

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 249  
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BETWEEN	ROLANDO TABISORA First Applicant
AND	JOVIE TATOY Second Applicant
AND	NELSON PEREZ Third Applicant
AND	NORIEL ARGUELLES Fourth Applicant
AND	TANA GROUP LIMITED First Respondent
AND	JASON MCCORMACK Second Respondent

Member of Authority:	Sarah Blick
Representatives:	Gerardus Elwell, counsel for the Applicant Michael O'Brien, counsel for the Respondent
Investigation:	On the papers
Submissions:	20 May 2022 from the Respondent
Determination:	15 June 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The four applicants in this matter state the first respondent, Tana Group Limited (TGL) (formerly Tana Scaffolding Limited) has breached:

- a. Section 4 of the Wages Protection Act 1983 (the WPA 1983) by making unlawful deductions from their wages without their written consent;
- b. Section 19 of the Holidays Act 2003 (the HA 2003) by failing to consult with them or provide the required notice relating to taking annual holidays before making deductions from their balances.

[2] The applicants also state the second respondent, Mr Jason McCormack:

- a. Aided and abetted TGL's breach of their employment agreements, being the failure to pay agreed wages; and
- b. Is a person involved in employment standards breaches (namely, s 4 of the WPA and s 19 of the HA 2003).

[3] The applicants seek to recover wage arrears and orders for penalties against the respondents pursuant to the WPA 1983 and the HA 2003, and a penalty against Mr McCormack pursuant to s 134(2) of the Employment Relations Act 2000 (the Act).

[4] Pursuant to s 142Y of the Act, the applicants apply for leave of the Authority to recover arrears or other money payable by TGL from Mr McCormack. Arrears in wages or other money may be recovered from a person who is not an employee's employer only to the extent that the employee's employer is unable to pay the arrears in wages or other money. That application for leave will be determined as part of the Authority's substantive investigation.

### **The Authority's Investigation**

[5] The substantive investigation meeting in this matter is to take place on 29 June 2022.

[6] The Authority issues this preliminary determination to confirm whether the applicants' actions for the recovery of penalties have been commenced within the relevant statutory timeframes for doing so.

[7] On 20 May 2022 the Authority received submissions from counsel for the respondents addressing this issue.

[8] On 27 May 2022 the Authority received advice from counsel for the applicants that they have no formal response to the submissions of the respondents and will await the determination of the Authority on the matters raised.

### **Background**

[9] The applicants state that on or about 13 April 2020 TGL, without prior consultation or agreement, began deducting their annual holiday entitlements and paid those to the applicants to 'top-up' the COVID-19 wage subsidy being paid at that time. TGL says it had written to its employees (including the applicants) on 24 March 2020 indicating that it would pay them for their usual contracted hours until 13 April 2020 and directing employees to take annual holidays from 13 April 2020. TGL states it also advised employees it intended to apply for the wage subsidy and if that was successful would pay employees at 80 per cent of their normal pay from such time after 13 April 2020 when the employees' annual holidays had run out. TGL says the applicants raised no objection to that and agreed to an application being made on their behalf for the wage subsidy.

[10] Between about 27 April 2020 and up until about 22 June 2020, the applicants say TGL unilaterally reduced their wages to 80 per cent of their agreed rates, without consultation or agreement.

[11] The applicants say that on 12 June 2020, TGL held a meeting with the applicants proposing to vary the terms of their employment agreements. They say part of the proposal included a 10 per cent reduction in wages for 12-18 months. TGL confirms on this date that it liaised with all of its employees about implementing a temporary wage reduction of 10 per cent to avoid having to effect any redundancies. TGL says it offered employees more than their contractual minimum working hours and gave employees until 18 June 2020 to raise any objections to that proposal. It says the applicants did not object and accepted this arrangement. The applicants say they accepted this variation, but felt pressured to do so.

[12] The applicants say that in exchange for the reduction in wage, TGL offered an additional five days of annual holidays to those employees who agreed to the variation. TGL says that on 8 September 2020 TGL unilaterally gifted all its employees an additional week's holiday leave as a gesture of goodwill and thanks for the employees'

accommodation during the difficult period of lockdown and the impact on the business. It says the applicants did not object to receiving the additional holidays.

[13] The applicants say that from 22 June 2020, they were paid 90 per cent of their usual wages and required to work their usual hours.

