

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 193
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: Alistair Miller, counsel for the Applicant
No appearance for the Respondents

Investigation Meeting: By written submission with correspondence up to and
including 5 May 2022

Date of Determination: 11 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 3 March 2021 I issued a determination in which I concluded the first respondent, Tiger Construction NZ Limited (Tiger), had made unlawful and unreasonable deductions from the wages of three employees.¹ I ordered the money be repaid and imposed penalties on the company.

[2] I also recorded that the inspector had cited Mr Davis, Tiger's sole Director and majority shareholder, as a respondent for the purpose of both penalties (s 142X) and possible liability for the wage deductions should Tiger not pay (s 142Y).

[3] However, I also concluded the claims against Mr Davis 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 (s 142W). That case, *Southern Taxis*,² will establish the threshold for whether or not someone might be personally liable. The Employment Court found *deliberate involvement* was required³ after the Authority had earlier found *wilful blindness* was sufficient.⁴ The outcome of the appeal would impact on any subsequent determinations regarding the applicability of ss 142X and 142Y.

[4] With respect to the s 142Y claim there had not, at that stage, been any default by Tiger which might warrant the passing of responsibility to Mr Davis though the Inspector was reserving her rights in that regard.

[5] Since then the Court of Appeal has resolved the question regarding the standard required for personal liability under s 142W and, according to the Inspector, Tiger has failed to make good the wage underpayments which resulted from the illegal deductions.

The Investigation Process

[6] As already said the question of Mr Davis' liability for penalties was adjourned pending the Court of Appeal's judgement in *Southern Taxis*. When that was resolved the Authority raised the adjournment with the parties and timetabled an exchange of submissions.

[7] The Inspector complied, as scheduled, on 14 April 2022. Despite reminders, Mr Davis has not furnished a response though that is not a great surprise as he took an unhelpful and cavalier approach to the original investigation.⁵

Discussion

[8] That there was a failure to comply with minimum employment standards, and therefore a breach, has already been established with Tiger being the party (entity) in

¹ A Labour Inspector v Tiger Construction NZ Limited and Hayden Davis [2021] NZERA 86

² *Labour Inspector v Southern Taxis Limited* [2021] NZCA 705

³ *Southern Taxis Limited v A Labour Inspector* [2020] NZEmpC 63 at [187]

⁴ *A Labour Inspector v Southern Taxis Limited* [2019] NZERA 291

⁵ Above n 1 at [3] and [5]

breach.⁶ To then be personally liable for a penalty under s 142X or responsible for rectifying the breach under s 142Y an individual must be a person involved.

[9] To be a *person involved* where a breach was that of an entity an individual must be both an *officer* of that entity and:

- a. Aided, abetted, counselled or procured the breach; or
- b. 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. Conspired with others to effect the breach.⁷

[10] Here there is no doubt that as Tiger's sole director Mr Davis fulfils the definition of officer.⁸ The question is whether or not he also meets one of the requirements of s 142W(1) and here it is being argued he has been knowingly concerned in, or party to, the breach ([9](c) above).

[11] The level of knowledge required is set out at paragraph [59] of the Court of Appeal's judgment where the Court said:

The level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer.

[12] Put another way, the Court of Appeal has adopted the English position from *Burton v Bevan*⁹ and "knowingly" means with knowledge of the facts upon which contravention depends and knowledge of the law is immaterial. A director cannot avoid liability because they did not turn their mind to the legal consequences of what they knew.

⁶ Above n 1

⁷ Section 142W(1) of the Employment Relations Act 2000

⁸ Section 142W(3) of the Employment Relations Act 2000

⁹ *Burton v Bevan* [1908] 2 Ch 240 at 247

[13] The Inspector must therefore establish, to the civil standard, that Mr Davis had either actual knowledge of all the essential facts giving rise to the breach or was wilfully blind in relation to those facts.¹⁰

[14] A number of factors lead to a conclusion the answer is yes. They include:

- a. The evidence, in the substantive investigation, established Mr Davis was deeply and personally involved in Tiger's day to day management. He was the human actor through which Tiger operated and was the only person in control of the business;
- b. As sole director, and majority shareholder, he was the only person with legal authority over Tiger, the employer company, in any case;
- c. It was Mr Davis who contracted with the recruitment company to engage the Filipino workers and it was he who signed a Recruitment Agreement which set out what Tiger and he were financially responsible for;
- d. The evidence shows Mr Davis was, or at least should have been. aware that the recruitment company was acting to protect the interests of its migrant workers. To this end it required assurances the workers would receive their contracted wages without deduction and Mr Davis gave this personally. Furthermore, he agreed to reimburse the amounts paid for visa processing and that the cost "will not be shouldered by the workers"; and
- e. Notwithstanding that, it was Mr Davis who subsequently made deductions from each of the employee's wages. It was also he who insisted that the employees were not to agree to the recruiter's contractual terms which, as the inspector submits, suggests he always intended to make non-permissible deductions. Even if that were not the case he must, having signed the above documents, had full knowledge the deductions were not in accordance with the contract he had made to acquire the workers services.

¹⁰ Above n 4 at [42]

[15] These factors lead to a conclusion that Mr Davis' actions in making the deductions from the employees' wages without their consent or consultation were deliberate and knowing. As was submitted by the Inspector the only possible conclusion to be drawn from the evidence is that Mr Davis had knowledge of the fact deductions were made and of the circumstances in which they were in fact made. He therefore had knowledge of "the essential facts that establish the contravention" and, as made clear by the Court of Appeal, knowledge of the law is immaterial though I also note Mr Davis' failure to participate in the process means I know nothing about that anyway.

[16] The above conclusion means Mr Davis is liable for both penalties and the amounts due to the workers represented by the Inspector.

[17] With respect to the unauthorised deducing I note, and accept, the Inspector's advice the money remains outstanding. Given over a year has passed since the original order was made, and in the absence of any contrary evidence, I assume that is because Tiger is unable to pay.¹¹ Even if that is not the case Mr Davis' control of Tiger means that he controls its ability to pay and the failure to do so essentially amounts to the same thing – an inability/unwillingness to do so which can only be rectified by Mr Davis.

[18] With respect to leave¹² – it is both granted and the order making Mr Davis personally liable will be made. This is because enough time has passed as a result of Mr Davis' failures regarding the Authority's processes and there is no value in adding another step.

[19] Turning now to the penalties. The amount for which a person involved is liable is half of that applicable to a company. Here Tiger has been penalised and the analysis concerning amount already undertaken. Given the level of Mr Davis' control I conclude exactly the same analysis could, and should, apply to him and a penalties half the size of that imposed on the Tiger should be imposed here.

[20] In reaching this conclusion I reiterate the evidence establishes the failures were deliberate and the result of Mr Davis' actions; that the workers were immigrants and inherently vulnerable; that there was a direct profit motive and there has been no attempt to remedy or mitigate the breaches either before or after the initial

¹¹ Section 142Y(2)(b) of the Employment Relations Act 2000

¹² Section 142Y(2)(a) of the Employment Relations Act 2000

determination and the evidence leads to a conclusion that it is Mr Davis who is responsible for that.¹³

Conclusion and orders

[21] For the above reasons I make the following orders:

- a. Provided payment has not yet been made the second respondent, Hayden Karaka Davis, is ordered to pay \$21,692.27 (twenty one thousand, six hundred and ninety two dollars and twenty seven cents) being money unlawfully and unreasonably deducted from the wages of the workers represented by the Inspector. Payment is to be made to the Labour Inspectors Trust Account no later than 4.00pm Wednesday 1 June 2022 and the Inspector will then be responsible for arranging disbursement to those she represents; and
- b. Mr Davis is to pay penalties totalling \$10,500.00 (ten thousand, five hundred dollars) to the Crown via the Authority, with payment to again be made no later than 4.00pm Wednesday 1 June 2022.

[22] Costs are reserved as they were with the initial determination. Having been totally successful the Inspector should, if she wishes to seek costs, do so by serving a memorandum within 14 days of the date of issue of this determination. From the date of service Mr Davis will then have 14 days to lodge any reply.

Michael Loftus
Member of the Employment Relations Authority

¹³ Above n 1 at [32] to [37]