

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 86
3090292

BETWEEN	A LABOUR INSPECTOR Applicant
AND	TIGER CONSTRUCTION NZ LIMITED (t/a TIGER SCAFFOLDING) First Respondent
AND	HAYDEN KARAKA DAVIS Second Respondent

Member of Authority: Michael Loftus

Representatives: Claire English, counsel for the Applicant
No appearance for the Respondents

Investigation Meeting: By telephone and on the papers with input up to and including 3 December 2020

Date of Determination: 3 March 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A Labour Inspector (the Inspector), acting on behalf of three former employees of Tiger Construction NZ Limited (Tiger), alleges the latter made unlawful deductions from their wages contrary to the provisions of ss 5 and 5A of the Wages Protection Act 1983 (WPA). It is alleged the deductions were made without authority and are unreasonable.

[2] The Inspector seeks to recover these monies from Tiger or, in the absence of payment by the company, from Mr Davis pursuant to s142Y of the Employment

Relations Act 2000 (the Act). The Inspector also asks that penalties be imposed on both respondents.

[3] With the exception of one brief contact neither respondent has participated in the Authority's process and their response is unknown.

The Investigation Process

[4] Tiger is a company. Hayden Davis is its sole director and majority shareholder and, as already said, neither has participated meaningfully in the Authority's process. No statement in reply was lodged and nor was there any other contact from either respondent prior to 29 June 2020 which was the day I had scheduled a telephone conference to discuss how the investigation should proceed.

[5] Mr Davis was called on a number provided by the Inspector and answered. After being told the purpose of the call Mr Davis advised he had other things to do and would not participate. That was the contact referred to in [3] above.

[6] As a result, and given the absence of an earlier response, I scheduled an investigation meeting on the proviso it would only proceed if the respondents showed a desire to participate by lodging a statement in reply and statements of evidence no later than 17 August 2020. Should they fail to do so the scheduled investigation meeting would be cancelled and the Inspector's claims determined on the papers.

[7] The process and attendant requirements were specified in a notice of direction sent, along with all other relevant documents, to two addresses. The first was 33 Waitohu Road, York Bay, Lower Hutt. It is the registered address for both Tiger¹ and Mr Davis in his capacity as a director.² The second address is the one Tiger's website, along with various business directories, records as being the physical one from which the company operates. I am satisfied service was properly effected at both addresses on 30 June 2020.

[8] It follows both Tiger and Mr Davis are, or at least should be, aware of the process and its requirements. They were also told of the consequences of failing to participate.

¹ Section 192(1) of the Companies Act 1993

² Section 387A(1)(b) of the Companies Act 1993

[9] Despite that there has been no response and the lack thereof means I know of no reason why I should not continue. Given the circumstances I choose to do so.

Background

[10] The following facts are gleaned from the evidence of the Inspector.

[11] In September 2018 Tiger engaged Woburn International Limited (Woburn), a New Zealand based immigration advisory company, to assist with visa applications for Filipino nationals to enter and work in New Zealand.

[12] Woburn then engaged the assistance of Rensol Recruitment, a Philippines based recruitment agency, to assist with recruiting and employing Filipino nationals. As a result, Messrs Medgar Lumuglas, Jesus Ng and Sugarray Manalo were recruited as employees of Tiger.

[13] On 28 February 2019, the National Manager of the Labour Inspectorate was notified of concerns by the Philippine embassy. These included allegations made on behalf of one of their nationals that Tiger was making deductions from his wages without consultation, let alone written consent and that he, along with two others, were not being offered the contracted hours and not then being paid for those they worked.

[14] As a result the inspector commenced an investigation. Information was obtained from the employees; Mr Davis was interviewed and various records including employment agreements and payslips were sourced.

[15] Each of the employee's agreements, provided to them by Woburn on behalf of Tiger, contained a general deductions clause which read *You authorise us to make deductions from any money we pay you, including any final pay for any money you owe to us.*

[16] The payslips recorded that as at early September 2018 each of the employees owed Tiger an amount, which varied between \$15,689.90 and \$17,702.79. They also showed weekly deductions were being made from the employees' wages. The deductions ranged from \$301.73 to \$387.41

[17] All three employees advised the Inspector they were not aware the deductions were to occur until they received their first payslips. They say they then raised the

issue with Mr Davis who provided a list of what the deductions were for and which included costs associated with the property the employees were living in and the cost for certification for a NZ Scaffolding ticket.

[18] The Inspector asked Mr Davis evidence the property costs by providing bills but he failed to do so and the employees stated they have never sat the certification tests with training being limited to a Site Safe course. Mr Davis was then asked about this but again failed to respond.

[19] After a further month Mr Davis was telephoned about the certification issue. He then accepted the employees did not do the NZ Scaffolding ticket though he made deductions for it. He stated he would reimburse that money, which totals \$1326.87.

[20] Mr Davis also advised he had messages pertaining to discussions with the employees about the deductions. He was asked to provide these but that did not occur. What was forthcoming was an email from Rensol to Mr Davis outlining the types of costs that might be recoverable but Rensol confirmed nothing had been agreed or formalised.

[21] As a result of the investigations the Inspector concluded the deductions were not properly consented by the employees as required by the WPA. The Inspector also concluded *that the items the deductions were made for represented (as far as I could tell given the lack of supporting documentation provided) the employer's own costs of doing business, and were therefore unlawful and unreasonable.*

Discussion

[22] As already said the Inspector conducted an investigation by sourcing information from numerous sources including the employees, Mr Davis and the recruitment agencies which brought the two together.

[23] That information is well documented and, in my view, supports the conclusions reached by the Inspector, that there have been unauthorised and improper deductions. To that I add the fact those conclusions are not undermined by any contrary evidence – indeed the claims have not even been denied and at least one example of improper deduction has been acknowledged by Mr Davis.

[24] I also note Mr Davis signed an *Affidavit of Undertaking* that Woburn required in which he acknowledges ... *the company (Tiger) will not collect and/or charge fees to all Overseas Filipino Workers who were recruited in the Philippines.*

[25] I am also cognisant of the fact Tiger appears to rely upon a general deduction clause. The Court has found that in such instances and absent an *individualised written consent* there must, as a minimum, be evidence of at least consultation. There is none which further undermines Tigers right to retain monies as the Inspector's evidence satisfies me it did.³

[26] Lastly I note the comprehensive submissions tendered on behalf of the Inspector which need not be recorded⁴ but which convince me there is a legitimate legal basis for the claims.

[27] It follows from these points I conclude the Inspector has made out her claims. Arrears are owing and Tiger has made unlawful and unreasonable deductions from the wages of the employees the Labour Inspector represents.

[28] As a result Tiger will be ordered to pay the Inspector a total of \$21,692.27 which she will then distribute to those she represents as follows: Mr Lumuglas gets \$7636.42, Mr Ng \$7071.33 and Mr Manalo \$7,254.52.

Penalties

[29] As already said the Inspector also sought penalties against both Tiger and Mr Davis. Dealing with the company first.

Penalties against Tiger

[30] The conclusion Tiger made unlawful and unreasonable deductions means there is a breach to which a penalty might apply.⁵ The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,⁶ *A Labour Inspector v Prabh*⁷ and *A Labour Inspector v Daleson Investment*.⁸

³ *Jonas v Menefy Trucking Limited* [2013] NZEmpC 200 at [62]

⁴ Section 174E(b)(ii) of the Employment Relations Act 2000

⁵ Sections 5, 5A and 13 of the Wages Protection Act 1983

⁶ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁷ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

[31] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[32] The Court has found the Act's objects, which include the effective enforcement of employment standards, are particularly relevant in penalty matters involving migrant employees. Failure to provide minimum standards directly disadvantages employees, and arise in circumstances which the Court has described as *involving a distinct power imbalance* and here the evidence is the employees were acutely aware of that imbalance.⁹

[33] With respect to the nature and extent of the breaches I note the Inspector only sought one global penalty for an unreasonable and/or unlawful deduction from each employee's wages contrary to ss 5 and 5A of the Wages Protection Act.¹⁰ As three employees were involved that would mean a total of 3 separate, albeit identical, breaches.

