

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 435
3157181

BETWEEN VALU MOEONO
Applicant

AND ATEYA CONSTRUCTION
LIMITED
First Respondent

AND EDNA LILY LEONE
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Gerardus Elwell, counsel for the Applicant
No appearance by the Respondents

Investigation Meeting: 1 June 2022 at Auckland

Further Information Received: 8 June and 23 July 2022 from the Applicant

Date of Determination: 5 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Moeono was employed by the first respondent Ateya Construction Limited (Ateya) as a construction worker.

[2] Mr Moeono was a full-time permanent employee who was employed to work 40 hours a week at the rate of \$30 per hour. His first day of work was 2 February 2021 and he signed a written employment agreement on 5 February 2021, after he had already started work.

[3] The second respondent, Edna Lily Leone was the Manager of Ateya at the material time and she made all decisions relating to Mr Moeono's employment. Ms Leone was the sole

shareholder of Ateya. It appears from the Companies Register that she was also the sole director of Ateya.

[4] Mr Moeono attended work as usual on 16 and 17 August 2021. He was available to work but did not attend work from 18 August 2021 onwards, due to Auckland being put into a Covid-19 Level 3 lockdown. Ms Leone arranged for Ateya to stop paying Mr Moeono his usual wages from 18 August 2021 onwards. He was not consulted about that and did not agree to it.

[5] Mr Moeono said he was only paid \$1,200 over the period 18 August – 4 October 2021, during the Covid-19 lockdown. He told the Authority his request to Ms Leone to use his sick leave and/or annual leave during the lockdown period (so he received some income) was denied.

[6] Mr Moeono provided the Authority with a printout from the Ministry of Social Development website that showed Ateya had been paid a wage subsidy of \$325,918 in August 2021, based on 39 employees. He therefore believed Ateya had the money to pay him if it had wanted to do so.

[7] On 4 October 2021 Mr Moeono resigned from his employment after obtaining alternative employment, because Ateya had not been paying him. Mr Moeono specifically told Ms Leone that he was leaving because he had not been paid his salary. Mr Moeono did not raise a constructive dismissal personal grievance claim, so that was not a claim before the Authority for determination.

[8] Mr Moeono told the Authority that when Ms Leone found out who his new employer was, she threatened his job security. He claimed she had told him that the Site Manager of his new employer was a good friend of hers, so his (Mr Moeono's) job would not last long.

[9] Mr Moeono claimed he is owed wage arrears, that the failure to pay him was an unlawful deduction from his wages that breached the Wages Protection Act 1983 (the WPA) and that Ateya breached the Holidays Act 2003 (HA03) by failing to pay him his annual holiday entitlements when his employment ended. Ateya also failed to pay its Compulsory Employer Contribution (CEC) to KiwiSaver on his wages.

[10] Mr Moeono sought penalties be imposed on Ateya for breaches of his employment agreement, the WPA and the HA03. He asked that some or all of any penalties imposed be paid to him instead of the Crown.

[11] Mr Moeono also claimed that Ms Leone was:

- (a) “*a person involved in a breach of employment standards*”, under s 142W of the Employment Relations Act 2000 (the Act); and/or
- (b) “*a person involved in non-compliance*” under s 11A(1)(c) of the WPA.

[12] Mr Moeono sought leave to pursue Ms Leone personally under:

- (a) Section 142Y(2) of the Act to pay his wage arrears and/or other money payable to him due to a breach of employment standards if Ateya was unable to pay him; and
- (b) Section 11A(2)(a) of the WPA to pay his wage arrears if Ateya was unable to pay him.

[13] The “*employment standards*” referred to in s 124Y(2) are defined in s 5 of the Act, and include the provisions of the WPA and HA03 that Mr Moeono claimed Ateya had breached.

[14] Mr Moeono further claimed that Ateya’s failure to pay him his full salary while employed, and holiday pay when his employment ended, unjustifiably disadvantaged him. He sought an award of distress compensation for that disadvantage grievance. Mr Moeono also sought costs and an award of interest on the money he is owed.

[15] Neither respondent responded to Mr Moeono’s claims against them.

Authority’s investigation

Investigation meeting

[16] The Authority held an in-person investigation meeting in Auckland. Mr Moeono attended with his counsel. The Authority questioned Mr Moeono about his claims and reviewed documents he had filed. Neither respondent appeared at the investigation meeting, despite having receive notice of it.

Service

[17] On 17 May 2022 Mr Moeono's counsel emailed a copy of his witness statement to Ms Leone, by way of service, and to the Authority.

