IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 223
3116932

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	ELEV 8 GLOBAL LIMITED First Respondent
	AND	VICTORIA JEON (aka JONG AI PARK) Second Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Greg La Hood, counsel for the Applicant Seungmin Kang, counsel for the Respondents	
Investigation Meeting:	29, 30 and 31 March 2022 at Christchurch	
Submissions Received:	14 April and 23 May 2022 from the Applicant 16 May 2022 from the Respondent	
Date of Determination:	4 May 2023	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (who I will refer to as the LI) is warranted as a Labour Inspector under s 223 of the Employment Relations Act 2000 (ERA). Elev 8 Global Limited (Elev 8) is a registered company. Victoria Jeon is the sole director and shareholder of the company. Elev 8 operated businesses known as Elev 8 Skincare Academy and Beauty Clinic, K-Beauty and Elev 8 Toning Table Centre from commercial premises in Princess Street and in Moray Place, Dunedin.

[2] In late 2019, there were employment standards complaints to Immigration New Zealand and to the Labour Inspectorate about Elev 8 and Mrs Jeon. The complaints caused the Labour Inspector to require Elev 8 and Mrs Jeon to provide a list of company employees employed between May 2017 and January 2020. The LI also specifically named several persons for whom copies of employment agreements, their time and wages records and their holiday records were required.

[3] Mrs Jeon provided some information in response. The LI sought further information through the complainants and also had further exchanges with Elev 8 and Mrs Jeon. The LI set out her views in a draft report in April 2020.

[4] The present claims were lodged in the Authority in August 2020. The LI says that Elev 8 employed Haesol Yuk on every Monday to Saturday between 22 April and 8 June 2019 (42 working days), for 12 hours per day. Haesol Yuk was not paid any wages for this work. The LI claims arrears of $8,920.80 under s 6 of the Minimum Wages Act 1983 (MWA), $318.60 for work on public holidays under s 50 of the Holidays Act 2004 (HA), $637.20 for alternative holidays under s 60 of the HA and $790.13 for final holiday pay under s 23 of the HA. Interest is claimed on arrears. There are also penalty claims for alleged breaches of s 6 of the MWA, s 23 HA (holiday pay at termination), s 50 HA (time and a half for public holidays worked), s 56 HA (alternative holiday provided), s 60 HA (payment for untaken alternative holidays at termination) and s 81 HA (Holiday and leave records). There was no employment agreement and no time and wage records for Haesol Yuk, so the LI claims penalties under s 65 and 130 of the Employment Relations Act 2000 (ERA).

[5] The LI also says that Elev 8 breached s 81 HA (Holiday and Leave records) and s 130 ERA (Wages and Time Records) in respect of the following: Yeoeun Park, Qian Wang, Yeran Choi and Jeong Ho Yoon. It was alleged that Jojo Pan was another employee for whom these records had not been kept. However, counsel withdrew the claims with respect to Jojo Pan during the investigation meeting.

[6] The LI claims penalties against Mrs Jeon under s 142W of the ERA as a person involved in Elev 8's breaches of s 130 of the ERA; ss 65, 81, 23, 50 56 and 60 of the HA; and s 6 of the MWA.

[7] The claims are defended. Elev 8 and Mrs Jeon say that Haesol Yuk worked as a volunteer and was never an employee. Elev 8 and Mrs Jeon say that records kept for its employees Yeoeun Park and Qian Wang have been compiled into compliant records. Qian Wang worked for a week and had been fully paid. Elev 8 and Mrs Jeon say that the claims in respect of Yeran Choi are barred by a record of settlement between Yeran Choi and Elev 8. Jeong Ho Yoon never started working for Elev 8 so the company had no obligation to keep records.

[8] The following issues arise:

(a) Was Haesol Yuk an employee of Elev 8 or a volunteer?

(b) If Haesol Yuk was an employee, what default in payment to her of wages under the Minimum Wages Act 1983 and holiday pay under the Holidays Act 2004 has been established?

(c) Are the LI's claims in respect of s 81 HA and s 130 ERA in relation to the employment of Yeran Choi barred by the record of settlement between Yeran Choi and Elev 8?

(d) Did Jeong Ho Yoon commence work for Elev 8?

(e) Has the LI established a breach by Elev 8 of s 81 HA and s 130 ERA in respect of Yeoeun Park?

(f) Has the LI established a breach by Elev 8 of s 81 HA and s 130 ERA in respect of Qian Wang?

(g) What if any breaches of minimum entitlements (MWA, HA & ERA) have been established?

(h) Is Mrs Jeon involved in any breaches by Elev 8 so as to be liable for any penalties?

