



- (c) A penalty for breach of the Wages Protection Act 1983 pursuant to s.13(b) of the Wages Protection Act;
- (d) Interest on arrears of holiday pay alleged to be owing to employees of Lao Di;
- (e) Costs including the application fee on the lodging of the statement of problem.

[3] Ms Kim accepts that since the statement of problem was lodged and served on Lao Di, it has taken steps to comply with the enforceable undertaking and Ms Kim no longer seeks to have the problem resolved by way of a compliance order. Ms Kim still seeks the remaining orders set out in the statement of problem.

### **Preliminary matter**

[4] The parties' respective evidence in this matter was lodged and served pursuant to a notice of direction issued by the Authority on 28 October 2015.

[5] A review of that evidence by the Authority, the parties and the parties' representatives led to an agreement that this matter could be resolved on the papers and an investigation meeting would not be necessary. Accordingly, the parties' representatives lodged and served legal submissions in accordance with a further notice of direction issued by the Authority on 20 November 2015.

[6] Having received all of the relevant evidence and legal submissions from the parties' representatives, I now determine this matter on the papers. In accordance with s.174E of the Act, my written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but it does not record all of the evidence and submissions received.

### **Brief account of events giving rise to the employment relationship problem**

[7] In February 2014, the Ministry of Business, Innovation and Employment received a complaint through its Labour Contact Centre regarding Lao Di. That complaint alleged that migrant employees employed by Lao Di in the operation of its café/restaurant/karaoke bar (known as Ancestral) were not receiving their minimum employment entitlements such as minimum wage, access to their employment agreements, annual holidays and other leave entitlements.

[8] Ms Kim was assigned to investigate this complaint in March 2014.

[9] What followed in the course of Ms Kim's investigation was a workplace visit, interviews with employees, and various meetings with the directors of Lao Di. These investigations raised some concerns for Ms Kim as to whether Lao Di was meeting its obligations in terms of minimum employment entitlements to its employees. As a result, Ms Kim issued the directors of Lao Di with a formal notice pursuant to s.229 of the Act requiring Lao Di to provide to her copies of employment agreements, wage and time records and holiday and leave records for any employees employed by Lao Di.

[10] In April 2014, Ms Kim received from Lao Di various employment agreements, payslips and holiday and leave records for four of 15 employees.

[11] After reviewing the information, Ms Kim determined that she required further clarification in respect of the information provided and the employment practices of Lao Di. Two meetings were subsequently held with the directors of Lao Di, one on 9 June 2014 and one on 18 June 2014. In the course of those meetings, Ms Kim received further information and documentation from the directors of Lao Di.

[12] Ms Kim assessed that further information and documentation provided and formed the view that Lao Di was not paying its employees correctly in respect of their entitlement to alternative holidays when a public holiday was worked. It was also not clear that employees who received a salary received the correct payment for working a public holiday.

[13] As a result of this assessment, Ms Kim advised Lao Di on 3 September 2014 that the information provided was still insufficient for her to determine whether Lao Di was complying with minimum standard requirements. A further notice pursuant to s.229 of the Act was served on Lao Di requiring it to provide copies of employment agreements, wage and time records, holiday and leave records and any other documentation which records remuneration for all employees employed by Lao Di in the last six years.

[14] Lao Di's lawyers, Lane Neave, responded to this notice on behalf of Lao Di requesting an extension of time to comply with the provision of information pursuant to the notice. In any event, the documentation that Lao Di was able to provide in response to the notice was provided to Ms Kim on 26 September 2014.

[15] In addition to providing the information on behalf of Lao Di, Lane Neave requested a meeting with Ms Kim and this meeting was held on 14 October 2014. At this meeting, the parties discussed various employment obligations, minimum entitlement issues surrounding part time and casual employment which appeared to be relevant to Lao Di, Lao Di's recordkeeping practice, complaints that had been received regarding compliance with minimum standards and possible terms and conditions of an enforceable undertaking. It was accepted by Lane Neave that Lao Di had failed to fully comply with the notice issued as it was unable to provide all of the information requested regarding the employees who had been employed for the period of time in question.

[16] As a result of this admission and the other discussion at the meeting on 14 October 2014 the parties negotiated the terms of an enforceable undertaking in order to address the concerns that Ms Kim had about Lao Di's failure to meet minimum employment standards and entitlements.

[17] Various correspondence was exchanged between Ms Kim and Lane Neave in the course of those negotiations and eventually Ms Behrnes of Lane Neave agreed the terms of an enforceable undertaking with Ms Kim. Lao Di signed that enforceable undertaking on 15 November 2014 and Ms Kim countersigned the enforceable undertaking on 17 November 2014.

[18] The enforceable undertaking included the following obligations:

3.1 *The employer will rectify the breaches listed in section 2.1 of this undertaking and take the actions listed below, being ones that the Labour Inspector determines are appropriate having regard to the nature of those breaches:*

3.1.1 *The employer agrees to audit all existing wage, time, holiday and leave records and all information contained in the payroll system for all employees they employed since 15 September 2012 which was when the employer began trading their restaurant ("Ancestral") business; and*

3.1.2 *The employer agrees to ensure that minimum employment standards are met with regard to the employees':*

[1] *Annual holiday entitlements,*

[2] *Public holiday entitlements,*

[3] *Alternative holiday entitlements in lieu of public holidays worked,*

[4] *Sick leave entitlements; and*

3.1.3 *Where the employer accepts that arrears, alternative holidays and/or annual holidays are owed, the employer agrees to make payments to the employees*

*of any arrears assessed as due and reinstate any alternative holidays and/or annual holidays owing.*

*3.1.4 The employer agrees to undergo training on the use of the payroll system through their payroll provider (i.e. Ace Payroll) and remedy any payroll system issue(s) identified as a way to ensure compliance with minimum employment standards.*

*3.1.5 The employer agrees, for all current employees in whom the employer have "casual" employment, review the nature of their employment and ensure that their work is "intermittent" or "irregular" as defined by s.27 of the Holidays Act 2003 and assess whether the true nature of the employment relationship meets the requirements of s.27 of the Holidays Act 2003.*

[19] In order to comply with the requirements of the enforceable undertaking, Lao Di engaged Michelle Gilbert of Small Biz Support. Ms Gilbert undertook an audit on behalf of Lao Di of their accounts and employment records and also provided training to one of the directors to assist her with understanding minimum employment requirements and the recordkeeping obligations imposed upon Lao Di as an employer.

[20] Ms Gilbert's audit involved a review of the wage and time records of Lao Di in relation to all employees employed by it. Ms Gilbert assessed, for each employee, whether that employee had worked on a public holiday, whether that employee had been paid correctly for any work on a public holiday and whether that employee was owed any money either because he/she was paid short for working on a public holiday or because he/she was not given an alternative day in lieu.

[21] In addition, Ms Gilbert's audit assessed holiday pay owing to every employee on termination of employment and established whether that holiday pay had been paid or not.

[22] What Ms Gilbert also did in her audit was account for a meal deduction that Lao Di charged to each of its employees. This meal deduction was an \$8 charge for food and drink that employees were able to consume whilst working at Ancestral. Lao Di claims it had (and has) authority to take this meal deduction from wages. Lao Di also states that employees preferred to have this meal deduction taken from any final pay due on termination of employment rather than have it deducted from regular wage payments.

[23] The end result of Ms Gilbert's audit was a finding in respect of each employee as to whether there was a sum of money owed to him/her by Lao Di.

[24] Based on the audit Lao Di then paid any arrears owed to employees.

[25] In many cases, what the audit showed was that employees, who no longer worked for Lao Di, in fact owed money to it (when the offset for the meal deduction was applied). Lao Di chose not to pursue those employees for money owed to it.

[26] On 26 January 2014 Lao Di provided information to Ms Kim evidencing its compliance with the enforceable undertaking including a summary of the audit findings and the payments it had made to employees for arrears owed (as calculated by Ms Gilbert in her audit).

[27] In response to this, Ms Kim wanted to understand how the meal deduction was applied and whether Lao Di had authority to deduct such money from employees' wages (pursuant to the Wages Protection Act).

[28] There were various emails exchanged between Ms Kim and Ms Behrnes regarding the validity of the meal deduction and in particular whether Lao Di had the requisite consent. The end result of the email exchanges and the documentation provided indicated that Lao Di no longer had copies of written consents for the meal deductions for 24 employees who were no longer employed by it. It is, however, Lao Di's evidence that it did have written consents for all employees including the 24; it simply had not retained copies of the written consents (it being customary, in its view, to allow a leaving employee to take their employment agreement and related documents with him/her).

[29] It was Ms Kim's view that the failure to retain a copy of any written consent in respect of the meal deductions meant that there was no consent for the 24 employees and any deduction from any arrears of holiday pay and/or payment for an alternative holiday in lieu of working on a public holiday, was a breach of the Wages Protection Act.

[30] The last email exchange on this issue between Ms Behrnes and Ms Kim indicated Ms Kim's position (an email of 11 March 2015); Lao Di was unable to make the meal deductions from the arrears owing if it did not have written consent from the employees in question. It was Ms Kim's view that the enforceable undertaking had not been complied with and that Lao Di was still required to comply with all of the steps outlined in the enforceable undertaking. Ms Kim gave a deadline of 25 March 2015 for that compliance.

[31] Ms Behrnes, in an email on 20 March 2015, advised Ms Kim that Lao Di considered the requirements of the enforceable undertaking had been met. She provided a table showing employees' names, the status of whether an employment agreement was held on file and when payment of arrears had been made and how much. She also advised that a director of Lao Di confirmed that it did previously have employment agreements signed by all employees including a valid deduction clause consenting to the meal deduction. Ms Behrnes concluded that employees had not suffered any disadvantage in the meal deduction being made because it was much lower than the standard rate for meals and as a result many of the employees had in fact been overpaid because the meal deduction was not taken during employment but from their final pay and any amount now owing by an employee was not being pursued.

[32] Ms Behrnes also noted that Lao Di had treated this matter very seriously, it had engaged a consultant at significant expense and it had taken legal advice to ensure that it had all systems in place to meet its requirements under law. Her final statement in the email was:

*If this matter is still of concern to you, can I suggest we discuss how to resolve these issues in both parties' interests?*

[33] This is the last exchange between Ms Kim and Ms Behrnes in relation to this matter and the next action taken by Ms Kim was to lodge the statement of problem.

[34] In response to the statement of problem being served on it, Lao Di then paid the amount of arrears in dispute (being the various meal deductions it had applied) to the relevant employees. On its own evidence, Lao Di has gone to significant steps to locate former employees and ensure that money it believed it was otherwise entitled to deduct (by way of the meal deduction) was actually paid to those employees.

[35] As a result of Lao Di making those payments, Ms Kim is now satisfied that the enforceable undertaking has been met and, as I stated earlier, a compliance order is no longer sought in respect of compliance with the enforceable undertaking, but Ms Kim still seeks penalties, interest and costs.

### **Issues**

[36] In order to determine whether a penalty or penalties should be imposed against Lao Di, I must resolve the following issues:

- (a) Has there been a breach of the enforceable undertaking by Lao Di;
- (b) Has there been a breach of the Wages Protection Act by Lao Di;
- (c) If there has been a breach is it appropriate to award a penalty (or penalties if there have been breaches of both the enforceable undertaking and the Wages Protection Act);
- (d) If a penalty is appropriate, what is the quantum of such penalty (or penalties); and
- (e) Should the Authority award interest on arrears owed (this being the arrears of holiday pay and payment in lieu of an alternative day's holiday for working on a public holiday that had been taken by deduction)?

### **Breach of the Enforceable Undertaking**

[37] In the notice of direction I issued on 20 November 2015, I asked counsel for the applicant to identify what breach of the enforceable undertaking was alleged, in her submissions, as there appeared to be various stages of compliance and potential breach.

[38] In her submissions, counsel for the applicant has said:

*As at 26 January 2015, the respondent had failed to comply with the enforceable undertaking in that they had not paid the arrears of holiday entitlements that were outstanding to all of the identified 24 employees.*

[39] I am grateful for the clarity and precision of that statement as it has enabled me to determine whether there has in fact been a breach of the enforceable undertaking as alleged.

[40] Of the enforceable undertaking actions (which I have quoted above) the only provision which is relevant to a failure to pay arrears of holiday entitlements is clause 3.1.3. That clause states:

*3.1.3 Where the employer **accepts** that arrears, alternative holidays and/or annual holidays are owed, the employer agrees to make payments to the employees of any arrears assessed as due and reinstate any alternative holidays and/or annual holidays owing. [emphasis added]*

[41] So the issue of whether Lao Di had breached the enforceable undertaking because it had not paid arrears of holiday entitlements turns on the question of whether it accepted that such arrears were owed and despite this did not make payment as it undertook to do by clause 3.1.3.

[42] Lao Di has paid two sets of payments in respect of “arrears, alternative holidays and/or annual holidays” and both payments were made when it accepted that such arrears were owed.

[43] First, Lao Di paid the arrears that Ms Gilbert’s audit concluded were owed. It may be that the result of that audit was flawed because the meal deduction could not be applied (a matter I will deal with below), but that is of no consequence for the enforceable undertaking. Lao Di’s evidence is that it acted in good faith on that audit and paid what it accepted was owed to employees as it undertook to do.

[44] After those payments were made there was an exchange of correspondence in which Ms Kim raised issues about whether the amount paid was the correct amount of arrears owed to employees. Ms Kim questioned whether Lao Di had correctly applied the meal deductions from any arrears owed as it could not produce written consents for the deductions.

[45] The last email exchanged on this matter before the statement of problem was issued was on behalf of Lao Di where Ms Behrnes stated, quite clearly, that Lao Di believed it was entitled to deduct the money as it had consents to make the deductions and therefore it had met the requirements of the enforceable undertaking by making payment of arrears owing. Ms Behrnes offered to discuss this further to seek resolution if Ms Kim did not accept Lao Di’s position.

[46] Ms Kim did not respond to that other than to issue the statement of problem. In response to the statement of problem, it appears that Lao Di then accepted that it would pay the amount of arrears in dispute. So, at this stage Lao Di made its second payment of arrears owed; accepting, at that point, Ms Kim’s position in respect of the meal deductions.

[47] On this basis, I do not accept that Lao Di has breached the enforceable undertaking by failing to pay arrears owed. At the time it paid arrears owed to

employees it paid what it accepted as owing in compliance with clause 3.1.3 of the enforceable undertaking.

[48] Even if I am wrong on this matter I would not be persuaded to impose a penalty for a breach of the enforceable undertaking in these circumstances as I believe the failure to pay arrears, giving rise to the breach, was inadvertent, Lao Di relying on Ms Gilbert's audit, the belief it had a right to deduct money as it had written consents for such deductions, and presumably relying on legal advice from senior employment counsel, Ms Behrnes.

[49] In all of the circumstances, it is inappropriate that Lao Di be penalised when it has gone to significant efforts to understand what is owed, made deductions in accordance with what it was directed to do by its HR adviser and then, when it became clear that Ms Kim would not accept that, it accepted her position and made payment of the further arrears.

### **Breach of the Wages Protection Act**

[50] The Wages Protection Act provides:

- 4 ***No deductions from wages except in accordance with Act***  
*Subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*
- 5 ***Deductions with workers' consent***
  - (1) *An employer may for any lawful purpose –*
    - (a) *With the written consent of a worker; or*
    - (b) *On the written request of a worker –*  
*make deductions from wages payable to that worker.*

....

[51] Ms Kim's position is that the meal deduction applied by Lao Di to the final payments due to employees is a breach of these provisions because the exception at s.5 of the Wages Protection Act does not apply.

[52] The first consideration is: does s.5 of the Wages Protection Act apply to holiday pay payable on termination of employment rather than simply wages? Wages is defined in the Wages Protection Act as including wages and salary and other amounts payable but it does not refer to holiday pay which is payable at the termination of employment. However, s.86 of the Holidays Act 2003 provides that

holiday pay is to be treated as wages for the purposes of deductions that an employer may be authorised or obliged to make for income tax or any other purpose.

[53] Applying s.86 of the Holidays Act to the Wages Protection Act means that if the employer has written consent to make a deduction from wages that deduction may be taken from holiday pay so long as the written consent is valid<sup>1</sup>.

[54] The second consideration is then: did Lao Di have written consents to take the meal deductions from wages?

[55] It is accepted that Lao Di was unable to produce written employment agreements including any written consents to deduct money from wages for 24 employees who have left its employment. As indicated above, the reason for this is because Lao Di honoured a cultural tradition and allowed departing employees to take their employment agreements and ancillary documentation with them. However, the evidence the directors have given on behalf of Lao Di, evidence which is untested by the applicant, is that Lao Di did indeed have written consents to deduct amounts owing to it, including the meal deductions, from wages.

[56] Whilst counsel for the applicant has attempted to persuade me in her submissions that the absence of any written consents at this stage suggests there was never any written consents, I cannot accept that. I accept on the unchallenged evidence before me that Lao Di did indeed have written consents to take the meal deductions from wages.

[57] The third consideration is then: do the written consents cover the meal deductions that were made by Lao Di?

[58] Lao Di's evidence is that the form of consent it had for the deductions made is the same as the current consent it has with existing employees. This consent is:

*I [ ], expressly give my written consent to Lao Di Fang Limited deducting \$8.00 per shift from my [weekly/fortnightly/monthly] wages in*

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<sup>1</sup> In *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644 (CA) the Court of Appeal stated in obiter at p332 that while s.2 of the Wages Protection Act does not expressly include holiday pay in the definition of wages, s.22 of the Holidays Act 1981 does (being similar to s.86 of the Holidays Act 2003) and there is no basis for reading down s.22 as not applying for the purposes of the Wages Protection Act.

*respect of the food or refreshments I choose to consume during each shift, as per the records kept.*

*Such consent is given pursuant to the Wages protection Act 1983. I understand that a copy of my written consent will be kept with my Individual Employment Agreement.*

[59] Lao Di has also stated that employees preferred any meal deductions to be made at the end of their employment. I take from this evidence that despite the terms of the consent which clearly anticipates that the meal deductions would be applied to the regular wage or salary payment there was an agreement that the meal deductions would accumulate over the term of an employee's employment and be deducted from any final payment owed at termination.

[60] Of course the problem with this arrangement, even if agreed with the employees, is the written consent does not cover this. Whilst it may seem pedantic the law is clear on this point. Deductions made in reliance on s.5 of the Wages Protection Act must be made against a clear and specific consent authorising that deduction (or those types of deductions if the deduction is ongoing).

[61] My conclusion is that notwithstanding that Lao Di had written consents to take the meal deductions from wages and that as a matter of law a written consent can apply to holiday pay, the consents in this case did not authorise the deductions to be made in these circumstances i.e. from any holiday pay owed to employees on termination of employment. Therefore, Lao Di has breached the Wages Protection Act by making the deductions it has.

### **Penalty**

[62] The next issue is, is it appropriate to award a penalty for this breach of the Wages Protection Act?

[63] I have considered the relevant factors and have reached the following conclusion about the breach :

- a. The breach by Lao Di was largely inadvertent. Lao Di acted in a way that it genuinely believed it was entitled to. The evidence shows Lao Di believed it had employees' consent to deduct the money it did and Lao Di relied on its HR advisor and her audit to determine what should be paid to its employees.

- b. The evidence before me is that employees agreed to the deduction that was made. There is little or no harm that has been caused to any employees and in many respects they have now received a bonus payment as a result of Ms Kim's actions;
- c. Lao Di is remorseful for what has occurred and has gone to significant lengths (including expense) to remedy any failing and understand its obligations;
- d. Given the circumstances I believe little will be achieved by way of deterrence if a penalty is imposed nor do I consider this is a breach that requires a punishment.

[64] In these circumstances I will not order a penalty against Lao Di for its breach of the Wages Protection Act.

### **Interest**

[65] For the reason expressed in paragraph [63] (b) I do not consider it necessary or appropriate to award interest to the employees for any arrears that have now been paid.

### **Costs**

[66] Costs are reserved. I encourage the parties to determine the question of costs between them and suggest that this is a case where it is appropriate that costs lie where they fall, i.e. each party bears its own costs.

[67] Ms Kim's application was well founded in terms of the compliance sought as I have found that Lao Di was not entitled to make the deductions it did and the arrears were rightly paid to the employees in question.

[68] That said, the lodging of a statement of problem may have been premature given the email correspondence with Ms Behrnes and it is possible that further discussion between Ms Behrnes and Ms Kim could have resolved this matter without the need for intervention by the Authority.

[69] Ultimately, of course, Lao Di has been successful in defending the application for penalties.

[70] If the parties are unable to agree costs then Lao Di, as the successful party in terms of my determination, may file submissions on costs by 29 January 2016 and Ms Kim may file submissions by 12 February 2016.

Peter van Keulen  
Member of the Employment Relations Authority