

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 304  
3016154

BETWEEN	A LABOUR INSPECTOR Applicant
AND	I.C.M. HORTICULTURAL CONTRACTING LIMITED (in liquidation) First Respondent
AND	MARTHA TANUVASA FRETTON Second Respondent
AND	GLOBAL 4040 LIFE SOLUTIONS LIMITED Third Respondent
AND	CHRISTINA KEWA SWARBRICK Fourth Respondent
AND	ANTHONY SWARBIRCK Fifth Respondent

Member of Authority: Michael Loftus

Representatives: Claire English, counsel for the Applicant  
Martha Fretton on her own behalf and for the second  
respondent  
Christina Swarbrick and Anthony Swarbrick on own  
behalf and for the fifth respondent

Investigation Meeting: 10 and 11 April 2018 at Napier

Date of Determination: 24 May 2019

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] The Inspector is acting in the interests of twelve Papuan New Guinean (PNG) citizens who performed various tasks for, or under the auspices of, the respondents. It is the Inspectors view those he represents performed those tasks as employees of one of more of the respondents though they were not treated as such and deprived of many of the minimum standards they should have enjoyed as employees.

[2] The Inspector seeks to enforce those standards and see those responsible for various compliance failures penalised.

[3] ICM and its sole director and shareholder, Ms Fretton, claim the 12 were never employees but people ICM had agreed to sponsor and train while they remained employees of Global 4040, Mrs and Mr Swarbrick.

[4] Global 4040, whose directors are Mrs and Mr Swarbrick, takes a similar approach. It claims the 12 came to New Zealand as participants in a life skills programme designed to encourage PNG nationals to break a cycle of widespread bribery and corruption in their homeland by experiencing another countries political life style and applying the learnings at a community level. It says it sponsored their trip to New Zealand so they could learn and not to work.

## **Background**

[5] As already said the Inspector is acting in the interests of a group from PNG who, he was advised, were working on a Hawkes Bay vineyard and not being paid. As a result of receiving that information on 3 August 2016 he chose to investigate and ultimately concluded the group were employed, that they had not been paid the minimum wage and there were other infractions in relation to record keeping.

[6] Again as already said it is the respondent's view the group were never employees but participants in a training programme designed and sponsored by Global 4040 and its principles – Mrs and Mr Swarbrick.

[7] Mrs Swarbrick hails from Mount Hagen in Papua New Guinea and expressed significant concerns about her homeland and what she considers inordinate levels of oppression, corruption and poverty. She says she had a vision aimed at addressing some of these issues by obtaining employment for some of her country people off

shore. She saw an avenue to do so via the New Zealand's Recognised Seasonal Employer (RSE) scheme and sought people who might be interested from her home town. According to Mrs Swarbrick New Zealand and Papua had signed an agreement under which the scheme could apply to PNG citizens but using it required the assistance of authorities in PNG and her attempts foundered on bureaucratic incompetence and the corruption she had already alluded to.

[8] However Mrs Swarbrick remained wedded to her belief exposure to the outside world would assist and says she reshaped her vision into one via which participants in her programme would be provided with an educative experience. She re-approached some of those with whom she had previously discussed the possibility of employment in New Zealand. She says she explained the new concept and made it clear there was no longer the possibility of employment. All those the Inspector represents and who gave evidence deny that was made clear.

[9] In the end she brought 16 people to New Zealand with each having been asked to contribute 2500 kina (which then approximated to a bit more than NZ\$1,100) toward the cost of their travel. They came on holiday visas.

[10] Mrs Swarbrick says the level of contribution was less than the costs incurred and she quickly ran into difficulty supporting the group. She had arranged some activities around the Waikato, where she then lived, which she portrayed as providing learning opportunities through exposure to a new environment. The evidence suggests most of these had some linkage to Mrs Swarbrick's church, Destiny, with cited examples being males participating in the *Man-up* programme while woman assisted with tasks such as catering for church events.

[11] The evidence suggests that did not satisfy the group with Mrs Swarbrick saying they became increasingly difficult to manage with, the males especially, *playing up* and drinking. They, or at least those who gave evidence, say they were restless given Mrs Swarbrick's failure to provide the work they say she had led them to expect.

[12] As a result Mrs Swarbrick says she sought assistance from various sources and finally approached two contacts provided by the church. One of those was Ms Fretton though the two had never met previously.

[13] Ms Fretton says she was approached by Mrs Swarbrick who requested she *provide training to Papua New Guinea workers who wanted to be trained to work in vineyards*. She goes on to say that in return she would make a donation to Global 4040 in order to assist with related costs.

[14] The arrangement was formalised via a document to which Ms Fretton and Global 4040 are signatories. It is headed Global Exposure (Program) and amidst other things it outlines a situation under which *...overseas experience, overseas exposure, life skills knowledge and industry skills [will be given] to participants who can relate to and make use of on their land when they get home*.

[15] The document then contains a section headed 'Sponsor and Fundraising Request'. Amidst other duties and expectations it provides:

- PARTICIPANTS will Fund Raise within the limits of SPONSOR Expectations.
- SPONSORS can remit the fundraising monies to GLOBAL EXPOSURE which uses the funds to pay for some of the living and running costs of PARTICIPANTS.
- This Sponsorship Request is not a JOB APPLICATION, therefore we are not looking for 'paid work' but we are looking for 'fund raising opportunities' which will help give our Participants Global Exposure in New Zealand and Globally.
- FUND RAISING SUPPORT \$1 – 20,000.

[16] It is Ms Fretton's evidence this last point reflected the fact she would provide whatever she could after she deducted her expenses from any proceeds the participants generated.

[17] Mrs and Mr Swarbrick then drove six of the group to Hawkes Bay. They were introduced to Ms Fretton and initially stayed at her property. No rent was paid and food was provided by Mrs Swarbrick.

[18] On 28 June this group were taken to a vineyard, given a 30 minute briefing and provided with tools before commencing what the Inspector says was work that should have been paid. The respondents portray this as training delivered in accordance with the life skills programme.

[19] A further six joined the original group on 18 July. During their time in Hawkes Bay all were required to fill in block sheets which recorded the work done

and formed a basis upon which Ms Fretton could bill the vineyards upon which the work was being performed. To those charges Ms Fretton added her normal commission percentage. She paid nothing to the PNG contingent but forwarded various sums totalling \$9,293.70 to Mrs Swarbrick.

[20] Mrs Swarbrick then paid some money to members of the group but she characterises this as an allowance. She also started deducting sums from some of these payments to cover the cost of accommodation which she was now arranging.

[21] On 3 August the Inspector received a complaint about these practices which he investigated and which ultimately led to this claim. Immigration New Zealand also became involved.

### **Discussion**

[22] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[23] The prime question is whether or not the group from PNG should be considered were employees of not? Section 6 of the Employment Relations Act 2000 provides the meaning of employee. The material provisions state:

*(1) In this Act, unless the context otherwise requires, **employee** —  
(a) means any person of any age employed by an employer to do work for hire or reward under a contract of service; ...*

*(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

*(3) For the purposes of subsection (2), the court or the Authority —  
(a) must consider all relevant matters, including any matters that indicate the intention of a person; and  
(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[24] In *Bryson v Three Foot Six Limited (No.2)*<sup>1</sup> the Supreme Court stated, amongst other things, what *all relevant matters*<sup>2</sup> means. It said:

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<sup>1</sup> [2005] ERNZ 372

*“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly require the Court or Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test) which were important determinants of the relationship at common law...*

[25] In other words I am required to consider the following in order to determine the nature of the relationship:

- a. The intention of the parties;
- b. Was there anything in writing to indicate the terms of the relationship between the parties;
- c. How the relationship operated in practice;
- d. Features of integration and control in the relationship; and
- e. Whether those the Inspector represents were effectively working on their own account.

[26] As already said there is no dispute it was Mrs and Mr Swarbrick who arranged the groups passage to New Zealand. There is also no dispute discussion between the Swarbrick’s and the group originally contemplated employment as RSE workers. Mrs Swarbrick says that had to change which she made abundantly clear while those of the group who gave evidence deny that to be the case. On this I accept the workers view.

[27] While some accepted they were told they were coming on tourist visa’s just prior to departure it was clear they lacked the knowledge or understanding to equate this with a reversal of the original intent and if they had an inkling they did not accept it given the money they had paid to access work opportunities. The evidence made it clear the group, or at least those who gave evidence, maintained an understanding

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<sup>2</sup> Section 6(3)(a) of the Employment Relation Act 2000

they would be given paid work and the respondents gave evidence they frequently enunciated these expectations. Indeed that was one of the points that led to the allegation some of the group were misbehaving. When questioned Mrs Swarbrick also conceded the ultimate goal always remained the provision of paid employment; just not on this trip.

[28] With respect to written indicators of the relationship I note there are no employment agreements or pay slips. There is, however, uncontested evidence some of the group filled out RSE forms and there is no doubt Ms Fretton sent invoices to vineyard partnerships under the auspices of Te Mata Estate Winery Limited upon whose land the group performed various tasks. The invoices were no different from those she used for others she accepts she employed and billed on a piece rate basis. Ms Fretton kept a portion of the proceeds on the basis it ... *represented my right to be paid for the contract pruning that was done and included in that was I believe reimbursement for my work involved in providing the training.*<sup>3</sup> In total she billed \$25,887.61.

[29] A portion of the income was forwarded to Mrs Swarbrick who along with Mr Swarbrick was, according to Ms Fretton, was in control of all *matters relating to the employment of the Papua New Guinean workers and their payment.*<sup>4</sup>

[30] I will deal with how the relationship operated and features of integration and control together. The evidence is the training was minimal and thereafter the group worked on tasks directed by Ms Fretton in a way identical to any group of employees she supervised and her I note she conceded significant experience as an employer. I also note the evidence shows Te Mata's managers claim they had been led to understand the group were RSE workers though there is no evidence they confirmed that was so.

[31] Finally I note there is no evidence, or even suggestion, the group were working on their own account.

[32] The above can led to only one conclusion. The group from PNG were performing work integral to ICM's core business. Their efforts were billed in the same way an employees' would and ICM accepted the benefits there-of. I conclude

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<sup>3</sup> Brief of evidence at [9]

<sup>4</sup> Brief of evidence at [10]

the group's members fit the definition of employee and should have been treated as such.

[33] That leads to the question of the employer's identity – ICM or Global 4040. At the conclusion of evidence Ms English expressed a view the employer was ICM. She went on to say *Global 4040 is not a player* though Ms Fretton and the Swarbrick's remained as persons involved who should be subject to a penalty.

[34] I agree. It was ICM who organised and supervised the work. It was ICM who billed the result and pocketed the bulk of the proceeds. I conclude, as Ms English urged me to do, that ICM was the employer but this now creates significant difficulty.

[35] Soon after the investigation meeting ICM was liquidated and that raises a question as to whether or not I can continue with respect to that respondent. On this there appears to be varying opinion. On one hand there is a decision of Faire J in a case similar to this in that only one of multiple respondents was affected. The Judge concluded liquidation after hearing did not preclude his Court from entering judgement.<sup>5</sup> That approach has previously been followed by the Authority.<sup>6</sup>

[36] There is then the decision of Judge Inglis in *Newick v Working in Ltd (in liquidation)* which suggests she may have a contrary view or there is at least scope for debate about the effect of s 248 of the Companies Act 1993 in such circumstances.<sup>7</sup> I can source no further decisions about the issue.

[37] In this case I believe it appropriate I follow Judge Faire's approach as while the liquidation means it is no longer possible to exercise or enforce a right or remedy over or against ICM's property<sup>8</sup> the issuing of a decision may clear the way for other avenues of recovery.<sup>9</sup>

[38] Accordingly I find that as employees those the Inspector represented where due wages the evidence shows were not paid. Section 132 of the Act allows me to accept the Inspector's estimate of the amount owing where there are no records but

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<sup>5</sup> *Pacific Holdings Ltd v Hudson NZ Ltd & Ors*, HC Auckland, CIV 2005-404-531 at [73]

<sup>6</sup> *Park v K & C Howick Ltd t/a Howick Kim's Club (in liquidation)* unreported, D King, 14 August 2007, AA247/07

<sup>7</sup> [2013] NZEmpC 132

<sup>8</sup> Section 248(1)(c)(ii) of the Companies Act 1993

<sup>9</sup> Sections 142W and 142Y of the Employment Relations Act 2000

the evidence shows they were requested and their absence impeded quantification of the sum owing. In this case both preconditions have been evidenced.

[39] The total claimed and owing is \$31,128.36 gross. This covers both unpaid wages and holiday pay to 12 employees with a breakdown of how that should be dispersed amongst the 12 attached to the Inspectors brief of evidence.

[40] Turning to the penalty claims. Originally penalties were sought against all five respondents. As already said Ms English conceded, when commencing her final submissions, that Global 4040 was no longer a player and there is simply no merit in considering claims against ICM as the liquidation means there is no scope for recovery.

[41] That leave the claims against Ms Fretton, Mrs and Mr Swarbrick who, it is claimed, were persons involved in various breaches. In this respect s 142W(1) provides:

- ... 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) has induced, whether by threats or promises or otherwise, the breach; or
  - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
  - (d) has conspired with others to effect the breach.

[42] The claim, as it applied to persons involved, was laid out in clause 3.8 of the statement of problem and 5 breaches which might warrant penalty were alleged. They were:

- a. Section 64 of the Employment Relation Act 2000 which places a duty on the employer to maintain a copy of the relevant individual employment agreement;
- b. Section 130 of the Employment Relation Act 2000 which is the duty, again placed upon the employer, to maintain wage and time records;
- c. Section 6 of the Minimum Wage Act 1983 which requires the employer pay the minimum wage;

- d. Sections 21, 24, 25, 27 of the Holidays Act 2003 which relate to the calculation and payment of holidays, with s 27 placing the requirement to pay on the employer; and
- e. Sections 81 of the Holidays Act 2003 which requires the employer maintain a holiday and leave record.

