

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 99  
5557038

BETWEEN BRIDGET ZONNEVELD  
(Labour Inspector)  
Applicant  
A N D MAUDAARA LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Angela Graham, Counsel for the Applicant  
Dilan De Silva, Advocate for the Respondent

Investigation Meeting: 8 July 2015 at Christchurch

Date of Determination: 17 July 2015

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**DETERMINATION OF THE AUTHORITY**

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**Disposition of this matter**

[1] At the conclusion of my investigation meeting into this matter, I retired and reconvened 20 minutes later to give an oral determination in respect to all of the matters in dispute between the parties except the allegation that the respondent employer (Maudaara) had exacted a premium from one of its employees, Mr Dissanayake and the subsidiary question of whether, if a premium was found, penalties should apply.

[2] In respect to all of the other matters identified by the applicant Labour Inspector (Ms Zonneveld), the Authority gave an oral decision and this determination records the substance of that.

**Employment relationship problem**

[3] Ms Zonneveld alleges that Maudaara extracted a premium under s.12A of the Wages Protection Act 1983 from its employer, Darshana Dissanayake, in respect to his employment by Maudaara, that in consequence penalties should be imposed by the Authority, that Maudaara also failed to pay the minimum wage and/or accurate holiday pay to certain employees and that penalties should apply in those regards, and that Maudaara failed to keep proper wage, time and holiday leave records and that penalties should apply in that regard also.

[4] Maudaara deny absolutely the allegation that they extracted a premium from Mr Dissanayake for his employment, in consequence resist the penalties claim in that regard, but concede the failure to pay minimum wage and holiday pay entitlements correctly and the failure to maintain correct wage, time and holiday records, but again resist the application for penalties.

[5] Mr Dissanayake commenced employment for Maudaara on 1 November 2013. He was in New Zealand on a work visa and had previously worked for another entity in Auckland. He was introduced to Mr De Silva by an intermediary (another Sri Lankan national, resident in New Zealand).

[6] Prior to commencing employment with Maudaara, Mr Dissanayake returned home for an extended visit from July 2013 to September 2013. Prior to leaving the country, he had given notice to his Auckland employer with the intention of returning to New Zealand to take up the employment offered to him by Maudaara. As a consequence, he returned into New Zealand through Christchurch international airport rather than through Auckland international airport.

[7] On his return to New Zealand, he was picked up by immigration officials who identified that his work visa related to an Auckland employer and not a Christchurch area employer and there was some immediate confusion about whether he was going to be allowed to remain in this country.

[8] This confusion appears to have been resolved more or less satisfactorily with the assistance of Mr De Silva and Mr Dissanayake duly commenced his duties, initially as assistant manager.

[9] Then, according to Ms Zonneveld, from 30 December 2013 down to 5 June 2014 payments totalling a net amount of \$9,724 were made by Mr Dissanayake to Maudaara.

[10] It is common ground that those payments were made from Mr Dissanayake's bank account to Maudaara's bank account, but the purpose of those payments is not agreed. The Labour Inspector characterises the payments as a premium under s.12A of the Wages Protection Act, while Maudaara says that they were simply a variety of transactions unrelated to the employment relationship for a variety of different purposes.

[11] Maudaara contend that the purposes for which these payments were made include sending money home to Sri Lanka, where it is alleged that Mr Dissanayake and Mr De Silva effectively amalgamated common funds to send back to their home country so as to minimise fees on the various transactions.

[12] In addition, Mr Dissanayake maintains that some of the payments from him were for various supplies (in effect shopping) because Mr Dissanayake was based in Hamner Springs at the accommodation property and Mr De Silva was in Christchurch.

[13] In addition, Mr De Silva maintained that some, anyway, of the payments were in the nature of loans, that they were private arrangements between Mr Dissanayake and Mr De Silva and they were made by Mr Dissanayake to Mr De Silva and/or Maudaara to assist Maudaara's precarious cashflow.

[14] The Labour Inspector's counsel and I both asked Mr Dissanayake about these payments at the investigation meeting. It is appropriate that I observe first that in the interviews recorded by the Labour Inspector with Mr Dissanayake in preparation for the investigation meeting, he, on the transcripts provided to me, appeared to make very clear statements that effectively what he was doing was lending money to his employer so that his employer (who acknowledged that he was in financial difficulty) would then pay the same money back to Mr Dissanayake as wages, a kind of inverse of the notion of a virtuous circle.

[15] However, at the investigation meeting, Mr Dissanayake rather backed away from those observations, making it clear that Mr De Silva was using the money for a variety of purposes and not just to pay him his wages.

[16] That said, Mr Dissanayake also made it clear that it was very difficult to get work in New Zealand for “an Asian person” but he was unable to offer any comment on what might have happened if he had been unable to assist his employer by making these so called advances.

[17] He told me that he “*felt some responsibility to help the business*” because he had the ability to do so, principally because the nature of his employment meant that he worked rent free and his only costs effectively were food.

