IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 201
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 17 May 2022
Date of Determination:	18 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] would establish the threshold for whether or not someone might be personally liable and impact on any subsequent determinations regarding the applicability of ss 142X and 142Y. The Employment Court found *deliberate involvement* was required[3] after the Authority had earlier found *wilful blindness* was sufficient.[4]

[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.

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 failed to participate in the original investigation.[5]

[8] That, in turn, led to a subsequent determination in which I concluded the penalty issue and also ordered Mr Davis be held personally liable for the outstanding arrears on the understanding that was yet to be paid.[6]

[9] On receipt of the determination the Inspector advised events had overtaken the May 2022 determination[7] and Tiger Construction had recently entered into an

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[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]
[6] A Labour Inspector v Tiger Construction NZ Limited and Hayden Davis [2022] NZERA 193 dated 11 May 2022
[7] Above n 6

arrangement for the payment of the arrears. That means that while the Inspector continues to reserve her position with respect to the possibility of invoking s 142Y that is not yet necessary. The Inspector asks I amend the determination accordingly.[8]

[10] The memorandum shows more than sufficient grounds to revisit the 11 May 2022 determination as one of its conclusions is no longer tenable. Accordingly, I choose to reopen the investigation[9] and remedy the issue which results in this determination that replaces the earlier one.

Discussion

[11] 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 breach.[10] 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.

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

a. Aided, abetted, counselled of 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.[11]

[13] Here there is no doubt that as Tiger's sole director Mr Davis fulfils the definition of officer.[12] The question is whether or not he also meets one of the requirements of s 142W(1) and it is being argued he has been knowingly concerned in, or party to, the breach ([12](c) above).

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

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[8] Memorandum to the Authority dated 17 May 2022
[9] Section 4(1) of Schedule 2 to the Employment Relations Act 2000
[10] Above n 1
[11] Section 142W(1) of the Employment Relations Act 2000
[12] Section 142W(3) of the Employment Relations Act 2000

> 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.

[15] Put another way, the Court of Appeal has adopted the English position from *Burton v Bevan*[13] 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.

[16] 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.[14]

[17] 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

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[13] *Burton v Bevan* [1908] 2 Ch 240 at 247
[14] Above n 4 at [42]

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.

[18] 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.

[19] The above conclusion means Mr Davis is liable for both penalties and the amounts due to the workers represented by the Inspector should Tiger default in that respect.

[20] With respect to the unauthorised deductions I note, and accept, that an arrangement has been entered into for the repayment of those monies. That means there is yet to be a default on Tiger's behalf. Therefore this matter need not be considered any further at this point other than to remind Mr Davis the Inspector continues to reserve her rights in this regard.

[21] Turning 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 that with one possible variation, the same analysis could, and should, apply to him and a penalty half the size of that imposed on the Tiger should be imposed here.

[22] 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; that there was no attempt to remedy or mitigate the breaches before the initial determination and the evidence leads to a conclusion that it is Mr Davis who is responsible for that.[15]

[23] The variation referred to in [21] arises from the fact Tiger, which as I have concluded is controlled by Mr Davis, is now taking some action to remedy the breach. For the following reasons that does not, however, alter my view as to quantification of the penalty. Had it not been for *Southern Taxis* penalties against Mr Davis would have been determined in 2021 and the subsequent remedial action could not have been taken into consideration as it was then yet to occur. Second, I note nothing was done in this regard for about a year and only after the Authority advised the parties it was reactivating its consideration of the outstanding mattes which does not create a situation which would encourage me to consider a reduction.

Conclusion and orders

[24] For the above reasons the orders made in determination [2022] NZERA 193 dated 11 May 2022 are set aside and replaced with an order that the second respondent, Hayden Davis, pay penalties totalling $10,500.00 (ten thousand, five hundred dollars) to the Crown via the Authority. Payment is to be made no later than 4.00pm Friday 17 June 2022.

[25] I also record that the Inspector continues to reserve her rights with respect to a s 142Y application should there be a future default by Tiger with paying the arrears.

[26] 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

[15] Above n 1 at [32] to [37]