

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 558
3023415

BETWEEN A LABOUR INSPECTOR
Applicant

AND LA WHEAT LIMITED (In Liquidation)
First Respondent

AND WANNAKAWATTAWADUGE JANAKA
SUJEEWA FERNANDO
Second Respondent

AND ARUMADURA UDENI LAKMALI
FERNANDO
Third Respondent

Member of Authority: Helen Doyle

Representatives: Greg La Hood, Counsel for the Applicant
Penny Shaw, Counsel for the Respondent

Submissions Received: 21 May 2019 and 10 July 2019 from the Applicant
21 June 2019 from the Respondent

Date of Determination: 30 September 2019

DETERMINATION OF THE AUTHORITY

A I order Wannakawattawaduge Janaka Sujeewa Fernando and Arumadura Udeni Lakmali Fernando to pay to the Labour Inspector under s142Y of the Employment Relations Act 2000 for the use of employee P the sum of \$34,066.82 for arrears of minimum wages and holiday pay.

B I order Wannakawattawaduge Janaka Sujeewa Fernando and Arumadura Udeni Lakmali Fernando to pay to the Labour Inspector under s142Y of the Employment Relations Act 2000 for the use of employee M the sum of \$16,725.29 for arrears of minimum wage and holiday pay.

C Costs are reserved.

Prohibition from Publication:

[1] I prohibit from publication all of the financial and medical information provided to the Authority in the affidavits of the second and third respondents and attachments to the affidavits.

Employment Relationship Problem

[2] The Authority in a determination dated 1 February 2019¹ (the determination) ordered the first respondent to pay to the Labour Inspector for the use of two employees who I shall call P and M minimum wage and holiday pay arrears. There is also an order made in the determination that interest be payable on the arrears and that a portion of the penalty payable by the first respondent is payable to P and M.

[3] The first respondent was placed into liquidation by special resolution of the company shareholders on 15 February 2019. The liquidator's first report dated 22 February 2019 confirms a significant shortfall to creditors. No payment was made to P and M by the first respondent.

¹ *A Labour Inspector v La Wheat Limited and Wannakawattawaduge Fernando and Arumadura Fernando* [2019] NZERA 50

[4] The Labour Inspector returns to the Authority under s142Y of the Employment Relations Act 2000 (the Act) to seek recovery from the second and third respondents of minimum wage arrears, holiday pay arrears, interest and penalties ordered payable to the two employees by the first respondent in the determination.

[5] There was some recalculation necessary by the Labour Inspector of the recovery amounts to account for the dates the second and third respondents became directors after 1 April 2016 when s142Y came into force. The second respondent was a person involved and became a director from 11 July 2016. The third respondent was a person involved and a director from 1 April 2016.

[6] The first and second respondents are husband and wife. They agree that there has been a default in payment by the first respondent. They further accept that they did not challenge the Authority's finding that they were persons involved in the breaches.

[7] The second and third respondents say that the Authority is not able to order them to pay interest and penalties because that is not money payable to the employee due to a breach of employment standards. Otherwise on the basis that one paragraph of the updated calculations contains a typographical error and should refer to \$34,066.82 they accept the calculations.

[8] The second and third respondents apply to the Authority for payment by instalment of any money that they are ordered to pay on the ground that their financial position requires it.

[9] The Labour Inspector seeks the following amounts from the second and third respondents for employee P:

- (a) A sum of \$34,066.82 for arrears. This is made up of minimum wage arrears in the sum of \$28,013.79 and holiday pay arrears in the sum of \$6,053.03.
- (b) A sum of \$3,593.35 being interest.

[10] The Labour Inspector seeks the following amounts from the second and third respondents for employee M:

- (a) A sum of \$16,725.29 for arrears. This is made up of the minimum wage arrears in the sum of \$15,131.81 and holiday pay in the sum of \$1,593.48.
- (b) A sum of \$1,167.88 being interest.

[11] The Labour Inspector additionally seeks to recover from the second and third respondents the portion of the penalty ordered to be paid in the determination by the first respondent to employees P and M of \$5000 to P and \$2,500 to M.

The Issues

[12] The second and third respondents do not dispute that there had been a default in the payment of wages and holiday pay to the employees P and M by the first respondent. They do not dispute that the arrears are due to a breach of employment standards and they are persons involved within the meaning of s142W of the Act.

[13] There are two issues that require determination before orders are made under s142Y of the Act and a third about whether the Authority can order payment by instalment:

- (a) Is the Labour Inspector able to recover from the second and third respondents' interest awarded by the Authority on arrears to be paid by the first respondent?
- (b) Is the Labour Inspector able to recover from the second and third respondents the portion of penalties awarded to the employees by the Authority and payable by the first respondent?
- (c) Does the Authority have the power to order that any wages or other money payable by the second and third respondents by virtue of s 142Y is payable by instalment?

Is the Labour Inspector able to recover interest from the second and third respondents awarded by the Authority on arrears to be paid by the first respondent?

[14] Section 142Y is a provision within Part 9A of the Act. The object of Part 9A is found in s142A(1) of the Act and that is to provide additional measures to “promote the more

effective enforcement of employment standards (especially minimum entitlement provisions)...”.

[15] Section 142Y provides circumstances where a Labour Inspector or an employee may recover from a person who is not the employee’s employer any wages or other money payable to the employee. Three requirements need to be met.

[16] The first is that there has been a default in the payment of wages or other money payable to the employee.² The second is that the default is due to a breach of employment standards.³ The third requires that the person is a person involved in the breach within the meaning of s142W.⁴

[17] Employment standards is defined in s5 in the Act as meaning any of the following:

- (a) the requirements of any of sections 64, 69Y, 69ZD,69ZE and 130:
- (b) the provisions of the Equal Pay Act 1972:
- (c) the minimum entitlements and payment for those under the Holidays Act 2003:
- (d) the requirements of sections 81 and 82 of the Holidays Act 2003:
- (e) the minimum entitlements under the Minimum Wages Act 1983:
- (f) the provisions of the Wages Protection Act 1983

[18] Mr La Hood submits that the Labour Inspector may recover from the second and third respondent interest ordered on the arrears found owing. He submits that it is not relevant that the definition of employment standards does not refer to interest because such an award is a consequence of a breach. He further submits that wording in s131(1) of the Act which deals with recovery of arrears and is worded similarly to s142Y does not contain a specific reference to interest and submits that such a reference is not required.

[19] I accept Mr La Hood’s submission that the wording in s142Y(1)(a) is initially broad about the default and the ability to recover wages or other money.

² Section 142Y(1)(a) of the Employment Relations Act 2000

³ Section 142Y(1)(b) of the Employment Relations Act 2000

⁴ Section 142Y(1)(c) of the Employment Relations Act 2000

[20] That initial broadness is narrowed by the second requirement in s142Y(1)(b) that the default is due to a breach of employment standards.

[21] There is no doubt that a failure to pay minimum entitlements under the Minimum Wages Act 1983 or the Holidays Act 2003 is such a breach of employment standards.

[22] I do not disagree with Mr La Hood that there is a causal connection between the arrears found owing and the interest ordered by the Authority. A default by the first respondent in paying the interest on arrears awarded at the discretion of the Member in the determination is less due to a breach of employment standards and more a consequence of arrears. It is necessary however to consider what s142Y of the Act provides and when interest is payable.

[23] Section 142Y provides the ability for a Labour Inspector or an employee to recover from persons who are not the employer wages or other money where there has been a default and the default is due to a breach of employment standards. It makes persons involved in the breach⁵ such as directors accountable in circumstances where they would not otherwise have been.

[24] Section 142Y has to be read with the power of the Authority to award interest in clause 11(1) of schedule 2 of the Act. Clause 11(1) of the Act provides when the Authority may, if it thinks fit, order the inclusion in the sum for which judgment is given of interest. The important aspect for current purposes is that set out below as to the time when interest may be payable:

.... on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

[25] Under s 142Y the cause of action against a person involved in a breach does not arise until there has been a default in the payment of wages or other money due to a breach of employment standards. In the determination the Member specifically states that it was not

⁵ As defined by s 142W in the Employment Relations Act 2000

possible at that stage for him to ascertain whether the first respondent was unable to pay the arrears ordered.⁶

[26] There was no cause of action against the second and third respondents for payment of arrears until after the determination when within days the first respondent was placed in liquidation and the liquidator's first report made it clear the total shortfall to all creditors was sizable. There was then a default within the meaning of s142Y due to a breach of employment standards.

[27] That can be contrasted with s131 of the Act. That section is concerned with recovery of arrears from an employer. The cause of action is a default in the payment to an employee of any wages or other money payable or where payment has occurred at a lower rate.

[28] The Member exercised his discretion in the determination to make an award of interest to P and M for arrears owing by the first respondent from the last two days of their employment, 24 December 2016 with interest running until the date of payment.⁷

[29] Liability of a party for interest before a cause of action has arisen is a significant departure from the usual basis for an interest award. If that was the intent then a specific provision to that effect would be expected. There is no such provision. I do not find that it is available to the Labour Inspector to recover under s142Y from the second and third respondents the interest awarded to P and M payable by the first respondent.

[30] The answer to the question about whether the Labour Inspector is able to recover interest from the second and third respondents ordered payable by the first respondent in the determination under s142Y of the Act is no.

Is the Labour Inspector able to recover from the second and third respondents the portion of penalties awarded against the first respondent to the employees by the Authority?

[31] The Authority ordered the first respondent to pay a portion of the \$20,000 penalty to P and M. For P it was \$5000 and for M it was \$2,500.

⁶ Above n 1 at [94]

⁷ Above n 1 at [87] and [88]

[32] Mr La Hood seeks recovery of that portion of the penalty ordered payable to P and M under s142Y of the Act from the second and third respondents. He submits that the portion of the penalty payable to the employees meet the test of s142Y(1) as “other money payable” to an employee. He submits that the penalty portion payable to the employees is compensatory in nature and provides recompense to the employees for harm caused by the actions of all three respondents. He does not accept that the second and third respondents are therefore third parties.

[33] Ms Shaw in her submissions states that penalties are imposed to punish the wrong doer and deter others and should not be passed onto third parties unless there is specific provision for doing so.

[34] The second and third respondents were also ordered in the determination, as persons involved in a breach, to pay penalties of \$10,000 each although these penalties were payable to the Crown.

[35] In the determination there was extensive separate consideration to the liability of the first respondent in paragraphs [108] – [133] and the second and third respondents in [134] - [146]. There was some limited cross reference to the liability of other respondents as permitted in the determination. The Employment Court has held that this can be done where it is fair, proportionate and just to do so although not in a formulaic manner.⁸ I accept Mr La Hood’s submission that there was a compensatory element to the portion of the penalty found payable from the first respondent directly to P and M expressed in the determination.⁹ The determination does not state that such payment was designed to recompense P and M for the actions of all three respondents but focuses on the first respondent.

[36] A finding of liability for the second and third respondents under s142Y of the Act for the portion of the penalty payable to P and M by the first respondent would be a significant departure from the usual individual and non-transferrable liability for penalties or fines.

[37] Further the determination does not distinguish between the breaches of the first respondent and the breaches relied on to impose a penalty for the second and third

⁸ A Labour Inspector v Sampan Restaurant Limited and Yu Ouyang [2018] NZEmpC 69 at [48]

⁹ Above n 1 at [149]

respondents.¹⁰ That would mean the second and third respondents would become liable to pay a portion of a penalty awarded against the first respondent for the same breaches that they have been ordered to pay a penalty for. There is an element of double jeopardy that supports the need for clear provision if it was intended under s142Y that persons involved would be liable for any portion of the penalty ordered payable to employees by the employer in the event of default.

[38] There is no such provision to support payment of a penalty ordered payable to an employee by an employer by persons involved under s142Y of the Act.

[39] I do not find the Labour Inspector can recover under s142Y from the second and third respondents the portion of penalties awarded against the first respondent payable to P and M.

[40] The answer to the question whether the Labour Inspector can recover the portion of the penalty ordered payable by the first respondent to P and M is no.

Orders made

[41] Taking into account those findings the following orders can be made:

Order made in respect of P

[42] I order Wannakawattawaduge Janaka Sujeewa Fernando and Arumadura Udeni Lakmali Fernando to pay to the Labour Inspector under s 142Y of the Employment Relations Act 2000 for the use of employee P the sum of \$34,066.82 for arrears of minimum wages and holiday pay.

Order made in respect of M

[43] I order Wannakawattawaduge Janaka Sujeewa Fernando and Arumadura Udeni Lakmali Fernando to pay to the Labour Inspector under s 142Y of the Employment Relations Act 2000 for the use of employee M the sum of \$16,725.29 for arrears of minimum wages and holiday pay.

¹⁰ Above n 1 at [134] – as supported additionally by the appendix

Can the Authority order payment of these amounts by instalment?

[44] Ms Shaw seeks payment by instalment in the amount of \$20 per week each for P and M reviewable as circumstances improve. She also seeks an order for payment by instalment of \$10 each for the penalty ordered payable to the Crown. There is no agreement by the Labour Inspector to those proposals or on the face of it agreement to the Authority making such an order.

[45] Ms Shaw relies on s123(2) of the Act that provides the Authority may order payment by instalments. That section empowers the Authority to make such an order but it is a section concerned with remedies in relation to personal grievances. The Authority is also empowered under s131 of the Act to order payment of wages or other money however that section is concerned with a default in payment of arrears.

[46] I am not satisfied that there is a corresponding power for payment by instalment under Part 9A and in particular under s142Y of the Act. I am not satisfied that I can order payment by instalment without the Labour Inspector's agreement to the same.

[47] The financial situation is set out very thoroughly in the affidavit evidence. It is grave and almost inevitably requires payment by instalment of an amount which allows for the basic necessities of life such as food and housing for the second and third respondents and their dependents. Limited equity is not able to be realised easily if at all at this point for reasons set out in some detail. Importantly there is no ability for further borrowing on that equity. Concerns about whether any business interest has been maintained by the second and third respondent have been addressed and on the basis of the affidavit evidence there are none whatsoever.

[48] I acknowledge the situation is very unfortunate for P and M who have been without their money for a considerable time. Their previous employer is in liquidation and the financial situation of the second and third respondents as set out in the affidavit evidence will not be reassuring.

[49] In conclusion however I do not find I am empowered to make an order for payment by instalment without agreement.

Costs

[50] I reserve the issue of costs. The financial situation would have to be taken into account if an application is to be made.

Helen Doyle
Member of the Employment Relations Authority