IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 411
3069012

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	CHRISTOPHER CHARLES ALEXANDER GRAY First Respondent
	AND	JENNIFER FRANCES GRAY Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Alistair Miller, counsel for the Applicant Christopher Gray and Jennifer Gray in person	
Investigation Meeting:	16 July 2020 at Christchurch	
Submissions [and further Information] Received:	On the day, 22 July 2020 and 6 August 2020 from the Applicant 16 July and 3 August 2020 from the Respondent	
Date of Determination:	12 October 2020	

DETERMINATION OF THE AUTHORITY

A **Christopher Gray has breached provisions of the Minimum Wage Act 1983, the Wages Protection Act 1983 and the Holidays Act 2003.**

B **Awards have been made for reimbursement of arrears, entitlements, unlawful deductions and holiday pay on arrears for the affected employees.**

C **There is an order for interest payable on the above amounts.**

D **Jennifer Gray has not been found to be a person involved in the breaches.**

E A timetable has been set for an exchange of submissions about the imposition of any penalties.

F Costs are reserved until after a determination on whether penalties should be imposed and, if so, in what quantum.

Employment Relationship Problem

[1] A Labour Inspector, whose primary role is to audit employers involved in the Recognised Seasonal Employer scheme (RSE), conducted an audit of the business Christopher Gray operates that trades as Motukarara Asparagus.

[2] The audit followed Mr Gray submitting a second application to the RSE Unit of Immigration New Zealand in May 2018 to recruit workers from Fiji for the asparagus harvest that generally runs from October to December each year.

[3] On 7 August 2018 the Labour Inspector conducted an audit visit at the Motukarara Asparagus workplace accompanied by the RSE relationship manager. The purpose of the visit was set out in an email to Mr Gray dated 1 August 2018. It was to discuss the application, provide further information about the documentation still required, view wage and time records and holiday and leave records for the RSE workers employed to work the previous season and any current employees, and conduct an audit of the worker accommodation proposed to be used for the upcoming season.

[4] As a result of the visit some issues were identified. It was also established that Mrs Gray completed the payroll tasks.

[5] Information was subsequently requested from Mr and Mrs Gray by the Labour Inspector about travel costs for employees, written consent to deductions made, signed employment agreements, payment of wages and payment for work undertaken on public holidays.

[6] In September 2018 Mr Gray was sent a “Potentially Prejudicial Information” letter outlining the issues identified during the audit. Mr Gray responded to the letter and the Labour Inspector commented on the responses.

[7] In an investigation report dated 5 October 2018 the Labour Inspector identified the following breaches:

(a) Failure to pay the minimum wage for all hours worked.

(b) Failure to pay time and a half for hours worked on a public holiday;

(c) Failure to provide alternative holidays;

(d) Failure to pay unworked public holidays;

(e) Failure to obtain/and or keep written authority from employees to make deductions from their wages.

(f) Failure to keep copies of each employee's individual employment agreement.

(g) Failure to offer a written employment agreement to 1 x New Zealand citizen employee, John Frood.

[8] Mr Gray responded to the report however, the Labour Inspector, after considering the responses did not conclude it altered her findings.

[9] The Labour Inspector seeks findings that Mr Gray has breached section 6 of the Minimum Wage Act 1983, section 5 of the Wages Protection Act 1983 and sections 49, 50, 56, 60 and 81 of the Holidays Act 2003.

[10] Orders are also sought for payment of arrears of minimum wages, repayment of all deductions made without consent, payment of public holiday entitlements and payment of 8% holiday pay on all arrears owing together with interest and costs.

[11] An order is also sought that Mrs Gray was a person involved in the breaches under s 142W of the Act 2000 and that arrears to the extent that Mr Gray is not able to pay them are recoverable from Mrs Gray under s 142Y of the Act.

[12] Orders are sought for penalties from Mr and Mrs Gray.

[13] It was agreed that the matter would be determined in two parts.

[14] Firstly the Authority will determine any issues in dispute, whether there are any minimum standard breaches and whether there are any arrears payable. It will also determine whether Mrs Gray was a person involved in the breaches under s 142W of the Employment Relations Act 2000.

[15] If an issue about the imposition of a penalty arises it will then ask for further submissions from the parties.

[16] Mr and Mrs Gray did not lodge a statement in reply or statements of evidence with the Authority. They both attended the Authority investigation meeting and answered questions from the Authority and Mr Miller. I have also in determining this matter had regard to their communication with the Labour Inspector during the process leading to the investigation report and some additional information supplied after the investigation meeting.

[17] Of the 13 employees who this claim affects, 10 of them are RSE employees.

The issues

[18] The Authority needs to determine the following issues in this case:

(a) Did Mr Gray fail to make payments to 12 employees for their work at not less than the minimum rate of wages required by s 6 of the Minimum Wage Act 1983 (MWA)?

(b) If a failure is established then what amounts are owed to the affected employees?

(c) Did Mr Gray make deductions from 11 employees' wages without their written consent in breach of s 5 of the Wages Protection Act 1983 (WPA)?

(d) If it is established that deductions were made without written consent then what amounts are owed to the 11 affected employees and what bearing do signed consent forms from three employees provided after the investigation meeting have on any amounts to be repaid?

(e) Did Mr Gray breach obligations under ss. 49, 50, 56 and 60 of the Holidays Act 2003 (HA) with respect to public holiday entitlements?

(f) If it is established that there was a breach what amounts are owing to employees?

(g) Should there be an award of 8% annual holiday pay on arrears and if so what amounts are owing to the employees?

(h) Did Mr Gray fail to keep holiday and leave records for employees as required under s 81 of the HA?

(i) What orders should be made for each employee?

(j) Should there be an award of interest on any amounts owing?

(k) Was Mrs Gray a person involved in the breaches pursuant to s 142W of the Employment Relations Act 2000 (the Act)?

(l) If Ms Gray was, should an order be made to recover from her all arrears owed to the employees to the extent that Mr Gray is able to pay the amounts owing pursuant to s 142Y of the Act.

Did Mr Gray fail to make payments to 12 employees for their work at not less than the minimum rate of wages required by s 6 of the Minimum Wage Act 1983?

[19] During the audit on 7 August 2018 the Labour Inspector viewed wage and time records for the 2017 harvest season with Mrs Gray. The Labour Inspector was able to ascertain that manual records were kept in an A4-sized notebook and that the supervisor Samisoni Ratubalavu recorded the amount of asparagus picked and start and finish times for employees on cards and these were provided to Mrs Gray for calculating wages.

[20] The Labour Inspector said in her evidence at the Authority investigation meeting that she was told by Mrs Gray wages were calculated when employees were picking asparagus based on the amount of asparagus picked - paid at $2.50 per kilogram. When the workers were in the packing shed they were paid according to the number of hours worked at the relevant minimum wage of $15.75 and 8% annual holiday pay was paid on a pay-as-you-go basis.

[21] The Labour Inspector said that it became clear to her that there was no system in place to check that employees had earned at least the minimum wage for every hour worked or to identify when employees had earned less than the minimum wage when being paid $2.50 per kg for picking the asparagus. She did not see evidence from the records to show that the wages were at any time topped up to $15.75 per hour when earning piece rates.

[22] Mrs Gray said during the audit to the Labour Inspector that her time records were “rubbish” and that she did not go by them.

[23] Having considered the documentation and heard from the Labour Inspector, I accept that there was a strong basis to conclude that the wage and time records were an accurate record for the following reasons.

[24] In concluding that the hours of work recorded in the A4 notebook were correct, the Labour Inspector took three matters into account. Firstly that the start and finish times were recorded by the supervisor who was tasked with accurately recording the times for every employee and the quantity of asparagus picked. This formed the basis for the entries made into the A4 book. Further the first week's wages for the employees was calculated using an hourly rate and those hours of work were comparable to those in subsequent weeks. Finally the Labour Inspector compared the wage and time records for the 2017 harvest season with the sample of wage and time records for the 2016 harvest season provided to the Labour Inspectorate as evidence of compliance with an improvement notice in 2016. She noted that the hours of work recorded in 2016 was comparable to the hours recorded in 2017.

[25] I also note that the Labour Inspector was advised deductions were made for any asparagus that did not pass quality control in the shed and that may have contributed to minimum wage breaches.

[26] Section 6 of the MWA provides for payment of minimum wages and states:

> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[27] I find that there was a breach of section 6 of the MWA because there was a failure to pay twelve employees working for Mr Gray for their work at not less than the minimum wage.

[28] I accept that there are arrears owed to employees as calculated by the Labour Inspector in a separate schedule for reimbursement and that orders should be made accordingly. The arrears on the schedules prepared for each employee include elements of public holiday entitlements which are addressed separately.

[29] The gross minimum wage arrears that are owing to the 12 employees are as set out below:

Ratu Kinivuai	$1,668.20
Ratu Makoto	$2,229.21
Satini Mateiwai	$1,630.59
Vakuruivalu Naqaravatu	$2,128.34
Patrick Ratubalavu	$701.94
Namatua Tuiniqaqa	$1,933.87
Waisea Vakalevu	$1,883.35
Penijamini Vakasavuwaqa	$2,140.32
Tevita Vakasavuwaqa	$1,724.22
Noa Volavola	$1,417.06
Samisoni Ratubalvu	$256.38
Ratu Namuaira	$32.02

Did Mr Gray make deductions from 11 employees' wages without their written consent in breach of s 5 of the Wages Protection Act 1983?

[30] As part of the application made in 2017, Mr Gray was required to supply a deductions consent form template to the RSE unit. This was to show that he had a system in place to get the written consent to make deductions for costs associated with the RSE scheme. These costs included flights, visa costs, medical insurance and accommodation costs.

[31] The Labour Inspector asked in August 2018 for signed forms in order to establish written consent from the workers for the deductions made from their wages. Mr and Mrs Gray could not provide them and explained at the time that the consent forms were signed but not returned and/or the workers took them away with them at the end of the season.

[32] The employees are now in Fiji and the Authority did not hear from them. Mrs Gray said at the Authority investigation meeting that she thought she could locate some of the signed consent forms for deductions.

[33] After the investigation meeting Mrs Gray provided signed deduction consent forms for three employees to the Authority. She also supplied letters of offer, signed individual

employment agreements, personal details and seasonal worker travel insurance application forms for ten employees.

[34] The Authority provided these documents to Mr Miller for comment. He responded in an email to the Authority dated 22 July 2020, forwarded on to Mr and Mrs Gray, that the three signed deduction consent forms for Penijamini Vakasavuwaqa, Noa Volavola and Patrick Ratublavu are not valid consents to deductions under the WPA. This is on the basis that deductions were made from the employee's wages in the first week before the forms were signed. Further it was uncertain from the records kept what each weekly deduction amount was for, deductions varied each week and do not correspond with the amount recorded on the three signed deduction consent forms.

[35] Other discrepancies that Mr Miller set out in his email from the wage and time records were that more than $123.60 was deducted from employees' wages in some periods and there was no apparent reason what this was done. The airfare to and from Fiji cost $802.20 per person and not $1584.00.[1] Employees under the scheme paid half of the return airfare and that was $401.10. Further that it appeared that rent was not deducted from the employees' wages which suggested that they had to pay the motel directly. But if not, then there was no agreement to deduct rent from their wages.

[36] Mrs Gray then provided a further document to the Authority on 3 August 2020. It set out the basis on which the three consent forms show a deduction of $66 each week for airfares. Added onto the cost of the airline ticket of $402 was the health insurance for each worker as recommended by Immigration NZ. The applications for travel/health insurance were provided by Mrs Gray at the same time as the signed consent deductions forms.

[37] The WPA is clear that when any wages are payable the entire amount of those wages is to be paid to the worker without deduction unless those deductions are in accordance with s 5(1) and 6(2) of the WPA.[2]

[38] Section 5(1) of the WPA provides that:

> An employer may, for a lawful purpose, make deductions form wages payable to a worker-
>
> (a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or

[1] Document JL16 exhibited to the Labour Inspector's statement of evidence.
[2] Section 4 of the Wages Protection Act 1983.

(b) on the written request of the worker.

[39] There is no written consent for deductions to be made for 8 workers.

[40] The written consents that have been provided for three employees set out weekly deductions for airfares, x-ray, visa, lodging fees, fuel, rent, food and work clothes. I agree with Mr Miller that deductions were made before the forms were signed and it is unclear from the records that exist what each weekly deduction amount was for. So, that cannot be cross-checked with the consent form.

[41] I am prepared to give credit for the amounts in the signed deduction forms where the deduction is clear and reasonable. To the extent deductions were made over and above those to which the employees consented that are clear and reasonable, an order for reimbursement will be made.

[42] I am prepared to give credit for half of the cost of the return airfares for each of the three workers to the extent of $401.10 only. I am not prepared to give credit for the travel/health insurance because on the consent forms that aspect is not separated out from the half return airfare so it is not clear as it must be that the worker agreed to pay for that.

[43] Credit can also be given for the X-ray for $120.00 and the visa costs of $375 that has been agreed to by the three employees. There is an amount for fuel of $72 for the period of employment agreed to by all three employees and credit can be given for that.

[44] The lodging fees of $22 Mr Gray said was for a fee incurred in Fiji. The Labour Inspector raised this as a concern at the time but Mr Gray responded that he thought he was able to claim this as a deduction. There was no concluded view about that at the time. At the investigation meeting there was no evidence about this as there were no consent forms available. I will give a credit at this point but if there is some concern on the part of the Labour Inspector that it is not a permissible deduction then it can raised in any submissions about penalty and Mr Gray can respond.

[45] I also give credit for work clothes purchased in the total sum of $100.80 which was agreed to by the employees. Mrs Gray said the clothing workers came with was insufficient for the cooler weather in New Zealand. The food deduction stated that it was for the first week in the sum of $50 and then after the first pay employees' pay for themselves. It is less clear what happened after that about food. I am only prepared to give credit for each of the

employees of $50. The sums added together of $410.10, $120, $375, $72, $22, $100.80 and $50 total $1149.90. That amount is to be credited against the amounts the Labour Inspector found owing for unlawful deductions for the three employees because she had not been provided with the signed consent forms.

[46] I have not given credit for any rental deductions. As I understand the evidence the workers paid for accommodation at a motel as the accommodation at the farm had not been signed off by council and could not be used.

[47] I note Mr Miller's concerns about the late provisions of the documents and s 229(2) of the Employment Relations Act 2000.

[48] Mr Gray has been unable to establish that deductions were lawfully made from workers' wages except to the extent set out above for three employees. That is because he has not retained signed consent forms that clearly confirm agreement to the amounts deducted.

[49] Deductions made therefore were in breach of s 5 of the WPA.

[50] I accept that the Labour Inspector has calculated the unlawful deductions using the records that were supplied from Mrs Gray. I find that orders should be made with the adjustments for the three employees of amounts as set out earlier of $1,149.90 each.

[51] The amounts owed to 11 employees for unlawful deductions are as follows:

Ratu Kinivuai	$2,097.47
Ratu Makoto	$2,097.47
Satini Mateiwai	$2,097.47
Vakuruivalu Naqaravatu	$2,082.22
Patrick Ratubalavu	$486.77 (credits applied as above)
Namatua Tuiniqaqa	$2,145.84
Waisea Vakalevu	$2,079.47
Penijamini Vakasavuwaqa	$947.57 (credits applied as above)
Tevita Vakasavuwaqa	$2,081.92
Noa Volavola	$947.57 (credits applied as above)

Samisoni Ratubalvu $4,456.92

Did Mr Gray breach obligations to employees in accordance with ss. 49, 50, 56 and 60 of the Holidays Act 2003?

[52] There was no evidence before the Authority that any public holiday entitlements were recognised by Mr Gray. In his evidence he confirmed that there was no payment made for Christmas Day because the employees only received payment when they worked. The records provided to the Labour Inspector did not show payments had been made for other public holiday entitlements.

[53] Three public holidays were worked in 2017 being Labour Day, Canterbury Anniversary Day and Boxing Day but there was no corresponding payment of time and a half. That is a breach of s 50 of the HA.

[54] There was no provision of alternative days for working on public holidays that would otherwise be working days. That is a breach of s 56 of the HA which requires an alternative holiday must be provided. Further there was no payment for alternative days in accordance with s 60 of the HA. Mr Gray said in his evidence that if it was a long weekend the employees had Sunday and Monday off work however there was no payment made to the employees and that did not satisfy the requirements of the HA.

[55] Some employees were entitled to payment for Christmas Day because whilst not worked it was an "otherwise working day." Failure to pay in those circumstances is a breach of s 49 of the HA.

[56] One employee, John Frood, because of his work pattern was entitled to payment for Waitangi Day 6 February 2018, Good Friday 30 March 2018, Easter Monday 2 April 2018 and Queens Birthday 4 June 2018. That is because based on his pattern of work these days these were public holidays would otherwise have been working days. As set out above this was a breach of s 49 of the HA.

[57] I find that there are breaches of the HA in respect of public holiday entitlements. The Labour Inspector has calculated the amounts owed to each employee. This has been done with regard to work on public holidays, alternative days and payment for public holidays not worked if applicable. I accept that the calculations are sound.

[58] The public holiday entitlements owed to 12 former employees are as follows:

Ratu Kinivuai	$646.78
Ratu Makoto	$646.78
Satini Mateiwai	$646.67
Vakuruivalu Naqaravatu	$646.49
Patrick Ratubalavu	$646.92
Namatua Tuiniqaqa	$646.34
Waisea Vakalevu	$646.78
Penijamini Vakasavuwaqa	$646.85
Tevita Vakasavuwaqa	$647.00
Noa Volavola	$645.00
Samisoni Ratubalavu	$841.61
John Frood	$1,058.04

[59] I accept that there should also be 8% annual holiday pay on all the arrears owing. I am satisfied that the calculation undertaken by the Labour Inspector is correct.

[60] The amount owed to the employees of 8% annual holiday pay on arrears is set out below:

Ratu Kinivuai	$185.20
Rau Makoto	$230.08
Satini Mateiwai	$182.18
Vakuruivalu Naqaravatu	$221.99
Patrick Ratubalavu	$107.91
Namatua Tuiniqaqa	$206.42
Waisea Vakalevu	$202.41
Penijamini Vakasavuwaqa	$222.97
Tevita Vakasavuwaqa	$189.70

Noa Volavola	$165.13
Samisoni Ratubalavu	$87.84
Ratu Namuaira	$2.56
John Frood	$84.64

Did Mr Gray fail to keep holiday and leave records for 12 employees as required under s 81 of the Holidays Act 2003?

[61] Holiday pay was paid on a "pay as you go" basis but there was no recording of public holiday entitlements and Mr Frood's entitlement of 5 days sick leave was also not recorded. I accept that holiday and leave records as required under s 81 of the HA were not kept and there was a corresponding breach of s 81 of the HA.

Orders made

[62] Breaches have been established of s 6 of MWA, s 5 of the WPA and ss. 49, 50, 56, 60 and 81 of the HA.

[63] Awards have been made for reimbursement of minimum wage arrears, public holiday entitlements, unlawful deductions and holiday pay on arrears for the employees.

[64] Christopher Charles Alexander Gray is ordered to pay to the Labour Inspector for the credit of the each named employee the sums set out below:

(a) $4,597.65 gross for Ratu Kinivuai

(b) $5,203.54 gross for Ratu Makoto

(c) $4,556.91 gross for Satini Mateiwai

(d) $5,079.04 gross for Vakuruivalu Naqaravatu

(e) $1,943.54 gross for Patrick Ratubalavu

(f) $4,932.47 gross for Namatua Tuiniqaqa

(g) $4,812.01 gross for Waisea Vakalevu.

(h) $3,957.71 gross for Penijaminin Vakasavuwaqa.

(i) $4,642.84 gross for Tevita Vakasavuwaqa.

(j) $3,176.76 for Noa Volavola.

(k) $5,642.75 gross for Samisoni Ratubalavu.

(l) $34.58 to Ratu Namuaira

(m) $1,142.69 for John Frood

Interest

[65] Interest is claimed by the Labour Inspector on the above amounts from the date the claim arose. The employees have been deprived of the use of their money for a period of time and Mr Gray has had the resulting benefit of the use of the money. I consider it appropriate therefore for interest to be awarded and order accordingly. Interest should be calculated by the Labour Inspector from the period two weeks after each employee's employment terminated under the Interest on Money Claims Act 2016. Some of the employees had different termination dates.

[66] The calculations should then be provided to the Authority for checking with submissions about the imposition of any penalty.

Was Mrs Gray a person involved in the breaches pursuant to s 142W of the Employment Relations Act 2000?

[67] I asked Mr Miller for further submissions on this point.

[68] Section 142W of the Act provides as follows:

> 142W Involvement in breaches
>
> (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
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> (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.

> (2) 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.
>
> (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
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> (a) a person occupying the position of a director of a company if the entity is a company:
> (b) a partner if the entity is a partnership:
> (c) a general partner if the entity is a limited partnership:
> (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:
> (e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.**]**
>
> (4) This section does not apply to proceedings for offences.

[69] Mr Gray is the employer. He was referred to as the employer on key documents including the ten signed individual employment agreements provided after the Authority investigation meeting by Mrs Gray. He was the person granted RSE status in 2017 by Immigration New Zealand.

[70] Mr Miller submits that holding Mrs Gray liable as a person involved is consistent with the purpose of s 142W of the Act.

[71] I have considered the three distinct elements of s 142W. In respect of the first I am satisfied that there is a qualifying breach. The Authority has concluded breaches of minimum standards on the part of Mr Gray.

[72] I have then considered whether there is qualifying conduct and a qualifying position.

[73] It is sensible to start with the qualifying position in s 142W(2) of the Act. Mrs Gray would need to hold a qualifying position if she is to be treated as a person involved in the breach.

[74] Under s 142W(2) if the breach is a breach by an entity, in this case a sole trader, then a person who occupies a positon in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

[75] Mrs Gray held no formal position as such in the business operated by Mr Gray. She undertook payroll activities and some record-keeping. Her experience to do so from her evidence was that she had undertaken some bookkeeping “years ago.” She also received

assistance along with Mr Gray from Immigration NZ and the Labour Inspector about what was required.

[76] I turn to whether Mrs Gray was an officer of the entity. The subsections in s 142W (3) (a) to (d) do not apply to Mrs Gray. That leaves only subsection (3)(e).

[77] Section 142W(3)(e) provides that Mrs Gary can only be an officer of the entity if she is in a position to exercise significant influence over the management or administration of the entity.

[78] Mr Miller says that because Mrs Gray was the only person authorised to perform payroll and record-keeping functions she was in a positon to exercise significant influence over management or administration. Further that she liaised with the Labour Inspectorate on behalf of Mr Gray, signed documents on behalf of the employer with reference to the IRD monthly schedule and that she could be characterised as an owner-operator of the sole trade entity and benefitted from the work undertaken by the employees.

[79] Mr Miller places some weight on two matters from Mr Gray's oral evidence. The first is that Mr Gray explained he is a horticulturist and Mrs Gray did the paperwork and the second is the evidence that business and personal funds/accounts were intermingled.

[80] I am not satisfied from the evidence that Mrs Gray was in a position to exercise significant influence over management because she carried out the payroll/record-keeping functions. Mr Gray sent an email to the Labour Inspector dated 31 August 2018. In it he states that he disagrees with the Labour Inspector about the hours worked and the "Kgs." He refers to the wage book as "my wage book" and states "I pay them on what they actually do" and "it is proof they work."[3] Mrs Gray did communicate with the Labour Inspector from time to time about payroll and record-keeping. More significant or material communications including about payroll and record-keeping particularly at the time of the investigation report were from Mr Gray.

[81] I accept employees went to Mrs Gray about payroll matters and she had some influence over administration. It is not enough to satisfy the requirements of s 142W(3)(e) that there be influence in that respect. It must be significant. I find in all likelihood

[3] Exhibit JL21

significant decisions about administration rested with Mr Gray. A conclusion strengthened by observing Mr and Mr Gray when they gave their respective evidence.

[82] Mr Miller refers to an Authority determination where a senior representative of a company who was not a director or shareholder was concluded to be a person involved.[4] That finding appeared in part to have been based on a level of business sophistication as a result of the person having established her own company. It was not a finding solely reached because of communication with the Labour Inspector and undertaking payroll.

[83] I do not find intermingling of business and family funds particularly instructive in considering whether Mrs Gray was in a position to exercise significant influence over the management or administration of the entity. The evidence fell short of satisfying the Authority Mrs Gray could be characterised as an owner-operator of Motukarara Asparagus and the business could not function without her. Mr Gray did not give evidence that the business was owned and operated by any person other than him. There was no suggestion of that in his correspondence. Some key decisions about administration were considered by him. At one point for example he advised the Labour Inspectorate he was looking at alternatives to a manual pay system and deciding whether they would be more satisfactory.

[84] I do not find considering all matters that Mrs Gray was an officer of the entity under s 142W(3)(e) of the Act. She was involved in administration and paperwork but was not in a position to exercise significant influence over that or management of the entity. She is not therefore able to be treated as a person involved in the breach under s 142W (2) and no finding will be made that she was a person involved in the breaches.

[85] I would for completeness not have been satisfied from the evidence of intentional and purposeful actions on the part of Mrs Gray for the matters under s 142W (1) of the Act.

Further steps

[86] Mr Miller is to provide submissions on any liability for the imposition for penalties within three weeks by 2 November 2020.

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[4] *A Labour Inspector v Indian Heaven Limited and 3 others* [2019] NZERA 227.

[87] Mr Gray is to have a further three weeks to respond by 23 November 2020. As one of the considerations if penalties are imposed would be the financial position of the business any recent accounts or other information about that would be helpful.

[88] The Authority will then need to determine whether penalties should be imposed and if so in what amount. An Authority Officer will contact the parties before doing so as to whether a further meeting or telephone conference to address the Authority on this matter is required.

Costs

[89] I reserve costs until after the issue of any imposition of penalties has been determined.

Helen Doyle
Member of the Employment Relations Authority