

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 417
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
Submissions Received:	29 May 2023 from the Applicant No further submissions from the Respondent
Date of Determination:	4 August 2023

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by a Labour Inspector (LI) to recover minimum entitlements and to enforce employment standards.

[2] In my earlier determination,¹ I found that Elev 8 Global Limited (Elev 8) employed Haesol Yuk and owed her arrears under both the Minimum Wage Act 1983 and the Holidays Act 2003. Leave was reserved for the Labour Inspector to recalculate the arrears based on the findings made.

[3] I found that Elev 8 breached employment standards with respect to Ms Yuk and several other employees. I further found that Victoria Jeon was a person involved in Elev 8's breaches of employment standards. Leave was reserved for the Labour Inspector to lodge submissions regarding the appropriate penalties against both Elev 8 and Mrs Jeon.

[4] Leave was also given for the respondents to reply.

[5] I have received submissions from the Labour Inspector on these issues. Nothing further has been received from the respondents.

[6] This determination resolves the arrears and penalty issues.

Arrears – Haesol Yuk

[7] Ms Yuk worked every day (except Sundays, 25 April and 3 June) from 23 April 2019 to 8 June 2019, 12 hours per day for 39 days. Ms Yuk was not paid for her work. The applicable minimum wage rate at the time was \$17.70 per hour.² Elev 8 must pay Ms Yuk \$8,283.60 (gross) in arrears of wages by effect of s 6 of the Minimum Wage Act 1983.

[8] Anzac Day and Queen's Birthday both fell on days that would otherwise have been working days for Ms Yuk, so she was entitled to a day off and to be paid her relevant daily pay for each day. Elev 8 failed to pay Ms Yuk so must now pay arrears of \$424.80 (gross) by effect of s 49 of the Holidays Act 2003.

¹ *A Labour Inspector v Elev 8 Global Ltd and Anor* [2023] NZERA 223.

² Minimum Wage Order 2019 cl 4.

[9] Ms Yuk worked less than 12 months and was entitled to holiday pay of 8% of her gross earnings by effect of s 23 and s 27 of the Holidays Act 2003, a total of \$696.67 (gross).

Penalties – Elev 8

Objects

[10] I agree with counsel for the LI that the objects of the Employment Relations Act 2000 must be reflected in the level of penalties for breaches of minimum entitlements and employment standards. Employees' inequality of power in the employment relationship and the enforcement of employment standards are material here.

Nature and extent of breaches

[11] Elev 8 was found to be liable for a penalty for the breach of s 6 of the Minimum Wage Act 1983. Maximum liability for the breach (failure to pay minimum wage – Ms Yuk) is \$20,000.00.

[12] Elev 8 was found to be liable for a penalty for breach of s 23 and s 27 of the Holidays Act 2003. Maximum liability for the breach (failure to pay holiday pay on termination – Ms Yuk) is \$20,000.00.

[13] Elev 8 was found to be liable for a penalty for breach of s 65 of the Employment Relations Act 2000. Maximum liability for the breach (failure to have a written employment agreement - Ms Yuk) is \$20,000.00.

[14] Counsel includes in his penalty analysis two breaches of s 49 of the Holidays Act 2000, based on Elev 8 not paying Ms Yuk for the two public holidays during her employment that she did not work but which fell on days she would otherwise have worked. However, the statement of problem did not include a claim for penalties for that specific breach. It did include claims for breaches of sections 50, 56 and 60 of the Holidays Act 2003, but the facts did not support those claims and they were dismissed.

[15] Elev 8 was found to be liable for penalties for breaches of s 130 of the Employment Relations Act 2000. Maximum liability for the breaches would be \$100,000.00 (wage and time records – five employees).

[16] Elev 8 was found to be liable for penalties for breaches of s 81 of the Holidays Act 2003. Maximum liability for the breaches would be \$100,000.00 (holiday and leave time records – five employees).

[17] Counsel submits that it is not appropriate to globalise any penalties, across employees and separate legislation. However, I disagree. The separate statutory obligations to keep wage and time records and holidays and leave records overlap and can be combined as a breach of record keeping obligations.³ Compliant wages and time records would have met much of the holidays and leave record requirement, so I will deal with the record keeping breaches as breaches of s 130 of the Employment Relations Act 2000.

[18] Elev 8's record keeping failures for the five employees can also be globalised and treated as a single breach. The circumstances ranged from disputed employment (no records - Ms Yuk) to monthly payslips that did not properly comply with requirements (Mrs Park). I would otherwise need to adopt an artificial approach to discounting at a later stage to reach a realistic level of penalty for the record keeping failure. The number of affected employees and the differing circumstances can be reflected in the level of the single penalty set.

[19] That leaves the failure to pay minimum wages to Ms Yuk, failure to pay holiday pay to Ms Yuk, failure to provide a written employment agreement to Ms Yuk, and the record keeping failure as penalties to be fixed.

Breaches not inadvertent

[20] Mrs Jeon, the principal of Elev 8, is experienced in business.

³ Adopting *Labour Inspector v Matangi Berry Farm Ltd* [2020] NZEmpC 43.

[21] The minimum entitlement breaches with respect to Ms Yuk were intentional. Elev 8 prevailed upon Ms Yuk to work in its business, in circumstances where it thought it could avoid the cost of paying her. Elev 8 knew it had an obligation to pay Ms Yuk wages and holiday pay and knew it should have provided her with a written employment agreement.

[22] The record keeping breach for Ms Yuk was also intentional. Regarding the other employees, there were either no records or payslips that were not compliant with the record keeping requirements. There is little evidence regarding the circumstances of the other employees, so I am not in a position to confirm that the failures were intentional. They must be regarded as negligent, in light of Mrs Jeon's business experience.

Nature and extent of the loss

[23] Regarding the minimum entitlements, Ms Yuk suffered a significant loss. Ms Yuk was deprived of wages when in a vulnerable situation. Equally, Elev 8 avoided the cost of paying for labour used for its business purposes.

[24] It is not apparent what (if any) loss was suffered by the other employees affected by the record keeping breach. The record keeping breach with respect to Ms Yuk did not disadvantage her ability, through the Labour Inspector, to prove arrears of wages and holiday pay.

Steps to mitigate loss

[25] Elev 8 did nothing to mitigate the loss to Ms Yuk.

[26] Elev 8 took some steps to compile records for other employees.

Circumstances in which the breaches took place

[27] The record keeping and the minimum entitlement breaches took place over some months.

[28] Ms Yuk was a migrant worker. That, family circumstances regarding her husband who was employed by a trust under the control of Mrs Jeon and Ms Yuk's faith initially in Mrs Jeon made Ms Yuk vulnerable. Elev 8 utilised that vulnerability for its business purposes.

[29] Ms Yuk was injured, apparently suffering an allergic reaction to something she used at work. The breaches of minimum entitlements have not been shown as a material cause of the injury. However, the breaches did affect Ms Yuk's ability to properly respond to the injury.

No previous findings in employment proceedings

[30] I am referred to two cases.⁴ However, I do not accept counsel's submission that the findings expressed in the determinations are relevant here.

[31] There is some overlap between the conduct and findings in *Jeon* and in this matter. However, the conduct in the present case pre-dated the 2023 findings in *Jeon*. Accordingly, Elev 8 cannot be said to have "previously been found by the Authority" to have engaged in similar conduct.⁵

[32] The *Choi* matter dealt with enforcement of a record of settlement of a personal grievance entered into under s 149 of the Employment Relations Act 2000. The Authority in *Choi* did not make any finding that Elev 8 had engaged in similar conduct to the present findings.

Deterrence

[33] The breaches are of minimum entitlements (Ms Yuk) and employment standards.

[34] Penalties need to reflect deterrence for Elev 8 and others.

⁴ *A Labour Inspector v Jeon and oths* [2023] NZERA 175 and *Choi v Elev 8 Global Limited* [2020] NZERA 194.

⁵ Employment Relations Act 2000 s 133A(g).

Culpability

[35] Elev 8 has a significant level of culpability. It is not necessary to repeat what has been said above.

Consistency

[36] The Labour Inspector claims penalties totalling \$170,000.00. I am referred to *A Labour Inspector v Prahb* as an example of an analogous case where penalties of \$100,000.00 were set.⁶ However, that amount was a combination of pecuniary penalties and ordinary penalties. The ordinary penalties comprised somewhat less than half the nominal starting point and were just over a third of the total after the consideration of aggravating features. I note also that the level of ordinary penalties in *Prahb* reflected the failure to pay holiday pay and minimum wages for three employees, not one employee as in the present case.

[37] I was also referred to *Borsboom v Preet PVT Ltd* as a case where penalties of \$100,000.00 were imposed.⁷ However, that amount was the sum of penalties separately assessed against two employers. The case also concerned arrears of wages and arrears of holiday pay for a total of five employees, some who had been employed for more than a year.

Ability to pay

[38] There is no specific information to support a reduction in the level of penalties otherwise applicable.

Proportionality of Outcome

[39] I am referred to *A Labour Inspector v Daleson Investment Limited*.⁸ In that case the Court cautioned that penalties should not be reduced so as to create a perverse incentive that

⁶ *A Labour Inspector v Prahb* [2018] NZEmpC 110.

⁷ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

⁸ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

defaulting employers might apply a cost/benefit approach to taking a chance with non-payment.

[40] The caution must be understood in context. In *Daleson*, maximum penalties totalled \$220,000.00 but had been reduced to \$220.00, only 0.1% of the potential liability. The employer had not paid wages and holiday pay of \$12,542.52 due to six employees. The risk of a penalty of \$220.00 on a cost/benefit approach might reward and certainly would not deter such a default.

[41] *Daleson* is still a useful comparison. The Court assessed penalties for minimum wage arrears (two employees), holiday pay arrears (four employees), public holiday defaults (four employees) and failure to provide a written employment agreement (one employee). The Court imposed penalties totalling \$40,000.00, while noting that greater penalties would not have been inappropriate. In summary, *Daleson* involved minimum entitlement defaults affecting six employees, compared to one employee in this matter. The present matter includes record keeping defaults (five employees – globalised to one penalty), but overall should result in a penalty lower than was set in *Daleson* because the payment defaults there affected more employees.

Severity of the breaches – aggravating factors

[42] Counsel submits that the minimum entitlement breaches with respect to Ms Yuk should be assessed as 70%, with regard to the factors covered at s 133A of the Employment Relations Act 2000. I fix the slightly higher starting point of 75% to recognise that the breach involved not paying Ms Yuk anything for her work. The two minimum entitlement breaches would result in two penalties each of \$15,000.00.

[43] I also agree that the record keeping breaches should be assessed at 50%. A penalty at \$10,000.00 would result. I see no reason to treat the failure to provide a written employment agreement for one employee more seriously than the record keeping default for five employees. A further penalty at \$10,000.00 would result.

[44] Penalties assessed on this basis would total \$50,000.00.

Mitigating factors

[45] Elev 8 held employment agreements with respect to other employees, but not Ms Yuk. If it had regarded her as an employee, it would have had an employment agreement for Ms Yuk.

[46] Elev 8 kept some wage records (payslips) for some employees. The defaults occurred over a relatively limited time period. Elev 8 must be taken as having paid its employees correctly, except for Ms Yuk.

[47] Elev 8 operated its business to an extent so as to comply with statutory employment obligations.

[48] These factors cause me to discount the above total for penalties by 30%. The total reduces to \$35,000.00.

Totality

[49] To summarise, penalties would total \$35,000.00 in circumstances where the employer failed to pay any wages and holiday pay (of more than \$9,000.00) to one employee, did not have an employment agreement for that person, did not keep records for her and did not properly keep records for all of the other four employees.

[50] I see this as a proportionate outcome, judged by outcomes in cases like *Prahb* and *Daleson*. No further adjustment is required.

Penalties – Mrs Jeon

[51] Mrs Jeon has been found liable as a person involved in the company's breaches as follows:

- (a) Minimum Wage Act 1983 s 6 (Ms Yuk);
- (b) Holidays Act 2003 s 23 & s 27 (Ms Yuk);
- (c) Employment Relations Act 2000 s 65 (Ms Yuk);
- (d) Employment Relations Act s 130 (five employees); and
- (e) Holidays Act 2003 s 81 (five employees).

[52] There are two minimum entitlement defaults (wages and holiday pay). Mrs Jeon is liable to a maximum penalty of \$10,000.00 for the breach of s 6 of the Minimum Wage Act 1983 and \$10,000.00 for the breach of s 23 of the Holidays Act 2003.

[53] Mrs Jeon is liable to a maximum penalty of \$10,000.00 for the breach of s 65 of the Employment Relations Act 2000 (failure to provide written employment agreement – Ms Yuk).

[54] For the same reasons as given earlier, I will globalise the last two breaches as record keeping breaches under s 130 of the Employment Relations Act 2000. Mrs Jeon is liable to a maximum penalty of \$10,000.00 under that Act.

[55] Submissions for the LI do not separate the application of s 133A of the Employment Relations Act 2000 and other principles, as between the employer and Mrs Jeon as the person involved, except to note that the maximum liability for a corporate is \$20,000.00 compared with \$10,000.00 for an individual.

[56] In *A Labour Inspector v Sampan Restaurant Limited*,⁹ the Employment Court held that the purpose of the legislation is to ensure, primarily for deterrence, that an employer is punished for the breach and the person involved is punished for their purposeful acts. Each must be separately considered for their involvement and individual culpability.

⁹ *A Labour Inspector v Sampan Restaurant Limited* [2018] NZEmpC 69.

[57] Mrs Jeon is the sole director and shareholder of Elev 8 and made all decisions for the business regarding its operations. I see no reason to conclude that Mrs Jeon's culpability is any less than Elev 8's culpability, as assessed above. Equally, I see no proper basis on which I could consider that Mrs Jeon's culpability was greater than the company's culpability.

[58] At this point, it appears that fixing liability for Mrs Jeon at half the total of penalties ordered against the company will not raise a double-jeopardy problem. I note that the registrar of companies has initiated action to remove Elev 8 Global from the company register. In that event, the penalties ordered against the employer would fail. The LI would only have resort to the penalties ordered against Mrs Jeon for enforcement purposes. The legislative purpose of added deterrence would not be served by taking account of the penalties ordered against Elev 8 to reduce Mrs Jeon's liability.

[59] There will be orders for penalties against Mrs Jeon at half those ordered against the company because the maximum liability for an individual is half that of a corporate entity.

Summary and Orders

[60] Elev 8 as Ms Yuk's employer owes her arrears of minimum entitlements, comprising wages and holiday pay. Elev 8 failed to provide a written employment agreement for Ms Yuk and failed to maintain wage and time records and holiday and leave records for her. Elev 8 did not keep any or proper records for four other employees. Elev 8 is liable for penalties for breaches of minimum entitlements and employment standards.

[61] Mrs Jeon was a person involved in all of the breaches by Elev 8 and is also liable to penalties.

[62] Elev 8 Global Limited is to pay to the Labour Inspector, for the use of Haesol Yuk, the following amounts by 1 September 2023:

- (a) \$8,283.60 (gross) by effect of s 6 of the Minimum Wage Act 1983;

(b) \$424.80 (gross) by effect of s 49 of the Holidays Act 2003; and

(c) \$696.67 (gross) by effect of s 23 and s 27 of the Holidays Act 2003.

[63] Interest is claimed and is appropriate. Arrears total \$9,405.07 (gross). For convenience I take the last day of employment as the starting point for interest and the date of the determination as the end point. The orders are enforceable immediately and further interest would fall for the enforcement authority if required.

[64] Elev 8 Global Limited is to pay to the Labour Inspector, for the use of Haesol Yuk, interest of \$1,029.12 by 1 September 2023.

[65] By 1 September 2023 Elev 8 Global Limited is to pay to the Authority, for payment into a Crown Bank Account, the following penalties (totalling \$35,000.00):

(a) \$10,500.00 for breaching s 6 of the Minimum Wage Act 1983;

(b) \$10,500.00 for breaching s 23 & s 27 of the Holidays Act 2003;

(c) \$7,000.00 for breaching s 65 of the Employment Relations Act 2000; and

(d) \$7,000.00 for breaching s 130 of the Employment Relations Act 2000.

[66] By 1 September 2023 Victoria Jeon is to pay to the Authority, for payment into a Crown Bank Account, the following penalties (totalling \$17,500.00):

(a) \$5,250.00 for the breach of s 6 of the Minimum Wage Act 1983;

(b) \$5,250.00 for the breach of s 23 & s 27 of the Holidays Act 2003;

(c) \$3,500.00 for the breach of s 65 of the Employment Relations Act 2000; and

(d) \$3,500.00 for the breach of s 130 of the Employment Relations Act 2000.

[67] Costs are reserved. The Labour Inspector may lodge and serve a memorandum setting the claim for costs within 14 days. The respondents may lodge and serve a memorandum in response. I will determine costs with regard to those submissions and the Authority's practice.

Philip Cheyne
Member of the Employment Relations Authority