The Authority's investigation

[9] The LI lodged separate proceedings against Mrs Jeon (and others) as trustees of a trust (file number 3124517). Counsel for the LI sought to have the proceedings consolidated. However, the claims are in respect of different enterprises, despite Mrs Jeon's common involvement. They are in respect of different employees. I declined to consolidate the proceedings.

[10] Although only some documents were relevant to both matters, common bundles of material were compiled. Some witnesses gave some evidence that was relevant to both matters, but undifferentiated witness statements were lodged. My consideration of the separate determinations overlapped in time. Despite that, in this determination I will state factual findings, explain legal findings, express conclusions and set out orders as necessary to resolve matters in the statement of problem and statement in reply in the matter between the LI and Elev 8 and Mrs Jeon (file number 3116932).

[11] Several witnesses gave evidence by AVL and counsel cooperated over timetabling and other arrangements to accommodate that and the Covid-19 protocols.

[12] As part of the investigation meeting, I canvassed with counsel the issues for this determination. It was agreed that counsel would provide written submissions addressing those issues, that I would determine liability with respect to the penalty claims, and I would then provide an opportunity for counsel to provide further submissions about the level of penalties if the respondents were found to be liable.

Was Haesol Yuk an employee of Elev 8 or a volunteer?

[13] An employee means any person of any age employed by an employer to do work for hire or reward under a contract of service. The statutory definition[1] excludes a volunteer who does not expect to be rewarded for work performed as a volunteer and who receives no reward for work performed as a volunteer. To fall within the classification of "volunteer", the

[1] Employment Relations Act 2000 s 6(1)(c).

person must not expect to be rewarded for work performed and must not receive any reward for that work.[2]

[14] Here, Elev 8 operated in trade as a business providing services to clients who paid for Elev 8's services. It is unlike any of the types of enterprise listed in *Kidd v Beaumont* that commonly rely on volunteers.[3] Elev 8 accepts it had some employees to provide services to clients, so was an employer at least to that extent. It is accepted that Ms Yuk performed some tasks for Elev 8. It is also common ground that Ms Yuk received no reward such as payment for that work. This part of the problem centres on whether Ms Yuk performed those tasks as a volunteer without expectation of being rewarded for it.

[15] Ms Yuk came to New Zealand on 16 April 2019 with her husband and children, principally for him to take up the position of Pastor with Jesus Aroma Church Trust.[4]

[16] In messages to Ms Yuk before her arrival in New Zealand, Mrs Jeon said that she had arranged students who Ms Yuk could teach piano to here. Mrs Jeon understood that Ms Yuk would want to derive income from such activity. Ms Yuk also said in evidence that she completed a massage course at an academy in Korea before her departure, at Mrs Jeon's suggestion, to help Ms Yuk find work in New Zealand. Mrs Jeon's evidence is that she provided an introduction at Ms Yuk's suggestion, that Ms Yuk knew what Mrs Jeon did in New Zealand and knew that Mrs Jeon had difficulty finding staff, so Ms Yuk thought she might be able to assist. I prefer Ms Yuk's evidence about whose initiative it was for her to complete the massage course. In any event, it was understood between the two women that Ms Yuk might be able to assist in Mrs Jeon's business, because of the massage course.

[17] In messages to Ms Yuk in March and April 2019, Mrs Jeon asked her if she had completed the classes. However, Ms Yuk's visa never permitted her to work in New Zealand.

[18] Ms Yuk's husband (Song Choi) did not have a visa to starting work as a Pastor until 29 July 2019. Song Choi says that Mrs Jeon told him that one of them (meaning either him or Ms Yuk) had to start working and that it had to be his wife Ms Yuk as he was still waiting for

---

[2] *Kidd v Beaumont* [2016] NZEmpC 158 at [39].
[3] At [44] and [45].
[4] *A Labour Inspector v Jeon and oths* [2023] NZERA 175 at [25].

his visa at the time. Ms Yuk also says that Mrs Jeon told her that she had to work to support her family and her husband could not yet start work. I accept this evidence.

[19] Elev 8's business included Elev 8 Toning Table Centre at 83 Moray Place. Ms Yuk's evidence is that she worked there from Monday 22 April until Saturday 8 June 2019 between 9.00am up to 10.00pm. I return to the dates and times later. Elev 8 and Mrs Jeon accept that Ms Yuk performed some tasks with Elev 8 clients over this period.

[20] Messages from 23 April 2019 to 5 June 2019 between Mrs Jeon and Ms Yuk evidence arrangements for the tasks Ms Yuk performed. The messages establish that Ms Yuk performed the tasks at Mrs Jeon's direction. The tasks mentioned in the messages were principally client massages.

[21] A booking notebook was produced in evidence. It starts at 22 May 2019. I accept Ms Yuk's evidence that Mrs Jeon told her to keep a record of clients and that she recorded that in the notebook. There is a dispute about which records were made by Ms Yuk in the relevant period. It is not necessary to resolve that point.

[22] Ms Yuk's evidence is that she cleaned and set up the premises in the morning. This included attending to the washing (sheets and towels) which she had put on the night before and vacuuming. Ms Yuk's evidence is that she was told to do these tasks by Mrs Jeon. Mrs Jeon disputes the extent of the tasks performed as there were not many clients at the time. Putting aside the dispute about the extent of the tasks, I find that Ms Yuk cleaned and set up the premises, and did washing and vacuuming as required by Mrs Jeon over the period from 23 April to 8 June 2019.

[23] Ms Yuk and her family stayed with Mrs Jeon for several days after they first arrived in New Zealand. It is accepted that Ms Yuk and her family then moved to stay at 63 Princess Street, in premises leased by an entity associated with Mrs Jeon. Ms Yuk's and Mr Choi's evidence is that they lived there for approximately one month, before Mrs Jeon moved them to 83 Moray Place. However, Mrs Jeon's evidence is that she moved Ms Yuk's family to 83 Moray Place after only one week at 63 Princess Street. I prefer Ms Yu's evidence about the duration of their stay at Princess Street. I find that Mrs Jeon first gave Ms Yuk a key to the

Moray Place so she could open the business premises in the morning, not because Ms Yuk was living there.

[24] Elev 8 provided a gown which Ms Yuk wore while performing tasks for Elev 8.

[25] There is a submission that the mutual intention of Ms Yuk and Elev 8 (and Mrs Jeon) was for Ms Yuk to work as a volunteer to gain work experience, get a reference and be able to obtain employment elsewhere. This is supported by the absence of a written employment agreement, Ms Yuk's visitor visa status and declaration, her lack of relevant work experience, the practice and training opportunities that were provided and the relationship ending after 2 months when Ms Yuk requested payment.

[26] However, I find that Ms Yuk expected to be paid by Elev 8 for the work she had performed. The context for the arrangements about work included the discussion Mrs Jeon and Ms Yuk had had about massage training in Korea to help Ms Yuk obtain work in New Zealand, including assisting in Mrs Jeon's business. Ms Yuk's husband had not started employment, so Ms Yuk's family had no income after arrival in New Zealand. Ms Yuk was not entitled to any other financial support in connection with the work she did for Elev 8. Ms Yuk started working after Mrs Jeon told them that she had to work to support their family.

[27] I accept Ms Yuk's evidence that the relationship ended in early June 2019 because she asked Mrs Jeon for her wages. The evidence supports rather than detracts from my finding that Ms Yuk expected to be paid by Elev 8 for her work.

[28] Ms Yuk was not asked in evidence, but I will assume that she declared that she did not intend to work in New Zealand when she entered on her visitor visa. The declaration and visa have limited bearing on assessing the real nature of the relationship between Ms Yuk and Elev 8 with respect to the work Ms Yuk later performed for Elev 8 at Mrs Jeon's insistence.

[29] The absence of a written employment agreement also adds little to assessing the real nature of the relationship. The arrangement was at Mrs Jeon's direction and Ms Yuk had negligible bargaining power, given her family's dependency on Mrs Jeon. Elev 8 knew it had a statutory obligation to provide written employment agreements to employees. However, not

providing a written employment agreement to the subject of such an arrangement says little about whether the person was an employee.

[30] The tasks performed by Ms Yuk for Elev 8 were work, in accordance with the approach to determining that endorsed by the Court of Appeal.[5] Ms Yuk was required to be at the Toning Table Centre, she opened the shop and set up the centre, observed and undertook some massage work, took calls and wrote in the diary and cleaned and did washing there. Attention to these tasks placed constraints on Ms Yuk, they were central to the operation of the business and were of benefit to it.

[31] Counsel submits that the messages produced in evidence show that Mrs Jeon did not have control over Ms Yuk's work, unlike an employer. I disagree. For example, one message relied on by counsel includes Mrs Jeon saying that Ms Yuk "should have told" Mrs Jeon where she was going before she left the shop. In the next message Ms Yuk told Mrs Jeon that she was returning to the shop. Later the same day, Ms Yuk told Mrs Jeon she was going home, in compliance with the earlier instruction. I am referred to a message at 1.38pm on 13 June 2019 to show that Ms Yuk was free to reject jobs. However, this exchange was after Ms Yuk stopped working for Elev 8.

