

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 337
3017115

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS, INNOVATION
 AND EMPLOYMENT
 Applicant

AND EDUCASIA MEDIA LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Rebecca Denmead for Applicant
 Zhishen Cui for Respondent

Investigation Meeting: 25 and 26 October 2017

Determination: 26 October 2017

DETERMINATION OF THE AUTHORITY

- A. Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Ms Shu the sum of \$50,000 in recovery of the premium plus interest within 28 days of the date of this determination.**
- B. Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Ms Shu the sum of \$27,766.80 plus interest within 28 days of the date of this determination.**
- C. Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Ms Xu the sum of \$5,267.56 plus interest within 28 days of the date of this determination.**

- D. Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Mr Hou the sum of \$4,115.63 plus interest within 28 days of the date of this determination.**

- E. Educasia Media Limited is ordered to pay penalties of \$54,000 within 28 days of the date of this determination.**

- F. Educasia Media Limited is ordered to pay to the Labour Inspector costs in the sum of \$2,321.56 within 28 days of the date of this determination.**

Procedural background

[1] Educasia Media Limited trades as Asia Pacific Times. It did not engage in the Authority's process until the day of the investigation meeting.

[2] By way of statement of problem lodged in the Authority on 10 August 2017 the Labour Inspector sought penalties for breaches of minimum employment standards, payment of arrears of wages and repayment of a premium.

[3] The statement of problem was served on Educasia Media and signed for by Daniel Shy at 10.29am. Mr Zhishen (Oscar) Cui, the sole shareholder and managing director for Educasia emailed the Authority on 7 September and requested a second copy of the statement of problem. This was emailed to Mr Cui's email address that same day.

[4] No statement in reply was received from Educasia Media. On 21 September I issued a Notice of Direction setting out a proposal that the matter be dealt with by way of investigation meeting today. Included with the Notice of Direction was a direction to Educasia Media that any correspondence to the Authority must include an application for leave to respond to the matter.¹

[5] The Notice of Direction and Notice of Investigation Meeting were served on Educasia on 22 September and signed for by "Sally". The parties were advised that

¹ See Employment Relations Regulations 2000, Regulation 8(3).

any objections to the proposal must be lodged within 7 days. No objections were received.

[6] On the day of the investigation meeting Mr Cui arrived at the scheduled time. He made an oral application for leave to respond to the Labour Inspector's application which was granted.

Employment relationship problem

[7] Ms Huizi Shu, Ms Wei Xu and Mr Jiawei Hou were or are employees of Educasia Media. The Labour Inspector received a complaint from Ms Shu claiming she had paid \$50,000 to Educasia in order to secure employment and paid Educasia money which was then paid back to her partially as wages after a deduction was made for PAYE.

[8] The Labour Inspector investigated the complaint and identified a number of serious concerns with respect to not only Ms Shu's employment situation but that of Ms Xu and Mr Hou.

[9] The Labour Inspector also found Educasia had failed to maintain records as required under the Employment Relations Act (the Act), Holidays Act 2003 and had failed to pay minimum wages and holiday pay.

Issues

[10] In order to resolve this matter I must consider and determine the following issues:

- a) In respect of Ms Shu:
 - i. Was a premium paid to secure employment?
 - ii. Are arrears of wages owed?
 - iii. Is holiday pay owed?

- b) In respect of Ms Xu:
 - i. Are arrears of wages owed?
 - ii. Is holiday pay owed?

- c) In respect of Mr Hou:

- i. Are arrears of wages owed?
 - ii. Is holiday pay owed?
- d) Should interest be awarded on the premium and the outstanding minimum payments?
- e) Should penalties be imposed for breaches of:
- i. The Wages Protection Act;
 - ii. Minimum Wage Act;
 - iii. Holidays Act;
 - iv. Employment Relations Act;
- f) What if any portion of the penalties should be awarded to the employees affected by the breaches?

[11] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from the Labour Inspector but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Ms Shu

Premium

[12] Ms Shu worked for Educasia from 24 August 2015 to 26 July 2016. She contacted Mr Cui through a mutual friend and enquired about employment opportunities. Mr Cui initially declined to employ Ms Shu. Subsequently Mr Cui agreed to offer Ms Shu employment on the basis that she pay him \$50,000.

[13] Ms Shu made two large withdrawals from her bank account. The first was on 25 August 2015 in the amount of \$30,000. The second was for \$20,000 on 25 September 2015. When Ms Shu made the withdrawals Mr Cui accompanied her to the bank and she handed him the cash after making the withdrawals.

[14] On 2 August 2016 Ms Shu resigned from her employment. She met with Mr Cui and asked for a refund of the \$50,000. Unbeknown to Mr Cui this conversation was recorded. The Authority and Mr Cui have been provided with a copy of the translated transcript of the recorded meeting.

[15] Mr Cui refused to refund the \$50,000. He offered to refund Ms Shu about \$17,000 if she was able to find another employee who would pay a premium for employment. Mr Cui told Ms Shu that the company had three shareholders who had each benefited from the \$50,000 payment in equal shares.

[16] The information that there were three shareholders at the time Ms Shu paid the \$50,000 was untrue. A review of the companies register shows that there were two listed shareholders until 18 January 2016. On 18 January 2016 the Companies Register was amended removing one shareholder and showing Mr Cui as the sole shareholder of Educasia.

[17] Two weeks after their meeting Ms Shu returned to China where she is now residing.

[18] Section 12A(1) of the WPA states:

No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[19] The normal understanding a premium imports some consideration paid or demanded as a price of a contract.²

[20] I find Mr Cui's receipt of \$50,000 from Ms Shu, in exchange for employment, amounts to an employment premium in breach of s 12A(1) of the WPA.

[21] Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Ms Shu the sum of \$50,000 in recovery of the premium plus interest within 28 days of the date of this determination.

Arrears of wages including holiday pay

[22] The Labour Inspector says Ms Shu was not paid wages during her employment, did not receive holiday pay when the employment relationship ended and was not paid for public holidays not worked, during her employment.

² *Sears v Attorney-General* [1994] 2 ERNZ 39 at 61.

[23] After starting work for Educasia Ms Shu paid regular sums of money to Mr Cui in advance of her wages being paid. The money was advanced to her by her parents who resided in China. Mr Cui deposited the cash into his account and paid the money to Ms Shu after deducting PAYE.

[24] Initially the amount Ms Shu paid to Mr Cui was based on the minimum wage for 37.5 hours each week. This increased to \$18.50 in March 2016. I have concluded that Mr Cui was aware the arrangement entered into with Ms Shu was out of the ordinary. He told Ms Shu that she should vary the amounts she withdrew from her bank account to avoid any suspicions by Immigration New Zealand when she made her residency application.

[25] Taking on that advice Ms Shu transferred money into her boyfriend's account to hide the fact that she was paying her own salary. She also had an account opened in the name of a friend.

[26] I am satisfied Educasia has failed to meet its legal obligations to pay Ms Shu at least the minimum rate of pay for all hours she worked and has failed to pay holiday pay including annual holidays and public holidays not worked.

[27] Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Ms Shu the sum of \$27,766.80 plus interest. The sum is made up as follows:

\$24,210 for unpaid wages;
\$2,056.80 for unpaid holiday pay; and
\$1,500 for public holidays not worked.

[28] Payment is to be made within 28 days of the date of this determination.

Ms Xu

[29] Ms Xu moved to Hamilton in May 2016 and started working for Educasia. The terms of Ms Xu's employment were set out in a written employment agreement. She works Monday to Friday inclusive from 9.30 am to 5 pm each day.

[30] From 23 May 2016 to 27 June 2016 Ms Xu received training. During this period she was responsible for the graphic design work for the travel, overseas

studies, immigration and entertainment sections of the paper. Her work was checked by another part time graphic designer before it was published. Ms Xu was not paid during this training period.

[31] The Labour Inspector has established to my satisfaction that Ms Xu worked from 23 May to 27 June without payment of wages. The Labour Inspector is entitled to recover the sum of \$2,859.38 on her behalf.

[32] Educasia's office closed down from 21 December 2016 until 18 January 2017. Ms Xu had not worked long enough to be entitled to annual holidays for this period. In these circumstances the Holidays Act requires an employer to pay an employee 8% of the employee's gross earnings since the commencement of the employee's employment.³

[33] Ms Xu was not paid 8% of her gross earnings at the commencement of the closedown period. The Labour Inspector is entitled to recover the sum of \$1,693.80 from Educasia on Ms Xu's behalf.