[18] At 1.10 pm on 17 May 2022 a licensed process server engaged by the Authority also served Ateya at its registered office (in Papakura, Auckland) with copies of the following documents (referred to as "the service documents"):

- (a) The Statement of Problem;
- (b) Directions of the Authority dated 29 April 2022;
- (c) Mr Moeono's evidence, consisting of his witness statement and relevant documents; and
- (d) The Notice of the Investigation Meeting, for the investigation meeting that was to be held at 10am on 1 June 2022 in Auckland.

[19] These service documents were left by the process server with Ms Leone's sister, who confirmed to the process server that the address was Ateya's registered address for service.

[20] At 7.59 am on 24 May 2022 the process server served a copy of the same service documents on Ms Leone personally, in her capacity as the second respondent. That occurred at a prearranged meeting, during which Ms Leone acknowledged her identity to the process server and accepted the service documents from the process server. That interaction occurred at the same address as Ateya's registered office.

[21] The process server provided the Authority with an affidavit of service regarding service of these proceedings on both respondents.

Post IM information

[22] After the investigation meeting held on 1 June 2022, Mr Moeono filed some additional documents consisting of payslips he had received while employed, a screenshot of the Ministry of Social Development record of wage subsidies received by Ateya, a text message from Ms Leone to Mr Moeono, Mr Moeono's IRD child support statement, his KiwiSaver statement and an IRD printout of his statement of income.

[23] These documents were copied to Ms Leone, by way of service, by Mr Moeono's counsel in an email dated 8 June 2022. They were also served on the respondents by the Authority via email on 8 June 2022. The respondents were given until 22 June 2022 to comment on any of the new information that Mr Moeono had provided. No response was received.

Further questions from the Authority

[24] The Authority had some questions arising out of these new documents, so the parties were asked to address those matters. Mr Moeono did so in an affidavit dated 22 July 2022 that was lodged with the Authority on 23 July 2022. A copy of that affidavit was served on the respondents by email, but they did not respond to it.

[25] The Authority has therefore had to determine Mr Moeono's claims based on the information it currently has available to it.

No Statement in Reply

[26] Neither respondent has engaged in the Authority's investigation process.

[27] Mr Moeono's Statement of Problem was served on both respondents by email on 21 December 2021. On 21 December 2021 Ms Leone emailed the Authority saying that "A payment of Mr Moeono holiday pay has been sorted by Ateya accountant and it's in the payment schedule for the 22nd December 2021". That was not true because Mr Moeono was not paid anything.

[28] The Authority Officer replied in an email that confirmed to the respondents Mr Moeono had not withdrawn his claim, so the matter would be proceeding. Ms Leone then confirmed that she could accept service by email of the Statement of Problem, so service occurred by email.

[29] The Statement in Reply was therefore due on 15 January 2022. No Statement in Reply was filed.

[30] The Authority Officer wrote to Ms Leone as the representative for both respondents, advising that because the Statement in Reply had not been filed within 14 days of service of the Statement of Problem, if the respondents wanted to defend Mr Moeono's claims then they were required to seek leave from the Authority to lodge their Statement in Reply out of time.

[31] That resulted in an email from Ms Leone to the Authority Officer saying, “*You have a phone number to discuss I am not sure what I need to do*”. The Authority Officer called Ms Leone and advised her to file a Statement in Reply with supporting documents and explained that she needed to seek leave from the Authority by explaining the delay.

[32] Ms Leone replied in an email asking for an extension until 31 December 2021 to file the Statement in Reply. Ms Leone said that she needed an extension of time so she could have “*everything ready*” and that the delay had been caused because she was “*on my honeymoon hence why I just got back*”. She subsequently then asked that the requested extension be extended to 31 January 2022, instead of 31 December 2021. This request was opposed by Mr Moeono.

[33] The matter was referred to a Duty Member who granted an extension of time to the respondents to file a Statement in Reply by 28 January 2022, because 31 January 2022 was a public holiday in Auckland.

[34] The Statement in Reply was not filed by that date, so the Authority Officer emailed Ms Leone on 1 February 2022 pointing out that the Statement in Reply was again out of time. The Authority Officer also called Ms Leone, but no voicemail option was available to leave a message.

[35] The Authority had further email communications to Ms Leone on 10 and 11 February 2022 asking where the Statement in Reply was. The Authority also issued a direction to mediation to occur within 30 days, as mediation had not yet occurred.