[32] The picture that emerges from the messages overall is more consistent with the messages on 23 April 2019. Mrs Jeon told Ms Yuk that they had clients from 10.00 am and it would be good for her to come to the shop by 9.00am. Mrs Jeon then changed that to 9.30am. In her following message at 8.19am, Mrs Jeon said to Ms Yuk "You have to get up". Overall, the messages are consistent with an employer's exercise of control under a contract of service.

[33] In summary, I find that Ms Yuk was employed by Elev 8 to do work for hire or reward under a contract of service. The real nature of the arrangement was an employment relationship.

[34] I need to assess arrears of minimum entitlements under the Minimum Wages Act 1983 and the Holidays Act 2003.

---

[5] *Ide Services v Dickson* [2011] NZCA 14.

What default in payment to Haesol Yuk of wages under the Minimum Wages Act 1983 and holiday pay under the Holidays Act 2004 has been established?

[35] Elev 8 did not keep any wages and time records for Ms Yuk. I find that this has prejudiced the LI's ability to bring an accurate claim for arrears, as there were no specified hours and Ms Yuk had no reason to keep her own record. I am permitted to accept as proved Ms Yuk's claims as to her hours, days and time worked, unless Elev 8 proves that her claims are incorrect.[6]

[36] Ms Yuk says she worked on every Monday to Saturday between 22 April and 8 June 2019 (42 working days), for 12 hours per day from 9.00am until 10.00 pm. Ms Yuk says she was not given rest or lunch breaks. However, the LI's claim has been prepared on the basis that Ms Yuk worked from 9.30am to 10.00 and was able to take an unpaid meal break of 30 minutes each day, so a 12-hour working day.

[37] Monday 22 April 2019 was Easter Monday, not a standard business day. Based on the 23 April 2019 message to Ms Yuk to start work at 9.30am that day, I find that she started working on 23 April not 22 April 2019. The claim must be adjusted to reflect that.

[38] My finding that Ms Yuk did not start work on 22 April 2019 does not undermine her reliability or credibility with respect to other points.

[39] Ms Yuk's evidence is that there were "walk-in" clients for the shop as well as clients by appointment. There is a submission that the premises were at the back of the building and "not very accessible". However, the premises were accessible to "walk-in" clients. The evidence about the layout of the premises does not establish that Ms Yuk's claims as to her days and hours of work must be incorrect.

[40] Counsel submits that, as the notebook has six days without any written client details and seven days when only one client is noted each day, Ms Yuk did not work all the hours she claims. However, the evidence does not establish that all client appointments were recorded in the notebook or that Mrs Jeon alone provided client services on those days when only one

[6] Employment Relations Act 2000 s 132(2).

appointment was recorded. Elev 8 has not established by reference to the notebook that Ms Yuk's claims as to her days and hours of work are incorrect.

[41] There is a submission that Mrs Jeon said in evidence that Ms Yuk and her family were travelling away from Dunedin for two to three weeks in the period from 22 April to 9 June 2019. However, Mrs Jeon did not give that evidence, either in chief or in response to questions. Ms Yuk and Song Choi were not cross-examined on that assertion. The messages do not support an assertion that Ms Yuk was away from Dunedin between 23 April and 9 June 2019 for a period of two to three weeks. There is no documentary evidence to indicate that Ms Yuk was away from Dunedin over that time. Elev 8 has not established that Ms Yuk was not in Dunedin and could not have been at work for a two to three week period during the time she claimed to have worked.

[42] It is unlikely that Elev 8 would have been open for trade on Anzac Day, Thursday 25 April. Ms Yuk may also have had Queen's Birthday Monday 3 June 2019 as a day off, as nothing is recorded in the notebook. These two days should be treated as unworked public holidays falling on otherwise working days, for which Ms Yuk was entitled to pay in accordance with s 49 of the Holidays Act 2003.

[43] With the exception of starting on 23 April 2019, not working on Anzac Day and Queen's Birthday and treating Ms Yuk as having worked 9.30am – 10.00pm with a half-hour unpaid break each day, I accept Ms Yuk's claims about her days and hours of work.

[44] I will set a timetable for the LI to submit fresh calculations for arrears under the MWA and the HA and reserve leave on any issue associated with the necessary calculations.

Are the LI's claims in respect of s 81 HA and s 130 ERA in relation to the employment of Yeran Choi barred or affected by the record of settlement between Yeran Choi and Elev 8?

[45] Yeran Choi worked for Elev 8. There is a letter of offer and an employment agreement. There are monthly payslips for October 2018, November 2018, January 2019 and February 2019. Another payslip records holiday pay for the period 1 October 2018 to 28 February 2019. Mrs Jeon provided these documents to the LI on 27 January 2020. Further

documents in the form of wages and time wage records for Ms Choi were first provided with the statement in reply.

[46] It is apparent from another determination of the Authority[7] that there was a record of settlement under s 149 of the ERA between Ms Choi and Elev 8, dated 25 June 2019. The agreement was in full and final settlement of all matters between the parties arising out of the employment relationship. The LI was not a party to the record of settlement. The earlier determination arose from Elev 8's non-compliance with the record of settlement.

[47] Ms Choi was named in the 12 December 2019 complaint to the LI. The LI sought from Elev 8 a copy of the employment agreement, wages and time records and holiday and leave records for Ms Choi. However, the LI did not investigate any minimum wage breaches for Ms Choi.

[48] The LI's present claim for penalties for breach of s 81 of the HA and s 130 of the ERA were lodged in August 2020. Ms Choi has not been involved in these proceedings.

[49] The effect of affected employees entering into records of settlement on claims by a Labour Inspector to enforce employment standards has arisen in several cases.[8]

[50] In *A Labour Inspector v H4M Corporation Limited*, the records of settlement post-dated the LI's investigation. In the present case, Ms Choi's record of settlement pre-dated the LI's investigation. Counsel for Elev 8 submits that this fact makes a material difference. I disagree. In *H4M Corporation Limited*, the Authority noted as significant that the Inspector's powers are not dependent on an employee's consent or involvement, but are independent. That reasoning applies, whether the Labour Inspector acts before or after an affected employee separately enters into a record of settlement with their employer.

[51] In *A Labour Inspector v Super Ventures Limited*, the Authority held that the Labour Inspector's function is regulatory and separate from the provisions in the Employment Relations Act 2000 that allow employees to bring claims on their own behalf. In that case, the

---

[7] *Choi v Elev 8 Global Limited* [2020] NZERA 194.
[8] See for example *Labour Inspector v H4M Corporation Limited & anor* [2020] NZERA 406 and *A Labour Inspector v Super Ventures Limited* [2021] NZERA 99.

Inspector discontinued claims for arrears after those claims were settled between the employer and employees, but persisted with penalty claims.

[52] These determinations also referred to Employment Court judgments to the effect that penalties cannot be fixed solely by agreement, but require judicial decision.[9]

[53] The claim here with respect to Ms Choi is limited to penalties for breaches of s 81 HA (Holiday and Leave records) and s 130 ERA (Wages and Time Wage Records). The record of settlement between Elev 8 and Ms Choi does not prevent the LI from exercising statutory enforcement powers to seek penalties for alleged breaches of minimum standards with respect to employees including Ms Choi.

[54] Counsel submits that allowing Labour Inspector claims despite the record of settlement would undermine the importance of mediation. However, I note that the object of the Employment Relations Act 2000 is to build productive employment relationships through good faith by (amongst other things) promoting mediation, other than for enforcing employment standards (my emphasis).[10] Mediation remains as the primary problem-solving mechanism for an employee's employment relationship problem concerning statutory minimum rates of wages or holiday pay.[11]

[55] The "floodgates" argument is unpersuasive. Employees would not be able to receive a "windfall" by a complaint to the Labour Inspector, having settled their own statutory entitlement arrears claims through mediation. A Labour Inspector would first need to think it was appropriate to lodge a penalty claim, with regard to the objects of the ERA and the functions of an Inspector. If a breach was proven and a penalty was recovered, the default position is that the penalty is payable to the Crown. An Inspector would need good grounds to seek payment of a penalty to another person and the Authority would need to be persuaded it was just to so order.

[56] Counsel submits that the 12-month time for a penalty claim by the Labour Inspector must run from the date when the cause of action was first known (or should have been

---

[9] *Labour Inspector v Matangi Berry Farm Limited & Ors* [2019] NZEmpC 74 and *Borsboom v Preet PVT Limited & anor* [2016] NZEmpC 143.
[10] Employment Relations Act 2000 s 3(a)(v).
[11] Employment Relations Act 2000 s 148A and s 159AA.

known) to the affected employee. On that basis, the penalty claim based on breaches with respect to Ms Choi would be out of time, as she must have known of the cause of action sometime before the June 2019 record of settlement. However, s 135(5) permits an action for a penalty within 12 months of when the cause of action first became know (or should have been known) to the person bringing the action. In this case, it is an action by the Labour Inspector. The cause of action based on minimum standards breaches by Elev 8 could not have reasonably been known to the Labour Inspector before late November 2019, the date of the first complaint about Elev 8.

[57] I conclude that the record of settlement between Yeran Choi and Elev 8 does not bar the LI from seeking penalties for alleged breaches of s 81 of the HA and s 130 of the ERA. However, it may be relevant if breaches are proven and penalties are being determined.