[18] I asked Mr Dissanayake to look at the schedule of the payments made from his account to Maudaara and he acknowledged that the schedule was correct, but he was unable to remember the detail of any of the payments.

[19] Even when I specifically put to him an exchange in one of the transcripts of the interview between himself and Ms Zonneveld which concerned a particular pair of payments that he made, he was unable to be specific, although his recollection when he spoke to Ms Zonneveld appeared to be much better.

[20] The particular transaction I refer to involved two payments of wages made to him by the employer and then within three days two payments of similar quantum were made back to the employer by Mr Dissanayake.

[21] When I asked Mr Dissanayake what he concluded from all of this, he was very clear that he had not paid Mr De Silva or Maudaara money to either secure or maintain his employment, and that at best he had loaned Mr De Silva on a personal basis “*\$3,000 or something*”.

[22] Mr De Silva, for Maudaara, maintained that he had borrowed \$3,500 from Mr Dissanayake, but that that was a personal transaction outside of the ambit of the employment relationship and that it was incorrect of the Labour Inspector to characterise those payments made by Mr Dissanayake as a premium when in fact they were actually loans.

[23] The only matter that the parties agree about is the amount that left Mr Dissanayake’s bank account, the net sum being \$9,724.

[24] It seems to me it can also be inferred from the factual matrix that no premium was charged by the employer to create the employment, because the employment

commenced before there was any allegation that money was improperly sent from Mr Dissanayake to Mr De Silva. Moreover, even on Mr Dissanayake's evidence, the early transactions may perhaps have been moneys paid by him to Mr De Silva to aggregate with other moneys that Mr De Silva was sending home to family in Sri Lanka.

[25] Mr Dissanayake told me that from 2 March 2014 until 15 April 2014, the accommodation property had no income whatever because it was undergoing renovation. It is apparent that it is from that period onwards that the principal payments in question were made from Mr Dissanayake's bank account to Maudaara's bank account.

[26] The matters in dispute here came to notice because the Labour Inspector received complaints from former employees about underpayment of wages. This encouraged Ms Zonneveld to visit the business premises in Hamner Springs trading as Clear Ridge Apartments on respectively 22 September 2014 and 30 October 2014.

[27] Inquiries were undertaken in respect to the state of the employer's record keeping, together with the position in respect to wages for staff and former staff and subsequently the issue relating to the allegation of premium was uncovered as well.

[28] There were engagements immediately between the Labour Inspector and Mr De Silva, the director of Maudaara, who, once Ms Zonneveld became involved, promptly and regularly engaged with her in the fulfilling of her statutory obligations.

[29] As a consequence of Ms Zonneveld's active inquiries, a comprehensive series of allegations was developed against Maudaara and this was documented in the statement of problem filed in the Authority.

[30] Uncharacteristically for employers in this predicament, Maudaara not only continued engaging with the Labour Inspector, but was actively engaged in the Authority's process throughout, filing a statement in reply, engaging with the Authority's telephone conference to set the matter down for hearing, and being an active participant in my investigation meeting.

[31] It is appropriate that I record that this employer behaved absolutely correctly having got itself into a mess with its statutory obligations. I must take account of this employer's active engagement in the statutory process, not only in terms of its

willingness to engage with statutory officers, but also in its willingness to make appropriate concessions and to promptly set about remedying defaults.

### **Determination**

[32] I have now had an opportunity to reflect on the Labour Inspector's claim that Maudaara extracted a premium from Mr Dissanayake in respect to his employment. I have not been persuaded that the evidence before me discloses that a premium has been sought or received by Maudaara in respect to Mr Dissanayake's employment. In reaching that decision I rely on *Sears v. Attorney-General* [1994] 2 ERNZ 39, where Chief Judge Goddard determined *inter alia* that the notion of a premium carried with it the idea of consideration in the legal sense of that word as the price for an employment agreement being entered into or indeed being continued.

[33] There can be no suggestion here that Mr Dissanayake was put in the position of paying up or else there would be no employment, because that does violence to the facts, the commencement of the employment pre-dating any payments.

[34] But the principle must still apply if an employee is put in a position where the continuation of the employment is made conditional on the payment of a premium and that is the essence of Ms Zonneveld's allegation here. In effect, she alleges a money-go-round where Mr Dissanayake was being asked to fund his own wages by repaying money that he had received in wages back to the employer so that, allegedly, the employer would continue paying him.

[35] But there is no evidence of any enmity between the two men; indeed, Mr Dissanayake appeared at my investigation meeting with Mr De Silva and the two of them were talking happily enough in the waiting room during adjournments of my investigation meeting. Both men described some of the payments as loans made by one to the other and loans made on a personal basis.

[36] There just was not any evidence before me to link the continuation of the employment to the making of the payments and I am satisfied that without that link, I cannot find a premium proved.

[37] This is so despite the obvious difficulty that both Mr De Silva and Mr Dissanayake had in explaining away what the totality of these moneys were actually all about, because on either man's version of events, the money that was lent by the

one to the other amounted to only about a third of the totality of the money that had left Mr Dissanayake's account.

[38] That said, I simply cannot take that issue any further; without the "consideration" element as a link in the evidentiary chain, I decline to conclude that a premium was sought or paid.

[39] It follows from that conclusion that no question of penalties arises in respect to the allegation that a premium was sought.

[40] Turning now to the allegations made by Ms Zonneveld that Maudaara owes arrears of wages pursuant to the Minimum Wage Act 1983 and arrears of wages pursuant to various sections of the Holidays Act 2003, I am pleased to note that there was a concession by Maudaara that there had been a failure to meet the legal obligations in regard to these matters and a repayment schedule has been agreed and to date has been kept to.

[41] A request for an increase in the time available for Maudaara to complete the payment of all moneys owed by way of wages has been received by Ms Zonneveld, that request having been made because she had identified further employees who had also not been correctly paid. I grant Maudaara the extension they request to complete the repayment of all moneys owed to former employees. I have been provided with information (including financial statements) which satisfy me that Maudaara is in financial difficulty and I consider that the proper course of action is to make it as practicable as possible for Maudaara to meet its obligations to staff and former staff.

[42] Leave is reserved for the Labour Inspector to revert to the Authority for further orders in the event that there is any default from Maudaara.

[43] Next, Ms Zonneveld alleges a failure to maintain wage and time records and holiday leave records. Again, Maudaara has done the right thing and conceded that it has failed to fulfil its obligations, but has also taken remedial steps to remedy its default by engaging a contractor to undertake the necessary work now and into the future.

[44] Again I reserve leave for the Labour Inspector to revert to the Authority for orders in the event that she is not satisfied that full compliance has been achieved.

[45] I have dwelt on the employer's behaviour in this matter because I think it is important. I evidence three matters particularly that are relevant to my disposition of this matter. The first is this employer's active engagement both with the Inspector's process and with the Authority's process. It seems from my examination of the evidence before me that there has never been a situation where this employer has failed to engage appropriately with statutory officers in this matter and that behaviour is, in my experience, pretty rare for employers in this sort of predicament. I commend Maudaara for their straightforward approach to dealing with this issue.

[46] The second point that I make in respect to Maudaara's conduct in this matter is that they have made proper concessions in respect to the allegations against them and immediately proposed and then implemented remedial action. Again, this is a welcome approach and again it is sadly an unusual one.

[47] Thirdly, I am satisfied that the evidence before me of the financial difficulty of Maudaara is appropriate for me to take into consideration in determining questions of penalty which I must now address.

[48] In *Xu v. McIntosh* [2004] 2ERNZ 448 Chief Judge Goddard said:

*The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*

*The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach: Paras 47 & 48*

[49] I accept the submission for the applicant Labour Inspector that in a matter of this kind, notwithstanding the quantum of arrears of wages owing (over \$14,000) the proper approach is to look at the matter globally and start with a global figure for the

penalty which can then be added to or discounted depending on the various factors that I am required to consider.

[50] Applying that approach then, I am satisfied after a consideration of decided cases concerning the failure to pay minimum wages and holiday pay that a starting figure for a global penalty is \$15,000.

[51] Performing the same exercise in respect to the failure to keep proper records, and looking again at the decided cases, I venture the view that the Authority has taken an inappropriately lenient view of the failure to keep proper records. I say this because I accept the Inspectorate's position that without the maintenance of proper records, it is difficult, if not impossible, for Labour Inspectors, as statutory officers, to fulfil their obligations to society by ensuring that workers are paid in accordance with the law.

[52] Accordingly, and having regard to the Authority's decisions in this area, but also wanting to establish a higher benchmark than has been the case to date, I consider the starting figure for breaches of this kind ought to be the global sum of \$10,000.

[53] I now must turn finally to consider whether, in the particular circumstances of this case, those figures should remain, and be the decision of the Authority, or be either added to or taken away from having regard to the particular circumstances of this case. I determine that those figures are indeed the correct figures to apply for the particular circumstances of this case given the magnitude of the breaches, their extent over time, and the absolute failure to maintain proper wage and time records for any employee, notwithstanding the argument that these employees were simply volunteers who worked in return for lodgings ( Woofers ).

[54] However, I decline to make any orders in respect to those penalty awards if Maudaara fulfils each and every one of its obligations to its employees and former employees by way of the payment of arrears of wages and by way of the remedial action to effect proper wage time and holiday records for staff.

[55] If Maudaara complete the obligations on them in respect to arrears of wages and in respect to the rectification of the wage, time and holiday records, and the Labour Inspector is prepared to certify those achievements to me, I will close my file without issuing any further orders.

[56] Conversely, if Maudaara does not fulfil its obligations to the satisfaction of the Labour Inspector, it can expect me to levy those penalties on further application (without fee) by Labour Inspector Zonneveld.

**Costs**

[57] There are no costs issues in this matter.

**James Crichton**  
**Member of the Employment Relations Authority**