

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 20
3099854

BETWEEN	A LABOUR INSPECTOR Applicant
AND	HAPPYTIME BBQ RESTAURANT LIMITED First Respondent
AND	AYANG SONG Second Respondent

Member of Authority: Alastair Dumbleton

Representatives: Martin Denyer, counsel for the Applicant
Ayang Song, advocate for First Respondent and
Second respondent in person

Investigation Meeting: 12 August 2022

Submissions received: 9 September 2022 from Applicant

Determination: 17 January 2023

DETERMINATION OF THE AUTHORITY

- A. For multiple breaches of statutory employment standards, the first respondent is ordered to pay penalties of \$102,000. Chenming Sun is to receive \$10,000 of that sum and the balance is to be paid to the Authority for the Crown.**
- B. For her involvement in breaches of employment standards the second respondent is ordered to pay penalties of \$51,000. Chenming Sun is to receive \$5,000 of that sum and the balance is to be paid to the Authority for the Crown.**

- C. The first respondent is ordered to pay arrears of wages and other money owing from employment in the sum of \$65,503.78 to the Labour Inspector for the use of Chenming Sun.**
- D. To the extent the first respondent is unable to pay the arrears of \$65,503.78 to the Inspector, the second respondent is ordered to pay that money.**
- E. The first respondent is ordered to pay interest on the arrears for the use of Chenming Sun.**
- F. Costs are reserved.**

Employment Relationship Problem

[1] After a complaint was received by the Labour Inspectorate from Chenming Sun, the applicant Inspector commenced an investigation of Mr Sun's employment by the first respondent Happytime BBQ Restaurant Ltd (HBRL).

[2] The second respondent Ayang Sang was the sole director and shareholder of HBRL at incorporation of the company in 2010 and remained so throughout Mr Sun's employment from 2017 to 2019. HBRL is now being removed by the Registrar from the register.

[3] When Mr Sun was employed by it as a chef, HBRL traded as Hehe Barbeque from premises in Central Auckland. The restaurant was open seven days a week, apart from Christmas day when was open in the evening only.

[4] After a thorough investigation the Inspector compiled a detailed report based on extensive interviews with Ayang Song, Chenming Sun and others, and from any documentary information he could find such as wages and time records and bank statements.

[5] The Inspector concluded that HBRL had breached minimum employment standards provided by four statutes, as follows

(i) Minimum Wage Act 1983, section 6

- failure to pay Mr Sun for all hours worked at not less than the minimum rate of wages

(ii) Holidays Act 2003, sections 24, 25, 27, 49, 50, 56, 60 and 81

- failure to pay Mr Sun holiday pay due on termination of employment
- failure to pay Mr Sun time and a half for working on public holidays
- failing to allow Mr Sun alternative holidays for working on public holidays
- failure to keep for Mr Sun and seven other employees full holiday and leave records
- failure to allow Mr Sun holiday pay for unworked public holidays

(iii) Employment Relations Act 2000, sections 65 and 130

- failure to keep for Mr Sun and seven other employees full wage and time records
- failure to provide compliant employment agreements

(iv) Wages Protection Act 1983, section 12A

- failure to comply with the prohibition against seeking and receiving a premium for employing Mr Sun

[6] He assessed total arrears or underpayments of wages, holiday pay and other entitlements due from HBRL to Mr Sun, of \$65,503.78. The Inspector required the company to pay that money for the use of Mr Sun.

Application to the Authority

[7] When payment was not made, the Inspector applied to the Authority for an investigation and determination of the first respondent's liability to pay the arrears and penalties for the breaches of minimum employment standards.

[8] The second respondent was joined by the Inspector to that application as a person involved in breaches of employment standards, within the meaning of s 142Y of the Employment Relations Act (ER Act).

[9] To the extent that HBRL is unable to pay the arrears claimed from the company by the Inspector, a determination is sought that Ms Song is liable to pay them. For breaches of the minimum employment standards in which she was involved, penalties are sought against Ms Song personally.

[10] This determination is issued outside the three-month time frame of s 174C of the ER Act. An extension of time has been given by the Chief of the Authority.

Investigation meeting

[11] At an investigation meeting the Authority heard from the applicant Labour Inspector and Chenming Sun, the former employee of HBRL. Ms Song attended and an interpreter was provided by the Authority to assist.