[36] On 15 March 2022, the Authority again reminded the respondents they had to seek leave to file a Statement in Reply, because the first extension of time they had been granted had expired on 28 January 2022. No response to that email reminder was received and no Statement in Reply was filed.

Case management conference

[37] The parties were advised that the Authority would be holding a case management conference and the issues to be discussed were identified for them in an email dated 6 April 2022. A copy of this email was also sent by track and trace courier to Ateya’s registered address for service, marked for the attention of Ms Leone.

[38] A case management conference was held on 20 April 2022, which was attended by the applicant's counsel but not by the respondents.

[39] After the case management conference the Authority gave the respondents a further 14 days to file another leave application to lodge a Statement in Reply out of time. The Authority explained how the respondents could do that by providing an explanation for the delay along with a copy of the Statement in Reply that attached relevant documents. However that did not occur.

Mediation

[40] The parties have not attended mediation. The Authority has issued two directions to mediation. The first was issued on 10 February 2022, for mediation to occur within 30 days. The second direction to mediation was issued on 15 March 2022, for mediation to occur within 30 days.

[41] The first mediation set down for 9 March 2022 did not proceed due to COVID, so that mediation date was moved by the respondents to 7 April 2022. The second mediation set down for 7 April 2022 also did not proceed.

[42] Mr Moeono attended mediation on 7 April 2022 and waited there while the mediator contacted Ms Leone. Neither respondent appeared at the mediation and the mediator did not advise Mr Moeono about why the respondents had failed to attend mediation. The Authority does not know why neither respondent attended directed mediation.

Disclosure of relevant documents

[43] The Authority's directions dated 29 April 2022 ordered the respondents to provide Mr Moeono with his final payslip, a copy of his signed employment agreement, any documents relating to consultation with him regarding any deductions or reductions made to his wages, his written consent (if any) to any deductions being made from his wages and any written records of variations that were made by the parties to his employment agreement.

[44] The respondents were directed to provide these documents to Mr Moeono, whether they intended to defend his claims or not, by no later than 13 May 2022. That did not occur.

[45] Mr Moeono has been provided with no documentation by the respondent, other than the additional documents he filed after the Authority's investigation meeting.

Issues

[46] The following issues are to be determined:

- (a) Is Mr Moeono owed wage arrears?
- (b) Is Mr Moeono owed KiwiSaver arrears?
- (c) Did Ateya fail to pay Mr Moeono his full wages from 18 August – 4 October 2021?
- (d) If so, did the failure to pay Mr Moeono breach the WPA?
- (e) Did Ateya breach the HA03 by failing to pay Mr Moeono his annual holiday entitlements?
- (f) Should penalties be imposed for any breaches that have occurred?
- (g) Should some or all of any penalties imposed be paid to Mr Moeono instead of the Crown?
- (h) Was Ms Leone ‘a person involved in a breach of employment standards’ under s 142W of the Act and/or a breach of s 11A of the WPA?
- (i) If so, should the Authority grant Mr Moeono leave to pursue Ms Leone personally for money that Ateya is unable to pay him?
- (j) Did Ateya’s failure to pay Mr Moeono wages from 18 August – 4 October 2022 unjustifiably disadvantage him?
- (k) If so, what remedy should he be awarded?
- (l) Should Mr Moeono be awarded interest?
- (m) What costs and disbursements should be awarded?

Is Mr Moeono owed wage arrears?

18 August – 4 October 2021

[47] Mr Moeono was entitled to be paid his normal full time salary during lockdown because he had not agreed to any variations to his hours of work or rate of pay.

[48] He should have therefore been paid \$8,160 gross, based on 40 hours work per week at \$30 per hour, for the period 18 August – 4 October 2021 (being 6 weeks and 4 days). The Authority accepted Mr Moeono's uncontested evidence that he has only been paid \$1,200 over that period.

[49] Within 28 days of the date of this determination, Ateya is ordered to pay Mr Moeono wage arrears of \$6,960 (being what he should have been paid as normal contractual wages less the \$1,200 he was actually paid).

Annual holiday pay

[50] Mr Moeono did not take any annual holidays while employed. He is therefore owed eight percent of his total gross earnings as annual holiday pay under s 23(2) of the HA03. This amount was to have been paid to him in his pay period that followed the termination of his employment, as required by s 27(2) of the HA03. That did not occur. Mr Moeono has not received any of his annual holiday entitlements.

[51] Mr Moeono was employed from 2 February – 4 October 2021, so he is entitled to be paid his normal daily rate for each working day over that period, because his uncontested evidence was that he had not taken any sick, holiday or other leave while employed.

