

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 74
3117274

BETWEEN	A LABOUR INSPECTOR Applicant
AND	REXJOY ENTERPRISE LIMITED (IN LIQUIDATION) First Respondent
AND	MARY JOY EVERETT Second Respondent
AND	REX BRIAN EVERETT Third Respondent

Member of Authority: Helen Doyle

Representatives: Oscar Upperton counsel for the Applicant
Rexjoy Enterprises Limited (in liquidation) (no appearance)
Mary Everett and Rex Everett in person

Investigation Meeting: 13 December 2021 at Christchurch by Zoom

Submissions Received: 10 December and 21 December 2021 from the Applicant
20 December 2021 from the Second and Third Respondents

Date of Determination: 7 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Claim against the first respondent

[1] Rexjoy Enterprise Limited (in liquidation) was placed into liquidation on 22 March 2021. I shall refer to the company from hereon as Rexjoy Enterprise.

[2] The liquidator has consented in writing to the continuation of proceedings and will not complete the liquidation until the final determination of this claim. He does not intend to defend the proceeding.

[3] Rexjoy Enterprise operated a business called Dumpling Master as a small takeaway shop in Barrington Mall, Christchurch and employed nine employees from June to November 2019. After that time Mary Everett worked alone in the business. On or about 16 October 2019 the Labour Inspector received several complaints about the failure to pay wages to employees who had worked in the business of Rexjoy Enterprise. The Labour Inspector decided to investigate the payment to employees of minimum wage.

[4] The investigation report dated 9 April 2020 concluded there were breaches of the Minimum Wage Act 1983 because there had not been payment of at least the minimum wage to all employees. There was a breach found of the Employment Relations Act 2000 (ERA) because there was no record of the details required under s 130 of the Act for a wage and time record from 20 June until 10 July 2019. There were breaches of the Holidays Act 2003 because final holiday pay had not been paid to employees and two employees who had worked on a public holiday had not been paid correctly for that day and had not taken or been paid for an alternative day.

[5] The Labour Inspector initially proposed an enforceable undertaking under s 223B of the ERA to clear the arrears however there was no response by Rexjoy Enterprise by the required date.

[6] An improvement notice was issued dated 29 June 2020. It required that Rexjoy Enterprise make payments to nine employees of amounts for breaches of the Minimum Wage Act 1983 and Holidays Act 2003 by 5pm 28 July 2020. It also required reviews of sections of the ERA and Holidays Act 2003 about record keeping and bargaining for an employment agreement. It required evidence by way of copies of bank remittance that the payments set out had been paid in full by 28 July 2020 and evidence of steps taken to contact terminated employees to obtain their bank details if these were not kept on the employee system. Confirmation that the attached sections of the legislation had been read and that record keeping

requirements are understood was also required. These confirmation steps were required to be taken by 28 July 2020.

[7] On 9 July 2020 an accountant engaged by Rexjoy Enterprise advised the Labour Inspector that he found some of the wages paid to employees had not been included in her spreadsheet and calculations. Evidence of the payments was provided. The Labour Inspector reviewed the information and advised Rexjoy Enterprise that she had recalculated the arrears payable and amended the improvement notice. The same date for payment of arrears remained of 28 July 2020 and the reduced arrears totalled \$12,399.35.

[8] Despite emails sent on behalf of Rexjoy Enterprise that payments would be made there was no evidence of payment by 28 July 2020. On 6 August 2020 the Labour Inspector spoke to the accountant who advised that he understood some steps were being taken to borrow money. No evidence of payment was provided and a statement of problem seeking compliance with the notice was lodged with the Authority.

[9] No objection to the improvement notice was lodged.

[10] The Labour Inspector seeks orders requiring Rexjoy Enterprise to pay arrears to its previous employees in respect of breaches of employment standards:

- (a) Failure to pay minimum wage under s 6 of the Minimum Wage Act 1983 in respect of five employees.
- (b) Failure to pay time and a half for a worked public holiday as required by s 50 of the Holidays Act 2003 in respect of two employees.
- (c) Failure to provide an alternative holiday for a worked public holiday as required by s 56 of the in respect of two employees.
- (d) Failure to pay final holiday pay as required by s 23 of the Holidays Act 2003 in respect of five employees.

[11] The Inspector also seeks enforcement to show where any payments have been made to employees and copies of bank remittance showing that arrears have been paid in full. No enforcement is sought that Rexjoy Enterprise review relevant provisions of employment legislation because the company is now in liquidation.

[12] The Labour Inspector seeks payment by Rexjoy Enterprise of a penalty for the failure to comply with the improvement notice.

[13] There is a claim for interest on the outstanding arrears from the date the improvement notice was to be complied with and reimbursement of costs and expenses.

Claims against the second and third respondents

[14] The Labour Inspector seeks orders that Mary Everett and Rex Everett are persons involved in the breaches of the employment standards and are liable for payment of the arrears and interest owing to the extent that Rexjoy Enterprise is unable to pay the amounts owing.

The respondents' views of the claims

[15] There was no statement in reply lodged on behalf of Rexjoy Enterprise. Mr and Mrs Everett did not lodge statements in reply and took no part in the case management conference. There were no statements of evidence lodged by them in accordance with the timetable set out in the notice of direction dated 3 February 2021. They did however attend at the investigation meeting and provided some submissions.

The Issues

[16] The Authority is required to determine the following issues in respect of Rexjoy Enterprise:

- (a) Was there a failure by Rexjoy Enterprise to comply with the improvement notice?
- (b) Should the improvement notice issued on 29 June 2020 be enforced by a compliance order under s 137 of the Act?
- (c) Should Rexjoy Enterprises be ordered to pay interest on outstanding arrears from the date the improvement notice was to be complied with?
- (d) Should a penalty for failure to comply with the improvement notice be awarded?
- (e) Are Mr and/or Mrs Everett persons involved under s 142W?

- (f) If one or both are found to have been person involved, then should they be ordered to pay arrears and interest to the extent that Rexjoy Enterprise defaults in payment?
- (g) Should there be an award of cost?

Preliminary issues

When did Rexjoy Enterprise assume control of the business Dumpling Master?

[17] The date Rexjoy Enterprise assumed control of the Dumpling Master business did not appear to be an issue until an email was attached to Mr and Mrs Everett's final submissions. The submissions themselves state that Mrs Everett took over the shop on 20 June 2019.

[18] I am satisfied that Rexjoy Enterprise assumed control of the business on 20 June 2019. Elizabeth Presquito is the director of Pres Food Enterprise Limited (Pres Food) which company previously owned the Dumping Master business. She gave evidence to the Authority that Pres Food sold its business to Rexjoy Enterprise. There is a Deed of Assignment of Lease between Pres Food Enterprises Limited and Rexjoy Enterprise that provided the date of assignment of the lease was 20 June 2019. The Business Sale Agreement between the same two parties provided that the handover date would be set no later than 8 days after the deposit date. The first deposit date was 12 June 2019, and it is noted that the amount beside that date was paid. Ms Presquito said in her evidence that she agreed to defer the final pay until September 2019 but continued to hand over the business on 20 June 2019 since the POS, Rent and Internet had been set up for a handover on that date.

[19] Concerns involving the purchase of the business were raised in the submissions however these are not matters for the Authority.

Calculation of arrears – was there a reasonable basis for the amounts arrived at?

[20] There was no apparent dispute that wages and holiday entitlements are still owed to previous employees of Rexjoy Limited.

[21] The Labour Inspector relied on photocopied timesheets from her first visits as an accurate account of the hours and days worked by employees. Employees entered their start and finish times on the time sheets. It was not suggested by the respondents that the timesheet entries were inaccurate.

[22] One of the reasons the Labour Inspector did not rely on a spreadsheet supplied at a later point by Rexjoy Enterprise is because a 30-minute break was often deducted from total hours. Those breaks were not recorded in the timesheet on which the employees entered their work hours. The Labour Inspector concluded it was unlikely that breaks were taken when only one person was working all day by themselves.

[23] Mrs Everett said that she had managed a break when working alone in the shop. The employees worked a variety of hours each day and did not usually work set shifts.

[24] A previous employee of Rexjoy Enterprise who is owed wage arrears and holiday entitlements was summonsed to give evidence. Her evidence was that she only took a 30-minute break when she worked 9am to 6pm which she did from time to time over the period of her employment between 20 September 2019 and when she resigned on 13 November 2019 because she was not paid properly. The Labour Inspector made allowance for an unpaid 30-minute break when there were two employees in the shop. I do not conclude that is unreasonable.

[25] The Labour Inspector, in calculating arrears, reviewed the bank statements and highlighted every instance where wages were paid to an employee of Rexjoy Enterprises. She then created a spreadsheet using the hours worked for each employee based off the photos taken during her initial visits to the business of the timesheets.

[26] As Rexjoy Enterprise did not have a record of gross wages paid the Labour Inspector used the net wages paid and the Inland Revenue PAYE calculator to convert the net wages to the gross wages. The Labour Inspector calculated holiday pay payable for each of the employees where employment was less than 12 months at eight percent of gross.

[27] The Labour Inspector noted that two employees had worked one public holiday in the period of their employment and were entitled to time and a half for work on that day and an

alternative day. Mrs Everett raised an issue whether a second employee worked on Labour Day in 2019. Labour Day in 2019 fell on Monday 28 October. The Labour Inspector relied on the timesheets photographed during her first visits and they have both employees working that public holiday. A conclusion they both worked on that public holiday was reasonable. Although employment was for a short period for the two employees who worked on the public holiday there is a reasonable basis for the conclusion reached that Monday 28 October 2019 would otherwise be a working day for the employees.

[28] I conclude there is a reasonable basis for the calculation of arrears and holiday entitlements.

Arrears owing

[29] There have been several amendments to the arrears calculations because of payments made to employees coming to the attention of the Labour Inspector. The Labour Inspector had requested information from Rexjoy Enterprise about any payments made to previous employees following the improvement notice being issued but the requests were not responded to so there was insufficient clarity about what had been paid. Information about some of the payments came to the Labour Inspector directly from the employees later.

[30] Mr Upperton attached the up-to-date summary of the arrears to final submissions.

	Minimum Wage	Time and a half	Alternative holiday	Final holiday pay	Total
Employee A	\$549.59	\$0.00	\$0.00	\$112.57	\$662.16
Employee B	\$678.09	\$0.00	\$0.00	\$91.05	\$769.14
Employee C	\$2,453.71	\$61.95	\$115.55	\$439.42	\$3,070.64
Employee D	\$672.60	\$0.00	\$0.00	\$53.81	\$726.41
Employee E	\$2,115.15	\$26.55	\$84.61	\$178.10	\$2,404.41
Total	\$6,469.14	\$88.50	\$200.16	\$874.95	\$7,632.75

Was there a failure by Rexjoy Enterprise to comply with the improvement notice?

[31] There was a failure by Rexjoy Enterprise to comply with the improvement notice.

Should the Authority order compliance?

[32] The Authority can order compliance with an improvement notice by virtue of ss. 223D (6) and 137 of the Act.

[33] There has been a failure by Rexjoy Enterprise to comply with the improvement notice in respect of five employees and pay them their minimum wage, holiday pay and public holiday entitlements. There has also been a failure to provide copies of bank remittance showing that payments set out above have been paid in full.

[34] It is appropriate to order compliance as sought by the Labour Inspector.

[35] Rexjoy Enterprise is ordered within 20 days of the date of this order to:

- (a) Pay to employee A minimum wages arrears and holiday entitlements of \$662.16 gross.
- (b) Pay to employee B minimum wage arrears and holiday entitlements of \$769.14 gross.
- (c) Pay to employee C minimum wage arrears, holiday pay, time and a half for work on a public holiday and an alternative day in the sum of \$3,070.64 gross.
- (d) Pay to employee D minimum wage arrears and holiday pay in the sum of \$726.41 gross.
- (e) Pay to employee E minimum wage arrears, holiday pay, time and a half for work on a public holiday and an alternative day in the sum of \$2,404.41.
- (f) Provide copies of bank remittance showing that the amounts paid on 30 July 2020 and the amounts set out above have been paid in full.

Interest

[36] The Authority has the power to award interest under clause 11 of the second schedule to the Act. Clause 11 provides, amongst other matters, that in any matter involving the recovery of any money the Authority may order the inclusion of interest.

[37] I have had regard to the judgment of the full Court of the Employment Court in *Labour Inspector v IT-Guys NZ Limited* as to whether enforcement of an improvement notice is a matter involving the recovery of money to fall within clause 11.¹

[38] The Court in *IT-Guys* was asked to determine a question whether a Labour Inspector can use an improvement notice issued under s 223D of the Act to recover wages and holiday pay. It was held that a Labour Inspector can use an improvement notice to recover arrears of wages and holiday pay.

[39] Using an improvement notice to recover wages and holiday pay is therefore a matter involving the recovery of money for the purposes of clause 11 enabling the inclusion of interest on any amount recoverable. The employees are entitled to the inclusion of interest on the money that is owed to them from the date that payment should have been made in the improvement notice.

[40] I have calculated interest for each of the employees from the day after there was to be compliance with the improvement notice being 29 July 2020 until the date of this determination in accordance with Schedule 2 of the Interest on Money Claims Act 2016 and using the civil debt interest calculator.

[41] Within 20 days of the date of this determination interest is payable as set out below on the amounts set out in paragraph [36]:

- (a) Employee A – interest on the sum of \$662.16 in the sum of \$14.09.
- (b) Employee B – interest on the sum of \$769.14 in the sum of \$16.36.

¹ *Labour Inspector of the Ministry of Business, Innovation and Employment v IT-Guys NZ Limited* [2019] NZEmpC 115.

- (c) Employee C- interest on the sum of \$3,070.64 in the sum of \$65.33.
- (d) Employee D – interest on the sum of \$726.41 in the sum of \$15.45.
- (e) Employee E - interest on the sum of \$2,404.41 in the sum of \$51.16.

Penalty

[42] A penalty is sought for non-compliance with the improvement notice under s223F of the ERA.

[43] Section 133A of the ERA sets out the matters that the Author must have regard to in determining the amount of the penalty together with the additional considerations set out by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd* and *Nicholson v Ford*.²

[44] I consider that there should be a penalty imposed. Some of the employees were vulnerable because they had work visas. The evidence from the Labour Inspector was that three employees she spoke with were reluctant to be involved in the Authority proceedings because they had been threatened previously with their immigration status and were concerned involvement could impact on any immigration application detrimentally. There was documentary evidence to support there was some basis for a conclusion that threats of that nature had been made albeit regarding another employee. The employees also worked part time hours and were in receipt of minimum or low wages, so payment of entitlements was important.

[45] There is one breach and the maximum liability for a company in s 135(2) of the Act is \$20,000.

[46] As a result of the failure by Rexjoy Enterprise to comply with the improvement notice five employees have not been paid their wages and holiday entitlements for a considerable period. The amounts owing would be important to them as low wage workers. I do weigh that there has been payment to three other employees of amounts in the improvement notice on 30 July 2020. However, there was no communication about this to the Labour Inspector as was required in the improvement notice. The Labour Inspector only found out about these payments

² *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] ERNZ 514 at [151] and *Nicholson v Ford* [2018] NZEmpC 132 at [18].

on 10 and 11 June 2021 shortly before an adjourned Authority investigation meeting when she spoke directly to the employees. It is difficult to see why that information was not provided to the Labour Inspector at the time the payments were made.

[47] Rexjoy Enterprise advised the Labour Inspector that the failure to pay wages and holiday pay was because the business not doing well and not making a profit. Further there was some confusion about holiday and public holiday entitlements. I accept the business was not as successful as was anticipated at the time of its purchase. Difficulties were then exacerbated by the pandemic the following year. The decision not to pay at least minimum wage was deliberate even if it was made because the business could not afford payment. In those circumstances the communications with the Labour Inspector and employees who asked for their entitlements viewed overall was less than ideal. When the Labour Inspector became involved, she identified what was owed and proposed payment over a period by way of an enforceable undertaking but there was no response.

[48] I have weighed the relevant factors in this matter both aggravating and mitigating. Mr Upperton drew my attention to the imposition of a penalty of \$7000 for a single breach of failing to comply with an improvement notice.³ Some reliance was placed in awarding that penalty on the lack of evidence that the failure to pay was deliberate in imposing that penalty. It was not found in *IT-Guys* that there were financial circumstances that impacted on the ability to pay a penalty.

[49] I have stood back and considered all the circumstances and the proportionality of outcome. A penalty award needs to account for the fact that Rexjoy Enterprise is now in liquidation however I have also weighed that there was some deliberateness which was not concluded in *IT-Guys* and vulnerability because of immigration status. A penalty of \$7000 is appropriate taking financial circumstances into account.

[50] I order that Rexjoy Enterprise pay a penalty of \$7,000 to the Labour Inspector for payment to the Crown account within 28 days of the date of this determination.

Are Mary Everett and Rex Everett persons involved?

³ Above n 1.

[51] Section 142Y of the ERA enables a Labour Inspector or an employee to recover from a person who is not the employee's employer any wages or other money payable to the employee. To be able to recover there must be a default in the payment of wages or other money payable that is due to a breach of employment standards. The person must also be a person involved in the breach within the meaning of s 142W.

[52] Section 142W(1) sets out the requirements for a person to be involved in a breach. A person is involved in a breach where 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.

[53] If the breach is by a company as is the case in this matter then a person may only be liable as a person involved in a breach if they are an officer of the company. Section 142W(3) provides that this includes a director of the company and/or a person occupying a position in the entity if they are in a position to exercise significant influence over the management and administration of the entity.

Breaches of employment standards

[54] In this case there are breaches of employment standards as defined in s 5 of the ERA of minimum entitlements and payments under the Holidays Act 2003 and under the Minimum Wage Act 1983.

Qualifying position

[55] I accept Mr Upperton's submission that Mrs Everett exercised control of Rexjoy Enterprises. She hired employees and made decisions about their termination. Mrs Everett set the hours of work and tasks for employees to perform and was identified as manager of the business in employment agreements. She was responsible for making decisions about payment of employees and dealt with the accountant about payroll issues. Importantly the only person

that the Labour Inspector dealt with was Mrs Everett. Mrs Everett confirmed to the Labour Inspector in a meeting that she “manages everything” and that Mr Everett “doesn’t really have a day-to-day role”.⁴ She did indicate a level of reporting to Mr Everett. Ms Everett confirmed that she processed all wages and authorised the banking and wages transactions.

[56] Mrs Everett qualifies as an officer of the company as she was a person in a position to exercise significant influence over the management of Rexjoy Enterprise.

[57] Mr Everett is the sole director of Rexjoy Enterprise and qualifies as an officer of the company.

Qualifying actions

Mrs Everett

[58] I am satisfied that Mrs Everett knew the primary facts relevant to the breaches by Rexjoy Enterprises. She knew that there was money owing to employees for wages and indicated to the Labour Inspector that she was attempting to raise funds to make payments. She said that she was confused about holiday pay and public holiday entitlements however there was reference to the Holidays Act 2003 in the employment agreements and to payment for public holidays of time and a half.

[59] Mrs Everett’s actions and involvement in the day to day running of the business means that she procured the breaches and/or was directly or indirectly knowingly involved in them.

[60] Mrs Everett is a person involved in the breaches and liable if Rexjoy Enterprises defaults in payment of wages and holiday entitlements due to the previous employees.

Mr Everett

[61] There is no evidence to support that Mr Everett was involved to any real extent in the day to day running of the business. The evidence supported Mrs Everett reported to Mr Everett although she said that was limited so far as employee issues to those about dismissal of employees. Two letters sent to an employee that included both Mr and Mrs Everett’s names

⁴ Annexure 24 of the applicant’s bundle of documents.

could support that. They were the only letters produced on which Mr Everett's name was included. The evidence does not satisfy me that Mr Everett, whilst a director of Rexjoy Enterprise, procured and/or was directly or indirectly knowingly involved in the breaches or party to the breaches.

[62] Mr Everett is not a person involved in the breaches and is not liable if Rexjoy Enterprise defaults in payment of wages and holiday entitlements.

Should an order be made under s 142Y?

[63] It is appropriate given that Rexjoy Enterprise is in liquidation to make an order that Mrs Everett is liable to pay the arrears and interest on arrears to the extent that Rexjoy Enterprise defaults in payment of the wages and holiday entitlements.

[64] No penalty has been sought with respect to Mrs Everett as a person involved.

Orders made

[65] Rexjoy Enterprise is to comply with the improvement notice and pay the following gross amounts that include interest within 20 days:

- (a) \$676.25 to employee A.
- (b) \$785.50 to employee B.
- (c) \$3135.97 to employee C.
- (d) \$741.86 to employee D.
- (e) \$2,455.57 to employee E.

[66] Rexjoy Enterprise is to provide copies of bank remittance showing that the amounts paid on 30 July 2020 and the amounts set out above have been paid in full.

[67] Rexjoy Enterprise is ordered to pay a penalty of \$7,000 within 28 days of the date of this determination to the Labour Inspector for payment to the Crown account.

[68] Mary Everett is a person involved in the breaches and is liable to pay the arrears and interest on the arrears to the extent that Rexjoy Enterprise default in such payment.

Costs

[69] I reserve the issues of costs. If agreement is not reached, then the Labour Inspector has until 21 March 2022 to lodge and serve submission as to costs and the liquidator of Rexjoy Enterprise and Mr and Mrs Everett have until 4 April 2022 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority