

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 461
3120499

BETWEEN	A LABOUR INSPECTOR Applicant
AND	ELEMENTS THERAPEUTIC MASSAGE LIMITED First Respondent
AND	XUAN ZHANG Second Respondent
AND	PING DU Third Respondent

Member of Authority:	David G Beck
Representatives:	Amy Webster, Counsel for the Applicant No appearance for the first and second Respondents Alison Douglass, Counsel for the third Respondent
Investigation Meeting:	On the papers
Submissions received:	13 December 2022 from the Applicant 26 May from the third Respondent
Date of Determination:	21 August 2023

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination issued 26 August 2022 I found that the third respondent, Ping Du, was involved pursuant to s 142W of the Employment Relations Act 2000 (the Act), in identified breaches of minimum standards in that he:

... acted in concert with Xuan Zhang to aid and abet the breaches identified, in that he managed the day to day running of the business, introduced the system of

recording the number of massages undertaken and instructed Xuan Zhang on what wages to pay and would have objectively been aware, given his level of administrative knowledge and background, that structuring the pay of Rebecca and Emily around commission only, was a breach of minimum standards. And:

Objectively, Ping Du would be aware of the different approach Xuan Zhang was taking to the employees' remuneration in contrast to his own arrangement and he wilfully ignored these differences. I also find from the content of translated emails, that Ping Du engaged in threatening conduct that aggravated the situation.

[2] After determining a quantum of arrears of wages owed to ex-employees I indicated:

In regards the arrears of wages owed, I find Ping Du jointly liable for the breach of minimum standards but I exclusively find Xuan Zhang responsible for the unpaid holiday pay as it was his conscious decision to withhold such. In addition, I find Xuan Zhang was responsible for failing to keep adequate wage, time and leave records and did not provide one identified employee with an employment agreement.¹

[3] As a remedy sought by the Labour Inspector, I determined that the second respondent, Xuan Zhang, was also liable as a person being involved in the breaches pursuant to s 142W of the Act, as a sole director, shareholder, and manager of Elements Therapeutic Massage Limited. I ordered Xuan Zhang to pay identified wages and holiday arrears to three ex-employees and awarded a penalty against Xuan Zhang in the amount of \$8,000.

[4] I also awarded a penalty be paid by Ping Du in the amount of \$4,000 but did not, despite finding he was party to the breaches, indicate that Ping Du was jointly liable for any identified wage and holiday pay arrears owed to the workers involved in the breaches.

The Labour Inspector claim

[5] The Labour Inspector's counsel, by way of a memorandum of 13 December 2023, has sought clarity for the purpose of recovery on essentially whether the finding of Ping Du being involved in the breaches should also lead to his liability for the wage arrears that, to date, have not been recovered from Xuan Zhang who is believed to be living outside New Zealand. The initial response from the Authority is that my decision purposely excluded Ping Du from any liability for identified arrears based on a finding that he was involved but to a lesser extent.

¹ *A Labour Inspector v Elements Therapeutic Massage Limited and Ors* [2022] NZERA 415 at [66] and [68].

[6] The Labour Inspector has posited that the Authority has no discretion to ‘apportion’ arrears owed once the finding was made against Ping Du under s 142Y of the Act that he was party to the breach. The Labour Inspector seeks an additional determination finding clarifying Ping Du’s potential expanded liability.

Ping Du’s response

[7] Ping Du’s counsel, after traversing that I had alluded to Ping Du and Xuan Zhang potentially being held jointly and severally liable in the determination, noted that I went on to clarify this comment by indicating:

I exclusively find Xuan Zhang responsible for the unpaid holiday pay as it was his conscious decision to withhold such. In addition, I find Xuan Zhang was responsible for failing to keep adequate wage, time and leave records and did not provide one identified employee with an employment agreement.²

[8] Notwithstanding, the implied clarity in my intent reproduced above, Counsel for Ping Du also suggested that the seeking of further clarity by the Labour Inspector should be pursued either by the Labour Inspector seeking to reopen my investigation pursuant to cl 4 Schedule 2 of the Act or by way of a challenge in the Employment Court under s 179 of the Act.

Finding

[9] Setting aside the contention that there is no discretion for the Authority to exercise once breaches are established, the original determination was in my view clear at para [68] that Ping Du, while being held jointly liable for the breach of minimum standards, was not held responsible for arrears of holiday pay owed. I omitted at this point in the determination to make it clear that Xuan Zhang was responsible for both holiday pay arrears owed and wage arrears but that fact was made explicit in the determination’s section on headed “Conclusion on penalties and arrears” at para [99] – [101]. I also at this point made it clear Ping Du was only liable for a penalty and how it was to be apportioned between two workers involved. To this extent the determination does not need ‘clarifying’.

[10] I also accept that I cannot determine the legal question raised by the Labour Inspector on the scope of the Authority’s discretion and whether the Labour Inspector merely must

² Ibid at [57] and [68].

establish that all the elements set out in s 142Y(1) have been met to recover wage or holidays arrears from Ping Du. That could only be pursued as a challenge to the determination in the Employment Court or an application for a reopening of the investigation.

[11] In conclusion, I am not persuaded that I should order that Ping Du's liability for additional remedies beyond that set out in the original determination is necessary.

Costs

[12] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, the Labour Inspector has 14 days from the date of this determination in which to file and serve a memorandum on costs. The second and third Respondents' have a further 14 days in which to file and serve a memorandum in reply.

[13] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.

David G Beck
Member of the Employment Relations Authority