[52] Because Mr Moeono was entitled to be paid his normal full time earnings during lockdown, his wage arrears must be added to his total gross earnings for the purposes of calculating his holiday pay entitlements.

[53] Mr Moeono should have earned \$42,000 gross for the period he worked, so he was entitled to \$3,360 holiday pay arrears, being eight percent of his total gross earnings.

Is Mr Moeono owed KiwiSaver arrears?

[54] Mr Moeono is a member of KiwiSaver. Under clause 9.4 of Mr Moeono's employment agreement Ateya's Compulsory Employer Contribution (CEC) to KiwiSaver are to be paid at the rate of three percent, in addition to his normal hourly rate.

[55] Ateya did not adopt a total remuneration approach in the employment agreement to the payment of KiwiSaver, so Mr Moeono is entitled to three percent of his total gross earnings as Ateya's CEC contribution to his KiwiSaver. This is to be calculated based on all his earnings for his entire employment, including his holiday pay and wage arrears awarded to him in this determination.

[56] Mr Moeono's total gross earnings for the purposes of calculating his KiwiSaver arrears was \$45,360 (being \$42,000 total gross wages payable plus holiday pay arrears of \$3,360). Ateya is ordered to pay Mr Moeono CEC arrears of \$1,360.80, being three percent of his total gross earnings of \$45,360.

[57] The CEC KiwiSaver arrears are to be remitted by Ateya directly to Inland Revenue Department, for the benefit of Mr Moeono's KiwiSaver account, within 28 days of the date of this determination.

[58] Ateya is also ordered to deduct \$1,360.80 from the total wage arrears it owes Mr Moeono and remit that to IRD, for the benefit of his KiwiSaver account as his own employee KiwiSaver contribution. That should have, but did not, occur while he was employed, so must now occur within 28 days of the date of this determination.

Did the failure to pay Mr Moeono breach the WPA?

[59] Ateya's unilateral reduction of Mr Moeono's wages to \$1,200 in total over the period 18 August to 4 October 2021 breached the WPA. Ateya was not legally entitled to stop or reduce Mr Moeono's wages. He did not agree to deductions to his wages and there was no agreed written variation to the payment terms or remuneration set out in his employment agreement.

Did Ateya breach the HA03 by failing to pay Mr Moeono his annual holiday pay entitlements?

[60] Ateya breached s 27(2) of the HA03 when it failed to pay Mr Moeono his annual holiday pay entitlements in his final pay after his employment ended.

Should penalties be imposed on Ateya for the breaches that occurred?

[61] Ateya breached Mr Moeono's employment agreement, the WPA and the HA03. Penalties are used to punish and deter the wrongdoer. Ateya should have penalties imposed on it in order to signal strong disapproval of its actions and to deter it from acting in this way again. Penalising breaches of employment standards also acts as an important deterrent to others who may be included to engage in such conduct.

[62] The Authority needs to impose penalties that discourage employers from obtaining an unfair competitive advantage by breaching employment standards that its competitors are adhering to.

[63] Section 133A of the Act sets out the matters that the Authority must have regard to when determining a penalty. The full Employment Court in *Labour Inspector v Preet Pvt Ltd* also set out a four-step process for the Authority to use when assessing penalties.¹

Preet step 1 – nature and number of breaches

[64] The nature of the breaches or involvement in the breaches are that they all involve breaches of minimum standards. They consisted of an ongoing breach of the employment agreement from 18 August to 4 October 2021. The breaches also involved a breach of the WPA and a breach of the HA03.

[65] The breaches all involved failure to pay Mr Moeono his wages, that he was contractually entitled to under the terms of his employment agreement and in accordance with minimum code legislation. The breaches all arose from the same set of facts, namely the failure to pay him anything other than \$1,200 from 18 August 2021 onwards.

[66] There were essentially three breaches, if the multiple breaches of the payment terms in the employment agreement and WPA are treated as one ongoing breach each, involving a breach of the remuneration clause in Mr Moeono's employment agreement, a breach of the

¹ [2016] NZEmpC 143.

WPA for not paying him the wages he was owed and a breach of the HA03 for failing to pay him his annual holiday entitlements when his employment ended.

Potential maximum penalties

[67] Because Ateya is a company the potential maximum penalty for each breach is \$20,000 per breach. The total maximum penalties for three discrete breaches (one of the employment agreement, one of the WPA and one of the HA03) is therefore \$60,000.

Globalisation

[68] Because all of these breaches are similar, the three breaches should be globalised into one representative breach that attracts a penalty. This globalisation of the breaches has reduced the total maximum potential penalty to \$20,000 because the first respondent is a company.

Preet step 2 – provisional starting point

[69] In setting a provisional starting point for imposing a penalty in this case, the Authority has had regard to the mandatory statutory considerations set out in s 133A of the Act. These include the s 3 object of the Act.

[70] Section s 3(a) of the Act states that the object of it is to build productive employment relationships through the promotion of good faith. The breaches that occurred are contrary to good faith behaviour and are an example of the inherent inequality of power in the employment relationship that is recognised in s 3(a)(ii) of the Act.

[71] The breaches that occurred are also contrary to the s 3(ab) object in the Act to promote the enforcement of employment standards, because the breaches that occurred involved minimum employment standards.

[72] The nature and extent of the breaches were deliberate, serious, and ongoing. Ms Leone exercised her power as the sole director and shareholder of Ateya to prevent it from paying Mr Moeono what he was owed.

[73] When Mr Moeono pressed to be paid, he was told he would only be paid the wage subsidy if he did not tell his colleagues that it had been paid to him. That was indicative of a calculated and intentional flouting of minimum code legislation. The breaches are an example of the respondents deliberately ignoring Mr Moeono's rights so they could keep his money to use for their own purposes.

[74] The effects of the breaches on Mr Moeono were very detrimental and he has still not completely recovered financially. He was put to severe stress and financial embarrassment as a result of having no income for an extended period of time.

[75] Mr Moeono had to borrow money to keep up with his bills and rent payments. He fell into arrears with his child support payments so has incurred penalties as a result of that. Mr Moeono described to the Authority all of the adverse effects he had suffered as a result of the breaches that occurred. They are serious. He has not been restored to the position he should have been in, had the breaches not occurred. Nothing has been done to mitigate the adverse impact on him.

[76] The breaches that occurred were obviously intentional. It was clear under the terms of Mr Moeono's employment agreement what he was to be paid and when he was to be paid. Mr Moeono repeatedly asked to be paid. He also tried to come up with other solutions such as using sick leave or annual holidays to ensure he was paid at least something, so he could continue to support his family.

[77] Ms Leone's advice to the Authority on 22 December 2021 that Mr Moeono's holiday pay would be paid by the accountant was untrue. Despite knowing that these proceedings were underway, Ateya has still not paid Mr Moeono anything.

[78] Although Mr Moeono was not an inherently vulnerable employee, the failure to pay him made him financially vulnerable at a uniquely difficult time, given it occurred during the Covid-19 lockdown.

[79] The Authority is not aware of Ateya having had penalties imposed on it previously.

[80] The Authority has adopted \$6,000 as an appropriate provisional starting point for assessing penalties. As a rough cross check that would equate to \$2,000 per breach prior to allowing for globalisation into one potential penalty to cover all of the breaches that occurred.

Mitigating circumstances

[81] The Authority was not aware of any mitigating circumstances.

Aggravating factors

[82] The aggravating factors are that Ms Leone acknowledged at the end of last year that Mr Moeono was owed annual holiday pay that would be paid. That did not occur. Ms Leone's advice to the Authority about that demonstrated a level of deliberateness and deceptiveness that has an aggravating feature of these breaches.

[83] It is an aggravating factor that employment related documentation appeared to be deliberately inaccurate. That adverse finding about the employment documentation relies on Mr Moeono's evidence that he did not receive the pay identified in the payslips or recorded by the IRD as having been paid to him. His sworn evidence about that was uncontested, despite Ateya and Ms Leone being given an opportunity to respond to it.

[84] In particular, the payslips the respondents prepared and passed to Mr Moeono were inaccurate because they showed payments that had not actually been made to him. Likewise, the information the respondents passed to IRD about Mr Moeono's earnings was also inaccurate because it indicated he had been paid, when he had not.

[85] In addition to what appeared to be false employment records, there is also another element of deception associated with these breaches, in that Ms Leone tried to impose an obligation on Mr Moeono not to tell his colleagues he had been paid a government subsidy payment as a pre-condition of making the \$1,200 payment to him.

[86] This matter also has elements of retribution and vindictiveness. According to Mr Moeono's uncontested evidence, Ms Leone threatened Mr Moeono's new job by insinuating that because she was friends with his new manager, she would get his new job cut short. That appeared to be an attempt at retribution against him by the respondents for enforcing his legal rights.

[87] This sort of conduct must be strongly denounced and deterred. The level of penalty should therefore not be decreased from \$6,000 but should instead be increased to \$9,000 to reflect the necessary level of punishment and deterrence.

Preet step 3 – ability to pay

[88] There was no evidence regarding Ateya's ability to pay a penalty. It is still registered according to the Companies Office website.

Preet step 4 – proportionality

[89] Imposing a penalty of \$9,000 is effectively \$3,000 per globalised breach. It is also less than half of the maximum potential globalised penalty. It is therefore proportional to the breaches that occurred. It is also broadly consistent with the level of penalties on other such cases.

Penalty outcome

[90] Ateya is ordered to pay a total penalty of \$9,000 for all the breaches that occurred of Mr Moeono's employment agreement, the WPA and the HA03.

Should some or all of the penalties imposed be paid to Mr Moeono instead of or as well as the Crown?

[91] Section 136 of the Act enables the Authority to order that any part of a penalty may be paid to any person. There is a broad public interest in deterring those who might be inclined to do so from breaching their employment law obligations. In recognition of that broader public interest, it is appropriate for \$5,000 of the total penalty to be paid to the Crown bank account.

[92] The remaining \$4,000 of the total penalty imposed is to be paid to Mr Moeono personally to recognise that he has had to go to the trouble and expense of bringing these breaches to the Authority's attention, to enable them to be addressed both for his benefit and for the broader public good.

[93] Mr Moeono has suffered financial harm that has not otherwise been compensated. For example, he has incurred overdue child support liabilities in excess of \$5,000, but for the breaches it was unlikely he would have incurred those liabilities for non-payment.

[94] While penalties may not be used as compensation, it is appropriate for the Authority to recognise that Mr Moeono has suffered harm as a result of the breaches, for which he has not and cannot be compensated.

[95] The apportionment of \$4,000 of the penalties to Mr Moeono personally recognise that.

Was Ms Leone ‘a person involved in a breach of employment standards’ under s 142W of the Act and/or ‘a person involved in a breach of s 11A’ of the WPA?

Section 142W of the Act

[96] Section 142W of the Act deals with persons who have been involved in breaches of minimum standards. Section 142W(1) of the Act states that a person is involved in a breach of employment standards if they have aided, abetted, counselled or procured the breach; or have induced it or been in any way, directly or indirectly, knowingly concerned in or a party to the breach or have conspired with others to cause the breach.

[97] Section 142W(2) of the Act provides that where the breach is by a company, a person who is an officer of the entity may be treated as a person involved in the breach. Section 142W(3) of the Act identifies that for the purposes of establishing who is an officer of an entity involved in a breach that includes (among others) a director of a company.

[98] Ms Leone is named on the Companies Office as the sole director of the company under the legal name Edna Lily Bloomfield. She is also named as the sole shareholder of Ateya under her name Edna Lily Leone. Both Ednas listed on the Companies Office website as the sole director and shareholder of Ateya have the same address. It is more likely than not that they are the same person, using different surnames.

Section 11A of the WPA

[99] Section 11A of the WPA relates to proceedings for the recovery of wage arrears from a person involved in a failure to comply with the WPA. Section 11A(2) of the WPA enables a worker to recover unpaid wages from “*a person involved in the non-compliance*” of the WPA. In that case, the person involved in non-compliance of the WPA is Ms Leone. As sole director and shareholder she was the controlling mind of Ateya.

[100] Under s 11A(2), the Authority may grant Mr Moeono leave to recover his wage arrears from Ms Leone personally if Ateya is unable to pay him what he is owed.

[101] Section 11A(5) of the WPA states that for the purposes of recovering wage arrears from a “*person involved in the non-compliance*” of the WPA, a person is involved in the non-compliance if that person would be treated as a person involved in a breach within the meaning of s 142W of the Act. Ms Leone falls within that definition.

Findings against Ms Leone personally

[102] Ms Leone as the sole director and shareholder of Ateya was the controlling mind of that entity. All decisions not to pay Mr Moeono his wages, holiday pay and KiwiSaver entitlements were decisions Ms Leone personally made.

[103] Ms Leone was the person who caused these breaches to have occurred. She is therefore a “*person involved in a breach*” of minimum standards within the meaning of s 142W of the Act and she is also a “*person involved in the non-compliance*” of the WPA under s 11A(1) of that Act.

Should the Authority grant Mr Moeono leave to pursue Ms Leone personally for money Ateya is unable to pay him?

