

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 113  
3059233

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
AND	HIGHLY FLAMMABLE LIMITED First Respondent
AND	LOGAN ALEXANDER JAMES ELLIOT Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Amy Webster, counsel for the Applicant  
Steph Dyhrberg, counsel for the Respondents

Investigation Meeting: On the papers

Submissions Received: Up to and including 28 February 2023.

Date of Determination: 7 March 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] On 11 June 2021, the Authority conducted an investigation limited to determining penalties for breaches of employment standards initially against the First and Second Respondents.

[2] In its determination, the Authority ordered penalties of \$20,000 against the First Respondent but reserved the question of whether or not the Second Respondent was liable to pay penalties as a person involved, because the legal test regarding the level of knowledge a person involved should have, was before the Court of Appeal. The Court issued its decision in *A Labour Inspector v Southern Taxis* on 20 December 2021.<sup>1</sup>

[3] Following the decision in *Southern Taxis*, the Authority has now been asked to determine penalties against the Second Respondent investigating:

- (a) Whether Mr Elliot, the director of Highly Flammable Limited, is a person involved in the breaches of employment standards; and
- (b) If he is, what should be the penalties (if any) he should be ordered to pay?

### **The Authority's investigation**

[4] The parties have agreed this matter should be decided on the papers and both sides have filed helpful updated submissions which have greatly assisted the Authority in making this determination.

### **Background**

[5] Highly Flammable Limited (HF) was the subject of an investigation by a Labour Inspector. The Inspector concluded that HF had breached various provisions under the Employment Relations Act 2000 (the Act), the Holidays Act 2003, the Minimum Wages Act 1983, and the Wages Protection Act 1983.

[6] HF conceded it had breached a range of statutory employment standards and the parties reached settlement in respect of those claims.

[7] The Inspector sought penalties from HF in connection with the identified breaches of employment standards and asked the Authority to find Mr Elliot liable for penalties, on the grounds that he was a person “involved in a breach” of an employment standard under s 142W of the Act.

[8] Following the first investigation, the Authority awarded penalties of \$20,000 against HF, and it is now left to the Authority in this investigation to ascertain what if any penalty

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<sup>1</sup> *A Labour Inspector v Southern Taxis* [2021] NZCA 705.

Mr Elliot should be liable for, if indeed he was a person involved in a breach of an employment standard.

[9] In regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material, however, has been reviewed and considered.

### **The parties' submissions**

#### *The Inspector's views*

[10] The Inspector's submissions put forward the proposition that Mr Elliot is a person involved in the breaches after applying *Southern Taxis*. Following the Inspector's view of what Mr Elliot should be ordered to pay by way of penalties, the Inspector also seems to say that there should be no allowance for Mr Elliot's personal financial position or the fact that the penalties ordered against HF were personally paid by Mr Elliot. The Inspector says that the payment of those penalties on behalf of HF was Mr Elliot's decision and wasn't required by the Inspector or indeed by the Authority. The Inspector also notes that HF and Mr Elliot are separate legal entities, and it would be inappropriate to allow Mr Elliot to "conflate the legal personhood of himself and his company only where it would benefit him to do so".

[11] In support of his argument that Mr Elliot is liable as a person involved, the Inspector has analysed s 142W of the Act and notes that a party is a person involved in a breach if:

- (a) The breach is a qualifying breach, being a breach of employment standards; and
- (b) The person is a qualifying person, being, in this case, an officer of the First Respondent; and
- (c) The person has committed a qualifying action, having aided the breach or otherwise been a party to the breach as outlined in subsections (1)(a)-(d).

[12] The Inspector notes that HF had committed 33 statutory breaches but in respect of any penalty against Mr Elliot; five of those breaches were for the failure to provide compliant employment agreements for five employees which were breaches of s 65 of the Act and do not relate to employment standards. Accordingly, the Inspector says 28 statutory breaches are qualifying breaches.

[13] The Inspector says Mr Elliot is a qualifying person because he was the Managing Director of HF, thus an officer of the company and a qualifying person under s 142W(3)(a). A search of the Companies Register shows that Highly Flammable Limited has been removed from the register and at the relevant time, Mr Elliot was the sole shareholder and director.

[14] The Inspector argues Mr Elliot has committed a qualifying action because he has aided the breach, or otherwise been a party to the breach as provided for in s 142W(1)(a)-(d).

[15] After outlining his view of the law in light of *Southern Taxis*, the Inspector says that Mr Elliot deliberately created business systems where payment to employees was separated from actual hours of work. Mr Elliot required employees to accept the payment of the flat rates he set, regardless of their actual hours of work, and was or should have been aware of the hours of work, as he was actively involved in the authorising and administration of payment for wages and holiday pay at all times.

[16] In respect of the evidence of Mr Elliot, that the remuneration system was drafted by a staff member, the Inspector correctly points out that Mr Elliot was the sole director of the company and thus approved and implemented the system. He says that the decision, for instance, to halve Ms Liu's wages with an arrangement to repay the missing wages when the company was more solvent, was a deliberate action which effectively shifted business risk from HF and Mr Elliot to Ms Liu as an employee. The Inspector then submits that whilst Mr Elliot may not have been aware that his actions were breaches of employment standards, he still had knowledge as to all the essential facts that made up the breaches, and thus was a person involved in 28 of the 33 breaches agreed on by the parties.

[17] In respect of penalties, the Inspector noted that the Authority had ordered HF to pay \$20,000 in penalties and submitted that if there were to be an award of any penalty against Mr Elliot, it too must also be reduced on the grounds of consistency. Having said that, the Inspector has argued that Mr Elliot's actions must be judged on their own, with due consideration to the deliberate nature of the breaches and the impact on employees.

### **Mr Elliot's position**

[18] Mr Elliot disputes that he was a person involved in a breach in respect of all the breaches found against HF. He said he had no knowledge of essential facts and knew nothing about non-payment of sick leave, non-payment of unworked public holidays, non-payment of

alternative holidays and non-payment of time and a half for work done on public holidays. He says there is no evidence to suggest the breaches were intentional. He points out that both he and HF constructively engaged with the Applicant's investigation process and provided all requested information. He says the arrears have all been paid and that to impose penalties against him in these circumstances would not be necessary for deterrence purposes given the significant impact this matter has had on him personally and financially. He also argues it would be amounting to double jeopardy as he has paid all the penalties awarded by the Authority against HF because the company could not pay. The company has since stopped trading and has been removed from the Register.

[19] Mr Elliot accepts that the breaches outlined in the Authority's determination and by the Inspector, are qualifying breaches and that he is a qualifying person in respect of s 142W(3)(a) of the Act. He relies on *Southern Taxis Limited* and the Court of Appeal's comment that it is a person's knowledge of the primary facts that matter. He denies his actions amounted to counselling or procuring the breaches or inducing the breaches, although he accepts he was knowingly concerned in or a party to at least some of the breaches. He relies on a lack of knowledge of either the facts or the unlawfulness of some of the breaches. He also relies on the fact that he was unaware that some operations managers were not adhering to the team payment guide.

[20] Mr Elliot reiterates that he has already incurred financial liability as he has paid the penalties awarded against the First Respondent. He says he has learnt a lot from the proceedings and they have had a profound impact on him personally. He says there is no need for deterrence. He also relies on s 142ZD of the Act. He says he took all reasonable and proper steps to ensure people were properly paid for public holidays. He re-states his reliance on others.

[21] Mr Elliot submits that if he were to be a person involved in the breach that the maximum penalty available against him would be \$80,000 and following globalisation would be \$30,000. He notes that the Authority awarded \$20,000 in penalties against the First Respondent (following globalisation).

[22] Mr Elliot's evidence is that the award of any penalty against him would have a significant and disproportionate detrimental impact on him. He says it would likely result in his bankruptcy. He says he has no significant assets and derives his income from doing some

mentoring and coaching work. He lives week to week and owes significant sums to family and friends which he borrowed to pay employee arrears and legal fees and the penalties awarded against HF. He says a payment plan would be of no assistance to him given his debts and obligations.

[23] In essence, Mr Elliot is saying that he could only fall within the legal test of being a person involved for three of the breaches:

- (a) Failure to pay at least minimum wage for every hour worked;
- (b) Failure to calculate and pay annual holidays; and
- (c) Unlawful deductions from wages.

### **Analysis**

[24] In the main I accept the Inspector's argument that:

- (1) Mr Elliot is liable as a person involved in 28 out of 33 breaches;
- (2) Mr Elliot was the Director of HF and had either actual knowledge of the essential facts or was wilfully blind in relation to those facts;
- (3) Mr Elliot is sole director of the company who approved and implemented the company's systems for payment.

[25] I reject the submissions on behalf of Mr Elliot that distance him from some 25 of the breaches.

[26] However, I have formed a different view from the Inspector when it comes to the amount of any penalty. I have done that because in assessing any penalty I have taken into account:

- (a) The evidence relating to the dire financial position of Mr Elliot, although it is clear that in assessing the level of penalties to be imposed on HF, the Authority also took into account the company's financial position when it reached its discounted level of penalties. I have noted the Inspector's observation that Mr Elliot's financial situation has not been updated, however I am prepared to rely on the sworn evidence already before me. It would be unjust to require further information from Mr Elliot at this late stage.

- (b) The fact that Mr Elliot borrowed money to pay the penalties imposed against the company and took personal responsibility for them. He also paid the arrears of wages so that all payments ordered to be made to employees had been made.

[27] Whilst the current status of the company could be seen as neither here nor there, Mr Elliot's conduct in personally clearing the company's debts in respect of the penalty and arrears of wages should be recognised. I accept the Inspector is right technically in rejecting an argument there was double jeopardy, but it would be artificial not to take into account Mr Elliot's actions in personally meeting the penalty and arrears of wages prior to the company ceasing trading.

### **Conclusion and orders**

[28] The amount which Mr Elliot as a person involved is liable for, is half of that applicable to a company. The analysis used to arrive at a figure for \$20,000 in respect of the company needs to be consistent in the case of Mr Elliot and accordingly that would lend itself to a penalty half the size of that imposed on HF being imposed on Mr Elliot. However, certain aspects need to be considered further. First, there is Mr Elliot's personal financial situation which suggests Mr Elliot is in serious financial strife. In his affidavit of 16 May 2022, Mr Elliot highlights personal debts in excess of \$95,000. He says he lives week to week with maxed out credit cards, with overdrafts trying to scrape an income where he can. The fact that Mr Elliot used personal funds and/or borrowing to pay the penalties awarded against HF, together with wage arrears and holiday pay, no doubt has contributed to his current financial position.

[29] There is the fact that Mr Elliot met the company's liabilities in respect of the penalties and wage payments, and he simply could have let the Inspector seek to enforce penalties and lost wages against the company no doubt unsuccessfully.

[30] Both factors need to be considered. HF was given some reduction in penalties because of its financial position. However, in Mr Elliot's case, the drivers are different, and I accept the submissions made on behalf of Mr Elliot namely that I need to take these further into account.

[31] I need to consider Mr Elliot's actions in meeting the claims against HF. In essence, Mr Elliot has accepted personal liability for the awards against HF when he did not need to do so. To the extent a deterrent is needed, Mr Elliot has accepted personal liability for the awards against HF. The cost of doing so must act as a deterrent. Whilst I would normally have

considered a penalty of \$10,000 as appropriate, Mr Elliot has already paid more than twice that figure on his own initiative. This is one of those rare cases where I accept the submissions that it would be unjust to impose a further penalty. I note that this would only happen rarely, but this is one of those rare occasions.

### **Costs**

[32] This is a situation where the Labour Inspector was well within their rights in pursuing this action. The Labour Inspector has been correct in the analysis of Mr Elliot's liability and under most circumstances, a penalty would have been imposed. The Authority has exercised the discretion in favour of Mr Elliot, and I see this as a case where costs should lie where they fall.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**