

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 195
3006934

BETWEEN	A LABOUR INSPECTOR Applicant
A N D	DOUBLE SEVEN SERVICES LIMITED First Respondent
AND	QIN ZHANG Second Respondent

Member of Authority:	Peter van Keulen
Representatives:	Catherine Milnes, counsel for Applicant No appearance for First or Second Respondent
Investigation Meeting:	8 February 2018 at Blenheim
Submissions Received:	8 February 2018, 6 August 2018 and 9 November 2018 from the Applicant
Date of Determination:	20 December 2018

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination, Double Seven Services Limited is ordered to pay to the Labour Inspector, for the benefit of employees the Inspector has identified as being owed payments:**
- (i) \$7,047.35 for minimum wage entitlements;**
 - (ii) \$563.45 for holiday pay entitlements; and**

- (iii) **\$5,065.48 which is a premium under s 12A of the Wages Protection Act 1983.**
- B. Within 28 days of the date of this determination, Double Seven Services Limited must pay to the Authority for transfer to a Crown Bank account penalties in the sum of \$85,000.00.**
- C. Within 28 days of the date of this determination, Qin Zhang must pay to the Authority for transfer to a Crown Bank account penalties in the sum of \$42,500.00.**
- D. Within 28 days of the date of this determination, Double Seven Services Limited must pay the sum of \$1,500.00 together with half of the filing fee of \$71.56 to the Labour Inspector for costs incurred in this matter.**
- E. Within 28 days of the date of this determination, Qin Zhang must pay the sum of \$1,500.00 together with half of the filing fee of \$71.56 to the Labour Inspector for costs incurred in this matter.**

Employment relationship problem

[1] A Labour Inspector has applied to the Authority for payment of wage arrears and penalties relating to breaches of minimum standards.

[2] The Labour Inspector says that Double Seven Services Limited has failed to pay its employees the minimum hourly wage and the correct amount of holiday pay for hours worked and in relation to a public holiday. The Labour Inspector also says Double Seven failed to keep wage and time records, holiday and leave records and employment agreements for its employees. Finally, the Labour Inspector claims that Double Seven charged one of its employees a premium for working.

[3] In respect of all of these defaults the Labour Inspector seeks:

- (a) Wage arrears for the minimum wage shortfall;
- (b) Wage arrears for the holiday pay owing;

(c) An order for payment of the premium;

(d) Penalties against Double Seven for:

- i. Failing to maintain wage and time records;
- ii. Failing to maintain holiday and leave records;
- iii. Failing to provide or retain an employment agreement;
- iv. Failure to pay minimum wage;
- v. Failure to pay employees for public holidays;
- vi. Failure to calculate annual holiday pay for employees;
- vii. Charging a premium; and

(e) Penalties against Qin Zhang, a director and shareholder of Double Seven, as a person involved in the breaches by Double Seven (listed above).

Preliminary matter

[4] Neither Double Seven nor Mr Zhang participated in any part of this matter. A statement in reply has never been lodged and served on behalf of either party; no one participated in case management conferences on behalf of either party; and no one attended the investigation meeting on behalf of Double Seven or Mr Zhang.

[5] I am satisfied that both Double Seven and Mr Zhang have been served with all of the relevant documents and evidence in this matter. In particular a service agent completed personal service of relevant documents on Mr Zhang as a director of Double Seven and in his personal capacity, providing confirmation of Mr Zhang's identity. The documents served included:

- (a) The statement of problem;
- (b) A notice of investigation meeting;

(c) A minute of the Authority advising of the intention to proceed with the investigation meeting if the respondents did not attend and no explanation was provided for their non-attendance; and

(d) All of the evidence in this matter, including a signed brief of evidence from the Labour Inspector and spreadsheets setting out all of the calculations of wage arrears.

[6] Despite receiving all of this information, Double Seven and Mr Zhang did not attend the investigation meeting and neither contacted the Authority to explain why they could not or would not attend.

[7] In all the circumstances, I was satisfied that Double Seven and Mr Zhang were aware of the investigation meeting, the issues that would be addressed and that if they did not attend the investigation meeting I would proceed without them. On this basis, I proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Non-publication

[8] The Labour Inspector has sought orders for non-publication of the employees from Double Seven who have been involved in this matter in order to protect them against any adverse consequences of their involvement. I accept that this is appropriate.

[9] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication the names of any of the employees of Double Seven who have been involved in the Labour Inspector's investigation into alleged breaches of minimum standards by Double Seven and the investigation of this matter in the Authority.

Background Facts

[10] Double Seven operated a viticulture labour contracting business in Marlborough.

[11] Double Seven paid its employees on a piecemeal rate, that is, a price per piece of work completed. In an impromptu visit to vineyards as part of a wider operation being undertaken by the Labour Inspectorate, the Labour Inspector became aware that some employees of Double Seven might not be receiving the minimum wage rate due to the piecemeal rate being

operated. That is, some employees complained that they were not completing enough pieces of work each hour so that the piece rate they were paid met the minimum wage rate for an hour of work.

[12] The Labour Inspector followed up this concern by serving a notice on Double Seven, dated 7 July 2016, requiring it to produce wage and time records for the period 1 May 2016 to 7 July 2016. Double Seven provided documents in response to this request on 13 July 2016.

[13] The Labour Inspector also received information from employees of Double Seven about the hours they had worked, which conflicted with the records provided by Double Seven.

[14] The Labour Inspector then served a second notice, dated 15 August 2016, seeking wage and time records for the period 1 May 2016 to 31 July 2017.

[15] On 5 September 2016, Double Seven provided records to the Labour Inspector. A review of these records by the Labour Inspector revealed that some time records had been altered to reflect that some employees had been paid the minimum wage.

[16] And then a third notice, dated 19 September 2016, was served on Double Seven requiring it to produce wage and time records for the period 1 August to 4 September 2016.

[17] On 11 October 2016, Double Seven provided further records to the Labour Inspector.

[18] Through September and October 2016 the Labour Inspector also received further information from employees of Double Seven.

[19] After analysing all of the records received from Double Seven and the information received from various employees, the Labour Inspector compiled spread sheets identifying deficiencies in the records kept and provided by Double Seven and breaches of minimum wage entitlements and holiday pay entitlements.

[20] On 25 October 2016, the Labour Inspector interviewed Mr Zhang. Mr Zhang was unable to provide an adequate response to the identified breaches nor explain what appeared to be the falsified entries in the subsequent records provided by Double Seven.

[21] The Labour Inspector then produced an investigation report and served this on Double Seven and Mr Zhang. It appears that after this report was produced there was no further involvement in this matter by Double Seven or Mr Zhang.

Analysis

Breaches

[22] I have carefully reviewed the Labour Inspector's evidence and in particular reviewed his calculations and investigation report. I have also assessed the various statements received from employees. Based on this assessment I am satisfied that Double Seven has:

- (a) Failed to keep wage and time records in breach of s 130 of the Employment Relations Act 2000 (the Act).
- (b) Failed to keep holiday and leave records in breach of s 81 of the Holidays Act 2003.
- (c) Failed to provide or retain employment agreements for 104 employees in breach of s 64(1) of the Employment Relations Act.
- (d) Failed to pay minimum wage to 21 employees in breach of s 6 of the Minimum Wage Act 1983. The minimum wage arrears total \$7,047.35.
- (e) Failed to pay holiday pay entitlements to 21 employees in breach of ss 23 and 27 of the Holidays Act. The holiday pay arrears total \$563.45.
- (f) Failed to calculate annual holiday pay for 21 employees pursuant to s 23 of the Holidays Act.
- (g) Failed to pay 13 employees at least their minimum daily pay for a public holiday in breach of s 49 of the Holidays Act.
- (h) Charged an employee a premium for working in breach of s 12A of the Wages Protection Act 1983. The total premium paid was \$5,065.48.

Recovery of money

[23] The Labour Inspector seeks orders for recovery of the minimum wage shortfall, unpaid holiday pay and the premium against Double Seven as the employer and Mr Zhang as a person involved in the breaches by Double Seven.

[24] In terms of Mr Zhang's liability for payment of the claimed wages shortfall, unpaid holiday pay and the premium charged, I first need to be satisfied that he is a person involved in the breaches pursuant to s 142W of the Act.

[25] Section 142W of the Act provides:

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person –
 - a. has aided, abetted, counselled, or procured the breach; or
 - b. ...; or
 - c. has been in any way, directly or indirectly, knowingly concerned in or party to, the breach; or
 - d.
- (2) However, if the person in breach is a company ... a person holding a position in relation to the person in breach may be treated as a person involved in a breach only if the person is an officer of the person in breach.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of a person in breach:
 - a. A person occupying the position of director of a company if the person in breach is a company;
 -

[26] Applying this section, I need to be satisfied of two things:

- (a) That Mr Zhang has aided, abetted, counselled or procured the breaches of minimum standards or that he was in any way, directly or indirectly, knowingly concerned in or party to, the breaches of minimum standards.
- (b) That Mr Zhang was a director of Double Seven - as Double Seven (being the person in breach) is a company.

[27] Mr Zhang was and remains a director of Double Seven.

[28] Mr Zhang was also the sole shareholder of Double Seven and based on the evidence he appears to have been operating as the general manager or CEO, effectively running and controlling the operations of Double Seven.

[29] I am satisfied, on the evidence I received that Mr Zhang has aided, abetted, counselled or procured the breaches and that he was knowingly concerned in or party to, the breaches of minimum standards.

[30] So it follows that I am satisfied that Mr Zhang is a person involved in a breach for the purposes of the repayment orders that the Labour Inspector seeks against him.

[31] Mr Zhang's liability to meet the payments, which are otherwise the responsibility of Double Seven, then turns on the provisions of various Acts:

- (a) For the minimum wage arrears, liability is determined pursuant to s 11A of the Minimum Wage Act 1983.
- (b) For the holiday pay arrears, liability is determined pursuant to s 77A of the Holidays Act 2003.
- (c) For the recovery of the premium paid, liability is determined pursuant to s 11A of the Wages Protection Act 1983.

[32] All three provisions, set out similar requirements for recovery of money:

- (a) The employee must be entitled to the money under the relevant Act, the money is unpaid due to non-compliance with the relevant Act and the person from whom payment is sought is a person involved in the non-compliance – which is the same as a person involved in a breach under s142W of the Act.
- (b) The recovery can only be ordered to the extent that the employee's employer is unable to pay the money owed.

[33] For all three sets of recovery sought against Mr Zhang I am satisfied that employees are entitled to the money claimed under the applicable Acts, the money has not been paid due

to non-compliance with the applicable Acts and Mr Zhang is a person involved in the non-compliance.

[34] However, I am not satisfied at this stage that Double Seven is unable to pay. I accept that it has not paid the amounts sought, but the non-payment arises in respect of its breaches of minimum standards, not because it was unable to pay.

[35] For this reason I think the application for recovery of money against Mr Zhang is premature. I will order payment of the amounts sought against Double Seven. If Double Seven does not pay, then I will consider the application for repayment to be ordered against Mr Zhang. In this regard, the Labour Inspector has permission to come back to me seeking such orders for payment against Mr Zhang if payment is not made by Double Seven.

Orders for payment

[36] Based on my conclusions above I order Double Seven to pay to the Labour Inspector, within 28 days of this determination:

- (a) \$7,047.35 for minimum wage entitlements for the 21 employees;
- (b) \$563.45 for holiday pay entitlements for the 21 employees; and
- (c) \$5,065.48 for the premium charged to an employee.

Penalties

[37] Having established that breaches of minimum standards have occurred I must now determine if penalties should be awarded against Double Seven and Mr Zhang.

[38] Applying s 133A of the Act as well as the other matters outlined by Judge Inglis in *David Lumsden v SkyCity Management Ltd*¹ I have determined that it is appropriate to impose penalties against Double Seven.

[39] In terms of Mr Zhang's personal liability for penalties, this is governed by ss 142W and 142X of the Act and the corresponding provisions under the Minimum Wage Act 1983, the Holidays Act 2003 and the Wages Protection Act 1983.

¹ [2017] NZEmpC 30.

[40] Essentially, I need to be satisfied that Mr Zhang is a person involved in the breaches under s 142W and penalties can be imposed for those breaches. I have already determined that Mr Zhang is a person involved in the breaches and that penalties can and should be imposed for the various breaches I have found to have occurred.

[41] I must now calculate quantum of those penalties and will do so based on the four step analysis set out in *Borsboom v Preet PVT Ltd*². In terms of assessing quantum for penalties awarded against Mr Zhang I am guided by the principles set out in *A Labour Inspector v Sampan Restaurant Limited and Yu Ouyang*³.

Step 1 – Nature and number of breaches

[42] I am satisfied that the following breaches have occurred – Double Seven:

- (a) Failed to keep wage and time records for 199 employees.
- (b) Failed to keep holiday and leave records for 199 employees.
- (c) Failed to provide or retain employment agreements for 104 employees.
- (d) Failed to pay minimum wage to 21 employees.
- (e) Failed to calculate and pay annual holiday pay for 21 employees.
- (f) Failed to pay 13 employees at least their minimum daily pay for a public holiday.
- (g) Charged an employee a premium for working.

[43] For each identified breach, I can impose a penalty of up to \$20,000.00 for Double Seven and \$10,000.00 for Mr Zhang. Therefore, the maximum penalty exposure for Double Seven is \$11,580,000.00 and for Mr Zhang is \$5,790,000.00.

[44] In *Preet* the Court identified that as part of this first step it is appropriate to consider whether a global penalty can be imposed for multiple and similar breaches. I accept that it is appropriate to impose global penalties for some of the repeat breaches outlined above. Whilst

² [2016] NZEmpC 143.

³ [2018] NZEmpC 69.

it is not common to globalise breaches across a number of employees there are circumstances where this has occurred⁴, and in this case, I will globalise the record keeping breaches.

[45] After globalisation I have the following breaches:

- (a) One global failure to keep wage and time records.
- (b) One global failure to keep holiday and leave records.
- (c) One global failure to provide or retain employment agreements.
- (d) Twenty-one failures to pay employees minimum wage.
- (e) Twenty-one failures to calculate and pay holiday pay entitlements.
- (f) Thirteen failures to pay minimum daily pay for a public holiday.
- (g) One breach of charging a premium for working.

[46] The maximum penalty liability for 59 breaches is \$1,180,000.00 for Double Seven and \$590,000.00 for Mr Zhang.

Step 2 – Severity of breaches

[47] In this step I must consider the severity of the breaches and based on that assess what percentage of the total possible penalty that I have at the end of this step, should be imposed.

[48] Double Seven has failed to pay minimum standards, failed to keep mandatory records and has charged a premium to an employee. These are all serious breaches. The breaches of minimum standards are compounded because the Labour Inspector has been unable to check the full extent of any possible failure to comply with minimum standards because the mandatory records were not kept. And, it follows that the full extent of any losses suffered by employees of Double Seven cannot be fully understood.

⁴ See for example, *A Labour Inspector of the Ministry of Business, Innovation and Employment v DK Transport (2009) Ltd* [2017] NZERA Auckland 97 and *A Labour Inspector of the Ministry of Business, Innovation and Employment v Precise Contracting Limited* [2017] NZERA Christchurch 56.

[49] Further, Double Seven has exploited vulnerable migrant employees, employees who will have had little knowledge of their rights or, if they did know their rights, little power or ability to enforce their rights.

[50] And then when faced with an enquiry into its employment practices and its compliance with employment obligations Double Seven initially participated but it appears only to the extent that it put forward information that it believed would wrongly show it had complied, including providing amended information that was clearly incorrect. Once it became clear to Double Seven that the Labour Inspector was not going to be misled by its information, Double Seven and Mr Zhang stopped assisting and then did not engage at all in this action.

[51] In terms of Mr Zhang, he was the shareholder and Director of Double Seven, he was the controlling mind and the person who acted as the company – I attribute all of the seriousness of Double Seven’s offending to Mr Zhang. I see no reason to separate him out from the culpable behaviour.

[52] This is a list of quite serious aggravating features and my view is this behaviour should sound in a penalty of 90% of the maximum. The total provisional penalties after assessing severity are therefore \$1,062,000.00 for Double Seven and \$531,000.00 for Mr Zhang.

[53] There are no mitigating factors and therefore no further reduction at this stage.

Step 3 – Means and ability of Double Seven to pay

[54] Step 3 is an assessment of the respondents’ ability to pay any fine and it informs a consequent reduction in the penalty amounts at the end of step 2, if appropriate.

[55] In this case my assessment is very simple as neither Double Seven nor Mr Zhang participated in my investigation there is no evidence to support any reduction in the penalty amounts because of their ability to pay.

[56] The total provisional penalties at the end of step 3 remains \$1,062,000.00 for Double Seven and \$531,000.00 for Mr Zhang.

Step 4 – Proportionality

[57] It is clear from *Preet* that the penalties imposed should be proportionate to the amount of money unlawfully withheld⁵. It is also clear from *Preet* that proportionality requires me to assess the penalties imposed in similar cases to ensure that there is some consistency.

[58] Starting with the ratio between the money withheld, which gives rise to the breach of minimum standards, compared to the amount of penalty imposed, in most cases this ratio is in the region of 1.2 – 1.3 times i.e. the total penalties imposed are 1.2 – 1.3 times the amount withheld. This is consistent with *Preet* itself where the proportionality of the money withheld against the total amount of the penalties is 1.3 times, and the Court was satisfied that was proportionate.

[59] In the case of Double Seven, applying this ratio would mean the penalties imposed based on withholding just over \$12,600.00 in minimum entitlements should be about \$16,400.00. When I consider the number of breaches and the severity of the breaches, this seems inadequate.

[60] However, as I have already noted the failure to keep wage and time records and holiday and leave records for 199 employees means the Labour Inspector has been unable to assess whether the majority of employees of Double Seven received their minimum entitlements – it seems likely that many more employees would not have received their minimum entitlements. Based on the known figures of money withheld for 21 employees, a similar pattern of treatment for all 199 employees would mean Double Seven may actually have withheld approximately \$65,000.00 in minimum entitlements. Applying the ratio of 1.3 to this sum, the total sum of penalties to be imposed on Double Seven would be \$84,500.00, which seems correct.

[61] The second approach to proportionality is to consider the amount of any penalty imposed against similar cases. The difficulty with this assessment is gauging the correct level of similarity – this can be a similar number of breaches, similar types of breaches, similar levels of harm to employees, etc. I have considered the proportionality with cases where the maximum possible penalty is very high, so similar number of breaches for which penalties can be imposed.

⁵ *Preet* at [190].

[62] One way of assessing the proportionality is to consider the ratio of the penalties imposed against the total maximum penalty at the outset. I have considered this ratio from cases where there are a large number of breaches and a high maximum amount of penalty liability. This ratio tends to be in the region of 1 - 3% of that maximum amount imposed as the actual penalty. As an example, in one case,⁶ there were 307 breaches and a possible penalty of \$6,140,000.00 and the resultant penalty was only 2.4% of that amount.

[63] The problem with this assessment is that it does not account for the other steps in the *Preet* analysis – all that I do is simply take the maximum amount of penalty that can be imposed and reduce it so that the actual penalty is around 2%. That is not what *Preet* contemplates and it can lead to disproportionate amounts being imposed – for example in this case I would impose a penalty of approximately \$230,000.00 against Double Seven.

[64] I believe the comparison needs to be based on a ratio that takes account of the other reductions in the maximum penalty amount in the previous three steps. So, a ratio between the level of possible penalty at the end of step 3 of *Preet* against the final penalty. On my assessment of similar cases, this ratio is around 8%. Applying 8% to the penalty amounts I have at the end of step 3 of *Preet* (\$1,062,000.00 and \$531,000.00), I get penalty amounts of \$85,000.00 for Double Seven and \$42,500.00 for Mr Zhang.

[65] Considering proportionality and contrasting this with the seriousness of the offending, including the number of breaches I am satisfied that the total amount imposed by way of penalties against Double Seven is \$85,000.00 and against Mr Zhang is \$42,500.00.

Conclusion on penalties

[66] Within 28 days of the date of this determination, Double Seven must pay to the Authority for transfer to a Crown Bank account penalties in the sum of \$85,000.00.

[67] Within 28 days of the date of this determination, Mr Zhang must pay to the Authority for transfer to a Crown Bank account penalties in the sum of \$42,500.00.

⁶ *A Labour Inspector of the Ministry of Business, Innovation and Employment v Manukau Auto Valet Limited* [2017] NZERA Auckland 85.

Costs

[68] Counsel for the Labour Inspector seeks costs based on the daily tariff. However counsel submits that I should award the Labour Inspector the daily tariff based on a full day despite the investigation meeting taking less than a half day. Counsel says this is appropriate because of the additional work involved and various adjournments, all occasioned by the respondents failing to engage in this matter.

[69] I have considered these submissions against the principles applied to awarding costs in the Authority, as set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*⁷ and other relevant Employment Court and Court of Appeal decisions⁸.

[70] As the Labour Inspector has successfully obtained almost all of the orders sought, costs should follow the event - I will award costs to the Labour Inspector.

[71] Applying the daily tariff is the correct approach but I do not see any basis to apply the tariff to a full day. So, my starting point is to award \$2,250.00 for one half day of investigation meeting. However, I will increase the daily tariff to reflect some of the difficulties and therefore extra cost incurred by the Labour Inspector as a result of the respondents' failure to engage in this matter. I consider an additional \$750.00 is appropriate. Therefore I will award the Labour Inspector \$3,000.00 plus \$71.56 for the filing fee, as a contribution to his costs.

[72] The last consideration is how much of \$3,000.00 costs that I have awarded, should each respondent be liable for. Given the nature of the claims against each respondent, the time spent on the different parts of the claims and the result I believe it is appropriate that each respondent should be responsible for half of the cost incurred.

Costs orders

[73] Within 28 days of the date of this determination, Double Seven Limited must pay the sum of \$1,500.00 together with half of the filing fee of \$71.56 to the Labour Inspector for costs incurred in this matter.

⁷ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808

⁸ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385, *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4, *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, *Daive Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135, *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127

[74] Within 28 days of the date of this determination, Qin Zhang must pay the sum of \$1,500.00 together with half of the filing fee of \$71.56 to the Labour Inspector for costs incurred in this matter.

Peter van Keulen
Member of the Employment Relations Authority