

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 208
5452582 and 5454613

BETWEEN

KATE FEENEY,
LABOUR INSPECTOR
Applicant

AND

BY LIMITED, T/A VIZ CAFE
Respondent

Member of Authority: Robin Arthur

Representatives: The Labour Inspector in person
No appearance for the Respondent

Investigation Meeting: 28 May 2014

Determination: 29 May 2014

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination, BY Limited (BYL) must:**
- (i) Comply fully with the terms of the Improvement Notice issued to it by the Labour Inspector on 27 November 2013.¹**
 - (ii) Pay a penalty of \$3000 to the Authority (for transfer to the Crown Account) for failing to comply with all the terms of the Improvement Notice by the date set in that notice.²**
 - (iii) Pay \$6120 to the Inspector, for the benefit of its former employee Fei Teng, as wage arrears.³**
 - (iv) Pay a further penalty of \$5000 for breach of the Wages Protection Act 1983 (and pay \$2000 of that amount**

¹ Under s137(1)(a)(iiib) of the Employment Relations Act 2000 (the ERA).

² Under s223F and s135(1)(c) of the ERA.

³ Under s131 of the ERA.

directly to the Inspector for transfer to Fei Teng and pay the remainder of \$3000 to the Authority for transfer to the Crown Account).⁴

B. BYL must also pay the further sum of \$143.12 to the Inspector in reimbursement of the fees paid to lodge these two matters in the Authority.

Employment relationship problem

[1] The Labour Inspector made two applications about failure of the respondent company, BY Limited (BYL), to observe various statutory requirements in its employment relationships with staff at the café it operated in the downtown Auckland area.

[2] One application concerned information that BYL made one employee, Fei Teng, pay back \$200 a week in cash from the wages it credited to her bank account each pay day. On Ms Teng's behalf the Inspector sought an order requiring BYL to pay wage arrears for those cash amounts (which had totalled \$6120 over a six month period) and to pay a penalty for breach of the Wages Protection Act 1983 (the WPA).

[3] The other application sought an order requiring BYL to comply with the terms of an Improvement Notice issued to it on 27 November 2013 and to pay a penalty for failing to comply with that notice.

[4] The Inspector also sought reimbursement of the \$71.56 filing fee paid to the Authority to lodge both applications.

Non-appearance of the respondent

[5] BYL did not lodge a statement in reply to either application, did not attend the case management conference convened to set a date for the Authority investigation meeting, and was not represented at the investigation meeting. Courier records show correspondence and notices about the statement in reply, the case management conference and the investigation meeting were delivered to the company's registered

⁴ Under s13 of the Wages Protection Act 1983 and s136 of the ERA.

address for service – at the café premises – and were signed for by its director, Bin Zhang. That correspondence include an Authority Minute specifically advising that a director or other representative of the company attending the investigation meeting would have the opportunity to be heard even though no statement in reply had been lodged.

[6] No representative of the company attended at the time notified for the investigation meeting. After waiting 15 minutes I proceeded as no good cause was shown for the failure of BYL to attend or be represented.⁵

[7] In the absence of any information directly from BYL I have relied on the Inspector's evidence to determine the issues raised by her application.

Wages arrears

[8] From the documents lodged by the Inspector, and her sworn oral evidence of her interview of Ms Teng, I was satisfied Mr Zhang had required Ms Teng to hand back to him, in cash, part of her wages over a six month period between April and September 2013. Copies of text messages between Ms Teng and Mr Zhang and of Ms Teng's bank statements confirmed details of direct credit payment of wages to Ms Teng's account and the withdrawals of cash by her to hand over to Mr Zhang.

[9] Ms Teng made those payments because Mr Zhang told her they were needed as the business was not profitable and in order for her to keep her work visa with the company.

[10] As stated in the Inspector's application, the company breached the following provision of the WPA by making that requirement of Ms Teng:

12 Employer not to stipulate as to mode of spending wages

No employer shall impose any requirement on any worker as to any place or manner in which or any person with whom that worker shall expend wages received by that worker, or dismiss any worker on account of any place or manner in which or any person with whom that worker expends those wages.

⁵ Clause 12 of Schedule 2 of the Employment Relations Act 2000.

[11] Although not expressly cited in the Inspector's application, the company's actions also plainly breached the WPA s12A prohibition on charging a premium for employment.

[12] BYL's unlawful stipulation that Ms Teng pay part of her wages back to it must be remedied, in part, by the order for wage arrears set out at the beginning of this determination.

Compliance order

[13] The Improvement Notice issued to BYL required the company to do certain things in order to comply with minimum statutory requirements – provide written employment agreements, pay at least minimum wages and holiday pay, calculate and pay arrears of wages owed to two employees who were not paid minimum wages and public holiday payments due to them, and to establish and keep wages and time records. It also required the company to show the Inspector those employment agreements, records and calculations (as the Inspector was empowered to ask for under s229(1)(c) of the Employment Relations Act 2000 (the ERA)).

[14] The Improvement Notice included a term requiring compliance by 9 January 2014 but the Inspector did not make her application to the Authority until 19 March and that application was not heard until 28 May. As a result BYL has already had more than four additional months in which to take steps to comply fully with the terms of the Improvement Notice.

[15] However the Inspector advised that, as of the date of the Authority's investigation meeting, the company had complied with only some of the terms of the Improvement Notice. Written employment agreements had been provided to current employees. The company had reviewed wages to Ms Teng prior to April 2013 to check whether she was paid the minimum wage for each hour worked but had not shown that it had paid her wage arrears due for that period. It had reviewed public holiday arrears due to current and previous employees but had not shown the Inspector that it had paid any arrears due.

[16] There remained significant areas where the company had failed to comply with the Notice. The order for compliance, set out at the beginning of this

determination, was required to remedy those omissions. The areas where compliance was still required related primarily to providing evidence to the Inspector that BYL now kept and maintained records of wages, time and holiday pay and that BYL had paid any arrears due. However if the company has not done either thing fully – to make records and pay arrears – it must now do those things within the period stated in the compliance order and provide evidence to the Inspector of having done so.

[17] The Improvement Notice, and the order to comply with it, includes a payment to Ms Teng for minimum wages due to her. I was satisfied that was for an earlier period of her employment with BYL, not the period covered by the order for wages arrears also made in this determination.

Penalties

[18] BYL must pay the penalties imposed under the orders set out at the beginning of this determination for the following reasons.

[19] Penalties are imposed for breaching the WPA, and other minimum employment standards, in order to send an “*unequivocal message*” that this sort of conduct is wholly unacceptable.⁶ Such unacceptable conduct includes circumstances, as seen in this matter, where a vulnerable employee on a work visa was faced with the spectre of losing her visa if she did not comply with her employer’s illegal wishes. In addition to the harm done to such workers, it is also an affront to those many other businesses that do make the effort of cost and time to properly observe the expected community standards as expressed in the legislation enacted by Parliament.

[20] Section 13 of the WPA empowers the Authority to impose a penalty on any employer that contravenes that Act’s provisions. In considering whether to award such a penalty for BYL’s breach and, if so, what amount it should be, I concluded a penalty of \$5000 ought to be imposed because:

- (i) The amount Ms Teng was required to pay to Mr Zhang represented a significant portion of her weekly income, and brought her net income well below her minimum wage entitlements, so was a serious breach of her

⁶ See *Tan v Yang & Zhang* [2014] NZEmpC 65 at [34] and the cases cited at [1] of that decision.

rights that, by its nature, was inherently harmful to her standard of living and personal security.

- (ii) She was required to make a total of 17 payments over a six-month period (before she sought legal help to stop it) so the breach was not a ‘one-off’ but was repeated.
- (iii) The breach was not technical or inadvertent but deliberate and calculated, coercing the payment from a vulnerable worker by the threat that if she did not comply she would lose her work visa.
- (iv) A substantial penalty was required, not only to punish BYL for its action, but also to deter other employers who might engage in such conduct.
- (v) BYL provided the Authority with no explanation for, and expressed no remorse about, its conduct.
- (vi) A penalty of that amount was consistent with the range imposed in comparable cases, most recently by the Employment Court in *Tan v Yang & Zhang* (and the cases referred to at [36] of that decision).⁷

[21] Section 223F of the ERA authorises the Authority to impose a penalty on an employer who fails to comply with an Improvement Notice. In considering whether to award such a penalty for BYL’s failure to meet all the terms of the Notice, I concluded a penalty of \$3000 ought to be imposed because:

- (i) The company had adequate opportunity to meet the requirements and to provide the Inspector of proof of what it had done, so that its failure to provide that information indicated a high likelihood that it was continuing to breach the minimum statutory provisions it was required to observe.
- (ii) Its failure to observe all the terms of the notice caused harm to the employees (who either had not been paid all their minimum entitlements or, given the apparent ongoing absence of proper records, were hindered from checking and proving whether or not their full entitlements were provided).
- (iii) A substantial penalty was required, not only to punish BYL for its non-compliance, but also to deter other employers from failing to comply with an Improvement Notice.
- (iv) The penalty was consistent with the range imposed in comparable cases. To take account of some steps BYL had taken to comply with some terms

⁷ Ibid.

of the Improvement Notice (such as providing written employment agreements to current employees and making some payments to one employee), the amount of the penalty was less than what might have otherwise been awarded. I set the amount at sixty per cent of the amount imposed by the Authority in a recent case of total non-compliance with an Improvement Notice.⁸

[22] Rather than a 'global' penalty I imposed separate penalties for the breach of the WPA and for the non-compliance with the Improvement Notice because both breaches were serious in their own right and involved different actions or omissions.⁹

[23] I was also satisfied, from questioning the Inspector about it, that the events involved in the WPA breach were not referred to or included in the terms of the Improvement Notice, and so there was no imposition of double penalties for the same breach of its obligations.¹⁰

[24] Under s136(2) of the ERA the Authority may order penalties that would normally go to the Crown be paid, in part or whole, to some other person. The Inspector sought an order that part of any penalty awarded for the breach of the WPA be paid to Ms Teng. The harm done to Ms Teng warranted an order for a portion of that penalty to be paid directly to her, being \$2000, with the remainder to be paid to the Authority for transfer to the Crown.

Costs

[25] BYL must also reimburse the Inspector for the two fees paid to lodge her two applications in the Authority.

Robin Arthur
Member of the Employment Relations Authority

⁸ *Kate Feeney, Labour Inspector v Danuja International (PVT) Limited* [2014] NZERA Auckland 165.

⁹ *Xu v McIntosh* [2004] 2ERNZ 448 at [44].

¹⁰ See s223F(2) of the ERA.