[34] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question¹¹, or failed to take reasonable steps to fulfil their legal obligations.¹²

[35] While there are some gaps the evidence would suggest the breaches were intentional given they were contrary to undertakings Mr Davis had given the recruitment agency and he failed to remedy deductions he acknowledged as being wrongly made.

[36] With respect to the breaches severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 80%.¹³

⁸ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

⁹ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

¹⁰ Paragraph 1.2 of the Statement of Problem

¹¹ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

¹² *El-Agez v Comprade Limited*, TT 4121553, at para 18

¹³ See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

[37] The loss is monetary and its extent is reflected in the order made regarding arrears. As a result the employees lost the use of the money they were entitled to at the time it became due¹⁴ and Tiger improperly reduced its costs.¹⁵

[38] As already said there has been no attempt to remedy or mitigate the breaches and comment has already been made about the fact the employees were migrant workers. They are inherently vulnerable, particularly because they were unfamiliar with New Zealand laws and regulations.¹⁶

[39] Finally there is no evidence of similar previous conduct by Tiger.

[40] Having weighed these factors I conclude that while some of the above points, such as the failure to remedy acknowledged breaches, would suggest an increase on the 80% starting point there are none that favour a reduction. That said, additional factors that must be considered such as consistency and proportionality which suggest that would lead to an improperly high figure. Having weighed these factors I conclude Tiger should be required to pay a penalty of \$7,000 in respect to each of the three employees. The total, payable to the Ministry of Business, Innovation and Employment, is therefore \$21,000.

Penalties against Mr Davis

[41] The Inspector also asked that Mr Davis be found to be a person involved in the breach pursuant to s 142W of the Act and that as a result be both penalised (s142X) and held responsible for the arrears should Tiger default on any ordered payment (s142Y).

[42] I conclude this aspect must be adjourned pending disposal by the Court of Appeal of an Inspector's appeal against a judgement of the Employment Court about the level of knowledge required for a respondent to be found to be a person involved.¹⁷ The Employment Court found *intent* was required¹⁸ after the Authority had earlier found *wilful blindness* was sufficient.¹⁹

¹⁴ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [31]

¹⁵ *Ibid.*

¹⁶ The Court has noted, in *A Labour Inspector v Prabh Limited* at para [10]

¹⁷ *A Labour Inspector v Southern Taxis Limited* [2020] NZCA 337 (CA)

¹⁸ *A Labour Inspector v Southern Taxis Limited* [2020] NZEmpC 63 at [187]

¹⁹ *A Labour Inspector v Southern Taxis Limited* [2019] NZERA 291

Conclusion and Orders

[43] For the above reasons I conclude the First Respondent, Tiger Construction NZ Limited made unlawful and unreasonable deductions from the wages of three employees. As a result Tiger Construction NZ Limited is ordered to pay:

- a. \$21,692.27 (twenty one thousand, six hundred and ninety two dollars and twenty seven cents) to the Labour Inspectors Trust Account no later than 4.00pm Wednesday 31 March 2021 and the Inspector will then be responsible for arranging disbursement to those she represents; and
- b. Penalties totalling \$21,000.00 (twenty one thousand dollars) to the Crown via the Authority, with payment to again be made no later than 4.00pm Wednesday 31 March 2021.

[44] The question of Mr Davis' personal liability is adjourned till the Court of Appeal issues its decision in the *Southern Taxis* case.

[45] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority