

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 294
3032273

BETWEEN AN QUOC DO
Applicant

AND BF7 TRADING LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Roy Bishop for the Respondent

Investigation: By correspondence

Determination: 19 September 2018

DETERMINATION OF THE AUTHORITY

- A. BF7 Trading Limited (BF7) must, by no later than seven days from the date of this determination, comply with orders made by the Authority to pay An Quoc Do the full amount he is due for wages arrears and holiday pay and in reimbursement of the Authority application fee.**
- B. BF7 must also pay a penalty of \$2000 for breach of Wages Protection Act 1983 s 4. BF7 must pay this penalty by no later than seven days from the date of this determination. On payment the Authority is to transfer \$1000 to the Crown Account and \$1000 to Mr Do.**
- C. The Authority is to provide a copy of this determination to the Labour Inspectorate for consideration as to whether further inquiry of BF7's compliance with employment standards is warranted.**

Employment Relationship Problem

[1] On 23 August 2018 the Authority ordered BF7 Trading Limited (BF7) to pay An Quoc Do, also known as Brian Do, the following sums, less any applicable tax: \$1,304.10 wage arrears, \$104.33 holiday pay and \$71.56 in reimbursement of an Authority.¹ Mr Do was owed the wages and holiday pay for work he did in April 2018 for a client of BF7. BF7 operates a labour hire business under the trading name of Filled Roles.

[2] The determination reserved leave for Mr Do to seek further orders for compliance and a penalty under the Wages Protection Act 1983 (the WPA) if BF7 did not pay the money due by 30 August 2018.

[3] On 31 August 2018 Mr Do advised the Authority BF7 had paid him the net sum of only \$850.97. He provided a pay slip that showed the payment was based on a gross sum of \$996.30, including holiday pay. That was a shortfall of more than \$400 on the gross amounts found due as wage arrears and holiday pay in the Authority's earlier determination. Mr Do also asked the Authority to "continue", indicating he wished the options for a compliance order and a penalty to be determined.

[4] By Minute of 6 September 2018 I advised BF7 I was considering taking the following actions and gave the company an opportunity to be heard before any such steps were ordered or taken:

- (i) Ordering compliance with the 23 August orders;
- (ii) Ordering BF7 to pay a penalty under the WPA; and
- (iii) Referring any determination made, along with other recent determinations of the Authority about BF7, to the Labour Inspectorate to consider further inquiry into the company's practices.

[5] In light of the serious nature of those potential actions, and other recent Authority determinations about the company, the Minute also encouraged BF7 and its directors to seek professional advice on this matter if they had not already done so.

[6] BF7 has been the subject of four other recent determinations concerning claims by former employees. On 14 August 2018 the Authority found BF7

¹ *Do v BF7 Trading Limited* [2018] NZERA Auckland 268.

unjustifiably dismissed carpenter Elija Senice and ordered the company to pay him remedies totalling more than \$19,000 along with wage arrears of \$3,121 and a penalty of \$2000 for not providing wage and time records when requested.² Also on 14 August the Authority ordered BF7 to pay carpenter Sebastian Jenkins \$2,131 for arrears of wages and holiday pay.³ On 8 August 2018 the Authority ordered BF7 to pay builder Luke Brough \$2,366 for arrears of wages and holiday pay due for building services he carried out for a BF7 client.⁴ And on 8 December 2017 the Authority ordered BF7 to pay more than \$6500 in arrears of wages and holiday pay owed to its former Wellington regional client manager Anthony de Vries.⁵

[7] In most of those proceedings BF7 did not engage in the process, failed to lodge a statement in reply and failed to attend the notified investigation meeting although the Authority was satisfied that notice of the opportunity was properly given.

[8] In Mr Do's case Roy Bishop, who described himself as general manager of Filled Roles, did attend a telephone conference convened by the Authority on 22 August 2018. During that call Mr Bishop confirmed there was no dispute about the hours Mr Do had worked or the wages due to him. Mr Do had provided copies of BF7's invoices to the client he carried out the work for and copies of that client's bank statements showing it had paid BF7's invoices. In short, BF7 had the money Mr Do was due to be paid for the work he did.

[9] On 7 September Mr Bishop sent an email asking how he could respond to the Authority's 6 September Minute. In reply an Authority Officer drew his attention to a paragraph of that Minute advising BF7 could make a written response or seek to be heard, either in person or by telephone. The Minute directed the company to advise the Authority by no later than 14 September if it wished to take up that opportunity. No further communication was received from Mr Bishop or any other BF7 representative.

[10] On 18 September I had an Authority Officer contact Mr Do by email to check whether he had received any further payment of amounts due from BF7. The officer's

² *Elija Senice v BF7 Trading Limited* [2018] NZERA Auckland 255.

³ *Sebastian Jenkins v BF7 Trading Limited* [2018] NZERA Auckland 251.

⁴ *Luke Brough v BF7 Trading Limited* [2018] NZERA Wellington 69.

⁵ *De Vries v BF7 Trading Limited* [2017] NZERA Wellington 128.

email inquiry was also copied to Mr Bishop and a director of the company, Spencer Bishop. Mr Do's reply advised that he had received no further payment.

[11] On the information available to the Authority BF7 has failed to comply with the orders made on 23 August. BF7 has had notice of and the opportunity to be heard on the proposed actions in light of its failure. It had not taken the opportunity. Against that background, and the efforts made to engage the company in addressing these problems, I concluded the proposed actions could and should be made without further delay.⁶

Compliance order

[12] Accordingly, under s 137(1)(b) of the Employment Relations Act 2000 (the ERA), BF7 is ordered to comply with the orders made by the Authority on 23 August 2018 for payments to be made to Mr Do. BF7 must do so by no later than seven days from the date of this determination.

Penalty for breach of the Wages Protection Act 1983

[13] BF7 breached s 4 of the WPA by failing to pay Mr Do's wages when they were due. Under that provision an employer must pay the entire amount of wages to a worker when those wages become payable. The wages were due to Mr Do for work he did in April 2018. He spent several weeks pursuing his entitlement directly with the company, without success, before applying to the Authority for assistance. As a result BF7 was liable to a penalty imposed under s 13 of the WPA.

[14] Assessment of the appropriate level of such a penalty is guided by a four-step methodology recommended by the Employment Court.⁷ This assesses the scale of any breaches and the severity of the effect of breaches, accounts for any aggravating or ameliorating factors, considers the financial circumstances of the liable party and, finally, checks the overall proportionality of the outcome.

[15] Mr Do's case concerns a single breach but he was deprived of a significant amount of money on which he relied. An aggravating factor was BF7's pattern of poor business practice demonstrated by the other Authority determinations referred to earlier. No ameliorating factors were obvious and no information suggested BF7

⁶ Employment Relations Act 2000, s 173 and 174D.

⁷ See *Borsboom v Preet PVT Limited*, [2016] NZEmpC 143 at [137] – [151].

would be unable to pay a penalty. Weighing those factors I concluded a penalty of \$2000, that is ten per cent of the maximum permitted, was the least amount warranted for the breach. Checked against penalties awarded in similar cases I concluded a penalty at that level was proportionate to those cases, the amount withheld by BF7, and the severity of its effects on Mr Do. It was a sum appropriate to punish BF7 for its unexplained, deliberate and ongoing breach of an employment standard as well as to deter it and other employers from engaging in such behaviour in future.

[16] Under s 136 of the ERA penalties must be paid to the Authority and then by the Authority into a Crown bank account. However the Authority also has a discretionary power to order part of any penalty recovered to be paid to any person.⁸ In this case the effects on Mr Do of being deprived wages for which he had worked warranted an order for half of the penalty to be transferred to him once BF7 paid the due amount to the Authority.

[17] Within seven days of the date of this determination BF7 must pay to the Authority a penalty of \$2000 for its breach of s 4 of the WPA. On payment the Authority is to transfer \$1000 to Mr Do and \$1000 to the Crown account.

Referral to Labour Inspectorate

[18] The number of Authority determinations concerning former employees of BF7 raised the obvious concern that this may indicate wider problems in its compliance with employment standards. Accordingly it appears appropriate to draw this determination and the others referred to earlier to the attention of the Labour Inspectorate for consideration as to whether further inquiries might be warranted.

Robin Arthur
Member of the Employment Relations Authority

⁸ Employment Relations Act 2000, s 136(2).