

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 202
EMPC 19/2018**

IN THE MATTER OF	an application for the exercise of powers under sections 142B, 142E, 142J, 142W and 142X of the Employment Relations Act 2000
AND IN THE MATTER	of an application for the exercise of powers under section 142J(2)
AND IN THE MATTER	of an application for apportionment of costs
BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Plaintiff
AND	NEWZEALAND FUSION INTERNATIONAL LIMITED (IN ADMINISTRATION) First Defendant
AND	SHENSHEN GUAN Second Defendant

Hearing: 7 September 2020
(Heard at Auckland)

Appearances: R Denmead, counsel for plaintiff
M Lyttelton, agent for first defendant
Second defendant in person

Judgment: 19 November 2020

JUDGMENT OF JUDGE M E PERKINS

[1] This judgment deals with an application by the Labour Inspector for consequential orders under s 142J of the Employment Relations Act 2000 (the Act).

There is also an application for further directions as to costs. This judgment follows an earlier judgment issued on 13 November 2020,¹ which dismissed the defendants' application for a rehearing on matters the subject of a judgment of Chief Judge Christina Inglis dated 11 December 2019.²

[2] The application for rehearing and the application subject to this judgment were heard at the same time. The application for rehearing needed to be decided first.

[3] Chief Judge Inglis imposed substantial pecuniary penalties on the defendants. She also ordered the first defendant to pay sums by way of compensation to its former employees. Those orders for compensation were also for substantial sums to reimburse the former employees for the failure of the first defendant to pay minimum wages and holiday pay for the lengthy periods of employment.

[4] Paragraph [113] of the judgment reads as follows:

The first defendant must pay Mr Meng the sum of \$69,500 by way of compensation order; Ms Xiueli Wang the sum of \$69,000 by way of compensation order; and Ms Min Wang the sum of \$91,850 by way of compensation order. Leave is reserved to apply further to the Court for consequential orders under s 142J(2) in the event that the first defendant is unable to pay the above amounts ordered against it. The sums referred to ... are to be paid to the Labour Inspector within 28 days of the date of this judgment.

[5] Section 142J of the Act reads as follows:

142J Court may make compensation orders

- (1) The court may make a compensation order against a person if—
 - (a) the court has made a declaration of breach in respect of the person; and
 - (b) the court is satisfied that the employee concerned (the aggrieved employee) has suffered, or is likely to suffer, loss or damage because of the breach.
- (2) The court may not make a compensation order against a person involved in a breach for wages or other money payable to an employee except to the extent that the employee's employer is unable to pay the wages or other money.
- (3) An application for a compensation order may be made—

¹ *NewZealand Fusion International Ltd (in administration) v Labour Inspector* [2020] NZEmpC 195.

² *Labour Inspector v Newzealand Fusion International Ltd* [2019] NZEmpC 181, [2019] ERNZ 525.

- (a) only by a Labour Inspector or the aggrieved employee; and
- (b) at one of the following times:
 - (i) the same time as the application for a declaration of breach; or
 - (ii) subsequently, whether before or after the application for a declaration of breach is determined.

[6] At the hearing on 7 September 2020, clear evidence was presented that the first defendant, NewZealand Fusion International Limited (NZFI Ltd), is unable to pay the compensation orders against it. This was admitted by Martin Lyttelton, who, as sole director of NZFI Ltd, appeared on its behalf at the hearing.

[7] Mr Lyttelton filed affidavits sworn by him in support of the application for rehearing. NZFI Ltd has been placed in voluntary administration under the Companies Act 1993. In his affidavit sworn on 25 February 2020, Mr Lyttelton stated: “Clearly the Company is unable to pay the [Court’s] orders which has led to the Company being placed in Voluntary Administration.”

[8] An affidavit of Timothy Emmanuel Thomson, affirmed on 17 June 2020, and filed in support of the application for consequential orders under s 142J of the Act, annexed a report of the administrator of NZFI Ltd. Mr Thomson is a Regulatory Enforcement Collection Specialist employed by the Ministry of Business, Innovation and Employment. In the annexed report, the administrator, Philip Wharekura, recommended that the business assets of NZFI Ltd be transferred to the secured creditor in partial settlement of the outstanding loans owed to the secured creditor. He also recommended that the company be placed in liquidation. He stated that it was unlikely that there would be any pay-out to unsecured creditors. This would include the former employees who are the beneficiaries of the compensation orders in the judgment of 11 December 2019.

[9] It is clear from all this evidence that NZFI Ltd, as the employees’ employer, is unable to pay the wages or other money subject to the compensation orders. In view of the evidence, therefore, the plaintiff has made the application for consequential orders.

[10] In a subsequent judgment of Chief Judge Inglis dated 4 May 2020, the defendants were ordered to pay costs and disbursements amounting to \$65,380.³ The plaintiff seeks clarification as to how the costs are to be apportioned between the parties. In her submissions, Ms Denmead, counsel for the plaintiff, referred to r 14.14 of the High Court Rules 2016 which provides: “The liability of each of 2 or more parties ordered to pay costs is joint and several, unless the court otherwise directs.” While the High Court Rules may be used as a guide, sch 3, cl 19(2) of the Act gives the Court wide powers to apportion costs between parties and to vary or alter such order at any time. Recourse to the High Court Rules is, therefore, not required.

[11] Ms Shenshen Guan, the second defendant, filed an affidavit, affirmed on 4 August 2020, relating to the application seeking consequential orders. She set out incomplete evidence relating to her assets and liabilities.⁴ She stated that she is not in receipt of any income. She submitted during oral submissions at the hearing that, because of her financial position, the consequential orders sought should not be granted. Neither Ms Guan nor Mr Lyttelton made any submissions as to the application seeking clarification of the earlier costs award.

[12] In the present case, the requirements of s 142J(1) and (2) are met. The Court has made a declaration of breach in respect of Ms Guan. The Court has also declared that it is satisfied that the aggrieved employees have suffered loss or damage because of the breach. These matters were firmly resolved in Chief Judge Inglis’s judgment of 11 December 2019. The evidence now available is that NZFI Ltd is completely unable to pay the wages and holiday pay which make up the compensation orders awarded against it.

[13] I agree with the submission of Ms Denmead that there is nothing in s 142J which indicates that Ms Guan’s financial position is relevant to the granting of a compensation order against her. Nevertheless, the Court also must have regard to s 142L of the Act, which provides:

³ *A Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* [2020] NZEmpC 57.

⁴ As an example, while she has produced the record of title for the Golden Springs Holiday Park, it shows that, as one of the original owners, she subsequently transferred the property to her family trust. No information is provided as to any consideration for this transfer and what her own position is if she is a beneficiary under the trust.

142L Terms of compensation orders

- (1) If section 142J applies, the court may make any order it thinks just to compensate an aggrieved employee in whole or in part for the loss or damage, or to prevent or reduce the loss or damage, referred to in that section.
- (2) An order under this section may include an order to direct a relevant person to pay to the aggrieved employee the amount of the loss or damage (in whole or in part).
- (3) Subsection (2) does not limit subsection (1).
- (4) In this section, relevant person means—
 - (a) any person in breach; or
 - (b) any person involved in the breach.

[14] The discretion to award compensation against Ms Guan as a person involved in the breach must therefore take account of what is just. Any award against Ms Guan, in the circumstances of this case, may also be for the whole of the loss suffered by the employees or only in part. In exercising the discretion, the Court must also have regard to the objects of part 9A set out in s 142A of the Act. Compensation of employees for loss or damage suffered by them is part of those objects.⁵

[15] As Ms Denmead has also submitted the Court should have regard to legislative materials. Previous decisions of this Court have considered the intention of the Legislature in enacting pt 9A of the Act in view of its concern at the unacceptable level of non-compliance with minimum employment standards, particularly for migrant workers.⁶ That concern also covered the ability of company directors and other individuals to avoid accountability, including commonly winding up a company to avoid paying arrears when they are found to have breached employment standards.⁷ The present case involved the circumstances contemplated in these materials.

[16] In the present case, the abuse of the migrant workers by Ms Guan and her company NZFI Ltd was grave. This is reflected in the quantum of the pecuniary penalties awarded against each of them. The financial evidence Ms Guan has provided as a basis for trying to minimise or avoid her liability is inadequate and unconvincing.

⁵ Section 142A(1)(a)(iii).

⁶ Discussed in *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514; *Labour Inspector v Daleson Investments Ltd* [2019] NZEmpC 12, [2019] ERNZ 1; *Labour Inspector v Parihar* [2019] NZEmpC 145, [2019] ERNZ 406.

⁷ See Michael Woodhouse *Strengthening Enforcement of Employment Standards* (Ministry for Workplace Relations and Safety, 2015).

[17] I am of the view that the consequential orders should justly be made against Ms Guan. NZFI Ltd has not yet been placed in liquidation. Placing it in voluntary administration in circumstances where it is claimed to be insolvent also raises questions. This is a serious case of breach and whatever assets there are should fully be available to compensate the affected employees who have no other remaining remedies for enforcing the Court's awards. Such an order against Ms Guan would be in keeping with the stated objects of the Act and the expressed intention of the Legislature in introducing the amendments to the Act in 2016.

[18] For these reasons, in view of the clear insolvency of NZFI Ltd, Ms Guan is ordered to pay compensation of \$230,350 in full or, in the unlikely event that funds become available from the liquidation of, or enforcement against, NZFI Ltd, to the extent of any shortfall.

[19] In respect of the costs award against the defendants in the judgment of 4 May 2020, I order that the liability for costs between the first and second defendants is joint and several. That was the clear intention of the award in any event.⁸

[20] So far as costs on the present application are concerned, costs should follow the event. Any costs award in favour of the applicant following the judgment of 13 November 2020 dealing with the rehearing application should also cover costs in respect of the present application, as both matters were heard together. Any submissions yet to be filed in respect of the rehearing application should also include submissions in respect of costs in this application.

ME Perkins

Judge

Judgment signed at 4.10 pm on 19 November 2020

⁸ See also *Direct Auto Importers (NZ) Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 39 at [18].