[34] Ms Xu did not receive payment for any public holiday days that fell on days she would otherwise have worked but did not work. The Labour Inspector has established there were six public holidays falling within the period of the Labour Inspector's claims. The Labour Inspector is entitled to recover the sum of \$714.38 from Educasia on Ms Xu's behalf.

[35] Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Ms Xu the sum of \$5,267.56 plus interest within 28 days of the date of this determination.

Mr Hou

[36] Mr Hou started working for Educasia in April 2016 as an intern undertaking work on a part time basis while he completed a Master's degree at University. There was no expectation by Mr Hou that he would receive payment for this period and the Labour Inspector has made no claim for payment of wages for this period.

³ Holidays Act 2003 s 34.

[37] Mr Hou returned to China in October 2016. He returned to New Zealand in March 2017 and started working for Educaisia as an Editor in April 2017. He worked 37.5 hours each week but was not paid.

[38] The Labour Inspector has established to my satisfaction that Mr Hou worked from 2 April to 15 May 2017 without payment of wages. The Labour Inspector is entitled to recover the sum of \$3,879.38 on his behalf.

[39] Between 2 April and 15 May Mr Hou did not receive payment for the two public holiday days that fell on days he would otherwise have worked but did not work. The Labour Inspector is entitled to recover the sum of \$236.25 from Educasia on Mr Hou's behalf.

[40] Educasia Media Limited is ordered to pay to the Labour Inspector for the use of Mr Hou the sum of \$4,115.63 plus interest within 28 days of the date of this determination.

Interest

[41] The Labour Inspector has applied for interest to be paid on the premium and the arrears. It is appropriate that interest is paid. Interest is to be paid at the rate of 5% per annum from the date of this determination until the date of payment.

Penalties

[42] Failure to comply with minimum standard employment obligations makes an employer liable to penalty actions brought by a Labour Inspector. Determination of a penalty claim is an exercise of applying the established facts to the principles set down by the Employment Court in *Borsboom v Preet Pty Ltd*.⁴ This case sets out a four step process to be applied by the Authority.

Step one – nature and number of breaches

[43] This step requires me to identify the nature and number of applicable breaches. If there are similar or identical multiple breaches committed by Educasia I may treat these as a single penalty in respect to each separate affected employee. This approach does not encompass breaches of different statutes.

⁴ [2016] NZEmpC 143.

[44] There are three employees affected by Educasia's breaches of minimum standards. I am satisfied all three employees are vulnerable employees.

[45] The Labour Inspector has identified the following breaches have been identified:

- a) breach of s 12A of the WPA in seeking the payment of a premium from Ms Shu;
- b) failure to pay minimum wages to Ms Shu, Ms Xu and Mr Hou under s 6 of the MWA amounting to \$30,948.76 ;
- c) failure to pay holiday pay to Ms Shu under ss 23 and 49 of the Holidays Act, Ms Xu under ss 34 and 49 of the Holidays Act and Mr Hou under s 49 of the Holidays Act amounting to \$6,201.23;
- d) failure to keep wage and time records for the three employees under s 130 of the Act; and
- e) failure to keep holiday and leave records for the three employees under s 80 of the Holidays Act.

[46] The total breaches number 15.

Breach of the WPA

[47] The payment of a premium for employment is a breach of s 12A of the WPA. Section 12A is part of a suite of provisions designed to prevent exploitation of vulnerable employees or potential employees.⁵

[48] The Labour Inspector has established that Educasia sought and received a premium in respect of Ms Shu's employment. This breach amounts to a provisional total penalty of \$20,000.

⁵ *Labour Inspector v Tech 5 Recruitment Limited* [2016] NZEmpC 167 at [20].

Breaches of the MWA

[49] The Labour Inspector has established Educasia has failed to pay at least the minimum wage to Ms Shu, Ms Xu and Mr Hou. The failure to pay employees at least the minimum wage for all hours worked is a serious matter. It deprives the employees of income on an ongoing basis and allows the employer to profit from its own breach.

[50] Three breaches amounts to a provisional total of \$60,000.

Failure to pay holiday pay

[51] The Labour Inspector has established Educasia has failed to pay holiday pay as required by the Holidays Act. Ms Shu and Ms Xu did not receive their entitlements under two sections of the Holidays Act and Mr Hou under one section of the Holidays Act. This equates to five breaches which amounts to a provisional total of \$100,000.

Breach of the Employment Relations Act

[52] The Labour Inspector has established Educasia has failed to keep wage and time records as required by s 130 of the Act for the three employees. This equates to three breaches which amounts to a provisional total of \$60,000.

Breach of the Holidays Act

[53] The Labour Inspector has established Educasia has failed to keep holiday and leave records as required by s 130 of the Act for the three employees. This equates to three breaches which amounts to a provisional total of \$60,000.

Globalisation of the breaches

[54] After Step One Educasia is liable to a total maximum for provisional penalties of \$300,000.

[55] The Court in *Preet* held:⁶

Where there are materially similar or even identical multiple breaches committed by a defendant, these may be treated as making that defendant liable for a single penalty in respect of each separate affected employee. We are attracted by the Australian legislation's phrase "single course of conduct" to describe such situations. This approach counts as a single contravention, one that is committed by the same person and the contravention "arose out of a course of conduct by the person." That single course of conduct would not, however, encompass breaches of other Acts, for example

⁶ Ibid at [139].

breaches of both the Minimum Wage Act and the Holidays Act in respect of the same employee.

[56] The breach of the WPA in respect of Ms Shu was one breach and will not be globalised. The provisional penalty for this breach remains at \$20,000.

[57] Following the Court's approach I will treat the breaches of the MWA as a single course of conduct with respect to the failure to pay minimum wages for each of the three employees. This will have no effect on the total provisional penalties which will remain at \$60,000.

[58] I have globalised the breaches of the Holidays Act for the three employees affected by Educasia's failure to pay annual holidays and public holidays in accordance with the Act. The provisional penalties for the breaches of the Holidays Act for the three employees will be reduced to \$60,000.

[59] I have also globalised the failure to keep records under the Employment Relations Act as a continuing breach for each of the three employees. There is no change to this provisional penalty total which remains at \$60,000.

[60] I have globalised the failure to keep records under the Holidays Act as a continuing breach for each of the three employees. There is no change to the provisional penalty total which remains at \$60,000.

[61] At the end of step one the provisional penalties amount to \$260,000. The inability to globalise penalties further than I have already has led to an inflationary effect which is disproportionately large. I will deal with the inflationary effect at step four.

Step two – severity of breaches

[62] This step requires me to assess the severity of the breaches and allows me to make adjustments for aggravating and mitigating factors in relation to each breach.

[63] The premium sought by Mr Cui in relation to Ms Shu is an aggravating factor which I will take into account. Ms Shu relied on funds being transferred from her parents in China to pay the premium to Mr Cui. Mr Cui accompanied Ms Shu to the bank on the two occasions when she withdrew \$30,000 and then \$20,000 as payment

of the premium. I have no hesitation in finding Ms Shu was in a vulnerable position and Mr Cui took advantage of her.

[64] Mr Cui's actions warrant the imposition of a penalty at the top end of the scale. It is not appropriate to reduce the penalty for breach of s 12 of the WPA at this point which remains at \$20,000.

[65] The failure to pay minimum standards is serious and has resulted in Educasia being ordered to pay \$87,149.99. The orders include the payment of outstanding minimum wages, holiday pay and reimbursement of the premium to Ms Shu to rectify its breaches. This is a significant sum of money.

[66] There is an element of vulnerability in all three employees affected by the breaches. That Ms Shu effectively paid her own wages is an aggravating factor which I will take into account. I consider it appropriate to reduce each of the remaining elements as follows:

- a) The failure to pay minimum wages is the more serious breach of the remaining elements. The penalty can be reduced by 30 per cent amounting to \$42,000.
- b) The failure to pay holiday pay and public holidays can be reduced by 40% per cent amounting to \$36,000;
- c) The failure to keep wages and time records can be reduced by 50 per cent amounting to \$30,000; and
- d) The failure to keep holiday and leave records can be reduced by 50 per cent amounting to \$30,000.

[67] In the absence of any mitigating circumstances it is not appropriate to make any further reductions leaving total provisional penalties of \$158,000.

[68] I have accepted the Labour Inspector's submissions that a 20 percent reduction should be applied in light of Educasia's initial co-operation with the Labour Inspector's investigation. I have applied the 20 percent reduction to the minimum

standards breaches but have determined it is not appropriate to reduce the penalty for the breach of the WPA in respect of the premium.

[69] The total liability for provisional penalties at the end of step two is \$130,400.

Step 3 - Means and ability of Educasia to pay

[70] I must now consider the means and ability of Educasia to pay the penalties reached under Step 2.

[71] Educasia continues to trade. Mr Cui has provided copies of Educasia's financial statements for the years ending 31 March 2016 and 2017. These statements show that Educasia is not in a strong financial position. However, Educasia has benefited by paying its employee's less than the law allows.

[72] Educasia's ability to pay will be taken into account when I deal with Mr Cui's application for any penalties to be paid by instalment.

Step 4 – proportionality of outcome

[73] The Authority must impose a penalty at a level that signals its disapproval of the conduct of Educasia in not meeting its minimum standards obligations and which acts as a deterrent to Educasia and other employers who may not be minded to meet their obligations.

[74] The penalties imposed should be proportionate to the amount of money unlawfully withheld.⁷ The total amount unlawfully withheld by Educasia was \$87,149.99.

[75] At this point in the exercise provisional penalties stand at \$130,400. The total of unlawfully withheld minimum wages and holiday pay is approximately 67 per cent of this amount. This is disproportionate.

[76] The proportionality test requires the Authority to assess other relevant cases to ensure the result is not inconsistent with others.⁸ A review of the database of penalties imposed for breaches of minimum standards maintained by the Ministry of

⁷ Ibid at [190].

⁸ Ibid at [148].

Business Innovation and Employment shows that other similar cases have had an overall reduction in penalties resulting in a total penalty equating to between 11 and 25 percent of the total potential penalties.

[77] Applying the mid-point of 18 percent I consider the following penalties appropriate in this case:

- a) Breach of s 12 of the WPA \$3,600;
- b) Breaches of the MWA \$10,800;
- c) Breaches of the Holidays Act \$18,000;
- d) Failure to keep wage and time records \$10,800;
- e) Failure to keep holiday and leave records \$10,800.

[78] Educasia Media Limited is ordered to pay total penalties of \$54,000.

[79] It is appropriate that part of the penalties be paid to the affected employees.

[80] The penalty of \$3,600 being for the breach of the WPA is to be paid to the Labour Inspector for the use of Ms Shu.

[81] An amount of \$25,200 (50% of the balance) is to be paid to the Labour Inspector for the use of Ms Shu, Ms Xu and Mr Hou equally.

[82] The remaining \$25,200 is to be paid to the Employment Relations Authority. The Authority will then pay this sum into a crown bank account.

[83] At the investigation meeting Mr Cui applied for an order that the payment of the penalties be made by instalment. The Authority may order payment by instalments, but only if the financial position of the employer requires it. In support of his application Mr Cui has provided documents he asserts are the financial statements for Educasia.

[84] The Labour Inspector opposes the application and says the financial records are unreliable.

[85] The records have not been signed by either Mr Cui as director or the person compiling the statements. There are a number of anomalies with the records. For

example the name of the business has not been recorded accurately. The expenses for “Light Power & Heating” have reduced from \$696 in 2016 to \$103 in 2017 and office expenses have reduced to \$8 in 2017 from \$381 for the previous year.

[86] I have accepted the submissions by the Labour Inspector that these records may not be a true record of the financial state of the company. The application to have the penalties paid by instalments is declined.

Costs

[87] The Labour Inspector seeks a contribution to its costs. It is appropriate that costs follow the event. The investigation meeting lasted half a day. On the basis of the daily tariff of \$4,500 an appropriate reimbursement for costs is \$2,250. The Labour Inspector is also entitled to reimbursement of the filing fee of \$71.56.

[88] Educasia Media Limited is ordered to pay to the Labour Inspector the sum of \$2,321.56 for costs within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority