

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 196  
3024719

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              E MING LIMITED  
First Respondent

3024731

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              E LYNN LIMITED  
Respondent

Member of Authority:      Vicki Campbell

Representatives:            Martin Denyer for Applicant  
Anmol Shankar for Respondents

Investigation Meeting:      On the papers

Submissions Received:      11 May and 1 June 2018 from Applicant  
25 May from Respondents

Determination:                20 June 2018

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**DETERMINATION OF THE AUTHORITY**

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- A.      E Ming Limited is ordered to pay a penalty of \$16,200 into the Employment Relations Authority. The penalty will then be paid by the Authority into the Crown Bank Account.**

- B. E Lynn Limited is ordered to pay a penalty of \$16,200 into the Employment Relations Authority. The penalty will then be paid by the Authority into the Crown Bank Account.**
- C. E Ming Limited is ordered to reimburse the Labour Inspector the filing fee of \$71.56 on the Labour Inspector's application.**
- D. E Lynn Limited is ordered to reimburse the Labour Inspector the filing fee of \$71.56 on the Labour Inspector's application.**

### **Employment relationship problem**

[1] From 2011 until 27 February 2017 E Ming Limited and E Lynn Limited operated Domino's pizza franchises in Henderson and Te Atatu, Auckland respectively. The operation of both franchises was taken over by Domino's Pizza Enterprises on 28 February which subsequently purchased both franchises.

[2] Mr Xi (Bruce) Chen is a director and shareholder of both E Ming and E Lynn. Neither company currently owns or operates a Domino's pizza franchise or any other business.

[3] During 2017 and 2018 the Labour Inspector undertook an investigation of the Henderson and Te Atatu franchises and found E Ming and E Lynn had:

- a) Failed to provide employees with individual employment agreements that complied with s 65 of the Employment Relations Act 2000 and s 52 of the Holidays Act 2003;
- b) Failed to keep wages and time records that were compliant with s 130 of the Act;
- c) Failed to keep holiday and leave records that complied with s 81 of the Holidays Act.

[4] As a consequence of the lack of records E Ming had underpaid its employees a total of \$23,878.89. E Ming undertook its own calculations and of its own volition

paid 11 of its employees a total of \$11,318.26 in arrears. When Dominos purchased the franchise in October 2017 it calculated that a further \$12,560.63 was owed to former employees. E Ming agreed to allow Dominos to retain the \$12,560.63 at the time of settlement and for Dominos to pay the additional sum to the former employees.

[5] As a consequence of the lack of records E Lynn had underpaid its employees a total of \$30,746.61. On its own volition E Lynn calculated and paid 23 of its former employees a total of \$17,588.58 in arrears. When Dominos purchased the franchise in October 2017 it calculated that a further \$13,158.03 was owed to former employees. E Lynn agreed to allow Dominos to retain the \$13,158.03 at the time of settlement and for Dominos to pay the additional sum to the former employees.

[6] The Labour Inspector has asked the Authority to impose penalties on E Ming and E Lynn for the failures to provide compliant employment agreements and the failure to maintain compliant wage and time and holiday and leave records.

### **Issue**

[7] To resolve the Labour Inspector's claims I must determine what if any penalties should be imposed.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the Labour Inspector, E Ming and E Lynn but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

[9] During a case management call on 26 April 2018 the parties consented to the Authority making a determination of the issues on the papers currently before the Authority and for both matters to be determined at the same time.

### **Penalties**

[10] Failure to comply with minimum standard employment obligations makes an employer liable to penalty actions. Determination of a penalty claim is an exercise of applying the established facts to the principles set down by the Employment Court in

*Borsboom v Preet Pty Ltd.*<sup>1</sup> This case sets out a four step process to be applied by the Authority.

***Step one – nature and number of breaches***

[11] This step requires me to identify the nature and number of applicable breaches. If there are similar or identical multiple breaches I may treat these as a single penalty in respect of each separate affected employee. This approach does not encompass breaches of different statutes.<sup>2</sup>

[12] The Labour Inspector has invited the Authority to apply the penalties to each “category” or type of breach despite the large number of employees affected. That is, to take a global approach for each of the three failures.

Failure to provide compliant employment agreements

[13] The Labour Inspector has established that up to 57 employees were affected by E Ming’s failure to provide compliant employment agreements which, without globalisation would amount to maximum penalties of \$1,140,000.

[14] E Lynn’s failure affected up to 71 employees which, without globalisation, would amount to maximum penalties of \$1,420,000.

Failure to maintain compliant wage and time records

[15] The Labour Inspector has established that up to 46 employees were affected by E Ming’s failure to provide compliant wage and time records which, without globalisation would amount to maximum penalties of \$920,000.

[16] E Lynn’s failure affected up to 23 employees which, without globalisation, would amount to maximum provisional penalties of \$460,000.

Failure to maintain compliant holiday and leave records

[17] The Labour Inspector has established that up to 97 employees were affected by E Ming’s failure to provide compliant holiday and leave records which, without globalisation would amount to maximum penalties of \$1,940,000.

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<sup>1</sup> [2016] NZEmpC 143.

<sup>2</sup> Ibid at [139].

[18] E Lynn's failure affected up to 112 employees which, without globalisation, would amount to maximum penalties of \$2,240,000.

[19] I have accepted the Labour Inspector's invitation to treat each of the separate breaches globally. This will result in maximum penalties of \$20,000 for each respondent for each of the three breaches.

[20] After Step One E Ming and E Lynn are each liable to a total maximum for provisional penalties of \$60,000.

***Step two – severity of breaches***

[21] This step requires me to assess the severity of the breaches and allows me to make adjustments for aggravating and mitigating factors in relation to each breach.

[22] The aggravating factors include:

- a) that minimum standards are well known;
- b) the breaches of the two respondents affected between 23 and 112 employees per breach and resulted in the employees being underpaid; and
- c) the inaccuracy of the records resulted in the Labour Inspector being unable to calculate the arrears.

[23] In mitigation, there is no dispute that employment agreements were provided to employees of E Ming and E Lynn. However, the agreements were not compliant. I accept the submissions made on behalf of the two respondents that the non-compliant employment agreements did not affect the Labour Inspector's ability to calculate arrears or cause the employees to be underpaid.

[24] In addition I have taken the following mitigating factors into account:

- a) The respondents acted reasonably and promptly in acknowledging their failures;

- b) The respondents cooperated fully with the Labour Inspector and the Authority;
- c) The businesses are no longer trading and there are currently no employees working for either business;
- d) Neither of the respondents nor the respondents' director, Mr Chen, have been investigated previously for similar conduct;
- e) The respondents took steps to rectify any arrears owed to former employees resulting from its deficient record keeping;
- f) There is no evidence that the respondents' failures to provide compliant employment agreements were calculated to take advantage of vulnerable employees;
- g) There is no evidence that the respondents' failures to keep compliant wage and time or holiday and leave records were intended to breach minimum legal entitlements.

[25] Employers should be encouraged to act quickly once inadequacies have been identified by the inspectorate. E Ming and E Lynn both acted swiftly to rectify matters without the need for the Labour Inspector to resort to making any orders. Taking into account all of the circumstances of this case I have concluded a reduction of 70% is appropriate.

[26] The total liability for provisional penalties at the end of step two is \$18,000 for each respondent.

***Step 3 - Means and ability of E Ming and E Lynn to pay***

[27] I must now consider the means and ability of each of the Respondents to pay the penalties reached under Step 2.

[28] As already noted neither company is currently trading or carrying on business. I have been provided with financial reports for both companies to the end of March 2018.

[29] The respondents have made submissions that each is impecunious with limited liquid assets, minimal cash reserves and no assets. E Ming's bank records show it has a current cash balance of \$685.18. E Lynn's bank records show a current balance of \$2,527.93.

[30] The two franchises were sold in October 2017. At this time the Labour Inspector's investigation was ongoing. On 2 February 2018 the Labour Inspector completed his report and stated he intended to request the Authority impose penalties in respect of the non-compliant employment agreements and records.

[31] Knowing the Labour Inspector would be seeking penalties against both companies Mr Chen still arranged a payment of \$70,000 to be made by E Ming to the only other shareholder, Ms Huixia Chen on 19 February. Concurrently Mr Chen arranged a payment from E Lynn to himself as a shareholder of E Lynn of \$15,000. The payment by E Ming to Ms Chen on 19 February followed a payment of \$95,000 made to her from E Lynn on 26 January 2018.

[32] I accept that neither company is in a strong financial position. Taking all of the circumstances into account a further reduction of 10% is appropriate.

[33] After step 3 the total provisional penalties are \$16,200 for each respondent. This equates to a penalty of \$5,400 for each of the three breaches.

***Step 4 – proportionality of outcome***

[34] The Authority must impose a penalty at a level that signals its disapproval of the conduct of E Ming and E Lynn in not meeting minimum standards obligations and which acts as a deterrent to E Ming, E Lynn and other employers who may not be minded to meet their obligations.

[35] The penalties imposed should be proportionate to the amount of money unlawfully withheld.<sup>3</sup> The total amount unlawfully withheld by E Ming was \$23,878.89. The total amount unlawfully withheld by E Lynn was \$30,746.61.

[36] I am satisfied the total penalties to be imposed on each of the respondents is proportionate to the amount of money withheld.

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<sup>3</sup> Ibid at [190].

## **Orders**

[37] E Ming Limited is ordered to pay a penalty of \$16,200 into the Employment Relations Authority. The penalty will then be paid by the Authority into the Crown Bank Account.

[38] E Lynn Limited is ordered to pay a penalty of \$16,200 into the Employment Relations Authority. The penalty will then be paid by the Authority into the Crown Bank Account.

## **Costs**

[39] E Ming Limited is ordered to reimburse the Labour Inspector the filing fee of \$71.56 on the Labour Inspectors' application.

[40] E Lynn Limited is ordered to reimburse the Labour Inspector the filing fee of \$71.56 on the Labour Inspectors' application.

[41] If the Labour Inspectorate wishes to seek an order for a contribution towards its legal costs, apart from reimbursement of the filing fee, it is to first seek to reach agreement with E Ming and/or E Lynn on the amount of that contribution.

[42] If the parties are unable to agree the Labour Inspector shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. E Ming and E Lynn shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell  
Member of the Employment Relations Authority