

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 528  
3044631

BETWEEN	A LABOUR INSPECTOR Applicant
AND	GROCERYKING.CO.NZ (2016) LIMITED First Respondent
AND	QING LUO Second Respondent

Member of Authority: Andrew Dallas

Representatives: Miriam Long, counsel for the Applicant  
Diana Hudson, counsel for the Respondents

Investigation Meeting: On the papers

Date of Determination: 12 September 2019

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] A Labour Inspector, Eva Belley, lodged proceedings in the Authority against Groceryking.co.nz (2016) Limited and Qing Luo (known as “Jade”) alleging breaches of minimum employment standards in respect of four workers and four other “helper employees”. At the request of the parties, the Authority resolved the factual dispute between them by issuing a consent determination.<sup>1</sup>

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<sup>1</sup> *A Labour Inspector v Groceryking.co.nz (2016) Limited and Qing Luo* [2019] NZERA 231

[2] The issuance of a consent determination, which also provided that Ms Luo was a “person involved” in the breaches of employment standards under s 142W of the Employment Relations Act 2000 (the Act), has enabled the Authority to consider the potential imposition of penalties against Groceryking and Ms Luo without the need for factual inquiry.

### **The Authority’s investigation**

[3] With the agreement of the parties, the Authority heard this matter “on the papers”. Ms Luo on behalf of Groceryking and herself provided an affidavit setting out relevant financial matters to be taken into account when imposing penalties.

[4] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received from Ms Luo. Although this determination has not referred to all the submissions advanced by the representatives, I record that I have fully considered them.

### **Issues**

[5] The issues for determination are:

- (i) Are Groceryking and Ms Luo liable for the imposition of penalties for the contravention of employment standards and if so, in what quantum; and
- (ii) Should either party contribute to the costs of representation of the other party?

### **The Labour Inspector’s claim for penalties**

[6] Having considered the consent determination, the Labour Inspector’s evidence, Ms Luo’s affidavit and the submissions of the parties, it is appropriate for the Authority to impose meaningful, but proportionate, penalties on Groceryking and Ms Luo.

### *The breaches*

[7] The following breaches have been agreed by consent in respect of Groceryking. It has been further agreed by consent that Ms Luo is a person involved in the breaches as an officer of the company.<sup>2</sup> The breaches are:

- (i) 4 breaches of s 64 of the Act (failure to provide employment agreements);
- (ii) 4 breaches of s 81 of the Holidays Act (failure to keep holiday and leave records);
- (iii) 5 breaches of ss 16, 23, 24, 25 27 of the Holidays Act (failure to pay final holiday pay);
- (iv) 4 breaches of s 130 of the Act (failure to keep wage and time records);
- (v) 2 breaches of s 49 of the Holidays Act (failure to provide payment for an unworked public holiday that was a working day); and
- (vi) 1 breach of ss 46, 49, 50, 56 and 60 (payment for unworked public holiday, time and half for worked public holidays, provision of and payment for an alternative holiday for working on a public holiday)

[8] Based upon a penalty of \$20,000 for each breach of the above Acts, the maximum penalties available to the Labour Inspector against Groceryking are \$400,000. Based upon a penalty of \$10,000 for each breach as a person involved in the breach, the maximum penalties available against Ms Luo are \$200,000. While acknowledging these were technically the maximum penalties applicable, Groceryking and Ms Luo suggested that as they were so inexorably intertwined, it would be “manifestly unfair” to arrive at separate penalties for both. And, to take such an approach would be to impose, in effect, a “double penalty”.

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<sup>2</sup> Employment Relations Act, s 142W

[9] The decision of the Court in *Borsboom v Preet PVT Limited*<sup>3</sup> identified a framework for the assessment of penalties. This analysis has been supplemented in recent times by the enactment of s 133A of the Act and further decisions of the Court.<sup>4</sup> The synthesised penalty analysis now consists of a number of relevant considerations drawn from the statutory framework and the common law. Submissions lodged by the parties were consistent with this analysis.

## **Relevant considerations**

### *Objects of the Act*

[10] Consistent with this step of the penalties analysis, the Labour Inspector identified various objects of the Act said to be relevant to the imposition of penalties. The Court has found these objects are relevant when considering the imposition of penalties, particularly in cases involving migrant workers.<sup>5</sup> This was accepted by Groceryking and Ms Luo. However, issue was taken by Groceryking and Ms Luo, and not surprisingly, about how the Labour Inspector refracted its view of their conduct through the objects.

### *Nature of breaches*

[11] The Labour Inspector said that but for the inspectorate's proactive intervention, the "helper" employee regime that Groceryking and Ms Luo were operating would have gone undetected and there is no reason to believe it would not have continued. In contrast, Groceryking and Ms Luo said the amounts of arrears involved were small and those payments had been made.

[12] The Labour Inspector said while Ms Luo was a relatively recent migrant to New Zealand and that English was her second language, Groceryking and herself were aware of, and partially succeeded in, compliance with employment standards for the "disclosed" employees. However, the Labour Inspector said the situation was very different in terms of the "helper" employees and the actions of Groceryking and Ms Luo were intentional and a deliberate attempt was made to deceive the inspectorate.

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<sup>3</sup> [2016] NZEmpC 143 at [67] and [68].

<sup>4</sup> See, *A Labour Inspector v Pradh Limited* [2018] NZEmpC 110 *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12 and *Nicholson v Ford* [2018] NZEmpC 132.

<sup>5</sup> *Daleson* above n 4 at para [27]

[13] Groceryking and Ms Luo said the breaches were “inadvertent” in respect of the disclosed employees. Groceryking and Ms Luo said while the actions in respect of the “helper” employees appeared intentional they were actually based on a mistaken belief as to the nature of the relationship.

[14] The Labour Inspector said, in effect, that due to the paucity of the records kept by Groceryking the true extent of the default as to employment standards could not be determined. In contrast, Groceryking and Ms Luo said the financial consequences of the breaches were minimal (around \$1800) and Groceryking’s accountant had provided some calculations for the “helper” employees which the Labour Inspector accepted.

[15] Having considered the respective positions of the parties at this point, I accept the Labour Inspector’s submissions as to the severity of the breaches and the appropriate discounts to be applied, including the differential discounts to be applied for breaches of the Act and Holidays Act. So then, the total potential penalties for Groceryking and Ms Luo, after applying discounts, are:

- i. Groceryking: \$256,000; and
- ii. Ms Luo: \$128,000

#### *Mitigating factors*

[16] Groceryking and Ms Luo say the arrears had been paid, the failure to deal with the Labour Inspector’s improvement notice had been accepted and Ms Luo was, in effect, mistaken as to legal obligations owed to the “helper” employees.

[17] The Labour Inspector acknowledged that Groceryking had paid the arrears but noted that the Court has previously observed payment of monies owed is not evidence of contrition and amounts to no more than late performance.<sup>6</sup> The Labour Inspector said its investigation was stymied by a lack of cooperation and, in respect of the “helper” employees, deception. The Labour Inspector further said Groceryking and Ms Luo’s response to the proceedings was “predominately one of dismay at being investigated and avoidance”.

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<sup>6</sup> Daleson above n 4 at [33]-[35]

[18] However, the Labour Inspector accepted there should be some discount at this stage of the analysis and suggested this is 30%. Having considered the submissions of the parties, I find that is an appropriate discount to penalties. So then, total potential penalties are:

- i. Groceryking: \$179,000; and
- ii. Ms Luo: \$89,600

*Ability to pay*

[19] The Labour Inspector said the onus was on Groceryking and Ms Luo to put evidence before the Authority about the ability to pay penalties and at the time of lodging its submissions, this had not been done. The Labour Inspector acknowledged the likelihood of this happening and reserved its position to make submissions. However, the Labour Inspector was able to submit at this stage that Groceryking had continued to trade and had some ability to pay penalties; although financial circumstances of Groceryking were not a “pivotal factor to the penalty-setting exercise”.<sup>7</sup>

[20] Groceryking and Ms Luo would provide an affidavit setting out the financial position of both. They said Groceryking, while continuing to trade, was operating a deficit and could only meet a modest penalty payable by instalments. Ms Luo said she was not in a position to pay penalties at any level being totally dependent on her business for money. She said while she had a modest house, which was subject to a significant security, she did not have savings to speak of.

[21] The Labour Inspector, after taking time to consider Groceryking's accounts, said the business had reasonable liquidity year-on-year. The Labour Inspector also drew attention to reasonable drawings by Ms Luo from the business and the value of her home appeared to be greater than represented based upon cross-referencing with house valuation websites.

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<sup>7</sup> *Daleson* above n 4 at [45]

[22] Having considered the respective submissions of the parties as to this step, I have decided a reasonable discount needs to be applied based on ability to meet any penalties imposed. This should be 50%. So then, at this step of the analysis, the total potential penalties after applying this discount, are:

- i. Groceryking: \$89,500; and
- ii. Ms Luo: \$44,800

*Proportionality of outcome*

[23] The Labour Inspector accepted the application of the proportionality test at this stage of the analysis would result in an overall reduction of penalties. However, the Labour Inspector said the Authority should impose meaningful penalties on Groceryking and Ms Luo.

[24] Groceryking and Ms Luo said that a consideration based on proportionate outcome ought to result in a significant reduction in penalties payable by them. In advancing this submission, they relied on the small sums involved in the breaches, the limited timeframe during which they occurred, coupled with their respective financial positions. Groceryking and Ms Luo also submitted that the need for deterrence had been met by their involvement in the Labour Inspector's enforcement process and that the general deterrent effect is better served by more serious cases that are well publicised.

**Result**

[25] Taking the submissions of the parties into account, the inherent vulnerability of the "helper employees", the possible deliberate attempt to deceive the Labour Inspector in respect of these employees and the need for both deterrence and consistency, it is appropriate to impose significant, but proportionate, penalties on Groceryking and Ms Luo.

[26] So then, the following penalties must be paid to the Authority for subsequent transfer to a Crown Bank Account are:

- i. Groceryking: \$44,750; and
- ii. Ms Luo: \$8,960

[27] Groceryking and Ms Luo requested that any penalties imposed be paid by instalments. The Labour Inspector did not provide a specific submission on this. Consequently, the parties are directed to use their best endeavours to agree upon a payment schedule and submit this to the Authority for approval.

[28] Failing agreement, leave is reserved for the Labour Inspector to return to the Authority to request a timeframe for the penalties to be paid.

### **Costs**

[29] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 28 days from the date of this determination in which to file and serve a memorandum on costs. Groceryking and Ms Luo have a further 14 days in which to file and serve a memorandum in reply.

[30] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.<sup>8</sup>

Andrew Dallas  
Member of the Employment Relations Authority

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<sup>8</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.