[43] This raises an issue. All of the above obligations fall upon the employer. Having heard the evidence the Inspector argued, and I agreed, that the employer was ICM. ICM was a company which raises s 142W(2). It provides:

However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

[44] Officers are defined in s 142(3) but as a director only Ms Fretton meets the requirements and therefore follows it is only she who might be subject to a penalty. While the evidence leaves me with little doubt both Mrs and Mr Swarbrick share a high degree of culpability I see no way they can be considered to meet the definition in s142(3) and be held liable for a penalty given the conclusion ICM was the employer.

[45] It is clear from the evidence all five alleged breaches occurred and each applied to 12 people. That means 60 potential penalties at \$10,000 each – a total of \$600,000.

[46] It is also clear Ms Fretton is a person involved and meets a number of the criteria of s 142W(1). She is the personification of ICM and all actions performed by it are the result of decisions she made and implemented.

[47] She has therefore aided and procured the breaches by deciding ICM would act as it did in respect to its failures when complying with employment standards and then performing the actions that resulted in the breaches. As such she has knowingly been a party to those actions and therefore the breaches.

[48] The factors to be considered when determining an appropriate level of penalty are prescribed in s 133A of the Employment Relations Act 2000, namely:

- a. the Act's objects; and

- b. the nature and extent of the breach; and
- c. whether it was intentional, inadvertent, or negligent; and
- d. the nature and extent of any loss or damage suffered by the victim and/or gains made or losses avoided by the person in breach; and
- e. whether the person in breach has already paid an amount of compensation, reparation, or restitution, or taken other steps to avoid or mitigate any actual or potential adverse effects; and
- f. the circumstances in which the breach took place, including the vulnerability of the employee; and
- g. whether the person in breach has previously been found to have engaged in any similar conduct

[49] In respect to these points I record the following. The Act has been amended in recent times in an attempt to increase penalties for conduct such as this and there have been other changes which confirm conduct such as that which occurred here should be both discouraged and penalised.

[50] As already said there are 60 individual breaches though I have some qualms about the level of intent etc. The evidence would lead me to conclude Ms Fretton was extremely naive and lulled into acting as she did by Mrs Swarbrick. Her actions appear to fall into the category of negligent, albeit grossly negligent given a complete failure to check the situation. Even she, albeit with the benefit of hindsight accepts she has acted extremely foolishly.

[51] The nature and extent of the loss is quantified in paragraph 39 above and the situation appears to have been aggravated by the fact Ms Fretton (and also the Swarbricks) benefitted by retaining a portion of the amount invoiced and received as a result of the group's labours. She got the payment she would have expected from supervising a similar sized group of employees.

[52] There is no evidence Ms Fretton has paid any compensation or otherwise attempted to put things right. I do not consider the payments to Ms Swarbrick meet this requirement especially as little was passed to the 12 and the evidence shows Ms Fretton renounced any involvement or interest in how that money was spent.

[53] The evidence must lead to a conclusion the employees were extremely vulnerable and finally I note there is no evidence Ms Fretton has previously acted in this way.

[54] Ultimately and having considered the issues along with recent precedents I consider a global penalty of \$2,500 in respect to each employee appropriate. The total is therefore \$30,000 with that amount being payable to the crown.

[55] There was also a claim for interest on the arrears but I do not consider that is now recoverable. Again the employer, as conceded on behalf of the Inspector, was ICM. While responsibility for the arrears may possibly be passed to Ms Fretton I do not consider the Act allows the same to apply to interest.

### **Conclusion**

[56] For the above reasons I conclude:

- a. The 12 on behalf of whom the Inspector acted were employees;
- b. Their employer was I.C.M Horticultural Contracting Limited (in liquidation);
- c. I.C.M owes the 12 outstanding wages and holidays pay totalling \$31,128.36 gross and while judgement is entered accordingly s 248 of the Companies Act appears to preclude an order payment be made. That said other avenues for recovery remain and may yet be pursued by the Inspector;
- d. For reasons explained above, and while I consider the Swarbrick's should shoulder a considerable portion of the blame for what occurred the penalty claims against all but the second respondent, Ms Fretton, fail; and
- e. It is appropriate Ms Fretton be ordered to pay penalties.

[57] I therefore order the second respondent, Martha Fretton, pay to the Crown, via the Authority, penalties totalling \$30,000.00 (thirty thousand dollars). Payment is to be made no later than Friday 28 June 2019.

[58] Costs are reserved, though while the Inspectors success means there are grounds for such an order I again doubt there is any avenue for recovery.

Michael Loftus  
Member of the Employment Relations Authority