[14] On 14 September 2020, 4 October 2020 and 5 October 2020, counsel for the applicants sent letters to TGL raising personal grievances. The letters raised unjustified disadvantage grievances relating to the unilateral variation of the terms of the applicants' employment, including breaches of bargaining provisions under s 63A(2) of the Act. The letters also stated TGL had breached s 4 of the WPA 1983 by failing to pay the full wages or salary due without deduction. They also claimed a breach of s 18(3) of the HA 2003, which provides that when annual holidays are to be taken by employees is to be agreed between an employer and employee.

[15] On 8 December 2021, statements of problem were filed for the first and second applicants. On 15 December 2021 and 20 December 2021, statements of problem were filed for the third and fourth applicants.

### **Relevant provisions**

[16] Section 135(5) of the Act states:

An action for the recovery of a penalty under this Act must be commenced within 12 months or, for a penalty for non-compliance with section 69ABE, within 6 months after the earlier of—

- (a) the date when the cause of action first became known to the person bringing the action; or
- (b) the date when the cause of action should reasonably have become known to the person bringing the action.

[17] Section 76 of the HA 2003 relevantly states:

- (1) A Labour Inspector and the employee concerned are the only persons who may bring an action in the Authority against an employer to recover a penalty under section 75.
- (1A) However, only a Labour Inspector may bring an action in the Authority against a person involved in a failure to comply in order to recover a penalty under section 75.
- ...
- (5) An action for the recovery of a penalty must be commenced within 12 months after the earlier of when the cause of action became known, or should reasonably have become known, to the Labour Inspector or employee concerned.

[18] Section 13 of the WPA states:

- (1) Where—
  - (a) any payment is made by or on behalf of any employer in contravention of this Act; or
  - (b) any employer or any person on that employer's behalf contravenes or fails to comply with any of the provisions of this Act,—

that employer, and every person involved in the contravention or failure, is liable ... to a penalty imposed under the Employment Relations Act 2000 by the Employment Relations Authority.
- (2) A worker or a Labour Inspector may recover a penalty under subsection (1), but the worker may recover a penalty only in relation to the employer.

### **Respondents' submissions**

[19] In their submissions the respondents refer to s 135(5) of the Act. The respondents submit that these actions were commenced more than 12 months after the actions complained of occurred and also more than 12 months after the applicants had engaged legal counsel (and should have reasonably been aware of the cause of action).

[20] The respondents further state there is no ability for the Authority to extend the strict limitation period. Accordingly, the penalty claims by the applicants are outside the Authority's jurisdiction. Counsel referred to the Authority's determination in *Marx v Southern Cross Campus Board of Trustees*<sup>1</sup>, and *Aarts v Barnados New Zealand*.<sup>2</sup>

### **Discussion**

[21] The time limit set by s 135(5) covers the penalties that may be awarded under s 134 of the Act and s 13 of the WPA 1983. The time limit set by s 76(5) of the HA 2003 covers the penalties that may be awarded under s 75 of the HA 2003.

[22] The statements of problem lodged in December 2021 included penalty claims and so amounted to what the Act and the HA 2003 describe as 'an action for recovery of a penalty'.

[23] From April 2020 the applicants knew the information on which their causes of action for penalties for breaches of s 4 of the WPA and s 19 of the HA 2003 were based. Their knowledge had certainly crystallised by 14 September 2020, 4 October 2020 and 5 October 2020, being the dates personal grievances relating to the matters were raised

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<sup>1</sup> *Marx v Southern Cross Campus Board of Trustees* [2015] NZERA Auckland 308, [5]-[9].

<sup>2</sup> *Aarts v Barnados New Zealand* [2013] NZEmpC 85, [34]-[44].

by counsel on their behalf. The 12 month time limits set by s 135(5) of the Act and s 76(5) of the HA 2003 meant they had to start actions for penalties by April 2021, or at the very latest by September and October 2021. The penalties claims therefore cannot be considered by the Authority and are dismissed.

[24] For completeness, the Authority notes penalty claims against Mr McCormack for breaches of the HA 2003 and WPA 1983 could not have succeeded due to 76(1A) of the HA 2003 and s 13(2) of the WPA 1983.

### **Costs**

[25] Costs are reserved pending the outcome of the Authority's substantive investigation.

Sarah Blick  
Member of the Employment Relations Authority