

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 511
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 for the Applicant
Rachel Brazil for the third Respondent

Investigation Meeting: On the papers

Submissions received: 9 September 2022 and 29 September 2022 from the
Applicant
None from the first and second Respondents
20 September 2022 from the third Respondent

Date of Determination: 7 October 2022

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] Following a two-day investigation meeting in Dunedin, the Authority issued a determination of 26 August 2022 finding that:

- a) Xuan Zhang was a party to breaches of minimum standards and to the extent Elements Therapeutic Massage Limited cannot meet the arrears owed due to it not trading, Xuan Zhang is personally liable for arrears of wages and holiday pay as identified below.
- b) Ping Du has 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 the employees' around commission only, was a breach of minimum standards.
- c) 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.
- d) 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 Xuan Zhang's conscious decision to withhold such. In addition, I find Xuan Zhang was responsible for failing to keep adequate wage, time and leave records and he did not provide one identified employee with an employment agreement.

Conclusion on penalties and arrears

- e) 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.
- f) 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.
- g) 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.

Submissions

[2] After citing relevant authorities, Ms Webster briefly submitted that having successfully obtained rulings in their favour, the Labour Inspector seeks an overall contribution to costs of \$8,000 (i.e. the notional daily rate normally applied of \$4,500 for the first day and \$3,500 for subsequent days). The investigation meeting took nearly two days and extensive timetabled submissions were required.

[3] In addition, expenses for translation fees (\$2,458.24) the hearing fee (\$306.66) and the filing fee (\$71.56) were sought as being legitimately incurred. The Labour Inspector sought that the first to third respondents be held jointly and severally liable for any costs award.

[4] Ms Brazil for Ping Du submitted that the costs should be apportioned between the respondents to reflect their respective liability and contributions to the identified breaches. Ms Brazil suggested Ping Du had already incurred considerable legal costs in defending his position and was in no financial position to meet a costs award. No evidence was proffered on the latter suggestion.

[5] No submissions were received from Elements Therapeutic Massage Limited or Xuan Zhang.

Cost principles

[6] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ including costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.²

Assessment

[7] A general principle for a successful party is that costs should 'follow the event' and here the Labour Inspector established several key breaches and penalties were imposed.

[8] Taking all the circumstances into account, the Authority determines the costs as sought by the Labour Inspector of \$8,000 is an appropriate amount but they be apportioned to reflect the respective contributions of each party to the breaches and the outcomes. An 80% - 20% split in liability is deemed appropriate in favour of Ping Du.

[9] The Authority acknowledges that the Labour Inspector incurred legitimate document translation costs but does not consider it appropriate that such be reimbursed to a Crown entity. However, the hearing and filing fees are legitimate expenses to award.

Awards

[10] The Authority orders Ping Du to pay the Labour Inspector (Ministry of Business and Innovation) the sum of \$1,600 as a contribution to legal costs incurred.

¹ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

² Section 160(2) Employment Relations Act 2000.

[11] Further, Xuan Zhang is ordered to pay the Labour Inspector (Ministry of Business and Innovation) the sums of \$6,400.00 as a contribution to legal costs incurred, the \$306.66 Authority Hearing fee and \$71.56 for the Authority Filing Fee.

David G Beck

Member of the Employment Relations Authority