

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 526
3071172

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	HANAKO MASSAGE THERAPY LIMITED Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Tim Gray, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: On the papers

Submissions [and further Information] Received: 15 May and 8 December 2020 from the Applicant
Nothing from the Respondent

Date of Determination: 18 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] At material times, Hanako Massage Therapy Limited (Hanako) operated a massage therapy business in Papakura. Ms Somsamai Chantrasee is the sole director and shareholder of Hanako.

[2] The Labour Inspector applies to the Authority for penalties against Hanako arising from breaches of the Wages Protection Act 1983 (WPA).

[3] In October 2019, an Enforceable Undertaking (EU) under section 223B of the Employment Relations Act 2000 (the Act) was entered into between Ms Chantrasee for Hanako

and the Labour Inspector. The EU was signed respectively by Ms Chantrasee and the Labour Inspector on 23 and 24 October 2019. The EU recorded that Hanako acknowledged that it had breached sections 4, 5 and 5A of the WPA. The EU recorded the actions Hanako was to take to rectify the breaches. The actions were that Hanako was to pay money owing by it to two of its former employees, Ms Thanatpron Inthisit and Ms Piyamart Thuin, both migrants from Thailand (the employees) by instalments and the consequences for failing to do so.

[4] A Memorandum of Understanding (MOU) was signed by Ms Chantrasee on 7 October 2019, and by the Labour Inspector and a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 24 October 2019. The MOU recorded that Hanako was to make payments of final pay which included holiday pay to the employees. The payments have been made by Hanako in accordance with the EU and the MOU.

[5] The MOU recorded that the matter of penalties was to be determined by the Authority. This determination deals with the matter of penalties only.

The process

[6] On 7 April 2020, Member Larmer issued a direction requesting that by 24 April 2020 the parties file evidence for consideration by the Authority when assessing penalties. Following the filing of any evidence the parties were directed to file submissions on penalties by 18 May 2020. The parties were given until 9 April 2020 to raise any questions or concerns about the process and to email them to the Authority. No questions or concerns were raised by either party about the process.

[7] The Labour Inspector filed a witness statement on 24 April 2020 and submissions on 15 May 2020. Hanako did not file a witness statement or submissions. The progress of this file was hampered by New Zealand's national lockdown as a result of Covid 19 and also an injury suffered by Member Larmer. I am now progressing the file.

[8] On 8 December 2020, I convened a case management conference with the Labour Inspector to discuss the Authority's investigation into the issue of penalties. Hanako was informed of the conference but did not participate. Following discussion, it was agreed that this was a matter that could be dealt with by the Authority on the papers.

Investigation

[9] The Authority may determine a matter without holding an investigation meeting. This is such a matter, it will be dealt with on the papers¹.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Background Facts

[11] In August 2018, Hanako was the subject of a complaint to the Labour Inspector by two of its former employees, Ms Inthisit and Ms Thuin (the employees). They complained that Hanako had wrongfully deducted monies from their final pay and they wished to recover it.

Labour Inspector's investigation

[12] The Labour Inspector undertook an investigation into the complaints. She interviewed the employees, visited Hanako's business and spoke with Ms Chantrasee. The Labour Inspector obtained necessary records including employment agreements and the resignation letters from the employees. The Labour Inspector formed a preliminary view that Hanako was in breach of the WPA by making unlawful deductions from Ms Thuin's final pay and from Ms Inthisit's final holiday pay. Ms Chantrasee was provided with a copy of the Labour Inspector's investigation report for comment.

[13] Hanako's response was received by the Labour Inspector on 12 May 2019. Hanako accepted record-keeping breaches but denied other breaches of minimum employment standards. Hanako raised issues such as the expense that it had gone to in implementing computerised rosters, that it had provided the employees with benefits such as accommodation, entertainment and meals and had spent considerable funds in obtaining visas for the employees who were migrants from Thailand. Ms Chantrasee's response to the report was that the two employees had failed to give required notice under their employment agreements and that she had been told by the 'Department of Labour' being MBIE's service centre, that she was entitled to make deductions from the employees' final pay.

¹ s174D of the Employment Relations Act 2000 (the Act)

[14] The Labour Inspector considered the responses made on behalf of Hanako and made further enquires. Following his further enquiries, the Labour Inspector concluded that unlawful deductions had been made from Ms Inthisit's final holiday pay and from Ms Thuin's final pay, despite both employees having given the required notice of resignation to Hanako. The Labour Inspector concluded that Hanako's actions were in breach of the WPA.

Proceedings in the Employment Relations Authority

[15] The Labour Inspector filed a statement of problem in the Employment Relations Authority on 19 August 2019 seeking to recover from Hanako monies unlawfully deducted from the employees' pay, together with penalties for the breaches of the WPA.

[16] Following a mediation on 7 October 2019, the parties entered into a MOU and an EU. The Labour Inspector has been informed by the employees that the monies agreed to be repaid by Hanako have been paid. Therefore, the only issue for determination by the Authority relates to penalties for breaches by Hanako of the WPA.

Penalties - Applicable law

[17] The legal framework for assessing and fixing a penalty, having regard to the statutory requirements in s 133A of the Act and the full Court's judgment in *Borsboom v Preet*, was summarised by the Court in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.²

[18] The Court in those cases confirmed the considerations as:

- (a) The object of the Act as stated in s 3 of the Act (statutory consideration 1);
- (b) The nature and extent of the breach (statutory consideration 2);
- (c) Whether the breach was intentional, inadvertent, or negligent (statutory consideration 3);
- (d) The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by any person because of the breach or involvement in the breach (statutory consideration 4);

² *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19] *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143

- (e) Whether the person or entity in breach is paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5);
- (f) The circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6);
- (g) Previous conduct (statutory consideration 7);
- (h) Deterrence, both particular and general (*Preet* additional consideration 1);
- (i) Degree of culpability (*Preet* additional consideration 2);
- (j) Consistency of penalty awards in similar cases (*Preet* additional consideration 3);
- (k) Ability to pay (*Preet* additional consideration 4);
- (l) Proportionality of outcome to breach (*Preet* additional consideration 5).

Statutory consideration 1 – the object of the Act

[19] The objects of the Act are set out in section 3. Objects include:

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. Further, the promotion of effective enforcement of employment standards, in particular, by conferring enforcement powers on Labour Inspectors, the Authority and the Court.

[20] The actions in this case involve undermining employment standards. There was an imbalance of power. The employees were young migrants from Thailand and unfamiliar with New Zealand laws. They were recruited by Ms Chantrasee and were reliant on her to obtain employer sponsored temporary work visas which meant they could only work for Hanako.

Statutory consideration 2 – the nature and extent of the breach

[21] An analysis under this step involves four sub-steps – identify the number of breaches; identify the nature of each breach; identify the maximum penalty for each of the identified breaches; and consider whether global penalties should apply.³

³ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [20]

[22] The breaches of the WPA were of:

- (a) Section 4, which requires an employer to pay the entire amount of wages to an employee, without deduction, subject to ss5(1) and (2) of the WPA;
- (b) Section 5, which requires any deductions from wages to be with the written request and written consent of the employee; and
- (c) Section 5A, that the employer not make a deduction under s5 of the WPA if it is unreasonable.

Identifying the number of breaches

[23] There are two employees affected by Hanako's breaches. I accept the Labour Inspector's submission that the breaches of the WPA should be treated as two discrete breaches. The breaches were similar in nature, they concerned two separate employees and the unlawful deduction occurred for Ms Inthisit on 22 July 2018 and for Ms Thuin on 23 September 2018, two months apart.

Identifying the maximum penalty available in respect of the breaches committed by Hanako.

Maximum penalties

[24] The maximum penalty available in respect of a breach of the WPA is \$20,000 per breach pursuant to s 13 of the WPA and s 135(2)(b) of the ERA. The maximum penalties for two breaches of the WPA by Hanako is \$40,000 being \$20,000 per breach.

Statutory consideration 3 – whether the breach was intentional, inadvertent, or negligent

[25] From the evidence, it appears that while Hanako intentionally breached the WPA, it may have been acting under a misapprehension that the wording of the employee's employment agreements permitted the deductions to be made from final pay. However, Ms Chantrasee's behaviour during the Labour Inspector's investigation included misleading her in relation to various issues, including her identity when she first visited Hanako's workplace to meet with her as the director and the person in charge. During his visit Ms Chantrasee informed the Labour Inspector when asked, that her name was Tina, a staff member and that the person in

charge was not present at the time. This behaviour was misleading and demonstrates an element of intention by Ms Chantrasee.⁴

Statutory consideration 4 – the nature and extent of any loss or damage?

Assessment of the severity of the breaches

[26] In assessing the severity of the breaches, it is necessary to consider the nature and extent of loss or damage. The deductions amount to \$4,640.13 in total. Ms Inthisit was owed and entitled to \$2,993.97(net) in wages and annual holiday pay when her employment ended. Following the deduction of \$2,640 by Hanako, Ms Inthisit received \$353.97 net. Similarly, Ms Thuin was owed and entitled to \$3,196.27 net in wages and holiday pay when her employment ended. Following deductions by Hanako, Ms Thuin received the net sum of \$1,196.08.

[27] For more than a year following their resignations, neither employee was paid monies owed to them by Hanako. The employees lost the use of money they were entitled to at the time it became due and during a period of vulnerability. Hanako, on the other hand, benefitted financially by retaining monies it was not entitled to retain.⁵

Statutory consideration 5 – steps to mitigate effects of the breach

[28] Hanako accepted responsibility for its breaches of the WPA at the mediation held in October 2019. Hanako repaid the employees the money it had unlawfully deducted from their final pay, by February 2020. Chief Judge Inglis in a recent judgment of the Employment Court stated:

..., the defendants did take some steps to *mitigate the losses sustained by the employees*. They made good the financial arrears prior to the hearing. However, this step should not be overstated in the quantum-setting exercise. The reality is that the arrears were not paid until a relatively late stage, and after the Labour Inspector's investigation had been completed, the findings provided to the defendants, and proceedings had been filed – the writing was on the wall in large letters and it might be inferred that payment reflected a pragmatic decision rather than any genuine attempt to acknowledge wrong-doing and make amends.⁶

⁴ Labour Inspector's notes of site visit on 5 October 2020

⁵ Submissions for applicant, paras [25] and [26]

⁶ *A Labour Inspector v Choir & Ors* [2020] NZEmpC 203 at [48] citing *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12, [2019] ERNZ 1 at [35]

Statutory consideration 6 – circumstances of the breach, and any vulnerability

[29] I have already considered the circumstances of the breach and any vulnerability under statutory consideration, in paragraph [1] of this determination.