[12] Although the first and second respondents had not lodged a statement in reply to the Inspector's application, in the circumstances they were permitted to be heard.

[13] As Ms Song was not represented, she was given time by the Authority to consider whether she wished to proceed on her own. She advised she wanted the matter disposed of without further delay. She was given an opportunity to question the Inspector and Chenming Sun about the case presented by them. She did so, to clarify aspects of the way the Inspector's investigation had proceeded rather than to challenge any of his evidence or that of Chenming Sun.

[14] Ms Song offered no defence and accepted that the claims against her personally and her company HBRL were made out by the Inspector.

[15] After hearing from the parties the Authority gave an oral indication that the claims for arrears and breach of statute had been established and that a written determination would be given accordingly.

[16] A timetable was set for submissions to be made for the Inspector on the quantum of penalties sought. Ms Song was given four weeks to provide any submissions in reply.

[17] Full submissions were received from counsel for the Inspector, Mr Denyer. Ms Song gave no reply.

[18] This determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

The employment

[19] Arrangements were made by Ms Song in 2017 for Chenming Sun to come from China and begin working for HBRL under her direction and supervision.

[20] Part of those arrangements required him to transfer the equivalent of \$16,563.00 NZD from his bank account in China to that of Ms Song in New Zealand. She described the money as a refundable deposit. She has admitted to the Inspector the money was used by her and not refunded after the employment ended in April 2019.

[21] The Authority accepts as correct the Inspector's conclusion that the money was a premium and was charged by the employer in breach of s 12A of the Wages Protection Act 1983. The purpose of the payment was obviously to buy a job and it was therefore an illegal premium requested and received by Ms Song or HBRL, or both. The money is claimed by the Inspector to give back to Mr Sun.

[22] After paying the premium and starting work, Chenming Sun signed an employment agreement on 8 March 2018. His work hours as a chef were stipulated to be 40 over 5 days. For this, the agreement provided he was to be paid \$22 per hour. He commenced in October 2017, several months before the agreement was signed.

[23] From his investigation the Inspector concluded he had usually worked 60 hours a week - 10 hours on 6 days - in the restaurant, which opened seven days a week.

[24] Chenming Sun was not paid at all in some fortnights and underpaid his hours in others. His wages fell below the minimum wage of \$15.75 and fell even further below the contractual agreed rate of \$22 per hour.

[25] Looking at such wages and time records as were kept and considering the evidence of the actual hours worked, the Inspector concluded that Chenming Sun had been underpaid wages for the hours he worked in a total of \$37,600.65 for a period of 19 months employment.

[26] The Authority accepts as correct the Inspector's conclusions and assessment of the claim based on those.

[27] On 12 April 2019, Chenming Sun sent a poignant text to Ayang Song ending his employment. Translated it reads

Sister YANG, consider the issue from my side, I am stopping to go to work, no wages for half year is quite a big impact to me, I left my family and come to here is not an easy thing, I can't bear this being dragged on, I apologise to you about this.

[28] He asked Ms Song to refund his 'deposit' of \$16,563 but it was not paid back. A few weeks later he complained to the Labour Inspectorate.

[29] The investigating Inspector found many other failures of HBRL to comply with statutory employment standards. Chenming Sun had cooked in the restaurant on nine public holidays but was not paid at the rate of time and a half and given a day-off in lieu of the holiday to take later. The arrears for the hours worked were assessed to be \$927.50 and for the alternative day off \$1,855.00, claims for which amounts are accepted as correct by the Authority.

[30] On four public holidays he did not work because the restaurant was closed, but he was underpaid or not paid at all a total \$817.50 for those days.

[31] Chenming Sun was also not paid annual holiday pay, although he became entitled to that benefit after being employed for a year. No adequate holiday or leave records were kept by HBRL to enable Mr Sun or the Inspector to check his entitlements.

[32] The Inspector assessed a total of \$7,740.13 due for annual holidays. That claim is accepted by the Authority as correct.

[33] The total arrears owing to Chenming Sun is \$65,503.78 including the premium paid by him.

[34] The Authority confirms its oral indication given at the investigation meeting and now determines that HBRL must pay the Labour Inspector for the use of Chenming Sun, \$65,503.78.

Ms Song a person involved in a breach

[35] The assessed payments are all due under employment standards as defined at s 5 of the ER Act. The defined standards include the prohibition against charging or receiving a premium under s 12A of the Wages Protection Act 1983.

[36] The Inspector concluded that Ms Song had aided and abetted HBRL in the breaches, and clearly that was the case given her sole directorship of HBRL, the employer of Chenming Sun, and her hands-on role in running the restaurant. She was therefore involved in the breaches and is liable to penalties upon application the Labour Inspector has made under s 142X of the ER Act.

[37] Ms Song, as a person involved in the breaches, is also liable for default in payment of any wages or other money due to Chenming Sun under s 142Y of the ER Act. Her personal liability is for any of the total arrears HBRL cannot pay.

[38] The Authority confirms its oral indication as to liability of the second respondent and now determines that Ayang Song must pay the Labour Inspector \$65,503.78, to the extent there is any default by HBRL in making that payment.

Penalties

[39] Comprehensive written submissions were provided by counsel Mr Denyer for the applicant, addressing the two questions of whether HBRL or Ayang Song should pay any sum as a penalty for the breaches determined by the Authority, and if so what that sum should be.

[40] It is submitted penalties are compelled by the circumstances, and the total amount should be \$100,000 for HBRL and \$50,000 for Ayang Song.

[41] The circumstances in which multiple employment standards were breached rise far above the point where the Authority may exercise discretion not to order penalties although breaches have occurred. Ms Song as the controlling mind and hands of the employer HBRL, over a significant period deliberately and seriously exploited Chenming Sun as a vulnerable migrant worker. She received personal financial gain from her conduct in requiring a premium be paid as a condition of securing the employment. The business she owns also gained by having lower payroll costs than other restaurants which were complying with the employment standards, giving HBRL a competitive edge from its illegal conduct.

[42] The submissions on penalties for the applicant Inspector refer to and follow the guidance given by the Employment Court in recent cases involving the assessment of penalties, such as *Borsboom (Labour Inspector) v Preet PVT Ltd and another*¹, *A Labour Inspector v Prabh Ltd*², and *A Labour Inspector v Daleson Investment Ltd*³

[43] The facts against which the legal principles are to be considered and applied are those given by the Labour Inspector in his report, the statement of problem he lodged and the written statements of the evidence of the Inspector and Chenming Sun. The latter statements were formally affirmed to the Authority by the witnesses as true and correct.

¹ [2016] NZEmpC 143

² [2018] NZEmpC 110

³ [2019] NZEmpC 12

Purposes of penalties

[44] The Court in its decisions referred to above has identified the purposes of penalties. When ordering penalties, the Authority should seek to

- punish those who breach minimum employment standards
- deter companies and individuals from committing employment breaches
- compensate victims of such breaches, and
- eliminate unfair competition

[45] The Court in *Preet*⁴ developed a four-step methodology to be followed by the Authority when fixing the amount of penalties, to achieve consistency and transparency

- Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of the 4-step 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.

[46] In providing the Authority with full and exclusive jurisdiction to deal with claims for penalties, the ER Act requires the Authority to have regard to seven relevant matters which are set out at s 133A of the Act. There are a further five matters added by the Court in its decisions on the way the penalty jurisdiction of the Authority is to be exercised.

⁴ [2016] NZEmpC 143

[47] The Inspector's submissions address each of the 12 matters in turn. The heading of each is set out below along with any additional consideration given by the Authority.

Section 133A matters

- 1. The object of the Act**
- 2. The nature and extent of the breach**
- 3. Whether the breach was intentional, inadvertent, or negligent**
- 4. The nature and extent of any loss or damage**
- 5. Steps to mitigate effects of the breach**
- 6. Circumstances of the breach, and any vulnerability**
- 7. Previous conduct**

Additional matters

- 8. Deterrence**
- 9. Culpability**
- 10. Consistency**
- 11. Ability to pay**
- 12. Proportionality of outcome**

1. **The object of the Act**

[48] The Inspector has emphasised the importance of the Act's objects in the context of the employment of migrant workers. Chenming Sun came from China on a work visa to work for HBRL. Underpaying him directly or indirectly benefited the business at his considerable financial cost.

[49] Good faith was not observed by the first and second respondents and statutory employment standards were not complied with. Advantage was taken of the employee's weaker bargaining position.

[50] The Authority fully endorses the submission made for the Inspector that seeking and/or receiving a premium is an insidious example of an employer exploiting the inequality of power in an employment relationship entered into with a vulnerable worker.

2. The nature and extent of the breach

[51] The first respondent committed 28 breaches for which the penalty is \$20,000 per breach, making a potential total maximum of \$560,000 in penalties

[52] The second respondent was involved in 22 of HBRL's breaches for which the penalty is \$10,000 per breach, making a potential total maximum of \$220,000 in penalties.

[53] When globalised, the first respondent's breaches reduce to 18 and the second respondents to 12.

3. Whether the breach was intentional, inadvertent, or negligent

[54] The Inspector correctly views the breaches as deliberate conduct carried on with full awareness of what was being done to Chenming Sun in his employment. Ms Song had travelled to China to arrange the employment and from the beginning planned for the premium to be paid by Chenming Sun. She had been in business for several years employing a number of workers and trading in a populous city environment and can be taken to have known the legal requirements. Any ignorance on her part would not excuse the conduct.

4. The nature and extent of any loss or damage

[55] Ms Song initiated the conduct which saw payment being made to her of a large sum of money to procure a job, which is not a commodity or product to be bought and sold on the market. This was exploitative behaviour carried out deliberately and which injured the dignity of Chenming Sun in the circumstances where he had travelled from the other side of the world for the chance to improve his life. He was effectively held to ransom because he had natural ambitions to advance the quality of his life and that of his family remaining in China and because, as he told the Authority, he was fearful of reporting his employer to the Labour Inspectorate in case he lost his job and with it his right to work and live in New Zealand. That trap is liable to be used to advantage by an unscrupulous employer of a migrant worker.

5. Assessment of the severity of breaches

[56] The Authority does not differ with the Inspector in his general assessment of severity at 80% of the maximum in all but one case where it is 70%, except with regard to the breach involving a payment of a premium. The Authority considers the starting point should be nearer to the maximum and therefore lifts severity to 90% for that breach. The premium was a substantial payment extracted before the worker could secure the employment.

[57] The employee's acknowledgement to the Inspector that he was aware the payment was unlawful should make no difference, as he was in a vulnerable position and a target for exploitation. The law is intended to protect such workers and deter would be offenders.

[58] No credit should be given for the respondents' last-minute acceptance of their liability. They have needlessly wasted an Inspector's valuable time and prolonged the humiliation and ordeal of Chenming Sun in seeking redress for the wrong done to him.

[59] The Authority entirely agrees that the Labour Inspectorate should target those who abuse the inherent imbalance of power in the employment relationship by engaging in a particularly egregious practice, which is all too often aimed at visa-dependent migrant employees.

[60] The Authority makes no allowance for inability to pay when it has been offered no evidence or information in support of that as a currently existing situation.

[61] Should action against them become necessary to enforce the Authority's orders, the respondents are likely to be given a further opportunity to present statements of their financial positions.

[62] The Authority must ensure that penalties in the circumstances are meaningful, and they will both punish the respondents for their breaches and act as a deterrent to other employers from engaging in the same conduct. Nothing is known of any previous enforcement action taken against the first or second respondents.

[63] The Inspector has made the necessary adjustment of the final amounts of penalties sought to achieve consistency with other cases decided by the Court or the Authority, to the extent they may be similar.

[64] The Inspector seeks \$100,000 from the first respondent and \$50,000 from the second respondent. Appendix One and Two of this determination show the detail of the four-step approach the Inspector took to reach those amounts.

[65] The Authority slightly adjusts those figures upwards to \$102,000 and \$51,000 giving higher penalties for the breach of s 12A of the Wages Protection Act prohibiting the seeking and receiving of a premium. The starting point used by the Authority is 90% of the maximum instead of 80%.

Determination of penalties

[66] The Authority is well satisfied that penalties are justly to be imposed against the respondents who have offered no argument to the contrary. Under s 135 of the ER Act the first respondent is ordered to pay penalties of \$102,000 and the second respondent is ordered to pay \$51,000.

[67] Part of those penalties should be awarded to Chenming Sun, to recognise that he was the principal victim of the respondent's unlawful conduct which deprived him of statutory entitlements earned from his toil and service.

[68] Under s 136(2) of the ER Act the first respondent is to pay Chenming Sun the amount of \$10,000 of the penalties awarded against the company. The second respondent is to pay him \$5,000 of the penalties awarded against her.

[69] The first respondent will therefore pay \$92,000 to the Authority for payment into a Crown Bank Account.

[70] The second respondent will pay \$46,000 to the Authority for payment into a Crown Bank Account.

Summary of orders

- (i) The first respondent HBRL must pay the applicant Labour Inspector arrears of wages and other money in the sum of \$65,503.78 for the use of Chenming Sun.**
- (ii) To the extent the first respondent is unable to pay the applicant Labour Inspector all or any of the arrears of \$65,503.78 ordered against it, the second respondent Ayang Song must pay that money to the applicant Labour Inspector for the use of Chenming Sun.**
- (iii) For its breaches of employment standards, the first respondent HBRL is ordered to pay penalties of \$102,000, of which \$10,000 is to be paid to Chenming Sun and \$92,000 paid to the Employment Relations Authority for deposit into a Crown Bank Account.**
- (iv) For her involvement in HBRL's breaches of employment standards, the second respondent Ayang Song is ordered to pay penalties of \$51,000, of which \$5,000 is to be paid to Chenming Sun and \$46,000 paid to the Employment Relations Authority for deposit into a Crown Bank Account.**
- (v) The first respondent HBRL is to pay to the applicant Labour Inspector to the use of Chenming Sun, interest on \$65,503.78 from 12 August 2022, the date of the investigation meeting, until the arrears are paid in full to the applicant. The order is made pursuant to Schedule 2, clause 11 of the ER Act. The interest may be calculated using the www.justice.govt.nz/fines/civil-debt-interest-calculator .**

Costs

[71] The Labour Inspector has sought legal costs and expenses in his application to the Authority. Costs are reserved for written application by the Labour Inspector to be made within 21 days of the date of this determination. The respondents may reply within 21 days of the date of such application being made.

Alastair Dumbleton
Member of the Employment Relations Authority

APPENDIX ONE – HAPPYTIME – PENALTY ANALYSIS

Step 1 – Nature and Number of Breaches – Potential Maximum Penalties		
Failure to pay minimum wage	1 x \$20,000	\$20,000
Failure to pay holiday pay	2 x \$20,000	\$40,000
Premium	1 x \$20,000	\$20,000
Failure to maintain records	8 x \$20,000	\$160,000
Employment agreements	6 x \$20,000	\$120,000
	Subtotal	\$360,000
Step 2 - Aggravating Factors as a proportion of maxima in Step 1		
Failure to pay minimum wage	80%	\$16,000
Failure to pay holiday pay	70%	\$28,000
Premium	80%	\$16,000
Failure to maintain records	80%	\$128,000
Employment agreements	80%	\$96,000
	Subtotal	\$284,000
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)		
Less 10% of above subtotal	Subtotal	\$255,600
Step 3 – Defendant's Financial Circumstances		
No discount	Subtotal	\$255,600
Step 4 – Proportionality		
Reduce	TOTAL	\$100,000

APPENDIX TWO - AYANG SONG - PENALTY ANALYSIS

Step 1- Nature and Number of Breaches – Potential Maximum		
Failure to pay minimum wage	1 x \$10,000	\$10,000
Failure to pay holiday pay	2 x \$10,000	\$20,000
Premium	1 x \$10,000	\$10,000
Failure to maintain records	8 x \$10,000	\$80,000
Employment agreements	6 x \$10,000	\$60,000
	Subtotal	\$180,000
Step 2 – Aggravating Factors as a proportion of maxima in Step 1		
Failure to pay minimum wage	80%	\$8,000
Failure to pay holiday pay	70%	\$14,000
Premium	80%	\$8,000
Failure to maintain records	80%	\$64,000
Employment agreements	80%	\$48,000
	Subtotal	\$142,000
Step 2 – Ameliorating factors (reducing aggravating factors subtotal)		
Less 10% of above subtotal	Subtotal	\$127,800
Step 3 – Defendant's Financial Circumstances		
No discount	Subtotal	\$127,800
Step 4 – Proportionality		
Reduce	TOTAL	\$50,000