[104] Although Ateya breached its obligations to Mr Moeono, the breaches occurred as a result of Ms Leone arranging for the breaches to occur. The Authority considered it appropriate to grant Mr Moeono leave to pursue Ms Leone personally for any money he is owed, if it turns out that Ateya is unable to pay him the wage arrears or other money it has been ordered to pay him.

[105] Under s 142Y(1) of the Act, Mr Moeono may recover from Ms Leone any wages or other money payable to him in this determination, because the default is due to a breach of employment standards and Ms Leone is a person involved in the breach within the meaning of s 142W of the Act.

[106] The Authority has granted Mr Moeono leave for the purposes of the requirements of s 142Y(2)(a) of the Act to recover wages or other money payable to him from Ms Leone personally, to the extent that Ateya is unable to pay the wage arrears or other money, as per s 142Y(2)(b) of the Act.

[107] The Authority orders Ateya to pay Mr Moeono the money he is owed within 28 days of the date of this determination.

[108] If Ateya has not paid Mr Moeono the money he is owed by that date because it is unable to pay it, then Mr Moeono may apply to the Authority for an order that Ms Leone personally pays him the money Ateya is unable to.

[109] If Ateya has the money to pay Mr Moeono, but has simply not paid him, then he may apply to the Authority for a compliance order compelling Ateya to pay him the money it owes him.

Did Ateya’s failure to pay Mr Moeono wages from 18 August – 4 October 2021 unjustifiably disadvantage him?

[110] Mr Moeono was significantly disadvantaged as a result of Ateya’s failure to pay him wages and holiday pay he was owed when it became due. This disadvantage was unjustified, in accordance with the justification in s 103A(2) of the Act.

[111] The failure to pay Mr Moeono was not what a fair and reasonable employer could have done in all the circumstances at the time Mr Moeono was disadvantaged by not being paid his wages. His unjustified disadvantage grievance claim therefore succeeds.

What remedy should Mr Moeono be awarded?

[112] Mr Moeono is entitled to an award of distress compensation of \$9,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of the ongoing unjustified disadvantage he was subjected to by Ateya not paying him.

[113] Ateya is ordered to pay Mr Moeono \$9,000 distress compensation within 28 days of the date of this determination.

[114] If Ateya is unable to pay that amount then Mr Moeono may apply to the Authority to recover it personally from Ms Leone, as “*other money payable*” to him, as defined by ss 142Y(1)(a), (b) and (c) of the Act, because it is owed to him as a result of a breach of employment standards that involved Ms Leone as ‘a person involved in the breach’, as per the meaning of s 142W of the Act.

Should Mr Moeono be awarded interest?

[115] Mr Moeono has been deprived of the use of money that was his. Ateya’s breaches also meant that from 19 August 2021 it has had the use of Mr Moeono’s money for free. It is therefore appropriate for Ateya to compensate Mr Moeono for the use of his money by paying him interest on the wage arrears he is due.

[116] Ateya is ordered to pay Mr Moeono interest under the Interest on Money Claims Act 2016, at the rate calculated in accordance with the Civil Debt Interest Calculator on the New Zealand Ministry of Justice website on the following awards to Mr Moeono;

- (a) Interest runs on the total wages arrears (including the holiday pay and CEC KiwiSaver arrears) of \$11,680.8 from 4 October 2021 until it has been paid in full; and
- (b) Interest runs on the total costs and disbursements of \$2,285.78 from 28 days after the date of this determination until paid in full.

[117] Interest is not awarded on the \$9,000 distress compensation Mr Moeono has been awarded or on the \$9,000 penalties that have been imposed on Ateya.

[118] Ms Leone is ordered to pay Mr Moeono interest under the Interest on Money Claims Act 2016, at the rate calculated in accordance with the Civil Debt Interest Calculator on the New Zealand Ministry of Justice website on the \$2,285.78 total costs and disbursements she has been ordered to pay Mr Moeono. Interest on this amount of \$2,285.78 runs from 28 days after the date of this determination until it has been paid in full.

What costs and disbursements should be awarded?

[119] As the successful party, Mr Moeono is entitled to a contribution towards his actual costs.

[120] This matter involved a one and a half hour investigation meeting, the receipt of additional information after the investigation meeting and the filing of an affidavit by Mr Moeono to address the inconsistencies in the information that was filed after the investigation meeting. On that basis this matter has been dealt with as involving a half day of investigation time.

[121] The notional starting tariff is \$2,250 being a pro rata amount of the notional daily tariff which is currently \$4,500 for the first day of an investigation meeting.

[122] This notional starting tariff must then be adjusted to reflect the particular circumstances of this case. The manner in which the respondents elected to not engage with the Authority

increased Mr Moeono's actual costs, because he had to pay his counsel to receive copies of communications from the Authority to the respondents about their non-engagement.

[123] Because the Authority has had to follow up with the respondents about their failure to engage, particularly regarding their non-filing of a Statement in Reply, their non-engagement in the case management conference and their non-attendance at mediation these extra communications with the parties have increased Mr Moeono's actual legal costs.

[124] While mediation costs are not normally recoverable, in this case the Authority directed the parties to attend mediation. Mr Moeono incurred the cost of attending mediation with his counsel in circumstances where the respondents simply failed to turn up without explanation. Mr Moeono not only incurred legal costs, but he also lost wages because he had to take time off work to attend directed mediation.

[125] It would be unjust for Mr Moeono to bear the full financial costs of the respondents' actions in this regard. It was therefore appropriate to reflect that unnecessary additional expense Mr Moeono was put to by the respondents when the Authority was assessing costs.

[126] The notional starting tariff should be doubled to reflect that. Mr Moeono is awarded total costs and disbursements of \$4,500, consisting of \$4,500 towards his actual legal costs plus \$71.56 to reimburse his filing fee.

[127] The Authority orders the respondents to each contribute half of the costs and disbursements that have been awarded to Mr Moeono. Therefore Ateya is ordered to pay Mr Moeono \$2,250 costs and \$35.78 disbursements and Ms Leone is ordered to pay Mr Moeono \$2,250 costs and \$35.78 towards his costs and disbursements.

Outcome

[128] The Authority makes the following findings and orders:

- (a) Ateya breached Mr Moeono's employment agreement, the WPA and the HA03;
- (b) One globalised total penalty of \$9,000 is imposed on Ateya for all of these breaches;
- (c) Within 28 days of the date of this determination Ateya is ordered to pay:
 - (i) \$5,000 of the penalty imposed on it to the Crown bank account; and

- (ii) \$4,000 of the penalty imposed on it directly to Mr Moeono;
- (d) Ms Leone is 'a person involved in a breach of employment standards' under s 142W of the Act and s 11A of the WPA;
- (e) Mr Moeono has been granted leave by the Authority under s 142Y(2)(a) of the Act and under s 11A(4)(a) of the WPA to pursue Ms Leone personally for wage arrears and/or other money he is owed as a result of a breach of employment standards and/or as a result of the breaches of the WPA that have occurred, if Ateya is unable to pay him all of the money he has been awarded in this determination;
- (f) If Ateya is unable to pay Mr Moeono the full \$26,966.58 he is owed, then he may seek to recover the outstanding amount from Ms Leone personally;
- (g) Ateya's failure to pay Mr Moeono his wages, holiday pay and CEC KiwiSaver contribution unjustifiably disadvantaged him in his employment;
- (h) Ateya is ordered to pay Mr Moeono \$9,000 distress compensation for the unjustified disadvantage he suffered.
- (i) Ateya and Ms Leone are ordered to each pay Mr Moeono \$2,250 as a contribution towards his legal costs and \$35.78 each to reimburse half each of his disbursements.
- (j) Ateya is ordered to pay interest under the Interest of Money Claims Act 2016 on the \$11,680.80 wage arrears (unpaid wages, holiday pay and CEC KiwiSaver arrears) that is to run from 4 October 2021 until it has been fully repaid;
- (k) Ateya is ordered to pay interest under the Interest of Money Claims Act 2016 on the costs of \$2,285.78 it has been ordered to pay Mr Moeono. Interest on that amount is to run from 30 days after the date of this determination;
- (l) Interest is not payable on the penalties imposed or on the award of distress compensation.
- (m) Within 30 days of the date of this determination Ateya is ordered to pay Mr Moeono;
 - (i) Total wage arrears of \$11,680.80;

- (ii) Interest on the \$11,680.80 wage arrears calculated using the Civil Debt Interest Calculator on the Ministry of Justice website, from 4 October 2021 until it has been paid in full;
 - (iii) Distress compensation of \$9,000;
 - (iv) Costs and disbursements of \$2,285.78;
 - (v) Partial penalty of \$4,000.
- (n) Ms Leone is ordered to pay interest to Mr Moeono under the Interest of Money Claims Act 2016 on the \$2,285.78 she has been ordered to pay him as costs and disbursements, to run from 30 days after the date of this determination until that amount has been paid in full.

Rachel Larmer
Member of the Employment Relations Authority