[58] I consider later whether the LI has established the claimed breaches with respect to Ms Choi.

Did Jeong Ho Yoon commence work for Elev 8?

[59] The LI formed the view that Jeong Ho Yoon worked as an employee for Elev 8. There are no wages and time records or holidays and leave records for Jeong Ho Yoon, so the LI claims penalties. It is necessary to determine whether Jeong Ho Yoon actually worked for Elev 8.

[60] In evidence is Jeong Ho Yoon's visa dated 17 December 2018 for arrival in New Zealand before 17 March 2019. Elev 8 accepts that Jeong Ho Yoon arrived in New Zealand and that it intended to employ him. However, Mrs Jeon's evidence is that Jeong Ho Yoon also needed ACC registration, which she supported. While preparing for ACC registration, his health deteriorated and he then returned to Korea. Mrs Jeong says that Jeong Ho Yoon did not do any work for Elev 8. Mrs Jeon was asked for but did not provide any exchanges with ACC to evidence a registration application and Elev 8's support.

[61] Jeong Ho Yoon had left New Zealand before the LI's investigation, was not interviewed as part of her investigation and did not give evidence in these proceedings. I accept Ms Yuk's evidence that he told her that he did not want to get involved.

[62] Bank statements for Elev 8's business bank account have been produced in evidence. There are six payments to Jeong Ho Yoon from 12 February 2019 to 25 March 2019. The purpose of the payments is not apparent from the amounts or the frequency. Mrs Jeon told the LI that she supported Jeong Ho Yoon with his living costs and he sometimes came to the "store" and "tried to do whatever he could" when his health was okay. However, Mrs Jeon did not produce any evidence of Jeong Ho Yoon's requests for support with living costs.

[63] There is no evidence from Jeong Ho Yoon and only some limited evidence from other witnesses that he worked at Elev 8. The evidence of others on its own takes the matter no further than Mrs Jeon's acknowledgement that Jeong Ho Yoon "tried to do whatever he could" when he was at the "store".

[64] However, it is not probable that Mrs Jeon would have gratuitously supported Jeong Ho Yoon by paying him about $1,600.00 from Elev 8's account, without him performing work for Elev 8. I take from Mrs Jeon's evidence that Jeong Ho Yoon sometimes worked at the "store". I find that Elev 8's payments to Jeong Ho Yoon in February and March 2019 were for that work.

[65] I find that Jeong Ho Yoon actually worked for Elev 8 during February and March 2019. Elev 8 was required to but did not maintain wages and time records and holiday and leave records regarding that employment.

[66] It follows and I find that Elev 8 breached s 81 of the Holidays Act 2003 and s 130 of the Employment Relations Act 2000 with respect to Jeong Ho Yoon and is liable for penalties.

Has the LI established a breach by Elev 8 of s 81 HA and s 130 ERA in respect of Yeoeun Park?

[67] Yeoeun Park was specifically named in the LI's original request to Elev 8. Mrs Park had laid a complaint with Immigration New Zealand, who referred some aspects to the LI. Mrs Jeon responded with a copy of an employment agreement for Yeoeun Park but no pay records.

[68] The LI then sought and received from Immigration New Zealand a copy of the statement in English, given by Yeoeun Park to its investigator. It is undated and unsigned. That statement says that Yeoeun Park worked specific dates from 22 May 2019 to 9 August 2019 and was paid $1,573.00 net by internet banking.

[69] The LI required Elev 8 to provide timesheets, payslips and corresponding bank statements for payments to Yeoeun Park, based on her having worked between May and August 2019.

[70] Mrs Jeon replied, saying that Mrs Park arrived in April 2019, received a shorter visa than she had expected, returned to Korea, and Mrs Jeon had "ended all employment relations" because her husband "violently intruded our company without permission". Mrs Jeon later stated that Mrs Park worked from 18 June to 9 August 2019, 10 days in total.

[71] With its statement in reply, Elev 8 lodged wages and time records for Mrs Park. The three sheets include holiday and leave records. They show wages and time for weeks ending Sunday 24 June 2018, 1 July 2018, 15 July 2018 and 12 August 2018. "22/5/2018" is shown as "Date Started" and the final sheet shows "09/08/2018" as "Terminated Date". Mrs Jeon's evidence is that the accountant made a mistake. In evidence now are three corrected sheets amended to the corresponding dates in 2019. The sheets record wages of $422.58 (gross).

[72] The present claim is for penalties for breaches of s 81 of the HA and s 130 of the ERA.

[73] Section 81 of the Holidays Act 2003 requires an employer "at all times" to keep a holiday and leave record showing specific information. The holiday and leave record may be kept so as to form part of the wages and time record required to be kept under s 130 of the Employment Relations Act 2000.

[74] Section 130 of the Employment Relations Act 2000 requires an employer "at all times" to keep a wages and time showing specific information.

[75] I find that Elev 8 did not "at all times" keep records. If records for Yeoeun Park had been kept at all times by Elev 8, Mrs Jeon would have provided those in a timely manner in response to the LI's request.

[76] Compilation of wages and time records and holidays and leave records later in time is not a substitute for the statutory requirement that an employer "must at all times keep" compliant records. In the present case, the compiled records created a year after the employment are not consistent with Yeoeun Park's statement to Immigration New Zealand about her wages. Nor do they match the payments to Yeoeun Park in July 2019 as shown in Elev 8's bank statements and a further payment on 13 August 2019. By not keeping contemporaneous records, Elev 8 has put itself in the position of not being able to demonstrate payment in accordance with statutory obligations.

[77] If an employer fails to produce records when requested by a Labour Inspector, the Inspector may require them to compile records. In this case, the LI did not exercise her powers under s 232 of the ERA, but lodged a statement of problem in the Authority. That approach from the Inspector made no difference to Elev 8's ability to establish compliance with its statutory obligations.

[78] I find that Elev 8 breached s 81 of the Holidays Act 2003 and s 130 of the Employment Relations Act 2000 with respect to Yeoeun Park.

Has the LI established a breach by Elev 8 of s 81 HA and s 130 ERA in respect of Qian Wang?

[79] Qian Wang was not specifically named in the LI's original request. However, Mrs Jeon provided an employment agreement and a payslip (week ending 6 December 2018) for Qian Wang. Mrs Jeon stated that Qian Wang was employed by Elev 8 from 11 November 2018 to 6 December 2019 (my emphasis).

[80] The agreement referred to the employer in different clauses as either Park's Ltd 2017 or as Elev 8 Global Ltd, but it could be read as an agreement for "Temporary Employment" with the former company between 20 November 2018 and 31 December 2018. Despite that, the payslip indicates Qian Wang was employed by Elev 8 between 30 November 2018 and 6 December 2018. The LI requested clarification. Mrs Jeon explained it was her mistake because she had copied another employment agreement.

[81] The statement in reply included a sheet showing wages and time records and holidays and leave records for Qian Wang. The sheet shows time worked Monday to Friday in the week ending 6 December 2018, "30/11/2018" as "Date Started" and "06/12/2018" as "Terminated Date".

[82] The present claim is for penalties for breaches of s 81 of the HA and s 130 of the ERA. I adopt what I expressed above regarding the statutory obligation to keep "at all times" the two types of records.

[83] The LI came to the view that Elev 8 employed Qian Wang between 30 November 2018 and 6 December 2019 (my emphasis). There is a submission that Elev 8 did not keep accurate records. Counsel notes that the employment agreement was for a minimum of 30 hours per week, but the single payslip for one week showed only 20 hours work.

[84] I am not satisfied that Qian Wang probably worked after 6 December 2018. There is no direct evidence to support that conclusion. The agreement is ambiguous. It purports to cover temporary employment with another company between 20 November 2018 and 31 December 2018. However, it also refers to the manager Jojo Pan, who gave evidence that she was a volunteer and attended the "beauty shop" in 2019. Mrs Jeon says she was mistaken when she told the LI that Qian Wang worked until 6 December 2019, rather than 2018. The bank information shows wages were paid on 6 December 2018, so it is possible that Mrs Jeon may have given the wrong year by mistake.

[85] There is a message from Qian Wang to Mrs Jeon dated 23 December 2018 that is consistent with the employment relationship having ended amicably at the time of the 6 December 2018 payment. That is the best indication of the duration of Qian Wang's employment. I proceed on the basis that Qian Wang started working on 30 November 2018 and her employment ended on 6 December 2018.

[86] Holidays and leave records and wages and time records for Qian Wang were not kept during her employment in 2018 but were compiled later after the LI's request in 2020. As explained elsewhere, that is not consistent with the statutory obligation. For that reason, I find that Elev 8 breached s 81 of the Holidays Act 2003 and s 130 of the Employment Relations Act 2000 with respect to Qian Wang.

[87] The breaches with respect to Qian Wang may be less serious than the breaches with respect to Yeoeun Park, but I leave that for later consideration.

What breaches of minimum entitlements (MWA, HA & ERA) have been established?

Haesol Yuk

[88] Elev 8 breached s 6 of the Minimum Wage Act 1983 by not paying her at a rate no less than the minimum rate she was entitled to under the Act. Elev 8 is liable for a penalty under s 10 of the Minimum Wage Act 1983.

[89] Elev 8 breached s 23 of the Holidays Act 2003 by not paying Haesol Yuk when her employment ended, 8% of her gross earnings since the employment had commenced. Elev 8 is liable for a penalty under s 75 of the Holidays Act 2003.

[90] Elev 8 breached s 81 of the Holidays Act 2003 by not keeping a holiday and leave record for Haesol Yuk. Elev 8 is liable for a penalty under s 75 of the Holidays Act 2003.

[91] Haesol Yuk did not work on public holidays, so the claims for penalties for breaches of s 50, s 56 and s 60 of the Holidays Act 2003 are dismissed.

[92] Elev 8 breached s 65 of the Employment Relations Act 2000 by not having a written employment agreement for Haesol Yuk, and is liable under that section for a penalty.

[93] Elev 8 breached s 130 of the Employment Relations Act 2000 by not keeping a wages and time record for Haesol Yuk, and is liable under that section for a penalty.

Yeran Choi

[94] Elev 8 keep payslips in the name of Yeran Choi. These were provided in response to the LI's request. The payslips do not record all the information stipulated by s 130 of the Employment Relations Act 2000.

[95] Later compiled wages and time records covering the statutory information (incorporating holiday and leave records) were included with the statement in reply. However, for reasons set out elsewhere, these later compiled records do not establish compliance with

the statutory record keeping obligations. I find that Elev 8 did not at all times keep a holiday and leave record and a wages and time record for Yeran Choi.

[96] Elev 8 breached s 81 of the Holidays Act 2003 by not keeping a holiday and leave record for Yeran Choi. Elev 8 is liable for a penalty under s 75 of the Holidays Act 2003.

[97] Elev 8 breached s 130 of the Employment Relations Act 2000 by not keeping a wages and time record for Yeran Choi, and is liable under that section for a penalty.

Jeong Ho Yoon, Yeoeun Park and Qian Wang

[98] Elev 8 breached s 81 of the Holidays Act 2003 by not keeping holiday and leave records for these three employees. Elev 8 is liable to penalties under s 75 of the Holidays Act 2003.

[99] Elev 8 breached s 130 of the Employment Relations Act 2000 by not keeping wages and time records for these three employees, and is liable under that section for penalties.

Is Mrs Jeon involved in any breaches by Elev 8 so as to be liable for any penalties?

[100] The statutory breaches set out above are breaches of employment standards.[12] The breaches are by the company Elev 8 Global Limited. Mrs Jeon is the director and therefore an officer of that company.

[101] Section 142W of the ERA provides several gateways to establish whether a person is involved in a breach of employment standards. Relevantly here, Mrs Jeon aided, abetted, counselled or procured the breaches. Mrs Jeon was also party to the breaches.

[102] I find that Mrs Jeon was a person involved in the company's breaches of employment standards set out above.

[103] The claims are by a Labour Inspector. Mrs Jeon is liable under s 142X for penalties for Elev 8 Global Limited's breaches of employment standards.

---

[12] See definition of "employment standards", s 5 Employment Relations Act 2000.

[104] Mrs Jeon is liable as the person involved in Elev 8 Global Limited's breaches as follows:

(a) With respect to Haesol Yuk: section 6 of the Minimum Wage Act 1983, section 23 of the Holidays Act 2003, s 81 of the Holidays Act 2003, section 65 of the Employment Relations Act 2000, and s 130 of the Employment Relations Act 2000.

(b) With respect to Yeran Choi, Jeong Ho Yoon, Yeoeun Park and Qian Wang: section 81 of the Holidays Act 2003, and section 130 of the Employment Relations Act 2000.

Summary

[105] Haesol Yuk was employed by Elev 8 Global Limited and is owed arrears under the Minimum Wage Act 1983 and the Holidays Act 2003. Leave is reserved regarding issues with regard to the calculation of these arrears.

[106] The LI is to recalculate arrears due to Haesol Yuk based on the earlier findings, within 28 days or as soon as is practicable thereafter with the Authority's consent. Elev 8 and Mrs Jeon may lodge submissions addressing any dispute about the calculations within a further 14 days, or longer with the Authority's consent. A further determination fixing the amount of arrears will follow.

[107] Elev 8 Global breached the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000 and is liable for penalties as set out above. Mrs Jeon is liable as a person involved in the breaches, as set out above.

[108] The LI is to lodge submissions regarding the appropriate penalties to be recovered for the breaches, within 28 days or as soon as is practicable thereafter with the Authority's consent.

[109] Elev 8 and Mrs Jeon may lodge submissions in reply with respect to penalties within a further 14 days, or longer with the Authority's consent.

[110] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority