

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 415  
3120499

BETWEEN	A LABOUR INSPECTOR Applicant
AND	ELEMENTS THERAPEUTIC MASSAGE LIMITED First Respondent
AND	XUAN ZHANG Second Respondent
AND	PING DU Third Respondent

Member of Authority: David G Beck

Representatives: Amy Webster, Counsel for the Applicant  
No appearance for the first and second Respondents  
Rachel Brazil, Counsel for the third Respondent

Investigation Meeting: 18 and 19 May 2022 at Dunedin

Further submissions received: 30 June 2022 and 21 July 2022 from the Applicant  
14 July 2022 from the third Respondent

Date of Determination: 26 August 2022

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

### *First respondent*

[1] The Labour Inspector asserts that the first respondent, Elements Therapeutic Massage Limited (ETM), has:

- Failed to pay minimum wages to three identified ex-workers.
- Failed to pay annual holidays due on termination to three identified ex-workers.
- Made unlawful deductions from the wages of an identified ex-worker.
- Failed to provide an employment agreement to one identified ex-worker.
- Failed to keep sufficient wage, time and holiday and leave records for three identified ex- workers.

### *Second respondent: Xuan Zhang*

[2] The Labour Inspector asserts that Xuan Zhang (aka Nick) at the time being a director, shareholder and manager of ETM and a manager of Ping Du, is a person involved in the identified breaches of employment standards in that he allegedly aided, abetted, counselled or procured the breaches, has induced the breaches and/or has been directly or indirectly, knowingly concerned in or party to the breaches pursuant to s 142W(1)(a), (b) and (c) of the Employment Relations Act 2000 (“the Act”).

### *Third respondent: Ping Du*

[3] The Labour Inspector asserts Ping Du (aka Patrick), being a manager of ETM, is a person involved in the identified breaches of employment standards in that he allegedly aided, abetted, counselled, or procured the breaches, has induced the breaches and/or has been directly or indirectly, knowingly concerned in or party to the breaches pursuant to s 142W(1)(a), (b) and (c) of the Act.

## **Remedies sought**

### *Arrears*

[4] The Labour Inspector seeks orders for: the payment of arrears of minimum wages for the three identified ex-workers, payment of arrears of holiday pay for the three identified ex-workers, and payment of arrears for two alternative holiday days for one identified ex-worker. Should the orders be granted, recovery of the identified arrears is sought from Xuan Zhang and Ping Du to the extent that ETM is unable to pay the identified arrears pursuant to s 11A(3) of the Wages Protection Act 1983 (WPA) and s 142Y of the Act as they have ceased trading.

[5] The Labour Inspector seeks a declaration that Xuan Zhang and Ping Du are persons involved in connection to the breaches related to two identified ex- workers pursuant to s 142W of the Act.

### *Penalties*

[6] The Labour Inspector is seeking penalties for the identified breaches against ETM, Xuan Zhang and Ping Du in relation to one identified ex- worker. The penalty actions sought against the latter two parties are reliant upon them being found to be persons in connection with the breaches and are being pursued for obligations identified in s 75 Holidays Act 2003 (HA), s 10 Minimum Wage Act 1983 (MWA) and sections 135 and 142X of the Act.

## **The Authority Process**

[7] Unlike Ping Du, Xuan Zhang has not participated in any of the pre-investigation Authority proceedings and he did not attend the investigation meeting or provide a written statement. Xuan Zhang did respond to issues during the Labour Inspector's investigation prior to these proceedings. The Labour Inspector has information to suggest Xuan Zhang is currently living outside New Zealand and that ETM has ceased trading. I am, however, satisfied that ETM and Xuan Zhang have been served with the Labour Inspector's application and evidential statements and have knowledge of these proceedings.

[8] At the two-day investigation meeting the Authority heard evidence from two ex-employees of ETM (Rebecca and Emily), one current and two ex-Labour Inspectors, the Centre Manager of a Dunedin Mall and Ping Du. All provided written statements. The Authority was ably assisted by an interpreter.

[9] Pursuant to s 174E of the Act the Authority makes findings of fact and law, outlines conclusions on matters to resolve the identified issues, and makes orders but does not record all evidence and submissions received.

### **Issues**

[10] The initial issues for determination are:

- (i) Did ETM maintain sufficient wage, time and holiday and leave records?
- (ii) Did ETM provide an employment agreement to an identified ex-employee?
- (iii) Did ETM pay its ex-workers at least the minimum wage for all hours worked in accord with the MWA and how should the periods of employment that were interrupted by a contracting arrangement be treated?
- (iv) Did ETM correctly pay out holiday entitlements to identified ex-workers when their employment ended?
- (v) Did ETM pay identified ex-workers' wages when they fell due in accord with the WPA?
- (vi) Whether arrears flow from the above and can they be recovered from Xuan Zhang and Ping Du pursuant to s 142Y of the Act.
- (vii) Is Xuan Zhang a person involved in the identified breaches?
- (viii) Is Ping Du a person involved in the identified breaches?
- (ix) Should any party contribute to the costs of representation of the other/s?

- (x) The Authority has then to determine the quantum of penalties, if any, that the respondents should incur by applying relevant legal principles.

### **What caused the employment relationship problem?**

[11] ETM, a limited liability company, operated a therapeutic massage salon in a shopping mall located in central Dunedin. It is no longer trading. Xuan Zhang incorporated ETM on 22 May 2017 and was the sole director and shareholder during the time relevant to these proceedings. Xuan Zhang, who is not a massage therapist, was a contracting courier operator and at all the relevant times lived in Christchurch.

[12] Ping Du, a newly qualified massage therapist, says he met Xuan Zhang socially in Christchurch and persuaded him to invest and assist in running a massage business. Ping Du, a Chinese national, was unable to invest in a business due to his work visa status. Dunedin was chosen due to lease affordability. Ping Du took responsibility to set up the salon including liaising with the landlord. Ping Du's tasks included assisting with a commercial lease that ETM concluded under Xuan Zhang's signature on 27 June 2017. Around November 2017, Ping Du moved to Dunedin and oversaw the fit out and setting up of the salon. Ping Du says he was not paid for this work.

[13] Ping Du provided a copy of an employment agreement he and Xuan Zhang signed defining ETM as the employer party on 1 December 2017. The agreement describes Ping Du as a "Massage Therapist" to commence work on 11 December 2017 at an hourly rate of \$21, "for 40 hours each week on Wednesday to Sunday between the hours of 9 am – 6pm".

[14] An attached job description indicated Ping Du reported to "the Manager and Director of The Elements Therapeutic Massage Limited" (Xuan Zhang). Under a heading: "Main tasks and responsibilities", were listed Ping Du's massage skill requirements and a final task to engage in: "Training, assessing and receiving reports from interns". A business telephone list provided by the Dunedin mall manager and dated 20 December 2017, cited Ping Du as the contact for "Massage Zone" and the mall manager gave evidence that most of his dealings with Massage Zone was through Ping Du.

[15] ETM began operating as Massage Zone on 11 December 2017. Ping Du initially ran the business sole charge before he recruited another massage therapist (Rebecca) although he insisted that Xuan Zhang prepared and signed Rebecca's employment agreement. The mall lease required the business be open 64 hours per week (Monday – Sunday).

[16] Rebecca's evidence was that Ping Du contacted her on Facebook and persuaded her to move from Auckland where she had just graduated as a massage therapist. Rebecca says Ping Du conducted her whole recruitment process and induction and whilst Xuan Zhang and Rebecca signed an employment agreement dated 2 April 2018 (Xuan Zhang retained the only copy of such), she had no interaction with Xuan Zhang until three months later.

[17] Rebecca says ETM promised a work visa sponsorship (at the time Rebecca, a Chinese national, had an open work visa and was seeking to apply for a visa in an essential skills category). Rebecca said, Ping Du told her he oversaw running the business and "the boss was only an investor". Rebecca says Ping Du controlled bookings and her work allocation and that he calculated and ensured her pay was processed.

[18] Rebecca commenced work on 16 April 2018 and says problems arose over the methodology by which her pay was calculated. Although the employment agreement specified an hourly rate (\$16.50) and that: "The employee will work for 35 hours each week on Monday to Friday, between the hours of 9 am-5pm", Rebecca says she was paid on a commission basis calculated on each client massage undertaken, initially at 40% then increased to 45% but she was not paid for down-time awaiting clients.

[19] A further massage therapist (Emily) was engaged by Ping Du from 1 May 2018, initially on a casual basis. Emily, then a Chinese National and graduate from Otago Polytechnic, with an open work visa, says Ping Du interviewed her and said he was the manager of Massage Zone and "in charge of everything" and sometime later told her the owner was Nick (Xuan Zhang). Emily says Ping Du refused to divulge Nick's contact details. Emily says Ping Du told her she would be paid 40% commission for each massage.

[20] Emily signed an employment agreement that Ping Du provided (signed by Xuan Zhang) on 28 May 2018 and was given a copy of such. The agreement is for casual employment but Emily says she was a part-time employee with fixed hours working two days a week from 1pm

– 6pm and 9am – 6pm until early June 2018 when Ping Du went on holiday and she then worked full-time. The remuneration heading in the employment agreement states: “The employee will be paid on a piece work basis at a rate of 40 percentage (gross) for each completed massage session”. The hours of work clause references work being offered “as required” and the employee “may agree to work if the employer asks them” during core hours (Monday-Sunday 9am – 6pm) and that: “The employer will offer minimum number of hours for each work session”.

[21] Emily says after a few weeks working, Ping Du indicated he wanted her and Rebecca to do the massage work so he could manage the shop but he would help them if too many client bookings occurred. Rebecca explained she had cause to frequently question her hours and pay with Ping Du but he refused to divulge Xuan Zhang’s contact details claiming he (Ping Du) was the manager and controlled everything. Rebecca says there were times, because of low client numbers, when she only made \$40 but she had attended work all day. Rebecca says:

I was given a clear timetable to go to work, from June it was usually full day. So the 40% commission was confusing and not right for the number of hours I was working. On top of that, I never had any holiday pay and never had a payslip which I always asked for.

[22] In the period leading up to 7 June 2018 (when Ping Du went to China leaving Rebecca in charge of the salon), both Rebecca and Emily experienced uncomfortableness in working alongside Ping Du. Whilst in China, Ping Du continued to manage the salon remotely by email correspondence with Rebecca. I reviewed evidence and email exchanges between Ping Du and Rebecca that continued when he was in China – these exchanges were objectively harassing and inappropriately personal in content. Rebecca, supported by Emily, made a complaint to the police about Ping Du’s behaviour both in and outside the work environment.

[23] After being apprised of Rebecca and Emily’s concerns on 1 July, Xuan Zhang visited Dunedin to meet with them after they had both signalled, they intended to resign on or around 18 June and to close the shop. At the meeting, Rebecca and Emily say that Xuan Zhang convinced them to stay employed principally by assuring them Ping Du would not return to work. Rebecca says Xuan Zhang claimed to be unaware of Ping Du’s behaviour issues and advised them he did not know anything about the massage business but he had agreed to invest until Ping Du got permanent residency and could take a stake in the business. I accept this

evidence as likely indicative of Xuan Zhang hoping to sell the business to Ping Du at some point, although I had no evidence that such latterly occurred.

[24] In addition, Emily disclosed she had made a complaint to the Labour Inspectorate about her wage rate/hours ratio and this led to a discussion that Xuan Zhang initiated, of keeping the business afloat - by Rebecca and Emily switching to being engaged as contractors to prevent any finding of breaching minimum standards by the Labour Inspectorate. Rebecca says she agreed to this as it meant she would manage the salon with an increase in her commission to 45% and, that she was aware of the basic differences between an employee and a contractor but she stressed she was desperate to keep a job. Emily displayed less understanding of contracting and says she agreed to it, only because Xuan Zhang assured her that he would sort out her arrears of wages owed.

[25] Although I heard no evidence from Xuan Zhang, I find it is more likely than not that he advanced the contractor proposal as a sham given his experience of running a courier business in Christchurch, but that Rebecca and Emily exercised some leverage in seeking to lift the value of their commission payments as they were essential to keeping the business running.

[26] From 1 July 2018, both Rebecca and Emily worked full time and Xuan Zhang provided template invoices to them and promised to get contracts for services drawn up after he returned from a trip to China. Rebecca says a draft contracting agreement was provided on 22 July 2018 but after taking advice from her immigration consultant, she realised it would not be compliant with her work visa obligations. This led to a new employment agreement being executed with Rebecca on 1 August 2018. The second employment agreement whilst, describing Rebecca as a massage therapist, listed her duties as including:

- Administration of the shop.
- Security.
- Depositing daily cash sales.
- Maintaining a cash float.
- Recruiting and training new therapists – “collecting and sending their tax code to the director to decide when the employee can work.
- Arranging the laundry associated with the business.

- Taking and providing photos of daily sales and administration expenses to the director etc.

[27] The employment agreement purported to include a 90 days' trial period and confusingly referred to the position as being a "senior therapist" with training being provided. In the absence of any explanation for these provisions, I intuit that Xuan Zhang must have adapted the agreement from another source and not fully proofed it. The hourly wage rate was detailed as \$16.50 and the hours of work expressed as follows:

The employer may offer 35 hours work during its usual hours of business of Monday to Sunday, between the core hours of Meridian Mall open time.

The employer will offer no minimum number of hours for each work session.

[28] I find that it is more likely than not, that the above also describes the tasks up until this point in time, undertaken by Ping Du.

[29] Despite not being compliant with what was then s 67A(3) of the Act preventing a trial period for employees previously employed, the agreement went on to state that once the trial period ended an assessment would proceed and: "Depending on the result of the assessment, the employer may give the employee a shop Manager position".

[30] Rebecca says that for the interim period (8 July – 19 August 2018) she and Emily invoiced Xuan Zhang and were paid commission with no PAYE deductions but after Rebecca signed the second employment agreement, she says "my pay varied. I think he took commission I earned and divided it by 16.5 and then rounded it up or down to make it work". I find that in the absence of any other employment agreement, the first employment agreement Rebecca had signed ran up until 29 July 2018.

[31] Emily described similar issues with not coming to an agreement that she was to be deemed a contractor but she was not provided with a second employment agreement despite her now working full time. Emily, was paid for her identified shortfall in hours for time worked between May to June in the amount of \$1,111.92 and she says she "took this as an acknowledgment that just paying commission for all hours I worked was not right".

[32] Evidence of the convoluted and confusing pay issue, who was responsible for resolving it and who controlled pay issues, is found in a 19 June 2018 email from Ping Du (whilst he was

in China) to Emily. The translated email first suggested the remuneration provision in Emily's employment agreement (which was 40% commission), "should be changed to 16.5 plus 8% holiday pay. After I get back in Christchurch I will ask Nick to change it over". The email then explained:

The baseline is the contract is 40%. Therefore the above contract is meaningless on normal days. I also want to issue a 17.82/hour for you but limited by prices and customer groups, it is impossible. Making over 700 in five days – unless the company loses money instead.

If you need some contract for your application for permanent residence in the future, the company can also prepare it for you. Nothing but the contract is important. Please consult an immigration lawyer or agent in advance.

[33] Rebecca worked until 7 September 2018, then she took unpaid leave to visit her ill mother in China. Emily left ETM on 16 September 2018 for personal health reasons.

[34] Whilst Rebecca was in China, Ping Du returned to New Zealand on 5 October 2018. Rebecca says she became aware of Ping Du's return to New Zealand when the police advised her that he had returned to Dunedin.

[35] Rebecca says she contacted Xuan Zhang on 6 October about Ping Du's return and this led to an email of the same day from Xuan Zhang summarily dismissing her during a purported "assessment period". Xuan Zhang made various, generalised claims about Rebecca, including miss-management of the salon, poor relationships with co-workers, taking leave, claims that she had not been paying PAYE on her own wages and "irregularities in cash management". The email concluded with a suggestion that Rebecca's final pay for the previous week, "will be paid more or less after the company figure out the loss by you and accounting expenses incurred". The email ended in an objectively threatening tone with (note this is a translation):

The company reserves the right to take legal action against you on your inappropriate behaviour. If you do not damage the company in the future, the company will prove your work history. If you continue risk the company, the company will consider whether it is serious, or take legal action, or report to IRD on your owing PAYE, or report to INZ and any other related departments on your work performance.

[36] Ping Du's evidence was discursive and he claimed he was unaware of Rebecca and Emily's concerns and that Xuan Zhang only encouraged him to keep Rebecca "onside" to protect ETM's continuity of operating whilst Ping Du was in China. However, Ping Du did

recall that upon his return from China he was approached by the police about Rebecca's concerns.

[37] Whilst I do not have to determine the matter, I observe that there was plenty of documentary evidence to establish that Ping Du subjected Rebecca to unwelcome attention and his denials of such lacked credibility. It is also reasonably clear, from viewing correspondence and events, to draw a conclusion it was more likely than not, that Xuan Zhang seriously misled Rebecca into believing he was dealing with Ping Du's behaviour, that Ping Du would not return and Rebecca would manage the salon on an ongoing basis. Instead, it is evident that Xuan Zhang had only a short-term aim of keeping the business running in Ping Du's absence and no intention of dealing with Ping Du's conduct, and he then callously dispensed with Rebecca by summarily dismissing her without any fair process. This was reinforced by evidence that Ping Du was involved in ETM issues remotely when in China including communicating with Emily over her pay issues. I am led to an inference that Ping Du would have likely colluded in the deception.

[38] In the event, upon returning from China Ping Du resumed his role in managing Massage Zone for ETM in Dunedin until 5 October 2021. The Labour Inspector also noted that evidence from Ping Du's disclosed IRD records show that shortly after ETM received a completed investigation report (late August 2020) Ping Du's weekly pay from ETM increased from \$880 per week to \$2,060 per week.

[39] In the interim from 8 September 2019 – 22 September 2019, ETM engaged a further massage therapist (Charlie) who was not provided with an employment agreement and claims he was offered 40% commission and was not paid holiday pay upon termination of his employment. ETM claim the employment period was an "apprenticeship" to train Charlie in Western massage techniques, that did not work out.

### **The Labour Inspector's investigation**

[40] Following a complaint about wage rates laid by Emily's partner on 27 June 2018, and a complaint by Charlie being escalated to an investigation, the Labour Inspector sought information from ETM by contacting Xuan Zhang.

[41] By letter of 3 January 2019 to the Labour Inspector (wrongly dated 2018), Xuan Zhang first backgrounded the establishment of the Dunedin massage shop and said: “The shop manager Patrick (Ping Du) assists me in operating this shop”.

[42] Xuan Zhang then claimed he was trying to sort out the aftermath of Rebecca and Emily first signalling their resignations, then his dismissal of Rebecca and Emily abruptly leaving. Xuan Zhang detailed Rebecca and Emily’s initial engagements as full-time and casual respectively but then suggested that from 1 July 2018 the impetus to pay them as contractors had been at their initiative.

[43] Xuan Zhang claimed that Rebecca and Emily had been “extorting and threatening me from late June” and claimed he was forced to pay Emily arrears claiming she fabricated her working hours and they both “forced” him to switch their status to contractors. Xuan Zhang then went on to question the genuineness of Rebecca and Emily’s concerns about Ping Du saying: “It is very ridiculous that Rebecca told the police that Patrick (Ping Du) had a harassment to her and Emily from 1 May”. Xuan Zhang made no mention of the content of the conversation he had with Rebecca and Emily on 1 July 2018 regarding their harassment concerns (apart from the oblique and dismissive reference to Rebecca’s police complaint) or his alleged assurance to them that Ping Du would not be returning.

[44] Xuan Zhang in his letter, acknowledged he had withheld Rebecca’s final pay after dismissing her, claiming he had agreed to pay it (with deductions not agreed to) if she apologised to him in writing and she accepted he could pursue her for compensation if he incurred lease penalty payments – unsurprisingly no agreement ensued.

[45] Xuan Zhang also detailed various claims against Emily, that he believed provided him with a reason for not providing her with a new full-time employment agreement. Xuan Zhang then made various other claims or “main misconducts” about perceived transgressions and financial loss to ETM that Rebecca and Emily had been involved in, that objectively included matters where Ping Du had supplied information to support the allegations. Xuan Zhang concluded his letter by suggesting the Labour Inspector have regard to his problem of managing his business remotely and that they investigate his ex-employees with a view to compensating

ETM. Xuan Zhang provided various documentation including what he claimed were wage and time records (an excel spreadsheet).

[46] The Labour Inspector's investigation continued and Rebecca and Emily were interviewed on 22 November 2018 and 26 February 2019 respectively.

[47] The Labour Inspector then interviewed Xuan Zhang on 27 February 2019 and Ping Du on 16 March 2019. I note with concern that the Labour Inspector (who is no longer employed in that role) did not provide contemporaneous notes of these conversations and in evidence says her practice was to not take full notes but to subsequently type up bullet points after interviews. Of further concern was that the typed notes provided were not disclosed to the interviewed parties at the time, as was the otherwise claimed practice of the Labour Inspector concerned.

[48] On 18 November 2019, by email to Xuan Zhang, the Labour Inspector also issued in accord with s 223 of the Act, a "Notice Requiring Supply of a Copy of employment agreements, Wages, Time and Holiday Records" pertaining to Charlie's temporary engagement.

[49] After gathering further evidence and interviewing the parties the Labour Inspector emailed Xuan Zhang a "copy of the investigation report and supporting calculations" on 7 August 2020. Xuan Zhang responded on 9 August 2020 with comment on each section heading of the report. Whilst Ping Du says he was not provided with a copy of the investigation report by the Labour Inspector, it was apparent from evidence he gave and the responding comments provided in the report, that Ping Du had had an input. The comment on the report generally contested every assertion made by the Labour Inspector.

### *Emily*

[50] In relation to Emily the Labour Inspector says, copies of client appointment records were provided "which showed her work pattern for the period 2 July 2018 to 16 September 2018 along with bank records of payments she received during that period". Xuan Zhang provided limited records (a spreadsheet) on Emily's pay and no holiday and leave record. Upon analysing the limited information provided the Labour Inspector calculated minimum wages due based on the days worked and mall opening hours and determined Emily was owed

\$3,272.50 minimum wage arrears and a subsequent Labour Inspector calculation determined that \$529.32 was owed in unpaid holiday pay. A total of \$3,801.82. <sup>1</sup>

*Rebecca*

[51] The Labour Inspector says in relation to Rebecca, that calculating any wage arrears was hampered by a lack of records of hours worked and the fact that ETM at times imposed a commission-based pay approach rather than an hourly rate as expressed in the only employment agreement provided (running from 1 August 2018 – 7 September 2018). Utilising an approach based on the then minimum hourly wage and mall opening hours, the Labour Inspector calculated Rebecca’s arrears as \$7,143.34. and a calculation of unpaid holiday pay owed in the amount of \$1,538.48 and \$256.00 for two alternative holidays not paid when Rebecca worked on public holidays. A total owed of \$8,937.82. <sup>2</sup>

*Charlie*

[52] In the absence of any employment agreement, holiday records and an indication holiday pay was not paid upon termination, the Labour Inspector calculated Charlie was owed arrears of wages of \$96.30 and unpaid holiday pay in the amount of \$142.56. A total amount of \$236.86. <sup>3</sup>

*ETM counter claims*

[53] The Labour Inspector noted Xuan Zhang had admitted withholding wages and holiday pay for the three identified workers and detailed perceived “misconducts and losses” to justify ETM’s actions. However, the Labour Inspector found no operative deductions clause permitting the recovery or ‘off-setting’ of claimed losses and that even if there had been, the deductions would have been objectively unreasonable and no evidence had been provided to substantiate ETM’s claims.

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<sup>1</sup> Page 286 Common Bundle of Documents.

<sup>2</sup> Page 287 Common Bundle of Documents.

<sup>3</sup> Page 288 Common Bundle of Documents.

[54] The Labour Inspector’s investigation report of 7 August 2020 in summary identified the following “breaches of employment standards”:

- Section 63A the Act – failure to provide an intended employment agreement during bargaining with new employee.
- Section 130 the Act – failure to maintain sufficient wage and time records.
- Section 81 HA – failure to maintain sufficient holidays and leave record.
- Section 6 MWA and Minimum Wage Order - underpayments.
- Section 27 HA – failure to pay holiday pay due in employees’ final pay.
- Section 23 HA – failure to pay annual holidays at appropriate rate.
- Section 4 WPA – making deductions from wages without written consent.

[55] The Labour Inspector suggested the above breaches were “aggravated by the fact that they were applied in a systemic and premeditated manner to take advantage of young vulnerable migrant employees”.

### **Assessment**

[56] From the evidence made available I accept the Labour Inspector’s analysis and submissions. Nothing in Ping Du’s evidence displaces the presumption in s 132 (2) of the Act<sup>4</sup> and the lack of appropriate record keeping is fatal to EMT, Xuan Zhang and Ping Du’s narrative of suggesting the identified workers were at fault. I have also found that the period of engagement described as contracting was essentially a sham imposed by Xuan Zhang. For the purpose of considering potential remedies, I deem all three identified workers to have always been employees when they were engaged by EMT, I record I have reached this decision by taking into account s 6(3) of the Act.

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<sup>4</sup> Section 132 Employment Relations Act 2000 – Failure to keep or produce records

## Finding

[57] I find the arrears set out in paragraphs [46]- [48] above are owed to the three identified workers and the Authority having regard to the ambit of s 142 gives leave for recovery under s 142Y(2) to potentially hold Xuan Zhang and Ping Du jointly and severally liable for the arrears identified should I find either or both sufficiently involved in the breaches (discussed below). I also find that ETM failed to maintain sufficient wage, time and holiday and leave records. ETM has also admitted that they did not provide the third identified employee (Charlie) with an employment agreement wrongly believing such was not required.

## Involvement in breaches

[58] The Labour Inspector submits that Xuan Zhang and Ping Du are both persons involved in the identified breaches pursuant to s 142W of the Act and seeks that they each be held liable under s 142Y to pay the arrears claimed should ETM, given that it has ceased trading, be unable to pay such. Further, the Labour Inspector is seeking penalties for the identified breaches against ETM and, pursuant to s 142X, against Xuan Zhang and Ping Du.

[59] To ascertain whether Xuan Zhang and/or Ping Du were involved in a breach of minimum standards I must first be satisfied that they, as the Court of Appeal in *Labour Inspector v Southern Taxis Ltd* suggests as a prerequisite for liability, they each had, “knowledge of the essential facts that establish the contravention by the employer”<sup>5</sup> before I can find they were knowingly involved in the breaches. Further the Court of Appeal commented that:

It was common ground before us that a person is knowingly concerned in a breach if they have actual knowledge of all the essential facts giving rise to the breach, or are wilfully blind in relation to those facts. That is plainly correct, in light of the authorities on accessory liability in New Zealand, Australia and England.<sup>6</sup>

[60] In analysing a parallel approach to accessory liability in New Zealand under the Fair Trading Act 1986, the Court of Appeal set out the well-established English law concerning the phrase “knowingly contravene” by citing Neville J from *Burton v Beavan*:

I think that ‘knowingly’ means with knowledge of the facts upon which contravention depends. I think it is immaterial whether the director had knowledge

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<sup>5</sup> *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at [59]

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

of the law or not. I think he is bound to know what the law is, and the only question is, Did he know the facts which made the act complained of a contravention of the statute? <sup>7</sup>

[61] Section 142W of the Act is applicable:

**142W Involvement in breaches**

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
  - (a) has aided, abetted, counselled, or procured the breach; or
  - (b) has 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) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
  - (a) a person occupying the position of a director of a company if the entity is a company:
  - (b) a partner if the entity is a partnership:
  - (c) a general partner if the entity is a limited partnership:
  - (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:
  - (e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.
- (4) This section does not apply to proceedings for offences.

**Xuan Zhang**

[62] Whilst Xuan Zhang did not give any evidence or make submissions it was apparent that although he was the sole director of the company and sole shareholder he had, unlike Ping Du, little to do with the day-to-day operation of the business. The documentary evidence shows that in the key area of structuring Rebecca and Emily's employment terms including how they were to be remunerated, Xuan Zhang obtained, supplied, and signed the employment

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<sup>7</sup> *Burton v Beavan* [1908] 2 Ch 240 at 247.

agreements and was involved in direct negotiation with Rebecca and Emily when Ping Du was in China. I have found this included Xuan Zhang attempting to devise a sham contracting arrangement when he knew of the Labour Inspectorate interest in his business remuneration practices and impliedly acted in a threatening manner pertaining to the identified employees' employment and work visa status.

[63] Further, Xuan Zhang was in control of paying wages and had the ability to direct Ping Du to structure pay around commission only. Xuan Zhang was experienced in running his own contracting to a courier company and I find he would have had constructive knowledge of his obligations to his employees given their immigration visa status.

[64] It is notable that in employing Ping Du in a key role, Xuan Zhang for ETM entered an employment relationship and paid him for hours when the salon was open (as opposed to per massage sessions for others). Xuan Zhang also overlooked compelling evidence of Ping Du's misconduct and then inexplicably and exponentially increased Ping Du's wages. The latter act being suggestive of the relationship being more akin to a mutual business arrangement.

### **Finding**

[65] I find Xuan Zhang is a party to the breaches of minimum standards and to the extent ETM cannot meet the arrears owed due to it not trading, then Xuan Zhang is personally liable for the arrears of wages and holiday pay as identified.

### **Ping Du**

[66] I, likewise, find from the evidence that Ping Du acted in concert with Xuan Zhang to aid and abet the breaches identified, in that he managed the day to day running of the business, introduced the system of recording the number of massages undertaken and instructed Xuan Zhang on what wages to pay and would have objectively been aware, given his level of administrative knowledge and background, that structuring the pay of Rebecca and Emily around commission only, was a breach of minimum standards.

[67] Objectively, Ping Du would be aware of the different approach Xuan Zhang was taking to the employees' remuneration in contrast to his own arrangement and he wilfully ignored

these differences. I also find from the content of translated emails, that Ping Du engaged in threatening conduct that aggravated the situation.

## **Finding**

[68] In regards the arrears of wages owed, I find Ping Du jointly liable for the breach of minimum standards but I exclusively find Xuan Zhang responsible for the unpaid holiday pay as it was his conscious decision to withhold such. In addition, I find Xuan Zhang was responsible for failing to keep adequate wage, time and leave records and did not provide one identified employee with an employment agreement.

## **What level of penalties are appropriate in the circumstance of the breaches?**

[69] Having identified how the breaches were caused I now turn to consideration of penalties.

[70] The approach I intend to adopt is consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited*<sup>8</sup> and I am also guided by Judge Corkill's decision *A Labour Inspector v Matangi Berry Farm Limited*<sup>9</sup>. *Preet* identified a four-step framework to fixing penalties where multiple breaches of minimum standards are evident:

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalizable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalties starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.<sup>10</sup>

[71] To ensure consistency I use an approach adopted in an Authority determination (*Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd*)

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<sup>8</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

<sup>9</sup> *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 40.

<sup>10</sup> At [151].

that first considered the statutory framework and then assessed the quantum of remedies based on the four steps identified above.<sup>11</sup>

### **The object of the Act**

[72] Section 3(a) of the Act sets out relevant ‘aspirational’ matters I must consider. These include the need to “build productive employment relationships through the promotion of good faith in all aspects of the employment environment”, acknowledging and addressing the inherent inequality of power in employment relationships” and promoting effective enforcement of “employment standards” by Labour Inspectors.

### **The nature and extent of the breaches**

[73] There are fourteen established breaches involving Xuan Zhang and Ping Du for which penalties are sought, to recap these are:

- (a) Two breaches of s 6 MWA by failing to pay minimum hourly wage rates to two identified employees.
- (b) Three breaches of s 23 HA for failing to pay final holiday pay to three identified employees.
- (c) Three breaches of s 4B and s 130 of the Act by failing to keep compliant wage and time records for three identified employees.
- (d) Three breaches of s 81 HA for failing to keep accurate holiday and leave records for three identified employees.
- (e) One breach of s 63A of the Act in failing to provide one employee with an employment agreement.
- (f) Two breaches of s 4 WPA by failing to pay two identified employees their entire wages when they fell due.

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<sup>11</sup> *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

### **The nature and extent of any loss or damages suffered**

[74] The loss or damage incurred by the three workers involved relating to wage arrears and breaches of the HA is quantified cumulatively as \$12,978.50. Whilst this may seem a modest sum when split three ways, the fact is the three workers were on close to minimum wage and it does not include the value to one worker concerned of getting additional paid days off for working on public holidays.

### **Were the breaches intentional, inadvertent, or negligent?**

[75] Given the breaches were contested and only Ping Du gave evidence for the respondents, I can only draw inferences from their reported conduct as outlined in disclosed correspondence including the Labour Inspector's investigation report and interview notes and evidence that Rebecca and Emily gave.

[76] I conclude from such that Xuan Zhang failed to have due regard to his legal obligations and his conduct was self-serving and thus the breaches intentional.

### **What steps have been taken in mitigation?**

[77] I was presented with no evidence that the compliance matters have now been rectified and arrears paid to the workers concerned despite the time that has elapsed. This displays a worrying element of neglect by Xuan Zhang as the sums involved are relatively small and likely would have been of greater value to the modestly remunerated workers.

### **The circumstances of the breaches and any vulnerability factors**

[78] I heard evidence from two female workers who were both in a difficult work situation exacerbated by Ping Du's dominance and control approach to managing them and no assistance from Xuan Zhang. It is also easy to draw an inference that as migrant employees with English not their first language, that they would likely be unaware of their rights and reluctant to pursue such in a small workplace where their income and residency were potentially at stake and

cultural factors may have been in play given the age and experience gap between Ping Du and the workers involved. I find the workers were objectively vulnerable.

[79] In Ping Du's defence he was evidently under a great deal of pressure to get the business established. He was a recent immigrant with English not being his first language and the legal framework around compliance issues was not his responsibility. However, the evidence suggests Ping Du's management style tended toward coercion and control and some inappropriate boundary crossing.

[80] I did not hear from Xuan Zhang about his appreciation of New Zealand employment law obligations but I observe that compliance resources in other languages (including Mandarin) are available on Employment New Zealand's website.

### **Previous conduct**

[81] This was not at issue.

### ***Preet* step one – nature and number of breaches**

[82] The approach adopted in *Preet* allows me to consider whether any of the breaches can be 'globalised' for the purpose of quantifying penalties so that one breach may reflect two or more.<sup>12</sup> In applying a globalised approach in *Preet* the Court noted:

Still under Step 1, once the nature and number of breaches have been identified, the Court or the Authority should give consideration to whether global penalties may be appropriate in the particular case. If, for example, there are multiple and very similar breaches such as the repeated non-payment or below-minimum payment of wages to an employee, it may be an appropriate case for the imposition of a global penalty for these. This may include cases where the breaches are part of a consistent pattern of breach of a particular statutory requirement. The Authority or the Court should be careful to ensure that the globalisation of a penalty does not diminish the significance of a repeated and/or long-running series of breaches. Ultimately, this global penalty assessment will be subject to cross-checking and confirmation or potential reconsideration when the Authority or the Court applies what we call the proportionality test under Step 4.<sup>13</sup>

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<sup>12</sup> At [100].

<sup>13</sup> At [141].

[83] The effect of the above approach is where multiple breaches occur in respect of multiple employees, globalising can allow the application of one penalty for such. Here as in *Preet*, some of the breaches relate to one activity (record keeping). This approach was affirmed by the Court in *A Labour Inspector v Parihar* where Judge Perkins allowed that a failure to keep wage and time records and holiday and leave records although required under two separate statutes, relates to the general breach of failure to keep adequate records, and should be treated as one breach per impacted employee.<sup>14</sup>

[84] Judge Corkill pragmatically refined the latter approach in *A Labour Inspector v Matangi Berry Farm Limited*<sup>15</sup> where faced with multiple employees and identical breaches, he focused on the nature of the breach rather than the frequency per employee reducing such to a single breach for each type of default. Whilst the reasoning applied was to avoid ‘artificiality’ of discounting as Judge Perkins reasoned in *Parihar* “if the maximum penalty is related to each breach, an enormous total is reached”,<sup>16</sup> I see no reason why the approach confirmed in *Matangi* cannot be utilised for cases involving fewer employees.

[85] Taking the approach in *Matangi* and focussing broadly on the nature of the breaches rather than the frequency or each specific statutory transgression, allows me to reduce six breaches to one, for the transgressions of both s 130 of the Act and 81 HA. However, the other breaches of minimum standards relating to remuneration are not related and need to be treated separately: so, two breaches of s 6 MWA can be reduced to one, three breaches of s 23 HA can be reduced to one, two breaches of s 4 WPA can be reduced to one and the remaining issue of a breach of s 63A, was a single breach.

[86] The global approach I have applied above, now reduces the various breaches to five and provides a sensible starting point to define potential maximum penalties before I apply further analysis of other factors using guidance from *Preet*. So, at this stage, the potential maximum penalties I can impose on Xuan Zhang and Ping Du using a globalised approach, are \$10,000 per breach<sup>17</sup> which for the five accumulated breaches identified above amounts to \$100,000.

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<sup>14</sup> *A Labour Inspector v Parihar* [2019] NZEmpC 43.

<sup>15</sup> *A Labour Inspector v Matangi Berry Farm Limited* [2019] NZEmpC 43

<sup>16</sup> At [39].

<sup>17</sup> Section 135(2)(a) Employment Relations Act 2000 and s 75(1)(b) Holidays Act 2003.

### ***Preet Step 2 – severity of breaches***

[87] On top of statutory considerations (the aims of the Act) I am obliged, following *Preet*, to examine the extent of the respondents' culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[88] Considering the above and the aggravating features I have identified and that the breaches were contested by obfuscation from both Xuan Zhang and Ping Du and, despite the relatively small amount of money the employees were deprived of, I believe deterrence where vulnerable individuals are involved is a key consideration. I conclude that the breaches are reasonably significant and I deem 75% of the maximum accumulated penalty to be a 'starting point' (\$75,000).

[89] I could not identify any mitigating factors and the tone of Xuan Zhang's correspondence did not suggest any acceptance of wrongdoing and he has left New Zealand without engaging in the investigation. By contrast Ping Du has sought to explain his actions albeit somewhat unconvincingly.

[90] In the circumstances, I consider no further reduction of the potential maximum penalty is warranted which leaves it at \$75,000.

### ***Preet step 3 – means and ability of the respondent to pay***

[91] I have had no evidence from Xuan Zhang on his inability to meet any penalty award. I was made aware that ETM has stopped trading and the business has been sold to a new operator. Ping Du provided no evidence on his financial situation other than he continues to work as a massage therapist for the new owner but he suggested that his relationship with Xuan Zhang ended with wages being owed.

[92] In these circumstances, in the absence of evidence I am unable to apportion a further discount based on inability to pay as no compelling hardship reasons have been identified.

#### ***Preet* step 4 - Proportionality**

[93] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such where here three workers were involved. Four Authority cases I have contrasted feature breaches of a similar nature involving small businesses with three or fewer employees<sup>18</sup>. I also sought guidance from a recent case involving a bottle store that has a useful analysis of past authorities and amounts awarded.<sup>19</sup> The cases show penalties imposed range from \$12,000 to \$ 21,000 depending on various contextual factors.

[94] Considering the totality of factors which I have explored, and that applying proportionality to my analysis should lead to a further reduction, and that a penalty against EMT would be ineffective due to its trading situation, I consider below what would be proportionate in applying individual penalties against Xuan Zhang and Ping Du.

#### **What penalty should I impose on Xuan Zhang?**

[95] Xuan Zhang was sole director of EMT and I have found he was significantly involved in the breaches identified and benefitted from such. Xuan Zhang attended an interview with the Labour Inspector during their investigation where it was found that he was solely responsible for record keeping and remunerating hourly paid workers. I find these admissions sufficient to bring Xuan Zhang within the scope of s 142W(1)(c) of the Act.<sup>20</sup>

[96] As above I have applied the factors identified in *Preet* and applying proportionality and consistency I consider it appropriate that a potential penalty of \$35,000 be reduced to \$8,000 for Xuan Zhang.

#### **What penalty should I impose on Ping Du?**

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<sup>18</sup> *Labour Inspector v Sharma and Sons (2009) Ltd and Sharma and Sons Ltd* [2016] NZERA Auckland 128; *Labour Inspector v IXL Petroleum and Gas Ltd* [2017] NZERA Auckland 128, *Labour Inspector v Dhanoa* [2018] NZERA Wellington 32 and *A Labour Inspector v Janson Trading Limited t/a SBA Thames and Jaswant Singh* [2021] NZERA 5.

<sup>19</sup> *A Labour Inspector v Basra & Khella Limited* [2020] NZERA 534 at [211].

<sup>20</sup> Section 142W(1)(c) Employment Relations Act 2000 that specifies a person is involved in a breach where that person “has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach”.

[97] Ping Du contests that he was involved in the breaches but I have found on the contrary that he went a step beyond simply enabling such and he was involved in structuring the workers remuneration breaches. In applying proportionality, I consider an appropriate penalty for Ping Du is \$4,000.

### **Interest**

[98] Section 123(1)(b) of the Act allows the Authority to consider reimbursing “other money lost” by the employee flowing from a grievance and interest plainly falls under this category of remedy. I find that interest as claimed should be paid on the unpaid holiday pay and lost wages awarded and I fix the period of such up to the day of the investigation meeting 18 May 2022.

### **Conclusion on penalties and arrears**

[99] Within 28 days of the date of this determination Xuan Zhang must pay to the Labour Inspector for transfer to a Crown bank account: a penalty in the sum of \$8,000 and the Crown shall transfer a proportion of such penalty to:

- Qian (aka Rebecca) Wang in the amount of \$2,500; and
- Yihan (aka Emily) Chen in the amount of \$2,500.

[100] Xuan Zhang shall also pay the following amounts in arrears of wages and holiday pay combined due within the same timeframe as above to:

- Qian Wang (aka Rebecca) in the amount \$8,937.82.
- Yihan Chen (aka Emily) in the amount of \$3,801.82.
- Wanpio (aka Charlie) in the amount of \$238.86.
- Interest is to be paid on all the amounts above in accordance with Schedule 2 of the Money Claims Act 2016 for the period from the date each worker’s employment ended up until 18 May 2022.

[101] On the same terms as above: Ping Du must pay a penalty to the Labour Inspector for transfer to a Crown bank account in the sum of \$4,000 and the Crown shall transfer a proportion of such penalty to:

- Qian (aka Rebecca) Wang in the amount of \$1,500; and
- Yihan Chen (aka Emily) in the amount of \$1,500.

### **Costs**

[102] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 14 days from the date of this determination in which to file and serve a memorandum on costs. The second and third Respondents' have a further 14 days in which to file and serve a memorandum in reply.

[103] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.

David G Beck  
Member of the Employment Relations Authority