Statutory consideration 7 – previous conduct

[30] There is no evidence that Hanako has previously appeared before the Authority.

Additional consideration 8 – deterrence

[31] The breaches in this case are of minimum standards. The Employment Court in *Chhoir* stated:

...it is plainly important to send a strong message to these employers and other would-be employers that cutting employment standards at the expense of their workforce is a high-risk business strategy that is best avoided. Parliament has made it crystal clear that employers who default on their obligations will be exposed to stiff penalties...⁷

[32] Therefore, it is important that a penalty is set at a level at which it deters employers who default on their obligations as an employer from doing so. It also deters employers from exploiting the vulnerability of employees, in this case employees recruited from Thailand who relied heavily on Hanako in respect of work, visas and understanding of NZ laws.

***Preet* additional consideration 2 – degree of culpability**

[33] A consideration of the severity of the breach is necessary to establish a provisional starting point for the penalty. This includes an adjustment for aggravating and mitigating factors in relation to the breaches. There are a number of factors which are relevant in respect of Hanako's culpability, including as follows:

- (a) Ms Chantrasee's misleading conduct during the Labour Inspector's investigation;
- (b) The affected employees were migrant workers recruited and employed by Hanako and reliant on it and its director Ms Chantrasee;

⁷ Ibid at [52]

- (c) Hanako's misuse of power in the employment relationship and exploiting/exploitation by deducting payments from vulnerable low-wage migrant workers with few options.

Additional consideration 10 – consistency

[34] Many of the penalty determinations in Labour Inspector cases involve breaches in relation to a number of employees, whereas this case involves two affected employees.

Additional consideration 11 – ability to pay

[35] The onus is on Hanako to provide the Authority with up to date and accurate information in support of any submission that it is financially unable to meet a potential penalty award. Further, as was observed in *Daleson* mere financial incapacity without more, is unlikely to be regarded as warranting a penalty reduction to nil, or next to nil, having regard to the relevant statutory scheme and its underlying objectives.⁸ No financial evidence has been provided by Hanako. However, Hanako has repaid the employees' monies unlawfully deducted.

Additional consideration 12 – Proportionality of outcome

[36] This final step involves the proportionality or totality test, in which the Authority must consider whether the provision or penalty reached is proportionate to the seriousness of the breaches, and harm occasioned by them. This step is to ensure that the imposition of a penalty and the amount of it is just in all the circumstances.

[37] The Labour Inspector has submitted that a penalty of \$8,000-10,000 in total is appropriate in the circumstances. I must make my own considered view. Taking into account the aggravating and mitigating factors, I consider a penalty of \$10,000 to be appropriate.

[38] A table of the calculations is annexed as **Appendix One**.

Conclusion on quantum

[39] Hanako is ordered to pay \$10,000 by way of penalty for breaches of the WPA. This sum is to be paid to the Employment Relations Authority. The Employment Relations

⁸ *Daleson* at para [44]

Authority will then pay this sum into the Crown bank account. Payment of the penalties ordered against Hanako is to be made within 28 days of the date of this determination.

Costs

[40] The notional point for assessing costs in the Authority is \$4,500 for the first day of an investigation meeting. This matter was determined on the papers. I consider an assessment of costs based on a half day in the Authority is appropriate in the circumstances.

[41] I make an order that Hakano pay costs of \$2,225 to the Labour Inspector within 28 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority

APPENDIX 1 – PENALTY ANALYSIS

Step 1 – Nature and Number of breaches – Potential Maximum Penalties				
		<i>Affected Employees</i>	<i>Company</i>	
	Unlawful deduction from final pay, ss 4-5A WPA (Inthisit)	1	\$20,000	\$20,000
	Unlawful deduction from final pay, ss 4-5A WPA (Thuin)	1	\$20,000	\$20,000
			Subtotal	\$40,000
Step 2 – Aggravating Factors as a proportion of maxima in Step 1				
	Unlawful deduction from final pay ss 4-5AWPA (Inthisit)	50%	\$10,000	\$5,000
	Unlawful deduction from final pay ss 4-5AWPA (Thuin)	50%	\$10,000	\$5000
			Subtotal	\$10,000
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)				
	No deduction		Subtotal	\$10,000
Step 3 – Defendant’s Financial Circumstances				
	No information provided – no deduction		Subtotal	\$10,000
Step 4 – Proportionality				
	Consideration for the Authority – noting deductions above for ameliorating factors and financial circumstances		TOTAL	\$10,000