible upswing in cases involving a failure to comply with minimum employment standards in relation to such workers*

*The need for deterrence*

[31] I agree with Mr Gimblett, citing *Tan*, that the purpose of a penalty is to punish and deter others from engaging in such conduct and that this should be an important consideration in this case.

[32] It is all too easy for employers, especially small ones like the Bowdens, to turn a blind eye to employment legislation when they are dealing with migrant workers. This is proven by the number of cases that regularly come before the Authority and the Employment Court each year. Given that the motivation of such conduct is invariably monetary, the most effective deterrent, apart perhaps from adverse publicity, is the knowledge that they will face a significant penalty.

*Remorse shown by the party in breach*

[33] In her submissions on behalf of herself and her husband Mrs Bowden has fulsomely expressed contrition and responsibility for their acts. I note also that she and her husband have paid back to Ms Saharan all the money that they obtained from her. This is a significant step, avoiding the need for compliance orders and enforcement by the Labour Inspector.

*Conclusion*

[34] In conclusion, I am satisfied that it is appropriate to impose a penalty upon the respondents.

**What should be the quantum of the penalty?**

[35] First, as the respondents were operating as a partnership, it is necessary to determine what the maximum penalty the respondents can face, \$10,000 or \$20,000. S.135 (2) does not expressly refer to partnerships.

[36] The respondents are not a company but are they an *other corporation*? Section 13 of the Partnership Act 1908 provides as follows:

***13 Liability of the firm for wrongs***

*Where by the wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.*

[37] Using this section as guidance, I conclude that, as the partnership was a party to the employment agreement with Ms Saharan, their breach of s.12A of the 1983 Act should be treated as a breach by one of the Bowdens, so that the appropriate maximum is that applying to individuals, namely, \$10,000.

[38] Second, it is necessary to determine what the quantum of the penalty should be. The final element in *Tan*, which will assist in determining quantum, is to consider the range of penalties in comparable cases. In *Tan*, where a premium of \$7,000 was demanded, a penalty of \$6,000 was imposed. In *Ling Lin v Sandy Zhou and New Times Press Limited* [2012] NZERA Auckland 43, where significant egregious breaches of s12A were found to have occurred, penalties of \$7,000 and \$15,000 were imposed upon the first and second respondent respectively.

[39] I believe that the starting point in a case like this is roughly two thirds of the maximum that can be awarded under s.135(2)(a) of the Act; namely \$6,500. Although there are two individual respondents, I believe that it is just to treat them as one individual for the purposes of this section of the Act.

[40] In fixing the amount to impose, I take into account the fact that the respondents express contrition and have met with Ms Saharan with a mediator, at the end of which, Mrs Bowden reports, they all agreed to move on. Mrs Bowden also acknowledges the stress, humiliation and hurt caused to Ms Saharan. I believe that this merits a reduction in the starting point of \$6,500.

[41] All in all, I believe that it is appropriate to impose a penalty of \$5,000.

[42] Although I cannot reach any definitive conclusion as to the role that Ms Saharan played in what occurred, she clearly had some knowledge of the fact that the immigration authorities were being misled on her behalf, and so it would not be just to order that any part of the penalty be paid directly to her pursuant to s.136(2) of the Act.

#### *Payment by instalments?*

[43] Section 135(4A) of the Act allows the Authority to order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it.

[44] The respondents have stated that they would need to pay any penalty by instalments. I therefore directed the respondents to give me evidence of their present joint outgoings and income so I can assess whether their financial position required that, pursuant to s.135(4A) of the Act.

[45] Ms Bowden produced an affidavit which set out the income and outgoings of her and her husband. From this information, which was not backed up with any independent evidence, the Bowdens receive a net income of \$4,131, but have monthly outgoings in the region of \$5,746. This level of expenditure is clearly unsustainable, and I have little doubt that the Bowdens will need to address urgently both the level of their income and their outgoings, at least in the short term, to ensure their solvency.

[46] Given this urgent need, I am satisfied that the financial position of the Bowdens requires that the Authority order payment of the penalty by instalments.

[47] In arriving at an appropriate sum, I have to balance what is a manageable instalment regime against the purpose of the imposition of a penalty; namely, punishment for wrongdoing, as identified in *Xu*.

[48] I believe that payment by instalments of \$250 a month is a reasonable payment regime under the circumstances. I believe that it would be appropriate to give the Bowdens some breathing space to assist them to get their financial affairs into better order before the first payment is due, and I therefore direct that the first instalment payment does not need to be paid until Friday 9 January 2015.

### **Order**

[49] I order that the total sum of \$5,000 be paid by the respondents (who are jointly and severally liable for payment of this sum) into the Authority in the following instalments on the following dates:

- a. \$250 on or before Friday 9 January 2015;
- b. A further 19 instalments of \$250 each on or before the first Friday of each following consecutive month, save where such date falls on a public holiday, in which case payment is to be made by the next working day thereafter.

[50] I further order that, if any default occurs in the above payment scheme, the balance remaining to be paid shall become payable in full immediately upon the first working day after the day when the instalment in default was due to have been paid.

[51] The Authority will pay each instalment received into a Crown Bank Account.

[52] This instalment regime does not prevent the Bowdens from paying the penalty imposed in full, or by way of greater and/or more frequent instalments if they so wish.

### **Costs**

[53] The respondents have already paid back to the Labour Inspector the cost of their lodgement fee. However, it is not clear whether any further recoverable costs have been incurred by the Labour Inspector in making her application for the imposition of a penalty. If they have, and if the Labour Inspector seeks a contribution towards those costs, she is to make an application to the Authority within 14 days of the date of this determination.

David Appleton  
Member of the Employment Relations Authority