

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 295  
3047333

BETWEEN	A LABOUR INSPECTOR Applicant
AND	ANESLY JOY SAMUEL First Respondent
AND	ROMEECO CARS LIMITED Second Respondent
AND	WADDUWAGE NIROSHA DILRUKSHI PERERA Third Respondent

Member of Authority:	Andrew Dallas
Representatives:	Catherine Milnes, counsel for the Applicant Werner van Harselaar, counsel for the Respondents
Investigation Meeting:	On the papers
Submissions:	18 February 2022, 18 March 2022 for the Applicant and 11 March 2022 for the Respondent with further information received up to and including 7 April 2022
Determination:	5 July 2022

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] In my first substantive determination<sup>1</sup>, I made a series of findings and ordered the recovery of arrears of wages against, and the payment of significant penalties by, Anesly Joy

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<sup>1</sup> *A Labour Inspector v Anesly Joy Samuel* [2021] NZERA 479

Samuel as owner/operator of the Romeeco Bakery in Dunedin for former employees of the bakery, Charaka Madushana Wijesundara, Don Kasun Gayan De Seram and Shasika Chanthaka Ellawala (the workers).

[2] I reserved the question as to whether Wadduwage Nirosha Dilrukshi Perera should be joined to the Labour Inspector's proceedings under s 142Y of the Act as a person involved in Mr Samuel's minimum standards breaches pending disposal by the Court of Appeal of another Labour Inspector's appeal against a judgment of the court about the requisite level of knowledge required for a respondent be found to be a person involved. In that matter, the court found "intent" was required.<sup>2</sup> The Authority, in the same matter, found that "wilful blindness" was sufficient.<sup>3</sup>

[3] In *A Labour Inspector v Southern Taxis Limited*<sup>4</sup>, the Court of Appeal found "[t]he 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"<sup>5</sup> or "wilful blindness" in relation to those facts.<sup>6</sup> The matter was remitted to the court for further consideration in light of the Court of Appeal's answer to the approved question on appeal.<sup>7</sup> A subsequent appeal to the Supreme Court by Southern Taxis was abandoned.<sup>8</sup> Consequently, the Court of Appeal's judgment can be taken to be "good law" resolving the jurisprudential disjuncture between the employment institutions.

[4] For completeness, Mr Samuel did not challenge the Authority's determination. Ms Perera as a then non-party to those proceedings would not have had standing, nor did she attempt to, bring a challenge.

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<sup>2</sup> *A Labour Inspector v Southern Taxis Limited* [2020] NZEmpC 63 at [187]

<sup>3</sup> *A Labour Inspector v Southern Taxis Limited* [2019] NZERA at [47]

<sup>4</sup> [2020] NZCA 337 (CA)

<sup>5</sup> At [57]

<sup>6</sup> At [42]

<sup>7</sup> At [64]]

<sup>8</sup> SC19/2022, Notice of Result of Application for Leave to Appeal against Decision in Civil Proceedings, 14 March 2022.

## **The Authority's investigation**

[5] By agreement with the parties this matter was heard “on the papers”. While I have not referred to all submissions advanced by the parties during the investigation meeting, I have fully considered them.

## **Issues**

[6] The issues identified for investigation and determination is:

- (i) Is Ms Perera a person involved in Mr Samuel's breaches of minimum standards;
- (ii) If so, should Ms Perera also be liable for penalties for those breaches?

## **Is Ms Perera a person involved?**

[7] Ms Perera strongly denied the Labour Inspector's contention that she was a person involved in a breach of minimum standards for the workers.

[8] The Labour Inspector said Ms Perera was a person involved within the ambit of s 142W(1) of the Employment Relations Act 2000 (the Act). The Labour Inspector, relying on *Southern Taxis*, submitted that she must prove on the balance of probabilities that Ms Perera had knowledge of the essential facts of Mr Samuel's contraventions of minimum standards or was wilfully blind as to those facts.

[9] While Ms Perera did not dispute that the Court of Appeal's decision in *Southern Taxis* was relevant, she variously submitted “care” needed to be taken “while the ink is still wet”, that it could be “distinguished” and the proceedings had not been adjudged to finality by the court.<sup>9</sup> The difficulty with these submissions, and one the Labour Inspector was alive to, is that what the Court of Appeal was being asked to consider was the level of knowledge required to be found to be a person involved, *not* what types of conduct that may give rise to liability. Consequently, Ms Perera can find no shelter here.

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<sup>9</sup> At the time of writing, the court has not rendered a final judgment for the remitted matter.

[10] Having carefully considered the evidence, I find Ms Perera had actual knowledge of the following essential facts of the contraventions:

- (i) Ms Perera told the Labour Inspectors she was the owner of the business upon their first visit to the bakery;
- (ii) Ms Perera answered questions from the Labour Inspectors on two occasions about the employees and confidently articulated knowledge about their terms and conditions of employment;
- (iii) Ms Perera possessed a detailed understanding of bakery's operation including production, sales and suppliers and was responsible for the daily "cash up";
- (iv) Ms Perera was responsible for deployment of the workers' labour at the bakery on a daily basis;
- (v) Ms Perera lying to the Labour Inspectors about, at least, one of the workers' hours of work<sup>10</sup>; and
- (vi) Ms Perera's intervention in the telephone call to Mr De Seram which were directed at making threats about his involvement in the case.<sup>11</sup>

[11] Even if I am wrong about my finding at paragraph [10] above, I would alternatively find – contrary to what appears to be Ms Perera's central contention she was a mere bystander not directly or intimately involved in the business – that she was, at least, wilfully blind to the contraventions by Mr Samuel.

[12] For completeness, Ms Perera also said submitted "great care" needed to be taken when considering extending liability to a "spouse" given many New Zealand businesses, seemingly, are operated by persons also in domestic relationships. While an interesting and, perhaps, novel approach to the concept of accessorial liability, if I were to entertain this submission it would result in me reading down s 142Y of the Act to accommodate Ms Perera's domestic circumstances in the face of significant evidence pointing to her involvement in the contravention of that provision and, accordingly, I decline to do so.

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<sup>10</sup> Above n 1 at [15]

<sup>11</sup> Above n 1 at [23]

[13] So then, to the extent Mr Samuel is unable to pay the arrears ordered to be recovered by the Authority,<sup>12</sup> the Labour Inspector is entitled to recover these personally from Ms Perera.<sup>13</sup>

### **The Labour Inspector's claim for penalties**

[14] An extensive penalties analysis has already been undertaken in respect of the contraventions by Ms Samuel.<sup>14</sup> The Labour Inspector submitted that while the “cumulative financial impact” on the Samuel/Perera family unit could be taken into account when assessing penalties against Ms Perera, a “bulk discount” should be avoided.

[15] Little additional information was provided by Ms Perera for consideration by the Authority including further financial information. Ms Perera's main submission appears to be that she should be spared having penalties imposed on herself because of the “huge” penalties imposed on Mr Samuel. I do not accept this submission, Mr Samuel and Ms Perera are separately responsible for their own conduct.

[16] Taking these submissions into account, the relevant principles to be considered when imposing penalties<sup>15</sup> and having regard to all the relevant circumstances of the case, it is appropriate to impose significant, but proportionate (to the both the arrears ordered payable by, and the penalties imposed on, Mr Samuel) penalties of \$38,000 on Ms Perera.

[17] Ms Perera must pay the Labour Inspector \$38,000 as penalties for her involvement in the contravention of minimum employment standards within 28 days of this determination. This amount is to be paid by the Labour Inspector into a Crown bank account.

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<sup>12</sup> Above n 1 at [31]; [44]

<sup>13</sup> Employment Relations Act, s 142Y(2)(b)

<sup>14</sup> Above n 1 at [48] – [67]

<sup>15</sup> Above n 1 at [45] – [48]

## **Summary of orders**

[18] The following orders have been made:

- (i) Ms Perera is person involved in Mr Samuel's contraventions of minimum employment standards;
- (ii) To the extent Mr Samuel is unable to pay the arrears ordered to be recovered by the Authority<sup>16</sup>, the Labour Inspector is entitled to recover these personally from Ms Perera; and
- (iii) Ms Perera must pay the Labour Inspector \$38,000 as penalties for her involvement in the contravention of minimum employment standards within 28 days of this determination

## **Costs**

[19] Costs are reserved. If a determination of the Authority is required on costs, the Labour Inspector may lodge a memorandum within 14 days of the date of this determination and Ms Perera would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Dallas  
Chief of the Employment Relations Authority

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<sup>16</sup> Above n 1 at [31]; [44]